

EMPLOYMENT LAW UPDATE FOR CHARITIES SEMINAR

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Equality & Diversity - current issues in discrimination

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Overview

The purpose of this paper is to provide an overview of current issues in discrimination.

Background

Discrimination legislation dates back more than 35 years. I have put here a list of some of the ones which you will recognise. It is not intended to be comprehensive, just to give you an idea of the extent of legislation in this area, and it is, as you should be aware, an area that is ever growing.

- *Equal Pay Act 1970*
- *The Rehabilitation of Offenders Act 1974*
- *Sex Discrimination Act 1975*
- *Race Relations Act 1976*
- *Disability Discrimination Acts 1995 and 2005*
- *Employment Rights Act 1996*
- *Protection from Harassment Act 1997*
- *Human Rights Act 1998*
- *The Maternity & Parental Leave ...etc Regulations 1999*
- *The Part Time Workers (Prevention of Less Favourable Treatment) Regulations 2000*
- *The Fixed Term Employees (Prevention of Less Favourable Treatment) Regulations 2002*
- *Employment Equality (Sexual Orientation) Regulations 2003 and 2007*
- *Employment Equality (Religion or Belief) Regulations 2003*

- *Civil Partnership Act 2004*
- *The Gender Recognition Act 2004*
- *The Employment Equality (Age) Regulations 2006*
- *The Equality Act 2006*

Accordingly discrimination legislation covers sex, race, disability, sexual orientation, religion and belief and age. It also covers issues relating to marital status, employment status (part time/fixed term) and offenders. Collectively I will refer to these as the "prohibited grounds".

In the October 2002 consultation 'Equality and Diversity: The way ahead' the Government confirmed its intention to make equality legislation more coherent and easier to use. Since then the Government has sought to 'use the same wording, where appropriate, for all direct discrimination, indirect discrimination, harassment and victimisation'. Legislation introduced since 2002 has sought to follow through with this, although we are still some way from either coherent or easy to use legislation.

In 2005 the Discrimination Law Review (DLR) started to consider "the opportunities for creating a clearer and more streamlined equality legislation framework which produces better outcomes for those who experience disadvantage ...while reflecting better regulation principles". Its work culminated in the publication, in 2007 of 'A Framework for Fairness: Proposals for an Equality Bill for Great Britain' which outlined proposals to simplify, modernise, and increase the effectiveness of discrimination law.

In October 2007 the Commission for Equality and Human Rights (or CEHR) succeeded to the functions of the Equal Opportunities Commission, the Commission for Racial Equality and the Disability Rights Commission. It is also now responsible for enforcing anti-discrimination rules in other areas, including religion or belief, sexual orientation and age, and will have a general responsibility for the promotion of human rights.

In April 2009, a draft Equality Bill was published with the objective of codifying all of the existing strands of discrimination. It is intended that the new Equality Bill will come into effect in late 2010.

Who do the Acts apply to?

The above legislation prohibits discrimination by an employer at every stage of employment. Employment is widely defined in discrimination legislation and will cover and protect employees and the wider category of worker.

Discrimination legislation also applies outside of the employment field and covers the provision of goods and services (sex, race, disability, sexual orientation and religion and belief) as well as other relationships such as partners and post holders.

Changes to discrimination made since 2002 have sought to provide a uniform approach to the protection they provide. As a central feature, the common strands now appearing cover the following:

- direct discrimination;
- indirect discrimination;
- victimisation; and
- harassment.

Dealing with each in turn:

DIRECT DISCRIMINATION

The test is objective. The question is whether the complainant would have been treated differently and more favourably had it not been for a prohibited ground. For example, an employer will not employ any Polish workers. The motive or intention behind the actions are irrelevant and for race and sex claims there is no defence once direct discrimination has been provided.

Stereotypical assumptions can amount to direct discrimination. For example, assuming that a woman with young children will be an unreliable employee; or, assuming that the husband is the main bread winner and that the wife will resign employment and follow him in the event of the husband's relocation.

It is important to bear in mind the statutory wording.

A person (referred to as A) discriminates against another person (referred to as B) if on a prohibited ground A treats B less favourably than he treats or would treat other persons.

Comparators

In most cases of discrimination there is a need to properly identify a comparison, whether by reference to an existing or hypothetical person or by reference to a "pool" of individuals, to establish whether or not there is a disparity of effect by determining what proportion of persons with the particular, for example racial or sexual, make up can comply with the relevant provision criteria or practice.

There is no comparator required where the claim is for discrimination on grounds of pregnancy or maternity as this is a female only condition.

Identifying the relevant pool for comparison is fundamental.

WRIGLEYS

— SOLICITORS —

London Underground Limited -v- Edwards [1995]. London Underground introduced new flexible shift system which Mrs Edwards, a single parent with a young child, could not work to. She claimed the new system amounted to indirect sex discrimination basing her claim on the argument that a considerably small proportion of female single parents compared with male single parents could comply. The Industrial Tribunal upheld her complaint but the EAT allowed London Underground's appeal. The EAT assessed the correct pool as comprising all trained drivers to whom the new roster applied, not just train operators who were single parents.

It was a short victory for London Underground as indirect discrimination was found to exist on the grounds that 100% of the 2000 male train operators could comply with the new working pattern and 95.2% of the 21 female train operators could comply. The complainant was the only one of the 21 female train operators who could not.

Witham -v- Mill Hall For Girls. Mrs Witham was selected for redundancy on a policy which provided for selection on the basis of employees who worked under fixed term contract, regardless of length of service or other skills. The Tribunal found in her favour and took as a pool of comparison the 11 teachers who were employed at the school at basic grade in which 100% of the men (2 persons) could comply, compared to only 77% of the women (7 out of the 9).

Burden of Proof

There remains a great deal of uncertainty surrounding the burden of proof. Since 2001 in Sex claims and 2003 in Race claims a victim has been required to demonstrate that there is sufficient evidence from which a Tribunal can conclude that discrimination occurred. Once that level, wherever it may be set has been reached the employer is required to prove that there is an adequate explanation. In the absence of an adequate explanation the tribunal will find that the victim was unlawfully discriminated against.

Genuine Occupational Requirements (GOR)

Whilst it isn't possible to justify direct discrimination there is an exception to direct discrimination where there is a GOR. This must be a genuine and determining occupational requirement.

Recent cases have confirmed the narrow application of the GOR exemption. For example, in one case, a charity established to provide housing and day care services to Christians with learning disabilities took the view that all posts were subject to the GOR. The charity sought to justify this on that basis that all roles delivered on the charity's Christian ethos to the people that it supported. Existing non-Christian staff were permitted to remain in post but would not be eligible for promotion to any post subject to the GOR. As an alternative the charity offered assistance with retraining and in finding other work outside of the charity. Two separate claims were brought. The first from a manager who claimed constructive dismissal on the grounds of an instruction to discriminate against staff. The second claim was on the grounds of discrimination by an employee who was refused an appointment to a GOR post. It was accepted that the

charity had a religious ethos. However, the Tribunal was not satisfied that practicing the Christian faith was a GOR. The Tribunal considered the nature of those that the charity served and that for many years the service had run with non-practicing Christians in the relevant roles. Whilst faith was one of the principles which underpinned the charity's works it was principally providing support serviced to people with learning difficulties.

In order to establish a GOR an employer must look at every job and consider whether the specific duties are required to be carried out by a person of a particular faith because it is an essential requirement of that role. The charity failed to do so and introduced a blanket requirement.

Particular cases

Discrimination on grounds of pregnancy or for a pregnancy related reason is deemed to be an act which is gender specific and therefore no comparator is required.

The Sex Discrimination (Gender Reassignment) Regulations 1999 provide protection against direct (but not indirect) discrimination to anyone who intends to undergo, is undergoing or has undergone gender reassignment, but only as far as employment and vocational training are concerned. There is no obligation to disclose status as a condition of employment or for protection under the regulations.

The Gender Recognition Act 2004 provides for formal recognition of a gender change.

INDIRECT DISCRIMINATION

Discrimination is "indirect" when it is hidden behind a more or less plausible facade, where the discrimination is on the face of it, on other grounds but has the effect of discriminating on any prohibited grounds. Please remember that indirect discrimination does not apply to disability claims.

Indirect discrimination occurs when the employer imposes a provision, criterion or practice which will apply equally to others but which places the complainant at a disadvantage.

For example, a requirement that an employee should work full time as opposed to part time, discriminates against women on the basis that women may still be seen to have primary responsibility for child care.

The legislation refers to the following:

A person (A) discriminates against another person (B) if.....A applies to B a provision, criterion or practice which he applies or would apply equally to other persons but:

- (a) which puts or would put persons similar to B at a particular disadvantage when compared to other persons;

- (b) which puts B at that disadvantage; and
- (c) which A cannot show to be a proportionate means of achieving a legitimate aim.

In order to satisfy an indirect discrimination claim there has in the past been a great deal of emphasis on producing statistical evidence to demonstrate the disparate effect of any provision, criterion or practice. Claims have been lost or won on the correct identification of a comparator pool.

A proportionate means

An employer has a defence, that any indirect discrimination is justified. However that reason must be proportionate.

Justification can also exist by reference to the nature of the job. For example

1. The essential nature of the job calls for a man, by reasons of physiology (which will exclude physical strength or stamina) or in dramatic performances or other entertainment for reasons of authenticity.
2. Where the job will need to be carried out by a man or woman to preserve decency or privacy.
3. The nature or location of the work place makes it impractical for the holder of the job to live elsewhere than in premises provided by the employer.
4. Where the job is one of two to be held by a married couple or
5. Where the job needs to be done by a man because it is likely to involve performance of duties outside the United Kingdom in a country whose laws or customs are such that the duties could not, or could not effectively, be performed by a woman.

For example in recent case of **Noah v Desrosiers (trading as Wedge) ET Case No.220186/07**, a hairdresser, looking to employ a stylist and an assistant, rejected the application of a practicing Muslim woman who wore the traditional hijab headscarf.

The Tribunal held that there had been no direct discrimination. There was no evidence that the Claimant's religion had influenced the decision not to appoint her rather than the refusal to uncover her hair, which applied to all staff. However, this did amount to a provision criterion practice which put the Claimant, by reason of her religion, at a particular disadvantage when compared to others. This satisfied the grounds of indirect discrimination.

The Tribunal accepted that the hairdresser had a legitimate objective in expecting an assistant to promote the salon's business by wearing her hair in a style which represented the salon's modern image. But this was not an essential part of an assistant's role and therefore was not proportionate. Further, no other options had been considered such as

whether a refusal by the Claimant to uncover her hair would have damaged the salon's business or would customers have been aware and understood the reasons why the Claimant chose not to do so.

It is noteworthy that the Claimant was not local (and would have to travel) and in the end no stylist was appointed, so there was no need for an assistant. Either would have given a legitimate basis for a decision not to appoint. This is a reminder of the need to be clear as to a reason for not appointing (and in other cases the reason for dismissal) ensuring that prohibited grounds play no part in the decision. It is a further reminder of the need to avoid assumptions when making decisions about how others (in this case customers) would respond.

The case of Azmi (a Muslim teacher who refused to remove her veil when teaching children) was contrasted since in that case removing the veil was considered a necessary part of delivering the required teaching, which was intrinsic to the role.

Duty to make adjustment

As I refer to above, there is no equivalent concept of indirect discrimination under the Disability Discrimination Act. However, an employer is under a duty to take such steps as are reasonable to prevent any arrangements made by him, or any physical features of the work place from placing a disabled applicant or employee at a substantial disadvantage.

The obligation to make adjustments will extend to the terms and conditions of employment as well as physical alterations to premises.

Examples include:

1. allocation of duties;
2. altering working hours including permitting absences for rehabilitation, assessment or treatment; and
3. modification of equipment and instructions (for example, the use of braille), provisions of readers or interpreters and the use of supervision.

Cost is a relevant factor in determining whether or not an alteration is reasonable, but an employer must take into consideration the alternative cost of recruiting and training a replacement. A disabled person is not required to contribute to the costs.

The duty is confined to adjustments which are "job related". For example, the duty would include making adjustments to allow physical access to the work place, but not to the provision of transport to get to the work place from home.

In the case of *Kenny -v- Hampshire Constabulary [1999]* the job applicant had cerebral palsy and required assistance in carrying out his toilet functions. The EAT held that whilst there may be a duty to consider physical adjustments to enable access to the

toilet, the employer was not under a duty to provide a personal carer to assist the applicant. Such provision would address the applicant's personal needs but would not be job related.

This duty is subject to the employer's defence of justification if the reason for the failure to make an adjustment is both material in the circumstances and substantial.

Justification in Disability Discrimination

In order to establish a defence of justification, an employer must show that the reason for the treatment in question of the disabled person is both material in the circumstances and substantial. This however has been interpreted by the courts as meaning that the reason must be more than minor or trivial and must be relevant to the individual disabled person and not based on a general assumption about people with a particular condition (for example, an assumption that blind people cannot use computers).

VICTIMISATION

This occurs where a person is treated less favourably than others because that person has done something by reference to the protected act, which includes:

- bringing proceedings against the employer;
- giving evidence or information in connection with such proceedings brought by any other person; and
- alleging that the employer or any other person has contravened any provisions of the Act

A person (A) victimises another person (B) if A treats B less favourably than he treats or would treat other persons by reason that B has done a protected act. The protected acts are set out in the legislation and include having made a claim under the relevant legislation, or given evidence or information in connection with such a claim.

References

It is possible to bring a claim based on victimisation after employment has ended, for example, in a refusal to give a reference, or the provision of a bad reference.

HARASSMENT

A person (A) subjects another person (B) to harassment where, on prohibited grounds A engages in unwanted conduct which has the purpose or effect of:

- (a) violating B's dignity; or
- (b) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.

There is no requirement that the victim must make any objection to the conduct in order that it may become 'unwanted'. The tribunal will assume certain conduct as unwelcome, such as racist and homophobic remarks. The existence of pornography in an office was held to give rise to an intimidating environment where the female employee who made the complaint hadn't seen it, but was aware of its existence.

In harassment claims there is no need for a victim to identify any comparator. In addition where the conduct has the purpose (i.e. where A knew that such conduct was unwanted or would be unwanted) of violating B's dignity or creating an intimidating hostile, etc environment then the victim does not have to show that their reaction was reasonable.

Only where a tribunal is looking at the question of whether such conduct had the requisite 'effect' is a tribunal concerned with whether, in all the circumstances including the perception of B, it should reasonably be considered as having that effect. This introduced an objective test to limit the subjective reaction of B in circumstances such that a remark was entirely innocent and without any connection with the prohibited ground.

Liabilities for others

An employer is liable for acts of discrimination by their employees during the course of their employment. This is whether or not the acts were done with the employer's knowledge or approval. However it is a defence for the employer to show that they took such steps as were reasonably practicable to prevent an employee doing the act complained of.

This will include use of a policy statement communicated to all employees so that they are aware of their rights to complain and obligations not to subject others to discriminatory actions; and include ensuring the training of managers and supervisors on their responsibilities and to assist them in identifying factors which contribute to the working environment free from discrimination.

Positive Action

In most areas of discrimination giving any advantage to one protected group will generally create a disadvantage to another. This is referred to as "Positive Discrimination" and it is illegal save in relation to disabled people. In contrast positive action, which seeks to promote methods to abolish stereotyping or to counteract the effect of past discrimination, is permitted, but only in limited circumstances. Positive action can take the form of encouraging, for example through focusing training on, disadvantaged or under-represented groups.

Under disability discrimination legislation protection is afforded to those who are disabled. There is no corresponding rights or protections given to those who are not disabled. Hence to give an advantage to a disabled person does not disadvantage a non-disabled person for the purposes of disability discrimination. Positive Discrimination is therefore possible.

The Equality Bill

The format of the proposed new legislation is completely different to the way in which the existing discrimination laws cover the various prohibited grounds. In the same way in which I have sought to describe the common way in which discrimination legislation works above, the Bill sets out the general principals of prohibited behaviour (direct discrimination, indirect discrimination, victimisation and harassment) and then identifies any exceptions and any differences.

Rather than refer to prohibited grounds, the Bill identifies "protected characteristics"; being age, disability, gender reassignment, marriage and civil partnerships, pregnancy and maternity, race, religion or belief, sex and, lastly, sexual orientation. Pregnancy and maternity are set apart from sex discrimination as a protected characteristic.

Reflecting the current position, there is an "occupational requirement" (GOR) defence and some differences between the protection and rules which apply to the different protected characteristics.

The key changes to current rules are as follows:

1. **The Socio-economic duty.** The Bill introduces a new duty on public bodies "to reduce the inequalities of outcome which result from socio-economic disadvantage" when making strategic decisions. The public Body will have to decide for itself which form of socio-economic disadvantage it may be seeking to address.

Socio-economic status does not become a protected ground for any other purposes in the Bill. Any implications for the private sector are marginal and likely to arise only in an indirect manner in the procurement context.

2. **Extended equality duty.** Public bodies and other organisations which carry out any public functions (this may for example extend to care providers) must have due regard to eliminating unlawful discrimination, harassment or victimisation and to advancing equality of opportunity for those with a protected characteristic. This will extend the current duty beyond gender, race and disability.
3. **Gender pay gap information.** Employers with more than 250 employees (public bodies which employ more than 150 employees) are encouraged to publish information about gender pay gaps, with the possibility that this may become mandatory from 2013. Public bodies may be required to publish details of their gender pay gap, ethnic minority employment rate and disability employment rate.

4. **Pay secrecy clauses.** Pay secrecy clauses will become unenforceable in certain circumstances.
5. **Positive action.** Positive action will continue, for example in recruitment or promotion, where the employer "reasonably thinks" that people who share a protected characteristic are disadvantaged or that a protected group is disproportionately badly represented.

There is a new right for "Positive Action" which allows an employer to select between two otherwise equally "qualified" candidates. There is no guidance on how to identify where two people are "as qualified" as each other. Employers will be concerned that they could face discrimination claims from the unsuccessful candidate if they rely on this provision.

This is seen as Positive Action and Positive Discrimination remains unlawful. It is proposed that the Commission for Equality and Human Rights Commission will publish further guidance on what will be allowed.

6. **Discrimination by association.** There is to be a new definition of direct discrimination. A will discriminate against B if, because of a protected characteristic, A treats B less favourably than A treats or would treat others. There is no longer any requirement, as there is under the current age, sex or disability legislation, that B exhibit the protected characteristic.

It is intended that this will include discrimination by association bringing the law into line with *Coleman v Attridge*.

In addition discrimination of "grounds of" becomes "because of". It is suggested that this is simpler language, but it is difference and is likely to create new arguments about whether it changes existing laws.

7. **Disability discrimination.** Indirect discrimination will apply to disability as a measure intended to improve the position of a disabled claimant following *London Borough Council of Lewisham v Malcolm*. Other definitions, such as those for harassment and victimisation, have changed and/or been harmonised.
8. **Equal pay.** There are no significant changes to existing equal pay law, although there are new provisions to allow for a hypothetical comparator in relation to contractual pay claims.
9. **Age discrimination.** It is proposed to extend age discrimination to goods and services and there will be a consultation on extending age discrimination into financial services and insurance products.
10. **Multiple discrimination claims.** It is proposed that new rules are introduced to allow claims based on linked personal characteristics, for example an old woman, or a black Muslim.

Recent Developments

1. Age discrimination

Direct discrimination

Direct discrimination occurs where ‘on grounds of B’s age’ A treats B less favourably ‘than he or she treats or would treat other persons... and A cannot show the treatment... to be a proportionate means of achieving a legitimate aim’ - Reg 3(1)(a) of the Employment Equality (Age) Regulations 2006 .

In **Rolls Royce plc v Unite the Union 2008 EWHC 2420**, an issue arose as to whether the use of length of service as a criterion in a redundancy selection policy (i.e. last in first out) was indirect age discrimination, and whether it also fell within the service-related benefits exemption set out in Reg 32, which provides for an automatic exemption from the age rules for benefits based on a length of service of up to five years.

The Court held that a redundancy selection policy that took into account length of service was indirectly age discriminatory against younger workers but could be objectively justified on the basis that it pursued the legitimate aim of achieving a fair and peaceful selection procedure. Also, giving credit for length of service in a redundancy selection policy could be considered a ‘benefit’ under the Age Regulations and, as such, potentially fell within the service-related benefits exemption from the general prohibition on age discrimination.

Indirect discrimination

Regulation 3(1)(b) defines indirect discrimination as occurring where (i) the employer applies a provision, criterion or practice (PCP) that disadvantages persons of the same age group as the claimant when compared to other persons; (ii) the claimant is personally disadvantaged for that reason; and (iii) the employer is unable to show that the PCP is a proportionate means of achieving a legitimate aim. ‘Age group’ is defined by Reg 3(3)(a) as ‘a group of persons defined by reference to age, whether by reference to a particular age or a range of ages’.

Group disadvantage was considered in **Chief Constable of West Yorkshire Police and ors v Homer EAT 0191/08**. A requirement for senior staff to hold a law degree was potentially indirect age discrimination but this requirement applied to all. All senior staff, regardless of age, had to have a law degree before being eligible for promotion. The requirement for a degree was not something that was only required of those over a certain age or for those falling within a particular age group. In principle, it was no more difficult for an older employee than a younger one to obtain the qualification.

Compulsory retirement

The question whether compulsory retirement complied with the EC Equal Treatment Framework Directive remains to be decided. The ECJ have confirmed in the Heyday Case that the UK mandatory retirement provisions are within the scope of the Directive, provided they can be objectively justified. It is now for the High Court to decide whether the compulsory retirement provisions are objectively justified by a legitimate aim relating to employment policy and the labour market.

Current employee claims concerning compulsory retirement are stayed pending the outcome of the Heyday Case but the question of compulsory retirement arose in the case of a partner in a law firm in **Seldon v Clarkson, Wright and Jakes ET Case Nos.1100275/07**. The firm sought to justify its retirement criteria, by claiming that it was necessary in order to give provide career progression for junior staff, workforce planning, and limiting the need to expel partners using performance management. These were considered as legitimate and proportionate.

Ageist stereotyping

An office admin worker was dismissed on ground of poor performance. A claim for age discrimination was based upon comments made by a senior manger on the date of dismissal that the employee was simply too young. The Tribunal took the view that the employer's claims of poor performance did not stack up when the worker's performance was compared to the performances of both her predecessor and successor in that role. In addition the Tribunal took the view that the employer's attempts to assist the employee to achieve performance improvements was again tainted by a stereotypical assumption that because the person providing the assistance were older they were either more experienced or better able to do the job. The case turned on the burden of proof since the employee was able to demonstrate sufficient facts for the Tribunal to conclude a prima facie case of age discrimination. The employer was unable to prove that poor performance was the real reason for dismissal.

The case is also reminder of the importance to follow the statutory dismissal procedure even though the employee had less than 12 months service. An employee does not require 12 months service to bring a claim on grounds of discrimination. As the statutory procedure had not been followed there was an automatic uplift of 50% on the Tribunal award. **Wilkinson v Springwell Engineering Ltd ET Case No.2507420/07**.

Justification

The defence of objective justification failed in **Rainbow v Milton Keynes Council ET Case No.1200104/07**. A teacher, in her 60's and close to retirement, was turned down for a teaching post. The Council wanted to employ someone 'in the first five years of their career' where they believed they could pay a lower salary. The Council failed to show that the decision to appoint a cheaper, less experienced employee was objectively justified by considerations of cost. The tribunal stated that the test for objective justification in age discrimination claims was the same as in indirect sex discrimination:

there had to be clear evidence that the employer had considered its business needs against the discriminatory effect of the provision, criterion or practice, and had given considered alternatives that might achieve the same result without being disadvantageous to the claimant. Costs can be taken into account when considering justification, but only if combined with other factors.

2. Disability discrimination

An employer discriminates against a disabled person if, ‘for a reason which relates to the disabled person’s disability, he treats him less favourably than he treats or would treat others to whom that reason does not or would not apply, and he cannot show that the treatment in question is justified’ - S.5(1)(a) of the Disability Discrimination Act 1995.

Until recently the issue of identifying an appropriate comparator in order to establish less favourable treatment had been thought settled. In *Clark v TDG Ltd t/a Novacold 1999 ICR 591*, the Court of Appeal held that the comparator need not be in the same or similar circumstances as the disabled complainant. An employee dismissed for sickness absence arising from a disability would therefore be compared with a person who had not been absent (and who would not have been dismissed), rather than a non-disabled person who had also been absent.

The Novacold test makes establishing less favourable treatment relatively straightforward. However the House of Lords in *Mayor and Burgesses of the London Borough of Lewisham v Malcolm 2008 IRLR 700* took a very different view. The correct approach is to compare the treatment of the disabled person with that of a person who does not have a disability but who is otherwise in the same circumstances. In the case of dismissal for sickness absence, the treatment of the disabled person should be compared with that of a non-disabled person who had also been absent.

The case also held that in cases of disability-related discrimination, it is necessary for an organisation or individual to have actual or at least imputed knowledge of the disability in order to discriminate, unless the act complained of is inherently discriminatory. Moreover, that knowledge would need to inform and motivate the decision-making process.

Direct discrimination

In *Coleman v Attridge Law and anor 2008 ICR 1128*, the European Court of Justice was asked to consider whether the disability provisions of the EC Equal Treatment Framework Directive (No.2000/78) protect employees who are not disabled, but who suffer discrimination (or harassment) owing to their association with a disabled person. The ECJ held that associative discrimination does fall within the Directive’s scope - the principle of equal treatment enshrined in the Directive should not apply to particular types of person but to the particular grounds of discrimination set out in Article 1. The case has now returned to an employment tribunal, which read the DDA purposively in order to grant such protection under domestic law. The case has not as yet reached a

decision on the particular claim, but the preliminary issue of whether or not the treatment which was complained about fell within the DDA has now been settled.

Adjustments

The EAT has reconfirmed that an obligation to consider reasonable adjustments for an employee who is on long-term sick leave was not triggered until there was some sign of the employee returning to work. Employers should however consider carefully whether there are measures which form part of the absence management or other steps that can be taken to facilitate a return. However, the EAT also confirmed that it was reasonable for an employer to hold off from pursuing the question of a phased return to work until there was a definite date for return. Significantly, the EAT also ruled that if an adjustment would not help in removing the disadvantage which the disabled person was placed in then such adjustment cannot be considered "reasonable" under the DDA.

NCH Scotland -v- McHugh

Dismissal

The Claimant was employed as a staff nurse providing one to one care for critically ill children. There was a period of repeated absences which created severe operational difficulties in the Unit, with 38% sickness absence for a variety of reasons which included a disability. The employer dismissed on grounds of the unreasonable attendance record and there followed a claim including disability discrimination. At first instance, it was found by the Tribunal that the absences were due to the disability and concluded that there had been less favourable treatment. The decision was appealed and the EAT confirmed, that the DDA does not impose an absolute obligation on an employer to refrain from dismissing an employee who is absent on grounds of ill health due to a disability. The law requires that such a dismissal is justified. An employer can take into account disability related absences in determining whether to dismiss. Whether it was fair to do so would depend upon whether or not that decision was justified. The Tribunal had failed to consider that issue and accordingly the employer's appeal was allowed. -

Dunsby -v- Royal Liverpool Children's NHS Trust

3. Equal Pay

The Equal Pay Act 1970 is concerned only with ensuring that the sexes have the same pay and other terms and conditions of employment if and when they are doing the same work, work of equal value or work rated as equivalent by a job evaluation scheme. The Act implies equality into every employment relationship.

One of the final recommendations of the outgoing Equal Opportunities Commission was for a three year moratorium on all new equal pay claims in order to allow employers to address any outstanding discriminatory pay issues. The EOC also called for mandatory equal pay reviews.

Equal pay claims have also led to unions being sued by some of their female members where the unions had agreed settlements which were on terms which were less favourable than might have been awarded by a tribunal. In reaching settlement the unions adopted a "reasonable rather than maximum settlement policy" because pressing for maximum compensation for equal pay claimants could have had a detrimental impact on other members, both men and women. Since local authorities do not have unlimited funds there was the possibility of redundancies as well as a knock on effect on future pay award negotiations. A sex discrimination claim followed against the unions on the basis that most of those who lost out under the settlements were women. The claim was upheld, but the union was held to have used proportionate means to achieve a legitimate aim and its actions were therefore held to be justified.

Comparators

In *Macarthy's Ltd v Smith 1980 ICR 672* the ECJ held that a woman may compare herself with her predecessor in the job. However, in *Walton Centre for Neurology and Neuro Surgery NHS Trust v Bewley 2008 ICR 1047*, the EAT held it is not permitted to compare yourself with a successor.

In *Hovell v Ashford and St Peter's Hospital NHS Trust EAT 0163/08* the EAT considered the effect of a Job Evaluation Scheme and held that the fact that an employee's job had been placed in the same pay banding as those of her male comparators in a valid JES was of evidential value only, and not conclusive that the jobs had been of equal value in the period prior to the JES being implemented. An independent expert's report could still be obtained to determine the question of equal value for the earlier period.

Justification

In *British Airways plc v Grundy 2008 IRLR 815, CA*, the Court of Appeal rejected the argument that a collective agreement on pay for cabin crew amounted to objective justification. Collective bargaining, particularly which where they did not cover all employees (e.g. multiple unions recognised across different categories of worker for a single employer), can result in one group of employees doing worse than another. The employer must have regard for the possibility of differentials having an adverse disparate impact on employees of a particular gender, race etc.

In *Chief Constable of West Midlands Police v Blackburn and anor 2008 ICR 505, EAT* police officers who were available for 24-hour working were paid night-shift bonuses. A tribunal decided that this indirectly discriminated against women, who are less likely to be able to work at night because of childcare responsibilities. The EAT held that the bonus scheme was valid; the discriminatory impact was justified by the police force's legitimate aim of rewarding antisocial hours working.

Time limits

Equal pay claims must be brought within 6 months of the event giving rise to the claim, or where it is ongoing then within 6 months of any change in the relationship which brings the imbalance to an end. Where employment is terminated, the six months will run from the date of termination. Problems can arise when the employee has transferred under the Transfer of Undertakings (Protection of Employment) Regulations 2006. After a relevant transfer, employment contracts made with a transferor are treated as if originally made with the transferee. In **Sodexo Ltd v Guttridge and ors 2008 IRLR 752** the EAT confirmed that for equal pay claims involving a TUPE transfer, time begins to run from the date of the relevant transfer. However, the EAT also went on to say that any pay inequality existing at the date of transfer will continue after that date, such that an employee may have a continuing claim against the transferee such that time continues to run.

4. Race Discrimination

The Racial and Religious Hatred Act 2006 created a new criminal offence of inciting hatred on religious grounds through the use of threatening words or behaviour, or by displaying, publishing or distributing written material, visual images or sounds. Employers can be held vicariously liable for acts of their employees, both in and out of the workplace. Penalties include a fine and up to 7 years imprisonment. As always employers should have appropriate policies in place. Steps taken to introduce policies and procedures to comply with and raising awareness of the Employment Equality (Religion or Belief) Regulations 2003 will help but these may require some updating to include the new offence.

The wide exemption for freedom of speech (including preaching the benefits of or practicing one's own religion) will likely mean there be few successful prosecutions save in the more extreme or directed circumstances.

Direct discrimination

In **Centrum voor gelijkheid van kansen en voor racismebestrijding v Firma Feryn NV 2008 ICR 1390** a job advertisement stated that North Africans would not be employed because customers would not want immigrants to have access to their homes in order to carry out work. The statements were broad and sweeping and did not identify any particular individual who had therefore been subjected to discriminatory treatment.

The European Court of Justice held that public statements would dissuade potential applicants and therefore hinder their access to the labour market and that this constituted direct discrimination.

The ECJ went on to say that it was for individual member states to decide whether to allow representative proceedings, including in cases where there was no identifiable victim. In the UK the Equality and Human Rights Commission has a power to issue

proceedings in respect of indirect discriminatory practices but would not have the requisite powers to bring a claim in these circumstances, where there is direct discrimination with no identifiable victim. Whilst this case is therefore unlikely to have any real impact it is a reminder for employers to take care in what they say.

In **Khan v Home Office** a tribunal found that an employer's handling of a grievance was discriminatory. However, the subsequent dismissals of that employee had not been discriminatory. While the employer may have acted unfairly and unreasonably in dismissing the employee, the employer did not have to establish that he acted fairly in order to avoid a finding of discrimination, only that the true reason for the dismissal was not discriminatory.

Victimisation

Victimisation under S.2(1) of the Race Relations Act 1976 ("RRA") occurs where a person treats another less favourably than he treats or would treat others, and does so by reason that the person victimised has done a protected act, such as bringing proceedings under the RRA against him or any other person.

In **HM Prison Service -v- Ibimidun** an employee had made a number of separate claims against his employer over a number of years, most of which failed except for one victimisation claim. Many claims had been pursued to appeal and beyond, to Tribunals, where costs orders had been made against the employee for pursuing claims with no reasonable prospects of success. The employer dismissed on the grounds that the employee had been pursuing claims in order to harass the employer into making a financial settlement. This had created a great deal of stress and anxiety and involved significant cost and ultimately led to a breakdown in trust and confidence.

The EAT held that the reason for the disciplinary action was not the complaints themselves (which were protected acts) but that the complaints had been made in bad faith with a view to harass. Such action, harassment, was not protected and the employer was entitled to take action.

Such cases are very much limited to their facts but reflect the position under the whistle blowing legislation where any whistle blowing must be in good faith and not tainted by any personal motive. For employers the key remains in clearly identifying the grounds on which any disciplinary action is taken.

5. Religion or belief discrimination

The Employment Equality (Religion or Belief) Regulations 2003 SI 2003/1660 make it unlawful for workers to be discriminated against on the grounds of religion or belief.

In **Azmi v Kirklees Metropolitan Borough Council 2007 ICR 1154**, a female Muslim language teaching assistant was suspended when she refused to remove her veil while teaching. The EAT rejected her indirect religious discrimination claim on the ground that

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the school's treatment of her was justified as being a proportionate response to the legitimate aim of providing effective tuition to young children.

In **Noah v Desrosiers (trading as Wedge) ET Case No.220186/07**, a hairdresser, looking to employ a stylist and an assistant, rejected the application of a practicing Muslim woman who wore the traditional hijab headscarf.

The Tribunal held that there had been no direct discrimination. There was no evidence that the Claimant's religion had influenced the decision not to appoint her rather than the refusal to uncover her hair, which applied to all staff. However, this did amount to a provision criterion practice which put the Claimant, by reason of her religion, at a particular disadvantage when compared to others. This satisfied the grounds of indirect discrimination.

The Tribunal accepted that the hairdresser had a legitimate objective in expecting an assistant to promote the salon's business by wearing her hair in a style which represented the salon's modern image. But this was not an essential part of an assistant's role and therefore was not proportionate. Further, no other options had been considered such as whether a refusal by the Claimant to uncover her hair would have damaged the salon's business or would customers have been aware and understood the reasons why the Claimant chose not to do so.

It is noteworthy that the Claimant was not local (and would have to travel) and in the end no stylist was appointed, so there was no need for an assistant. Either would have given a legitimate basis for a decision not to appoint. This is a reminder of the need to be clear as to a reason for not appointing (and in other cases the reason for dismissal) ensuring that prohibited grounds play no part in the decision. It is a further reminder of the need to avoid assumptions when making decisions about how others (in this case customers) would respond.

The case of Azmi (a Muslim teacher who refused to remove her veil when teaching children) was contrasted since in that case removing the veil was considered a necessary part of delivering the required teaching, which was intrinsic to the role.

Eweida v British Airways plc EAT 0123/08 concerned the display of religious symbols. The EAT held that BA's insistence that a cross worn visibly on a necklace by a customer-facing employee be removed or concealed, in accordance with its uniform policy, did not amount to indirect discrimination on the ground of the employee's religion or belief. Indirect religious discrimination cannot be established without evidence that the PCP at issue disadvantages a group sharing the same belief as the claimant. In the absence of such evidence, the tribunal had been right to reject the claim. This contrasts with the case of Azmi (see above) where the wearing of the hijab was seen as integral to the display of a Muslim woman's faith. The Equality Regulations do not protect subjective personal religious views, and aim to deal with group, rather than individual, discrimination.

In **Ladele v London Borough of Islington ET Case No.2203694/07**, the EAT has sought to reaffirm that where there is a direct conflict between the protection afforded under the Equality Rules relating to religion or belief and those afforded to sexual orientation, one set of rights do not override the other. The employer was a registrar of births, deaths and marriages. She refused to conduct civil partnership ceremonies as enabling same sex unions was contrary to her religious beliefs. For many years a work around situation had existed with the employee swapping duties to avoid conflict. The employer received a complaint from some other staff that such conduct was contrary to the employer's dignity policy, was contrary to the Sexual Orientation Regulations and was discriminatory. The employee complained of poor treatment, a lack of support from colleagues and ultimately presented a complaint to the Tribunal on direct and indirect discrimination and harassment contrary to the Religion or Belief Regulations.

The Tribunal recognised the employer's objective of complying with its duties under the Sexual Orientation Regulations but held that the employer had failed to take into account the employee's rights under the Religion or Belief Regulations. A number of examples of direct discrimination were identified by the Tribunal, including a breach of confidentiality by sharing details of the proposed disciplinary action with those colleagues who had complained about the employee's conduct without anything in place to prevent those colleagues from further disclosing that information and had failed to uphold its dignity policy in respect of the behaviour of colleagues towards the employee. The Tribunal further recognised that the employer had a legitimate aim in promoting the rights of the LGBT community and that it also had a statutory duty to provide the service in question. However, the Tribunal took the view that the employer could have accommodated the employee's objections but had chosen not to do so.

The EAT took a more direct view in that the employers conduct was not based on the employee's religion (it would have acted regardless of any particular religion) and that their action was directed at an employee who had refused to carry out her duties. It was legitimate for the employer to promote equality.

Organisations that have an ethos based on religion or belief can rely on Reg 7(3) to treat job applicants and employees differently on the grounds of religion or belief where they can show that being of a particular religion or belief is a 'genuine occupational requirement' (GOR) for the job in question, and it is proportionate to apply that requirement in the particular case. However, as the tribunal's decision in **Sheridan v Prospects For People With Learning Disabilities; Hender v Prospects For People With Learning Disabilities ET Case Nos.2901366/06; 2902090/06** shows, this GOR will only apply in a small number of cases.

A charity established to provide housing and day care services to Christians with learning disabilities took the view that all posts were subject to the GOR as it was considered that all roles delivered on the charity's Christian ethos to the people that it supported. Existing staff were permitted to remain in post but would not be eligible for promotion to any post subject to the GOR. As an alternative the charity offered assistance with retraining and in finding other work outside of the charity. Two separate claims were

brought. The first from a manager who claimed constructive dismissal on the grounds of an instruction to discriminate against other persons. The second claim was on the grounds of discrimination by an employee who was refused an appointment to a GOR post. It was accepted that the charity had a religious ethos. However, the Tribunal was not satisfied that practicing the Christian faith was a GOR. The Tribunal considered the nature of those that the charity served and that for many years the service had run with non-practicing Christians in the relevant roles. Whilst faith was one of the principles which underpinned the charity's works it was principally providing support serviced to people with learning difficulties.

In order to establish a GOR an employer must look at every job and consider whether the specific duties are required to be carried out by a person of a particular faith because it is an essential requirement of that role. The employer would also have to go on and consider whether there were alternatives. The charity failed to do either and introduced a blanket requirement, which was held not to be legitimate or proportionate.

6. Sex Discrimination

The Sex Discrimination Act 1975 (Amendment) Regulations 2008 came into force on the 6th April make a number of changes from October 2008. Existing rules provide for different entitlements to benefits for women on Ordinary Maternity Leave (OML) and Additional Maternity Leave (AML). During OML a woman has a statutory right to benefit from all terms and conditions save in relation to remuneration. Benefits such as holiday, childcare vouchers, private medical insurance, mobile phone and car (private use) continue. Restricted rights exist during AML, covering contractual rights to discipline and grievance procedures, termination and redundancy.

The new regulations require that for those women whose Expected Week of Childbirth falls on or after 5 October 2008 benefits provided during AML must be no less than those provided during OML. Employers must also be cautious to ensure that any period of AML is taken into account when calculating any length of service related benefits.

With the recent extension of statutory maternity pay to 39 weeks (and the proposals to extend it to 12 months) it is likely that more women will be taking advantage of AML. This represents a significant increase in maternity rights.

Further changes extend the definition of harassment 'on the ground of her sex' to 'related to her sex or that of another person'. This means that a person claiming harassment is now only required to show that the alleged treatment was connected or associated with sex and not that it occurred because they were a woman (or man). The new regulations also remove the requirement for a woman to compare her treatment to that of a woman who is not pregnant or not exercising her right to maternity leave. The removal of the need to demonstrate that a comparator would have been treated differently eases the burden on the claimant and makes it easier to establish that there is a prima facie case for the employer to satisfy the tribunal that it did not in fact discriminate (the burden of proof shifts to the employer).

Perhaps receiving more press attention are the new rules which impose liability on employers who fail to protect employees from harassment by third parties, for example customers or clients. Where an employer fails to take reasonably practicable steps to protect an employee from third party harassment, where such action is known to have occurred on at least two other occasions, then the employer will be held (vicariously) liable for those acts.

Justification

Justification involves balancing the conflicting needs and rights of those who may be advantaged or disadvantaged by any decision. In *GMB v Allen 2008 IRLR 690*, the Court of Appeal held that the union did indirectly discriminate against female members when it negotiated a single status agreement with Middlesbrough MBC. The union had prioritised pay protection over securing any back pay which had a disproportionate effect on female members and was, therefore, indirectly discriminatory. However, the methods used by the union to procure acceptance of the pay award, involving withholding information and manipulation, was considered to be disproportionate and, accordingly, could not justify the discrimination. The issue of compensation remains to be determined but, of course, opens up the possibility of the unions having to finance back pay, rather than these claims proceeding against the local authority. Whether or not other unions who have negotiated similar single pay schemes are at risk depends upon the means that they have used to seek agreement. The Court stressed that the single pay scheme could be justified, it was the methods used by GMB which was held to be disproportionate.

7. Sexual orientation discrimination

Harassment under Reg 5(1) of the Employment Equality (Sexual Orientation) Regulations 2003 SI 2003/1661 occurs where, 'on grounds of sexual orientation', a person engages in unwanted conduct that has the purpose or effect of violating another person's dignity, or creating an intimidating, hostile, degrading, humiliating or offensive environment for him or her.

In *English v Thomas Sanderson Blinds Ltd 2008 ICR 607* the Court of Appeal held that the Sexual Orientation Regulations do protect someone who is known to be heterosexual against homophobic abuse. An agency worker had been subjected to "gay jibes" when colleagues had discovered that he had attended boarding school and had lived in Brighton. It was accepted that no one actually believed the agency worker was gay. The EAT had agreed with the Tribunal that this meant that the Equal Treatment Regulations could not apply as they only extended protection from harassment if he was gay, thought to be gay or suffered harassment through his association with someone who was gay or thought to be gay. The Court of Appeal held that it was the conduct which was prohibited, not the particular orientation of the victim.

In *Re The Christian Institute and ors 2008 IRLR 36* the Northern Ireland High Court considered an application for judicial review of the Equality Act (Sexual Orientation)

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Regulations (Northern Ireland) 2006 SR 2006/439, which apply to the provision of goods and services. The Court found that, in most respects, the Regulations were lawful, and did not treat evangelical Christians less favourably than other persons on the ground that they were subject to civil liability for manifesting their orthodox religious belief in relation to homosexuality. However, it ordered that harassment provisions - which would, for example, prevent a Christian guest-house owner from stating an objection to renting a room to a same-sex couple - should be set aside.

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