

# Top notch growth for BDBF

Leading specialist employment law firm, BDBF, adds three further employment lawyer hires bringing their headcount to 6 partners and 10 associates.

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## Fathers at Work – Understanding Paternity Leave

The number of men taking time off work when their baby is born is falling. Despite the government's attempts to encourage fathers to increase the time they spend caring for their children, it seems many men do not take advantage of their statutory right to paternity leave.

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## The menopause taboo: employers who ignore their responsibilities risk claims

Recent UK media headlines have focused on pioneering private medical treatment being offered to women to postpone the menopause by removing a piece of their ovary by keyhole surgery

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# **DIRECT DISCRIMINATION DUE TO “PERCEIVED” DISABILITY OF POLICE OFFICER**

The Claimant, Mrs Coffey, applied to the Wiltshire Constabulary to become a police constable. However, a medical examination revealed that she suffered from some hearing loss. Following Home Office guidance, the Wiltshire Constabulary arranged for a practical functionality test, which she passed.

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# **NHS Trust did not discriminate when removing Christian NED for speaking out against homosexuality and same-sex couple adoption**

Mr Page, a practising Christian, was a non-executive director of an NHS Trust and a lay magistrate sitting in criminal and family courts. He participated in decisions involving adoptions.

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## **A SIXTH ANNIVERSARY MESSAGE FROM GARETH BRAHAMS, MANAGING PARTNER OF BDBF**

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we opened the doors of BDBF.
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We started with the four name partners, one other qualified lawyer and a practice manager, all of whom are still in the business.

As of today, we have seven lawyers as partners and seven associates as well as our fantastic practice team.

We have retained our position in the top tier for acting for senior executives in Chambers & Partners legal directory for the fourth year running cited as a '**renowned boutique employment law firm**' acting for senior executives.

The [Legal 500](#) likewise has once again ranked us as top tier for our senior executive practice and ranked us also for our work for employers.

We have also achieved a listing as one of the **The Times Best Law Firms in 2019** (nationally) as rated by our peers.

Today is also a momentous day because [Emma Sell](#), our practice manager, who was with us before we even opened our doors becomes our first non-lawyer partner.

Emma has run our facilities and practice team since before day 1 and we simply would not be where we are without her.

I cannot tell you how proud we are of what we have achieved and how humbled we are by the support we have had from you to get here.

We look forward to working with you and reaching even greater heights over the next six years.

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## Employment Law News

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We are delighted to announce that BDBF is one of The Times newspaper's ['Best Law Firms 2019'](#) in England and Wales. The list is peer selected and is based on a simple question: **other than your own firm; which practice would you instruct in a specific area of work?**

**The Times** states:

*Founded in 2012 by four partners, there are now three more and the firm now has 14 lawyers. In a unique set-up all are co-owners and receive an annual performance-related bonus*

from the profits. It is also one of the few firms to have an equal balance of men and women in senior positions. The past year has been the firm's best yet, with a turnover of £2.8 million.

The firm has a strong focus on senior executives in the financial services and insurance industries, as well as senior doctors, and partners and senior employees in law, accountancy, and management consultancy firms. It does not act for bulge bracket investment banks to ensure it is conflict-free, making it a key choice for referrals from other large law firms. It also has built an expertise in fighting discrimination and whistleblowing cases.

The firm represented Alex Osipov, the chief executive of International Petroleum, in his groundbreaking high-value case against his employer and its senior officers, establishing the entitlement of whistleblowers to claim against individual directors. It also acted for Arjuna Weerasinghe, a surgeon unfairly dismissed after whistleblowing on poor standards of care at a hospital.

We have also been rated by our peers and clients to maintain our standing as the leading firm advising senior executives in employment law in the Legal 500 legal directory. What sets us apart is that every one of our partners has been rated.

The **Legal 500** states:

As 'one of the leading claimant firms in the market', **Brahams Dutt Badrick French LLP** is 'completely committed to getting the best outcomes for its clients' and is 'a well-established and competitive boutique player in the market'. Managing partner [Gareth Brahams](#) is 'both an excellent lawyer and a brilliant tactician' and 'the right man to have on your side and the wrong man to be against'; he recently represented an individual in a high-value whistleblowing claim. Clients also praise the 'impressive and committed' [Arpita Dutt](#); the

*‘tenacious’ [Polly Rodway](#); the ‘commercially minded’ [Nick Wilcox](#); and [Cerys Williams](#), who ‘strongly protects her clients interests’. Associate [Samantha Prosser](#) is also singled out as ‘a rising star that is a real credit to the firm’.*

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## Highest whistleblowing damages in a landmark employment case

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# Employment Law News

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## Highest whistleblowing damages in a landmark employment case

[Gareth Brahams](#), Managing Partner and [Nick Wilcox](#), Partner, of employment law specialists Brahams Dutt Badrick French LLP (BDBF) have successfully represented the claimant, former-CEO, Mr Osipov, in this landmark whistleblowing case.

Today the Court of Appeal has in *Timis v Osipov* upheld landmark decisions made by the Employment Tribunal and the Employment Appeal Tribunal (EAT) awarding the ex-CEO of International Petroleum Ltd, Mr. Osipov, in excess of £2 million gross. This was one of the highest sums ever awarded by an Employment Tribunal.

### Shareholder and Chairman instructed to fire whistleblower, Mr Osipov

Frank Timis, a director and the largest individual shareholder in International Petroleum, had been exposed for instructing fellow director and Chairman of the Company, Tony Sage, to fire Mr Osipov for whistleblowing.

### Shareholder and Chairman held personally liable for whistleblowing damages

Under the whistle blowing provisions of the Employment Rights Act, on behalf of Mr Osipov, BDBF successfully sued not just the Company but Frank Timis and Tony Sage personally.

This ruling establishes that if an individual director is behind the decision to dismiss someone for making protected disclosures, they can themselves be held personally liable and suffer the financial consequences.

Gareth Brahams, Managing Partner of BDBF, says of their victory: *"We are naturally very pleased with this decision, first and foremost because it upholds a very substantial award of compensation that is long overdue to our client. We are also happy to have had the principle of individual as well as corporate liability for victimising whistle blowers by dismissing them upheld at this level in the Courts. We believe this will encourage decision makers to think more carefully than ever before giving instructions to dismiss an employee for whistle blowing and will encourage employers to take steps to train their staff so as to prevent any such actions occurring in the first place"*

## **About BDBF**

Brahams Dutt Badrick French LLP are a leading specialist employment law firm based at Bank in the City. If you would like to discuss any issues relating to the content of this article, please contact [+44\(0\)20 3828 0350](tel:+44(0)2038280350) or your usual BDBF contact.

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# Tom McLaughlin features in Ignites Europe – questions on salary history may become a thing of the past

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Questions about prospective employees' previous salary are

common during financial services firms recruitment processes, but they could be on their way out. Siobhan Riding of Ignites Europe writes that State Street Global Advisors and MFS are closing the door on the practice as part of efforts to reduce the gender pay gap that exists in financial services.

Will other asset managers and financial services firms follow suit?

The thinking behind this is that employers use their knowledge of previous salary and bonus information as a reference point and bargaining chip when making compensation offers to new recruits. But, this can perpetuate the disparity in pay between male and female executive's earnings. The upshot is that women are likely to be paid a lower starting salary and bonus by their new employer. This could lead to women trying to catch up with their male peers' earnings throughout their professional life, and the income disparity following them into retirement.

The ban on asking about previous salaries has been implemented in certain US states such as New York and Massachusetts, but in a bold move, State Street and MFS are voluntarily choosing to extend it across their international businesses in an effort to increase wage transparency and bridge the gender wage gap.

Tom McLaughlin, specialist employment lawyer at BDBF LLP, says banning employers from asking about pay before they make an offer of employment is a way of levelling the playing field. It forces the employer to make an offer on the basis of what it is prepared to pay the individual, rather than what it thinks it needs to pay to entice the individual away from their current job.

There may be more reticence in implementing the ban in European financial services firms or entities. There are stricter compensation rules, whereby firms need to know the

detail of previous earnings in order to buy out a bonus or unvested shares.

Tom comments that there are ways around this, as firms could make an offer of employment first, after which point they could offer the buy out.

**Tom McLaughlin is a senior associate specialising in advising senior executives and businesses on severance issues for executive and c-suite employees, employee competition, the protection of confidential information and post-termination restrictions. He regularly advises overseas businesses wishing to establish a market presence in the UK. Tom can be contacted on [tommclaughlin@bdbf.co.uk](mailto:tommclaughlin@bdbf.co.uk) or on 0203 828 0366.**

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## **How can an employer give an opinionated reference?**

The High Court has clarified the scope of an employer's duty when giving a reference in respect of a former employee.

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# Recording employee's communications in UK financial services firms

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## What are the rules on recording employee communications in financial services firms?

In 2017, the FCA announced an increase in the number of financial services firms who must record communications made by their employees.

The announcement was part of the FCA's attempts to align

financial firms with Brussels rules, known as Mifid II. In spite of Brexit, the FCA has told firms that they must continue to comply with their obligations that derive from EU law, including Mifid II.

### **Who is affected by this announcement?**

Anyone who works for an investment bank or asset manager, inter-dealer brokers, investment managers, stockbrokers and corporate finance firms that execute orders or carry out transactions for the firm or its clients

### **What has changed?**

Firms who were not previously subject to the duty to tape telephone conversations (such as corporate finance firms) are now required to do so.

### **How can employers monitor their employees?**

Financial firms have sophisticated computer programs in place which record telephone lines, check emails for key words and look out for suspicious trading behaviour. It is not uncommon for an employer with an agenda to trawl through an employee's emails or Bloomberg chat records to find something damning. Of increasing prevalence is keystroke technology, which records all of the words typed onto a keyboard during the working day.

Even personal mobile phones are not immune from employer's prying eyes? Employers in the financial services industry have an obligation to make sure that employees are not using their personal communication devices to evade FCA rules or share confidential client information.

The FCA's rules state that

*'A [firm](#) must take reasonable steps to prevent an employee or contractor from making, sending or receiving relevant telephone conversations and electronic communications on privately-owned equipment which the [firm](#) is unable to record*

*or copy.'*

## **What are the implications on employees of recording communications?**

Employees who misuse their employer's electronic communication systems – by disclosing confidential client information, for example, could face disciplinary action, which could include dismissal without notice and significant financial consequences including loss of stock and deferred bonuses arising from being a bad leaver. Additionally, there are the longer-term consequences on an employee's regulatory status. If the monitoring uncovers behaviour which the employer considers is a breach of the conduct rules or stains that individual's fitness and propriety, it will be revealed on a regulatory reference to any new employer and the taint may follow the employee for the next 6 years.

## **What are employee's rights and employer's obligations?**

Even though an employer may have a duty to monitor calls, they still need to approach the matter with caution.

Employers have legal duties to ensure that the way in which it monitors work is for a clear and justified purpose. This requires notification in advance of monitoring, and the information gained should be kept securely and only used for the purpose for which it was carried out.

If an employee is approached by their employer and asked to hand over their personal phone for inspection, they'll need to think very carefully before doing so. Is there a legitimate reason to search a personal telephone? What is the employer's basis for doing so? Employees have a right to a private life and the employer cannot, without good reason, ride roughshod over that right. The employer should not be acting in any way that would seriously damage or destroy the employee's confidence or trust, unless it has reasonable cause.

The employee must weigh up the risks of not complying with their employer's request. A refusal to do so could count against the employee in a disciplinary hearing. Even if the employer's concerns are baseless or overblown, a refusal to co-operate in the investigation is likely to be sufficient to fuel the suspicion that the employee has done something wrong.

For all financial services employees, this does beg the question whether work communications on a private phone can ever be private.

[Tom McLaughlin](#) is a Senior Associate specialising in employment law and misuse of confidential information cases at City employment law firm BDBF LLP.

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# Made in Dagenham – a clarion call for equal pay in the City

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Today, 7 June 2018, marks the 50<sup>th</sup> anniversary of the strike by 187 female sewing machinists at a Ford car factory seeking sex equality, a story that inspired the 2010 film 'Made in Dagenham.' The strikes led to a meeting with Barbara Castle, then Employment Secretary, to discuss recognition and inequality of pay for females and, two years later, led to the inception of the Equal Pay Act 1970.

Further developments have occurred since, including the introduction of the Equality Act 2010 which replaced the 1970 Equal Pay Act, the launch of a Women and Work Commission, and the appointment of a Minister for Women and Equalities. However, 50 years on there is still a significant gap in pay

between men and women. The World Economic Forum predicts this gap will not close for another 217 years.

## **Gender Pay Reporting**

The latest initiative to address the imbalance in pay is the gender pay reporting obligation. Since 6 April 2017 organisations with 250 or more employees have been obliged to publish the following information each year:

1. overall gender pay gaps, showing the mean and median pay for both sexes;
2. the number of men and women in each of the 4 pay bands (lowest to highest salaries) to show how pay differs at different levels of seniority; and
3. information on pay gaps relating to bonuses and the proportion of males/females who received a bonus.

Over 10,000 firms have disclosed such information following the first round of mandatory reporting in April 2018. Of those, 78% of organisations reported a gap in favour of men. In addition, men were paid more than women in every single industry; there is no sector that pays women more than men.

## **Gender Pay Gap in the Financial Services Sector**

One of the largest disparities in gender pay can be found, unsurprisingly, in the financial sector.

According to research by law firm Fox and Partners, the gender pay gap in the financial sector is 22% for salaries and 46% for bonuses. Compared to the average UK gap of 9.7% this is a startling amount. A number of institutions within the financial sector are also performing much worse than this average – 43.5% at Barclays Bank Plc, 36.9% at Nomura International Plc, 36.5% at RBS and a 36.4% gap at Goldman Sachs. The gap is also substantially enlarged for individuals paid more than £1 million per year – the gender pay gap then rises to 91% in favour of men.

## **The glass ceiling**

There has been a lot of discussion as to the reasons for this divergence. Looking at the statistics, one of the clearest explanations is the lack of female representation at the highest levels within financial institutions. According to a Financial Times study in 2017, women account for 58% of the total workforce at junior levels. However, this drops significantly to around 25% at senior levels. When this is broken down further, studies show that nearly 23% of board directors are women, but only 1 in 7 women are represented on executive committees. At JP Morgan only 9% of higher paid jobs are held by women.

Steps are being taken to address the imbalance at leadership levels in financial services. Independent reviews have been undertaken and non-binding and voluntary recommendations have been made; these include increasing the representation of women for FTSE100 executive committees to 33% by 2020 and requiring FTSE350 companies to disclose the numbers of women on their executive committees. So far, the government has resisted some calls for binding recommendations and/or quotas on boards or executive committees. The hope is that these various initiatives, together with the increased transparency around gender pay gaps as a result of the new reporting obligations, will drive culture changes within organisations. Not least because at present, there are no sanctions for firms who report a gender pay gap.

**What options does an individual have in light of the gender pay reports released by their own employer?**

Our experience as employment lawyers acting for senior individuals is that despite the advent of gender pay gap reporting, the issues of pay and reward are still shrouded in secrecy. Differentials have started to appear even in sectors where pay scales exist due to the payment of bonuses in addition to basic pay. In the NHS for example, full-time male

consultants are paid 12% more than their female counterparts and male consultants are six times more likely to be paid bonuses. Pay differentials have been revealed to affect every professional and regulated sector.

It is however important to remember that a gender pay gap may not necessarily mean that there is a difference between the salaries or contractual bonuses of men and women performing like for like work or work of an equal value. If there is, this may give rise to a claim for equal pay. Alternatively, any less favourable treatment on the basis of sex, such as being passed over for job offers, promotions, discretionary pay rises or bonuses, may give rise to a claim for sex discrimination instead.

Specialist employment advice should be sought if you believe you have a claim for equal pay or sex discrimination. If so, the first step would be to request the information required to make an assessment as to whether there is a difference in pay between men and women performing like work and/or any less favourable treatment.

### **Stopping you enquiring about any discriminatory pay gap is unlawful**

Whilst companies can request that employees keep their salaries confidential, section 77 of the Equality Act 2010 makes pay secrecy clauses in contracts of employment unenforceable to the extent that they prevent an employee from finding out whether or to what extent pay is connected to his/her gender, age, race, sexual orientation or disability, for example. Section 77 also makes it unlawful to victimise an employee for raising the connection between pay and gender or any other discriminatory reason for a pay gap to their employer.

Therefore, if a woman asks her male colleagues about how much they are paid because she is concerned that she is being paid

less for carrying out the same or similar work, it would be unlawful for the employer to sanction her in any way for asking the question.

If any differences in pay or treatment are identified then further options could include submitting a formal grievance to the employer to address the situation.

### **Lessons from Dagenham – a collective approach**

One of the key lessons from the Dagenham strike is the importance of collective action. City executives are largely non-unionised and pay negotiations happen behind closed doors on an individual basis. The era of asserting individual rights has moved generations away from the shield provided by collectivism. The power of collective movements has been palpable lately from #MeToo and #TimesUp putting a spotlight on sexual harassment, objectification and representation of women, to the organising by trade unions of individuals contractually classified as 'self employed' to obtain workers rights for them.

From our experience of advising many City women, raising such issues under the banner of 'discrimination' is perceived to be job or career ending. There is strength in unity, lots of practical advice that can be shared when women talk to one another whether within City women's networks or in external professional networks, and there is power in bringing collective grievances to change the practices and culture of City employers. City employers may begin to understand that they cannot isolate employees easily and that such complaints call for systemic change.

Only time will tell whether we will see the gender pay gap in the financial sector narrow over the next annual gender pay reporting dates. One can only hope that the search for recognition and equality driven by the Dagenham factory girls moves its way quickly and persuasively into the City without a

further 50 years going by.

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