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**What is your star sign?** – Your job could depend on it.

**Rights Of Disabled People** – Government signs up to the Optional Protocol to the UN Convention on the Rights of Disabled People

**Nurse suspended for offering to pray for her patient**

**Unlawful Deduction From Wages** – PAYE Payment to HMRC not an unlawful deduction where it related to tax due

**Disability Discrimination Update** – Confirms that the Malcolm test applies in the employment field

#### News

##### **WHAT IS YOUR STAR SIGN?**

An Austrian insurance company posted the following advert in major newspapers:

"We are looking for people ... for part-time jobs in sales and management with the following star signs: Capricorn, Taurus, Aquarius, Aries and Leo."

A spokesman stated that almost all of their best employees across Austria have one of these five star signs and that they decided to hire workers on that basis.

The advert resulted in protests from equality groups and an investigation by Austria's anti-discrimination authorities. However, the Austrian authorities confirmed that there was nothing illegal in choosing employees according to their star signs as there was no discrimination on the grounds of gender, age, race etc. A spokeswoman for the employee's association of Salzburg stated that "it does appear like a certain limitation, but it is not discrimination".

##### **Comment**

This is a novel way of trying to find the best employees. We recommend sticking to normal interviewing techniques and not limiting recruitment in this way. However, who's to say that Pisceans don't make good divers, or Aries good shepherds!

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##### **RIGHTS OF DISABLED PEOPLE: GOVERNMENT SIGNS UP TO THE OPTIONAL PROTOCOL TO THE UN CONVENTION ON THE RIGHTS OF DISABLED PEOPLE**

The UK government have committed to signing this optional protocol which aims to promote, protect and ensure the full and equal enjoyment of all human rights by all persons with disabilities, and to promote respect for their inherent dignity.

Under the protocol, individuals or groups in the UK who believe that there has been a breach of the Convention by the UK Government can take their case to the UN. The UN can require the Government to provide responses and if applicable, suggested remedies in relation to any issues raised with them. The UN also has the power to carry out enquiries and to make specific requests and recommendations to the UK Government.

##### **Comment**

The Convention provides protection for disabled people in a number of areas including in relation to work and employment. The decision of the Government to sign up to the protocol has been welcomed by the Equality and Human Rights Commission which has stated that although the UK already has a good record in relation to promoting the rights of disabled people, the protocol "provides even greater accountability to disabled people in the UK, providing the option of redress at the highest level."

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##### **SUSPENDED FOR OFFERING TO PRAY FOR SOMEONE**

A Christian nurse who offered to pray for a patient's recovery was suspended for failing to show a "personal and professional commitment to equality and diversity" despite the patient not being offended.

Has political correctness gone mad? The Department of Health published a paper last month which stated that any attempt by a doctor or nurse to convert someone to another faith or religion during the course of their work is to be considered harassment or intimidation and will be subject to disciplinary procedures. Despite this the nurse's employer has now recognised that the nurse had been acting in the "best interests of her patients" and that nurses could "continue to offer high-

quality care for patients while remaining committed to their beliefs". It also conceded that for some people prayer was an "integral part of health care and the healing process".

**Comment:**

"Religion or Belief: A Practical Guide for the NHS" outlines that preaching or attempting to convert people in a workplace environment "can cause many problems, as non-religious people and those from other religions or beliefs could feel harassed and intimidated by this behaviour". One would question whether offering to pray for someone actually amounts to preaching or attempting to convert however and common sense has prevailed in this case: the suspended nurse has now returned to work. Don't expect a nurse to say "bless you" the next time you sneeze!

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## Recent Cases

### UNLAWFUL DEDUCTION FROM WAGES PATEL V MARQUETTE PARTNERS (UK) LIMITED

Mr Patel (P) was employed as a trader by Marquette Partners (MPL) from November 2001. He was entitled to basic pay and a substantial bonus which was paid in December each year. For the tax years 02/03 and 03/04, bonus was paid by dividends on shares distributed to employees through an employee benefit trust. In December 2006, an HMRC officer wrote to MPL indicating that dividends were earnings for tax purposes giving rise to additional PAYE liability and requesting a payment. In January 2007, roughly £65,000 was withheld from P's entitlement to bonus for the tax which should have been deducted. P claimed that there had been an unlawful deduction from wages.

MPL's counsel (none other than Cherie Booth QC) argued that the deduction was an excepted deduction in terms of the Employment Rights Act and MPL was bound to make the deduction because HMRC had requested payment of the additional PAYE. The EAT agreed with this argument and held that there had not been an unlawful deduction from wages, as HMRC's informal demand had effectively been a "determination" by a public authority, with which MPL was bound to comply.

**Comment:**

MPL may have been bound to make payment to HMRC, but it is interesting that they were entitled to do so by simply deducting the PAYE amounts from sums due to P, rather than by paying HMRC and then recouping the money from P via other means.

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### DISABILITY DISCRIMINATION UPDATE CHILD SUPPORT AGENCY (DUDLEY) V TRUMAN

The EAT has ended months of speculation on whether the decision of the House of Lords in London Borough of Lewisham v Malcolm ("Malcolm") would apply in an Employment law context. You'll recall that we previously commented on the Malcolm case which related to a tenancy dispute, and which established a new test for comparators.

The EAT has now confirmed that Malcolm does apply to employment law.

The question before the EAT was whether the Clark v Novacold ("Novacold") comparator test should be replaced by the Malcolm comparator test in employment cases. In **Novacold** the Court of Appeal decided that the correct comparator for an employee who was dismissed because he was to be absent from work for a year was a non-disabled employee who was "capable of carrying out the main functions of their job" i.e. not absent. In **Malcolm** the House of Lords confirmed that Novacold was wrongly decided and the correct comparator in the circumstances above would be a non-disabled employee with the same level of absence as the disabled employee.

**Comment**

This decision brings welcome clarification of the application of the Disability Discrimination Act for employers. However, employers should be ever more vigilant in relation to their duty to make reasonable adjustments. Judge Peter Clark in coming to his conclusion in Truman was quick to point out that: -

"Whilst (the decision reduced)...the effectiveness of disability-related discrimination for disabled employees the opportunity for 'positive' discrimination remains via the reasonable adjustment route."

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