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## earwiggin : employment law update

### GARDEN LEAVE

Standard Life Health Care Limited v Gorman and others

When an employee resigns in order to join a competitor, one option available to their employer is to place them on garden leave for the duration of their notice period. But what if the employee's contract does not include a garden leave clause? Over recent years the courts have been increasingly willing to find that the imposition of garden leave in the absence of a garden leave clause amounts to a breach of contract on the basis that some employees have an implied right to work. However, a recent case suggests that this may not be the case if the employee has acted in breach of their duty of good faith.

Mr Gorman and Mr Imich were employed by Standard Life as sales team managers and were paid on a commission-only basis. Although their contracts required them to give 3 months notice, they attempted to resign with immediate effect in order to take up jobs with a competitor. Even though their contracts did not include a garden leave clause, Standard Life refused to accept their resignations and decided to place them on garden leave for the duration of their notice periods. The employees argued that, since they were paid on a commission only basis, they had an implied right to work and therefore the imposition of garden leave amounted to a breach of contract which meant that they could leave immediately.

The Court of Appeal held that the employees' implied right to work was interdependent with their obligation to act loyally. Since there was evidence that they had breached their obligations by registering to work for the competitor whilst they were still employed by Standard Life, the Court found that Standard Life was released from its obligation to provide them with work. It therefore upheld the injunction requiring the employees to remain on garden leave.

Although this is an encouraging decision, it remains the case that the best way for an employer to ensure that it is able to place employees on garden leave is to include an express garden leave clause in the contract of employment.

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### SEX DISCRIMINATION AND IVF TREATMENT

Sahota v Home Office and Pipkin

The Sex Discrimination Act provides that it is unlawful to treat a woman less favourably on the grounds of pregnancy during the "protected period" which starts from the time she becomes pregnant. But when does the period of protection start if the woman is undergoing IVF treatment?

In this case, the EAT confirmed that an employee undergoing IVF treatment will be deemed to be pregnant once the fertilised ova have been implanted. If the implantation is unsuccessful, the protected period comes to an end two weeks after notification is received from the hospital that the implantation has failed.

Although the EAT rejected the proposition that the protected period should run from the start of the IVF treatment, it accepted that a woman undergoing IVF treatment will be protected for a limited period prior to implantation where the ova are collected, fertilised and immediately implanted.

The effect of this decision is to confirm that, where fertilised ova are frozen following IVF treatment with a view to implantation at a later date, the woman will not be deemed to be pregnant for the purposes of the discrimination legislation.

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## RELIGIOUS DISCRIMINATION

### Ladele v London Borough of Islington

In a case which has highlighted the potential conflict between the different strands of discrimination legislation, the Court of Appeal has confirmed that the rules prohibiting religious discrimination did not entitle an employee to refuse to carry out duties which she claimed were inconsistent with her religious beliefs.

Ms Ladele was a Registrar for Births, Deaths and Marriages for the London Borough of Islington. She informed the Council that she was opposed to participating in civil partnerships as part of her duties because same-sex partnerships were contrary to her Christian beliefs. After the Council threatened to dismiss her for gross misconduct, Ms Ladele issued claims alleging that she had been discriminated against on the grounds of her religious beliefs.

Although the Employment Tribunal upheld her complaint, this decision was overturned by the Employment Appeal Tribunal. Ms Ladele then appealed to the Court of Appeal which upheld the EAT's decision. The Court of Appeal concluded that, although the legislation prohibiting discrimination on the grounds of religious belief protects an employee's right to hold a particular religion or belief, it did not give them a right to manifest that religion or belief in whatever way they considered appropriate, particularly where this could breach other legal requirements. Therefore, it was permissible for the Council to insist that Ms Ladele participate in civil partnership ceremonies even though this conflicted with her Christian beliefs.

This decision is helpful in that it confirms that there may be occasions where it is permissible to take action against employees who try to manifest their religious beliefs in a way which could expose the employer to liability for breach of their own legal obligations.

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## NEW COMPENSATION LIMITS / STATUTORY PAYMENTS

The changes to compensation limits and statutory payments for 2010 were announced in December. For the first time ever, the maximum compensatory limit for unfair dismissal will go down to £65,300 (from £66,200). The new limit will apply to dismissals that take effect from 1 February 2010.

In addition, the standard rates for SMP and SPP will rise to £124.08 per week (from £123.06) with effect from April 2010. However, the rate of SSP will remain at £79.15 per week.

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