



- **50th issue Movie Special**

**Made in Dagenham – equal pay**

**Billy Elliot – industrial action**

**Philadelphia – sexual orientation**

**Green Card – immigration**

**The Social Network – Facebook & the workplace**

**Silkwood – whistleblowing**

**Disclosure – harassment**

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## Lewis Silkin Newsnotes

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The department comprises the  
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## Fanatical About Film

WELCOME to the fiftieth edition of Employment Newsnotes. To celebrate, we've decided to take you to the movies!

It's all very well being leading lights in the legal profession. Indeed, our reputation for client care surely merits a nomination for "Best Lawyers in a Supporting Role". But a part of us has always yearned for the heady romance and glamour of the Silver Screen...

### **Now you're Tolkien**

Stop smirking - the link between employment law and the world of cinema isn't as tenuous as you might think. Last year, New Zealand's government agreed to relax labour standards and introduce various tax incentives, with the apparent sole purpose of persuading Hollywood executives to film *The Hobbit* in the country.

Meanwhile, back home, Gillian Martin's employment tribunal claim against the GMB trade union has formally compared the general-secretary Paul Kenney to the evil Dark Lord Sauron, anti-hero of *Lord of the Rings*. Her witness statement continues:

*"I see myself as a female version of the hobbit Frodo Baggins carrying the ring, these precious claims of mine, to this tribunal of Mount Doom. I hope... in the same way as the ring was submitted to the molten lava of Mount Doom, that the eye of Lord Sauron will dissolve and justice will prevail."*

We're not quite sure what Ms Martin is on, but please could we have some?

### **Picture this**

In a vaguely similar vein, we're using our 50th issue as an excuse to revisit some memorable motion pictures of the past few years. Frustrated film critics though we are, you'll not be surprised that we've chosen movies with relevance to topical workplace issues. Don't give up the day job, as they say...

But hurry now, the trailers and Pearl & Dean ads are over. It's time to grab yourself a giant bucket of popcorn, crack open a Kia-Ora and settle down for the main feature.

## Made in Dagenham (2010)

(Director: Nigel Cole)

THIS funny, colourful and moving dramatisation of the 1968 Ford sewing machinists' strike was last year's feelgood movie highlight. Sally Hawkins is outstanding as working mum Rita O'Grady, thrust into the political spotlight in a dispute that paved the way for the Equal Pay Act 1970.

The "women's rate" at Ford at the time of the strike was 85% of men's pay and the dispute was resolved when the machinists settled for 92% of the men's rate! Whilst wage bias nowadays isn't nearly so blatant, women are still losing out in the earnings stakes over 40 years on.

According to latest statistics, the median gender pay gap for full-time, private-sector employees is nearly 20%. Meanwhile, 37,400 equal pay claims were lodged at tribunals in 2009/10 - slightly down from the previous year but still a huge figure.

### The gender agenda

*Made in Dagenham* was coincidentally released on the same date as last year's Equality Act came into force, but that has hardly transformed equal pay law. It merely re-enacted the existing rules from the 1970 Act with a bit of tinkering, rebranding them as "Equality of Terms".

Does the current Government intend to grasp the pay inequality nettle? Signs from the recently announced Equality Strategy aren't too promising.

A provision in the Equality Act requiring employers to publish their gender pay gap is being shelved. Rather, firms with more than 150 staff will be encouraged to report male/female pay differentials on a "voluntary" basis.

Looks like another case of the Tories pulling rank on their Coalition bedfellows, who had campaigned for mandatory pay audits. Lib Dem equalities minister Lynne Featherstone has described a voluntary system as "hardly worth the paper it's printed on".

### Mother of a problem

Yet transparency is just one aspect of a complex issue. Some consider that closing the gender pay gap is impossible so long as it's predominantly women who take career breaks to raise families.

If that's right, the Coalition's commitment to a legal regime fostering "shared parenting" could be more effective in the long term than further regulation on equal pay.

# Billy Elliott (2000)

(Director: Stephen Daldry)

SET in the Northeast during the 1984 miners' strike, this much-loved story features a motherless 11-year-old boy (Jamie Bell) who bravely takes up ballet dancing. Uncompromising in its depiction of the strikers' hardships, the film's emotional core is Billy's relationship with his dance teacher – Julie Walters in one of her most memorable roles.

The miners' strike was one of the defining events of the Thatcher era, which also spawned the restrictive legal framework for industrial action that remains largely intact today.

## **Striking coincidence?**

What goes around comes around, so they say... With Government spending cuts starting to bite, the spectre looms of extensive, co-ordinated union action of the type barely seen since the Eighties. And a Conservative prime minister once again ensconced in Number 10...

Small wonder, then, that reforms are being mooted to make it harder to organise industrial action. The CBI, for instance, believes low ballot turnouts have resulted in strikes lacking widespread support among the workforce.

Take the example of a factory employing 1,000 people. 500 of them belong to the union and are balloted, but only 200 vote – 101 of them in favour of the proposed action. Result: lawful strike, despite approval by just 10% of the workforce.

The CBI wants the legislation tightened to require 40% of balloted union members to support the action, as well as a majority of those actually voting. London Mayor Boris Johnson, amongst others, would apparently go further and make strikes lawful only if most of those eligible to vote were in favour.

## **Brothers up in arms**

Unions argue that legal shackles on the right to strike are already among the tightest in the developed world, breaching the UK's international treaty obligations. They point to cases in which judges have ordered injunctions on account of technical rule infringements by the union, despite the action having clear democratic support.

The Coalition may well conclude that the current legal regime strikes the right balance... although the PM seems to have an open mind. A bit like Billy, we're not yet sure whether Dave will dance to the bosses' tune.

## Philadelphia (1993)

(Director: Jonathan Demme)

REFLECTIVE and powerful, Hollywood's first mainstream movie tackling AIDS and homophobia featured Tom Hanks as a gay, HIV-positive attorney at a major corporate law firm. Fired for "incompetence", he successfully sues his bosses but dies shortly after the jury's verdict. Denzel Washington excels as the ambivalent PI lawyer who takes on the case.

In retrospect, it's shocking that it was ten years after this seminal movie before the UK implemented regulations outlawing discrimination against lesbian, gay and bisexual (LGB) people in the workplace. Nowadays, the relevant law is to be found in the Equality Act 2010, which includes sexual orientation as one of nine "protected characteristics".

Meanwhile, civil partnerships were introduced in 2005, putting LGB people on a similar footing to married heterosexual couples. Soon afterwards, sexual orientation equality laws were extended to the provision of goods and services – forcefully demonstrated by the gay couple who have just won their claim against Christian hotel owners who refused them a double room.

That case chimed with a string of recent – in our view correct – employment rulings rejecting religion/belief discrimination claims by employees who had refused to provide services on grounds of "conscience" to same-sex couples.

### **Sexuality reality check**

Whilst there's been a big shift in British law and society over a relatively short period, don't assume all is now hunky dory. Over half the respondents to a recent survey by Out Now Consulting felt that being openly gay could negatively affect their promotion prospects.

Equally depressing is the number of homophobic abuse tribunal cases we see reported, indicating that such attitudes are still prevalent and tolerated in many workplaces.

One obstacle might be that sexual orientation is sometimes regarded as a "poor relation" of other equality strands, still regarded as essentially a private matter and not accorded priority by employers. It can be also invisible, if staff are uncomfortable with being "out" at work.

The good news is that organisations are increasingly seeking to adopt inclusive diversity strategies under which LGB people – estimated at around 1.7 million of the UK's workforce – can feel fully welcome and valued.

Can't resist a final comment that we found one or two scenes in *Philadelphia* a bit cheesy...

## Green Card (1990)

(Director: Peter Weir)

CHARMING romantic comedy featuring Gérard Depardieu's first major English-speaking role as French musician George, who marries New York horticulturalist Brontë (Andie MacDowell) solely to secure a green card to work in America. After months apart, the authorities investigate and the mismatched couple must pretend their marriage is genuine...

Immigration authorities in the UK will also be busy this year policing the Government's permanent annual limit on migrants from outside the European Economic Area (EEA). This is due to take effect in April, replacing the interim cap introduced last summer. It is being set at just 21,700.

### It'll end in tiers

Breaking that figure down, the Tier 1 (General) route for highly-skilled migrants will be drastically limited, with only 1,000 visas for individuals of "exceptional talent". That's yet to be defined, but probably means academics, artists and scientific boffins of global repute.

As for Tier 2 – the route that allows employers to "sponsor" non-EEA skilled workers – there will be just 20,700 places a year. Occupations in short supply in the UK are most likely to get the nod, followed by posts with stringent academic qualifications and then appointments demanding higher salaries.

One crumb of comfort is that the permanent cap will not apply to multinationals sending existing staff from abroad to work in their UK business. Even then, the intra-company transfer route is to be tightened – limited to those with 12 months' service in an overseas office rather than six.

### Cursing the cap

Many business leaders have been vocal in slating the cap and its potential harm to the economy as the UK claws its way out of recession. Meanwhile, companies should at least ensure they have a valid sponsorship licence for Tier 2 and check that they're fully compliant with the rules to avoid being downgraded.

Otherwise, the implications for employers seeking to recruit from outside Europe are looking pretty grim. Just to be clear, though, a *Green Card*-style marriage of convenience isn't a recommended solution...

And if the worst comes to the worst, you can always rent a frothy rom-com on DVD to cheer yourself up.

# The Social Network (2010)

(Director: David Fincher)

A WITTY and engrossing take on the origins of Facebook and the ensuing legal dispute between founder Mark Zuckerberg and his Harvard contemporaries, the Winklevoss twins, who claim he stole their original idea. The story begins less than eight years ago in college dorms and frat clubs. Today, Facebook has over 600 million users worldwide.

How long will it be before the publication in your hands is a historic relic, replaced by a *Newsnotes* App or provided to you via a networking site?

## Networking nightmares

The intellectual property dispute featured in *The Social Network* still rumbles on, with Tyler and Cameron Winklevoss having recently challenged their \$65 million settlement with Zuckerberg.

The workplace is a contentious arena for this type of activity too. Sites such as Facebook and LinkedIn and other digital media create challenging complications for people managers. Fierce debate rages over the correct balance between employee privacy and free speech and the employer's right to manage and control.

Perhaps predictably, the first employment problems surfaced in California when Heather Armstrong's blog [www.dooce.com](http://www.dooce.com) made derogatory comments about her boss and the company she worked for. Her sacking in 2002 coined the phrase "to be dooced" - dismissed for one's online musings - now firmly established in the English lexicon.

## Branson's latest pickle

Almost daily, the media reports new cases of employees publicly denigrating their employer online. Take, for example, Virgin Atlantic dismissing 13 flight attendants for joking about engine failure and describing the airline's passengers as "chavs".

Bad-mouthing is just one area that employers now need to police. Cyber-bullying is not only a problem for school heads and vulnerable teenagers, but increasingly an issue for beleaguered HR professionals.

Bosses should also be wary about stemming the deliberate or inadvertent (wiki)leaking of confidential information, now that staff enjoy such immediate, readily accessible communication with the outside world.

No doubt future digital advances hold challenges for employers that we can't remotely foresee today. All you can do is try to put a brave Face on it...

## Silkwood (1983)

(Director: Mike Nichols)

MERYL Streep stars in the emotional, real-life saga of Karen Silkwood's battle against the Oklahoma plutonium plant where she worked. Having uncovered evidence of serious malpractice by management, she raises her concerns with the union and ultimately contacts a New York Times reporter before dying in a suspicious car accident.

The term "whistleblowing" was virtually unknown back when *Silkwood* was made, certainly in the UK. It wasn't until 1998 that the Public Interest Disclosure Act (PIDA) became law, in the aftermath of incidents such as the Zeebrugge ferry sinking, the scandals at BCCI and the Piper Alpha explosion.

Essentially, PIDA protects workers against victimisation or dismissal for spilling the beans on illegal or unsafe practices by their employer or third parties.

### **Blowing the cap**

That reference to "public interest" in the Act's title may prompt a rueful smile or two from seasoned HR and legal practitioners. Since compensation is uncapped, it can be tempting for claimants to use whistleblowing tactically – if not cynically – to get around the £70-80k limit on unfair dismissal compensation. At least if they've got no viable discrimination claim...

In some ways, the law encourages this tendency. One of the grounds for disclosure under PIDA is that the employer is breaching a "legal obligation". The courts have held that this covers individuals complaining about breach of their own employment contract – hardly the altruistic, public-spirited action the legislation was ostensibly designed to protect.

### **Stick to the facts**

Yet in other ways, the courts have perhaps made things too difficult for claimants. Take for instance the tricky distinction drawn in recent cases between the disclosure of "facts" about the alleged wrongdoing (protected) and the expression of an "opinion" or "bare allegation" (unprotected).

That's a very tough call for a worker to make, in what are likely to be stressful circumstances – at least without the benefit of legal advice.

We're not exactly blowing the whistle on PIDA as being unfit for purpose. But a bit of fine-tuning wouldn't go amiss, so it adequately protects workers when they need and deserve it while excluding those "dressing up" their own private agendas.

# Disclosure (1994)

(Director: Barry Levinson)

**SLICK**, suspenseful thriller exploring the potential for allegations of sexual harassment to destroy a person's career. Michael Douglas plays IT executive Tom Sanders whose new boss Meredith (Demi Moore), an old flame, aggressively attempts to seduce him in the office. Furious at being spurned, she files harassment charges and Tom counter-sues.

*Disclosure* attracted controversy because it subverted the standard gender roles in such a scenario. Maybe we should have chosen one of the later *Carry On* films instead... Sorry to be po-faced about a national institution, but they do epitomise the smutty male humour, salaciousness and routine chauvinism that underlie most harassment at work.

## Bottom line

Then again, take the recent case of John Lewis shop assistant Konstantinos Kalomoiris (aged 40), whose sex discrimination claim accused 68-year-old colleague Bianca Revrenna of slapping his behind on three occasions. Ruling against him, the tribunal found he was "sensitive" and had embellished his accusations against "motherly" Bianca, who was "tactile" in a non-sexual way.

It doesn't quite have the erotic frisson of Demi and Michael's unconsummated sex scene, does it? Nonetheless, it shows how employers can find themselves treading on eggshells in this area. The store's managers spent ages investigating Konstantinos's complaints.

## Harmonising harassment

It's an opportune time for employers to review and brush up their anti-harassment policies, not just in relation to workplace sexism but the other discrimination strands such as race, age and disability too. Last year's Equality Act usefully standardised the law, ironing out various quirks and inconsistencies. For example, it now clearly covers:

- unwanted conduct "related to" a protected characteristic, not necessarily the claimant's – e.g. a white worker offended by racial abuse of a black colleague
- harassment by association or perception – e.g. based on the religious beliefs of an employee's spouse, or because an employee is wrongly thought to be gay
- harassment by third parties (e.g. customers) in certain circumstances.

So there you go – not much of a note of escapist fantasy to finish on. In the words of the Dr Hook song, wish we could have made it more like the movies for you...

*The  
End*

*A Lewis Silkin Production*

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