

Legal update

May 2007

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This update covers the period from February to April 2007.

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Part 1

Proving discrimination

Guidance from the Court of Appeal on burden of proof

Since October 2001, courts have grappled with the concept of reversal of burden of proof introduced by the Burden of Proof Directive and implemented by statutory amendment to the Sex Discrimination Act and Race Relations Act (and, subsequently, to other discrimination legislation¹). In summary, the statutory provisions establish a two-stage approach; the complainant must prove facts from which the tribunal could conclude, in the absence of an adequate explanation from the respondent, that discrimination had occurred; if this is satisfied, then the respondent must prove that he did not commit the discrimination alleged. This issue continued to cause confusion despite the guidance given by the Court of Appeal in *Igen v Wong* (2005) which provided that the employee must establish a prima facie case of discrimination (ie, evidence of less favourable treatment on one of prohibited grounds) for the burden of proof to transfer and it is then for the employer to prove, on the balance of probabilities, that the less favourable treatment complained of was not on the prohibited grounds.

You may remember that Ms Madarassy brought claims of sex discrimination, victimisation and unfair dismissal. Her claim of unfair dismissal and most counts of sex discrimination were rejected by the tribunal and the EAT. However, the outstanding issues which went to the Court of Appeal included whether the burden of proof had been properly applied and whether Ms Madarassy had suffered discrimination by a failure to carry out a pregnancy risk assessment. The Court of Appeal in *Madarassy v Nomura International* upheld the *Igen v Wong* approach, but confirmed that judicial guidance is not a substitute for the statute itself and there is no error of law if a tribunal fails to work through such guidance paragraph by paragraph. However, clarification was given on how the burden of proof should work. A difference in status and difference in treatment are not enough to shift the burden of proof; those facts merely indicated a possibility of discrimination. The Court of Appeal approved the reasoning in *Laing v Manchester City Council* (2006) that in considering whether a claimant had a prima facie case, a tribunal could consider any evidence adduced by the employer that undermines the claimant's arguments that a prima facie case exists. A claimant is unlikely to have been prejudiced where the tribunal has acted on the assumption that the burden may have shifted and has considered the employer's explanation. From a practical point of view, this legal reasoning may have little impact on the way that an employer would actually prepare and present its evidence in defence. It will really only impact on the way the legal argument is made and the judgment given.

The Court of Appeal also upheld the decision that the claimant had not suffered unlawful discrimination as a result of the failure to carry out a risk assessment in accordance with regulation 16 of the Management of Health and Safety at Work Regulations 1999. The Court of Appeal held that the duty only arises where the work is of a particular kind which could involve special risk to a new or expectant mother or her baby. However, it is clearly good practice for employers to undertake a risk assessment for all pregnant employees to identify any potential hazards in their working environment and suggest solutions. (*Madarassy v Nomura International*)

¹ the Disability Discrimination Act, Employment Equality (Religion and Belief) Regulations and Employment Equality (Sexual Orientation) Regulations

Statutory grievance procedure developments

A claim cannot be stayed while grievance lodged to comply with the SGP

If a claimant has not complied with a necessary requirement of the statutory grievance procedure (eg failed to set out the grievance in writing or failed to wait 28 days before presenting the claim), then a tribunal is not entitled to stay his claim while he does so. The tribunal has no jurisdiction to hear the claim and the claim should be rejected. Section 32 of the Employment Act 2002 provides that once the issue of procedural compliance has arisen in relation to the statutory grievance procedures, then the tribunal simply has no jurisdiction to hear a claim unless it is presented after compliance with the procedural steps. Rule 1(8) of the Employment Tribunals Rules of Procedure 2004 prohibits a chairman or tribunal from considering the "substance of the claim" until the claimant has complied with the statutory procedures, leaving open the argument that it was implicit that a stay might be granted. The EAT did not accept that the effect of Rule 1(8) was "to trump" s32 by permitting a stay in these circumstances. (*LB Hounslow v Miller*)

Statutory grievance procedures do not apply against fellow employee

The Employment Appeal Tribunal (EAT) has confirmed that the statutory grievance procedures do not apply to an employee's claim against a fellow employee (following the earlier EAT decision of *Bissett v Martins and Castlehill House Association*). Accordingly, there is no requirement to issue a grievance against a fellow employee prior to commencing a discrimination claim. However, claimants need to be aware that whilst time for submitting a claim against the employer may be extended where a statutory grievance has been issued, the grievance will NOT operate to extend time for the claim against the employee. In practice, this means that claimants bringing joint claims against both employers and employees would be well advised to bring both within the normal time limit rather than risk the claim against their fellow employee being time-barred. (*Odoemelam v The Whittington Hospital NHS Trust*).

Victimisation

Vicarious liability in whistleblowing context compared to discrimination context

A recent Employment Appeal Tribunal (EAT) decision has confirmed that an employer may be vicariously liable where an employee is victimised by a fellow employee as a result of making protected disclosures. This decision is interesting as the wording of the relevant section of the Employment Rights Act 1996 (s.47B ERA) refers to the right of a whistleblower not to be subjected to a detriment by any act (or failure to act) by the employer but, does not expressly provide that anything done by employees in the course of employment shall be treated as the act of the employer. By contrast, the discrimination statutes (s.41 Sex Discrimination Act, s. 33 Race Relations Act and s.58 Disability Discrimination Act 1995) all specifically provide that anything done by employees in the course of employment shall be treated as the act of the employer for the purposes of vicarious liability. Could Parliament have intended the concept of vicarious liability to apply in this context without express words (such as are in the Discrimination Acts) and without a statutory defence being provided? The EAT held, partly on public policy grounds, that employers could be vicariously liable for detriment suffered by the whistleblower at the hands of fellow employees. To absolve employers of liability for the conduct of their employees would weaken the protection afforded under the legislation. Further, the concept of "employer" is, in any event, a legal construct. There are obviously various levels of seniority within an organisation and the EAT did not accept that it should arbitrarily draw a line and say that no act by any person below that line is an act of the employer. Furthermore, by reference to *Woodward v Abbey National* [2006] (which held that victimisation post-employment was protected under the ERA), the concept of

victimisation should be interpreted consistently across all the relevant statutes as "it would be odd indeed if the same sort of act could be victimisation for one purpose, and not for the other". (*Cumbria County Council v Carlisle*).

Harassment

New publications

Acas advice leaflet – Bullying and Harassment at work: guidance for employees - this leaflet gives employees basic information about bullying and harassment; summarises the responsibilities of employers; highlights sources of further information and advice and is available here.

General publications

Equalities Review: final report published – *Fairness and Freedom: the Final Report of the Equalities Review* has been published. This was a review chaired by Trevor Phillips looking into the causes of inequality in society. The report made a number of recommendations for future action, including the simplification of discrimination law in a Single Equality Act, an integrated positive duty on public sector bodies to replace the multiplicity of single-issue positive duties, and a more dynamic enforcement role for the CEHR.

Part 2

Sex discrimination and equal pay

Equal pay update

An interesting point to arise from the latest Employment Appeal Tribunal (EAT) decision in the *Bainbridge v Redcar & Cleveland Borough Council* litigation is that where an individual wishes to bring an equal pay claim against their employer, each allegation that a comparator was paid more is treated as a separate cause of action. Accordingly, employees are free to bring fresh proceedings in respect of the same period of time if they choose to cite a new comparator. The normal principles of issue estoppel and cause of action estoppel which prevent a claimant from issuing proceedings in respect of matters already considered by a tribunal would not apply in this instance. An unsuccessful finding in respect of one comparator would not prevent a claimant from succeeding in relation to another comparator. (*Bainbridge v Redcar & Cleveland Borough Council*)

Sex discrimination laws incompatible with EU Directive

The High Court has held that the Government failed to comply with its obligation to implement the Equal Treatment Directive (76/207/EEC) when amending the Sex Discrimination Act (SDA) in October 2005. In particular:

- the statutory requirement for a comparator who is not pregnant or on maternity leave should be removed from section 3A SDA. The EOC argued that there was no need for a comparator when bringing a claim for discrimination on the grounds of pregnancy or maternity leave in light of recent ECJ decisions (*Webb v EMO Air Cargo Ltd* and *Gillespie v Northern Health Board*). The High Court confirmed that women occupy a special position during pregnancy and maternity leave which in some circumstances requires them to have special protection, such as a risk assessment, which they would not have needed had they not become pregnant so it is not appropriate to compare them to a non-pregnant employee;
- the definition of "harassment" in section 4A(1)(a) SDA (which refers to a person's unwanted conduct which, on the grounds of her sex, has the purpose or effect of violating a woman's dignity or of creating an intimidating, hostile, degrading, humiliating or offensive environment for her), was too narrow and should be rewritten to eliminate the need for causation and to facilitate claims for harassment which are not "on the grounds of her sex" (but were related to her sex). Claims relating to harassment by a third party should also be facilitated where conduct towards another person has the effect of creating a humiliating or offensive environment towards a woman. Adequate protection should be provided against discrimination by clients and customers;
- section 6A SDA should be recast to clarify that women may bring discrimination claims relating to periods of maternity leave.

The court has ordered the Secretary of State for Trade and Industry to inform the EOC and the court how the Government plans to remedy the situation. The Government's response will also impact on the equivalent provisions relating to harassment contained in the Race Relations Act, Disability Discrimination Act, Employment Equality (Religion or Belief) Regulations and the Employment Equality (Sexual Orientation) Regulations. We understand that the Secretary of State for Communities and Local Government will now consider as soon as reasonably practicable what amended regulations are required and will consult with the EOC before introducing such regulations.

Gender Equality - new publications

Gender Equality Duty Code of Practice – from 6 April 2007, all public authorities are under a statutory duty to eliminate unlawful discrimination and harassment and promote equality of opportunity between men and women (the "gender equality duty"). The EOC has prepared a Code of Practice on the Gender Equality Duty which gives practical guidance to public authorities on how to meet their new obligations. This is available here and came into effect on 6 April 2007.

ACAS have updated their advisory booklet "Tackling discrimination and promoting equality – good practice guide for employers" which is available here.

Discrimination on grounds of part-time status

Refusal to offer alternative days off work to an employee who did not work Mondays was not discrimination on grounds of part-time status

The Court of Session, upholding the earlier decision of the EAT, held that an employer's failure to give a part-time employee who did not work Mondays pro-rata days off work to reflect the bank holidays was not discrimination under the Part Time Workers (Prevention of Less Favourable Treatment) Regulations 2000.

However, care should be taken in applying this decision more generally given the rather unusual circumstances of this case in which the employer operated a seven-day working week with a policy of only paying for statutory holidays that were normal working days. Accordingly, there were both full-time and part-time workers on a variety of patterns that may or may not have included Mondays. Although it was accepted that an employee who worked part-time Wednesday – Friday was treated less favourably than a full time employee who worked Monday – Friday in relation to bank holidays, this was through "the accident" of having agreed not to work on Mondays or Tuesdays. It was clear that a full-time employee who worked Tuesday to Saturday would also not receive the benefit of statutory holidays which fell on Mondays. Accordingly, there was no less favourable treatment on prohibited grounds. (*McMenemy v Capita Business Services Ltd*)

Currently, under the Working Time Regulations 1998, workers are entitled to four weeks' paid annual leave in each leave year. This entitlement will increase to 4.8 weeks from 1 October 2007 and to 5.6 weeks from 1 October 2008, subject to a maximum statutory entitlement of 28 days. The Government has not yet published its response to the Further Consultation document which included detailed proposals and draft regulations. One practical concern is that the draft regulations do not actually specify that the additional days' holiday are intended to represent bank holidays although, the legislation is clearly intended to implement the manifesto commitment to do this. Accordingly, there is a risk that employers whose contracts contain a standard clause stating that workers are entitled to "statutory holiday plus public holidays" could find workers are entitled to the increased 28 days statutory holiday in addition to public holidays. This seems to be an unforeseen consequence of the proposed increase to statutory holiday which may be corrected during the current consultation process.

Disability discrimination

No obligation to pay salary to a disabled employee on sick leave

The Court of Appeal has confirmed that an employer's failure to continue to pay salary to a disabled employee whose entitlement to sick pay had been exhausted under the employer's sick pay policy, was neither a failure to make reasonable adjustments nor disability-related discrimination. This decision will come as a relief to employers and reflects public policy considerations that the Disability Discrimination Act 1995 should not be interpreted to encourage people to stay off work and it was not reasonable to require an employer to subsidise indefinitely a disabled employee on long-term sick leave. Going forward, it should be harder for a disabled employee to succeed in a claim for full pay during sick leave, once the contractual entitlement to pay has been exhausted, unless, as in *Nottinghamshire County Council v Meikle*, it is the employer's failure to make reasonable adjustments which causes the absence. (*O'Hanlon v HM Revenue & Customs*)

No duty to carry out a formal risk assessment under DDA

The Court of Appeal held that the tribunal had reached a perverse decision in determining that a council had failed in its duty to make reasonable adjustments (s.6(1) Disability Discrimination Act) by failing to carry out a risk assessment. There is no obligation in law for an employer to carry out a formal risk assessment. There still remains some uncertainty as to the extent to which the employer is obliged to consult with the disabled employee in order to discharge the duty to make reasonable adjustments. Although an employer who has clearly complied with its duty to make reasonable adjustments should not be penalised for failing to consult with an employee in these circumstances, it certainly seems well advised to discuss with the relevant employee what adjustments they consider could reasonably be made to accommodate them. From a purely practical point of view, an employee who has been involved in discussions as to potential adjustments that can be made is less likely to perceive that the employer has failed in its duty and, perhaps, less likely to bring a claim. (*Hay v Surrey County Council*)

Reasonable adjustments under the Disability Discrimination Act 1995

The EAT has confirmed that it will not normally be a reasonable adjustment under the DDA for employers to pay salary to disabled employees on long-term sick (following *O'Hanlon v HMRC*) as it would not help the employee to return to work.

Disability discrimination - new publications

Disability Agenda – issued by the DRC on 14 February 2007, the Disability Agenda sets out ten policy prescriptions for Government in anticipation of the launch of the Commission for Equality and Human Rights in October 2007. Proposals include a call for reform of existing anti-discrimination law to achieve a simpler, fairer legislative framework, including a Single Equalities Act that will build on the positive features of the DDA. See here.

The United Nations (UN) adopted a new convention on disability rights on 13 December 2006 and the Convention and its Optional Protocol opened for signature on 30 March 2007. The UK signed the Convention (but not the Optional Protocol) and is now checking its legislation, policies and practices against the Convention's obligations. The Convention's purpose is to promote and ensure the full and equal enjoyment of all human rights by disabled people and covers accessibility, personal mobility, health, education, employment, habilitation and rehabilitation, participation in political life, and equality and non-discrimination.

The Government has launched a public sector guide for complying with the disability equality duty which is available here

Religious discrimination

Requirement for teacher to remove veil was not religious discrimination

The Employment Appeal Tribunal (EAT) has upheld the tribunal's decision in the widely reported case of *Azmi v Kirklees Metropolitan Borough Council*, that an instruction to remove the full veil when carrying out duties as a teacher, was not direct discrimination on grounds of religion or belief. Mrs Azmi had not been treated less favourably than a comparator would have been in similar circumstances and the correct comparator was a woman, whether Muslim or not, who covered her face (not, as Mrs Azmi argued, a Muslim woman who covered her head but not her face). Further, even though the instruction potentially amounted to indirect discrimination (i.e. where an apparently neutral provision, criterion or practice has, in practice, a disproportionate adverse impact on one particular group), the EAT considered that the employer had been justified in responding as it did. The instruction to remove the veil when teaching a class but, permitting the veil to be worn at other times on School grounds, amounted to a proportionate means of achieving the legitimate aim of providing the best quality education.

Useful guidance is given by the EAT on the principles of law regarding proportionality. Firstly, in relation to whether or not the aim is legitimate, the employer need only show that the proposal is justified objectively not that no other proposal is possible. Here, the need to raise the educational achievements of the children in the school was a legitimate aim. Secondly, the tribunal should make its own judgment as to whether the proposal is reasonably necessary after a fair and detailed analysis of the reasonable needs of the employer's business and working practices. Here there was evidence that, before issuing the instruction there had been observations of Mrs Azmi teaching and assisting the children and there were concerns about how effective her communication was when she wore the veil.

The EAT also made the interesting (but non-binding) comment that claims arising out of manifestations of religious belief (including the wearing of religious clothing or symbols, or participating in religious observances) did not necessarily have to be dealt with as instances of indirect discrimination. Treating an individual less favourably because of some manifestation of their religious belief could be direct discrimination. Mrs Azmi's request to refer this question to the European Court of Justice was refused.

Catholic school liable for direct discrimination on grounds of religion

In an interesting decision on the scope of the genuine occupational requirement defence in the context of discrimination on grounds of religion, the Employment Appeal Tribunal (EAT) upheld a tribunal's decision that an atheist teacher employed by a Catholic school had suffered direct discrimination under the Employment Equality (Religion or Belief) Regulations 2003 when he was refused an interview for the post of Principal Teacher of Pastoral Care. The post was not on the list of posts for which the Roman Catholic Church required a teacher to be Catholic (as set out in a 1991 agreement between the Council and the Church) and therefore the Council should not have assumed that the Church would not have approved the appointment. The EAT upheld the tribunal's finding that there was no genuine occupational requirement. In particular, it held that a local authority has no religious ethos and therefore cannot take advantage of the genuine occupational requirement defence, even in respect of employment in a religious school. (*Glasgow City Council v McNab*)

Sunday working

Two recent tribunal decisions have both found that the requirement for a practising Christian to work on Sundays was indirect discrimination on grounds of religion or belief. (*Edge v Visual Security Services Ltd*, *Estorinho v Zoran Jokic t/a Zorans Delicatessen*, as reported in EOC review April 2007)

Religious discrimination - new publications

Religion or Belief (Questions and Replies) Order 2007 has now been published and will come into force on 30 April 2007. It prescribes forms by which a person who has brought or is considering bringing proceedings under Part 2 of the Equality Act 2006 (discrimination on grounds of religion or belief) may question the respondent or potential respondent.

Age discrimination

Compulsory retirement age lawful in opinion of Advocate General

The Spanish Court recently referred a question to the ECJ as to whether a compulsory retirement provision in a collective agreement was lawful in light of the age discrimination provisions in the Equal Treatment Framework Directive. The Advocate General (AG) stated that the Framework Directive on age discrimination did not apply to state laws setting retirement ages (the fourteenth recital to the Directive expressly states that the Directive "shall be without prejudice to national provisions laying down retirement ages"). Further, even if the Directive did apply, a compulsory retirement age could be justified according to the AG. In this particular case, the compulsory retirement age had been adopted as part of a policy specifically designed to promote inter-generational employment. There was no doubt that the provision served a legitimate public-interest aim of employment and labour market policy. The legitimate objective must be "appropriate and necessary" to be justified but the AG highlighted that member states enjoy broad discretion in their choice of what measure is required to achieve their social and employment policy and there was no indication that fixing a retirement age of 65 would go beyond what was appropriate and necessary. It is not, in the AG's opinion, for the ECJ to substitute its own assessment of such complex national issues. (*Palacios de la Villa v Cortefiel Servicios*).

It will be interesting to see whether the ECJ follows the AG's opinion. If it does, it seems unlikely Heyday will succeed in its challenge to the UK mandatory retirement procedures contained in the Employment Equality (Age) Regulations 2006.

Race discrimination

Race discrimination - new publications

Race equality impact assessments - Acas has published 4 steps it followed when carrying out Race Equality Impact Assessments. The assessments are the methods used for looking at the way judgements are made as to whether services or products are disproportionately or unjustifiably discriminating against someone because of ethnicity. They are then signed off by the board of Acas before publication on their website. The 4 steps are available here.

Family-friendly leave

Family-friendly/flexible work - new publications

ACAS leaflet – updated guidance from ACAS on the right to apply for flexible working and work-life balance (see [here](#) and [here](#)).

Right to flexible work - the Children's Minister has suggested that all workers in the UK should be given the opportunity to work flexibly i.e. part-time, on flexitime, from home or as part of a job share unless there is a sound business case for them not to do so. See [here](#).

ACAS has updated its maternity guidance. See [here](#).

Sexual orientation/transgender issues

Sexual orientation - new publications

ACAS has published its findings on the impact that anti-discrimination regulations on sexual orientation and religion or belief have had since their introduction in 2003. It concludes that claims brought under the regulations have been dominated by alleged instances of harassment, bullying and physical assaults.