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Employment Law Cases Update and Newsletter

May 2012

Discrimination law has become a legal topic in its own right. It covers a wide range of characteristics, including gender, race, disability, age, sexual orientation and religion or belief.

From the point of view of the claimant, perhaps the most important point about discrimination claims in the employment tribunal is that there is no limit to the amount of compensation which may be awarded. Although most complaints of discrimination result in low levels of award, there are examples of headline-grabbing cases where massive sums have been awarded. These cases generally involve discriminatory behaviour which has resulted in the claimant being permanently unfit for work and suffering long-term loss of earnings.

The main drawback with discrimination law is its complexity. It is difficult for specialist lawyers to keep track of the statutes, regulations and rapidly-developing case law in this area. When the Equality Act 2010 was introduced, the opportunity to simplify discrimination law was not grasped. The Act comprises 218 sections and 28 schedules. It is an Act of grinding complexity and extreme prolixity. One example of this lack of transparency is the law of disability discrimination. This necessarily starts with the legal definition of disability. This is practically impossible to summarise.

The excessive legality of discrimination law means that some of the most vulnerable members of society, who may well be entitled to a legal remedy, have no option but to consult expensive lawyers. Their access to free or low-cost legal advice and representation is disappearing fast. Here at Frederick Place Chambers we are committed to providing advice, drafting and representation for victims of discrimination without driving them into bankruptcy.

R. H. Spicer
Head of Chambers

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Coping with.... Bullying at Work

It is a sad fact that while many of us have encountered some form of bullying in our lives, not all of it has occurred on the school playground. Recently, we have seen a rise in complaints of bullying at work; the effect of which causes serious emotional, psychological and medical issues. The problem is always compounded when it is the manager that is the bully. The difficulty for many is telling someone, either a colleague or a higher manager, for fear of not being believed, or making the situation worse. However, we have seen a number of situations improve through communicating the problem. The chances are the other person at work will agree that the behaviour is totally unacceptable. Employers should also have a specific anti-bullying policy, and if not, a grievance can be raised. If either of these fails, an employment tribunal claim can be issued. Alternatively, employees can take their complaint straight to the employment tribunal under the Protection from Harassment Act 1997. In times of austerity, employees are tolerating worse behaviour in their workplace just to retain their job. Being the victim of bullying at work should never be tolerated.

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Employment Law Cases

Age Discrimination – Comparators

Homer v Chief Constable of West Yorkshire [2012] UKSC 15

Facts H was aged 62. He retired from the police force aged 51 and was then employed by the Police National Legal Database. This organisation introduced a new career structure which required a law degree for promotion. H did not have a law degree and would have passed the normal retirement age by the time he could achieve this qualification. H complained of indirect age discrimination. The employment tribunal upheld the complaint on the basis that the appropriate age group for comparison was people aged 60 to 65 who would not be able to obtain a law degree before they retired and that group was put at a particular disadvantage compared with younger people. This decision was reversed by the EAT and by the Court of Appeal. H appealed to the Supreme Court.

Decision
1. All that was required under the Regulations was a particular disadvantage when compared with other people who did not share the characteristic in question.
2. Indirect discrimination law was an attempt to level the playing field by scrutinising requirements which appeared to be neutral but in reality worked to the comparative disadvantage of people with a particularly protected characteristic.
3. A requirement which worked to the comparative disadvantage of a person approaching compulsory retirement age was indirectly discriminatory on grounds of age.
4. The reason for disadvantage in H's case was that people in his age group did not have time to acquire a law degree. The reason for this was that they were soon to reach the age of retirement.
5. In relation to justification, it had to be asked whether the requirement was reasonably necessary to achieve the legitimate aims of a scheme. The tribunal had had not approached this question in a suitably structured way and the issue would be remitted for reconsideration.

Sex Discrimination - Victimisation

Hackney LBC v Sivanandan [2011] IRLR 740, EAT

Facts Following a successful claim of race discrimination against H's executive committee, S applied for two posts with an organisation which had been created by H and the Commission for Racial Equality. Interview panels for the posts comprised members of H's executive committee and an employee (X) of H. S's applications were unsuccessful. She brought claims against H's director and the panel members, and against H and its executive committee as being vicariously liable. The tribunal found that there had been victimisation. It ordered that all the defendants except X were jointly and severally liable to pay the compensation of £421,415 awarded. This included £15,000 for injury to feelings.
On appeal to the EAT, H argued that liability should be apportioned rather than being joint and several. S cross-appealed, arguing that the award for injury to feelings should be £10,000 related to the refusal of the first post and £15,000 for the second. She also argued that exemplary damages should have been awarded.

Decision
1. Both the appeal and the cross-appeal were dismissed.
2. The approach to compensation for unlawful discrimination under the Acts of 1975 and 1976 should follow the ordinary principles of the law of tort.
3. Where the same indivisible damage was done to a claimant by concurrent defendants, each was liable for the whole of the damage.
4. The claimant could recover in full from whichever defendant he chose. That defendant could seek contribution from the others. The tribunal did not have power to apportion liability.
5. Awards for injury to feelings were not punitive. £15,000 for both acts taken together was unchallengeable. There was nothing which could raise her claim into the top Vento band.
6. H would not be ordered to pay exemplary damages because its conduct had not been oppressive, arbitrary or unconstitutional.

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Race Discrimination – Being English

Pitman v Harlequin Valet (Cullompton) Ltd (2012) EqOppR 224:31, Exeter ET

Facts P resigned from her employment with H after a period of racial abuse. J, the owner and manager of the business, often told her that his Polish workers had a better work ethic than his English workers. This was expressed in foul and abusive language. The tribunal listened to a recording of J screaming and shouting obscenities at P. Witnesses for J had prepared their statements on the instruction, and possibly under the coercion, of J. The tribunal ordered that all the respondents' witnesses, other than the one giving evidence, should be excluded from the hearing room.

Decision
1. J had made clear his view that P, being English, worked less adequately than her Polish colleagues.
2. Being English is a protected characteristic under section 9, Equality Act.
3. £2000 would be awarded for injury to feelings.

Race Discrimination – Being Polish

Wisniewski v RS Groundworks & Isaac (2012) EqOR 224:31, Exeter ET

Facts W, a Polish man, was employed by RSG for five years. He worked with I, a foreman, for more than four years. W complained of racial harassment on the grounds of his nationality. He claimed that I had been dominating, intimidating and verbally abusive. He had called W a Polish wanker and other epithets attached to the word Polish.

Decision
1. The claim succeeded. W had been subjected to racial abuse which comprised insults which referred specifically to his race. The abuse went on for a long time but W stayed because of the benefits of working for RSG.
2. RSG was responsible for the harassment. There was no evidence to suggest that it took any action to prevent I from carrying out the harassment. Further, there had been no equal opportunities policy.

Sex Discrimination – Redundancy

Eversheds Legal Services Ltd v De Belin [2011] IRLR 448, EAT

Facts D was one of two solicitors employed by E as part of a team. The other solicitor (X) was on maternity leave. E decided that one of the team had to be made redundant. Both D and X were scored in relation to a number of criteria including "lock up" – the time between completion of work and payment. X could not be assessed in relation to lock up because she had been on maternity leave for seven months. X's score was higher than D's. D was selected for redundancy. He complained of sex discrimination and unfair dismissal. The employment tribunal upheld the claims. E appealed to the EAT.

Decision
1. The appeal would be allowed in part.
2. The protection of employees on maternity leave sometimes meant that they would be given more favourable treatment than their colleagues.
3. This more favourable treatment should not go beyond what was reasonably necessary.
4. The method used by E to deal with X's maternity absence had gone beyond what was necessary. There were alternative ways of dealing with the maternity-related disadvantage to X.
5. The disproportionate advantage given to X meant a direct and corresponding disadvantage to D.
6. In relation to unfair dismissal, it had not been reasonable for E to give a maximum lock up score to X.
7. The matter would be remitted to a different tribunal to consider the application of the Polkey principle: there was evidence that if D had been retained instead of X, he would have been part of a later redundancy exercise.

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Opinion

Since the Government announced that it was introducing fees for submitting an employment tribunal claim, and increasing qualifying periods of continuity of employment, employment lawyers have been wondering how to advise the excluded from asserting their legal rights. One solution, we foresee, is the increased use of discrimination law as a way to circumvent these other requirements.

The great benefits to discrimination law are the short qualifying period and potential for a large compensatory award. These two benefits therefore counter the two problems above. Interestingly, perhaps, discrimination law's greatest problem – its complexity – may well end up becoming one of these benefits. Due to its technical nature, which is difficult to predict, analyse and advise upon, discrimination cases are more likely to enter the discussion stage at tribunal. This is because the same facts can be interpreted differently and frequently evidential complexities need to be addressed. Thus cases are likely to proceed in order for tribunals to test these issues. Therefore, employment lawyers who are searching for a cause of action on which to hang their case may well turn to discrimination law as it is so fact-specific. An example may well be a 20 year old female retail worker. She has worked in her local supermarket for 18 months, until she is dismissed for suspicion of theft, which she vehemently denies. She believes an ex-colleague was the real perpetrator. Under the old law, an unfair dismissal claim could be lodged. However, since April 6th this year, she has no such protection. If we turn to discrimination law, and find that the ex-colleague is a 45 year old father of two, it would at least be arguable that our client was discriminated against due to sex or age, or both. It is the ability to argue the cases, which would otherwise not be able to be continued with, which provides the scope for further discrimination law developments.

Alongside these possible developments, there has also been the recent development of positive discrimination, particularly at the interview stage. A number of professions and roles offer "guaranteed interviews" for those who have a disability within the meaning given in the Equality Act 2010. As a relatively new concept, its success is yet to be determined. However, the idea that discrimination can be "positive" puts a further spin on the law. With the job market in its current state, it is interesting to consider how many "disabilities" will be included. Would, for instance, being short or long sighted count? The definition of disability is "a physical or mental impairment which has a substantial and long-term adverse effect on their ability to perform normal day-to-day activities". Short or long-sighted is a recognised eye problem, thus a physical impairment is provable. This problem, where serious enough to wear glasses or contact lenses, has a substantial effect; otherwise the need to wear corrective lenses would be removed. Further, usually being long or short sighted stays with people for life. Finally, activities such as walking, driving, watching television or shopping are all adversely effected. While obviously not as clear cut as this, the example does beg the question as to how far discrimination law can be utilised and manipulated.

It therefore seems ironic that perhaps the only people who can't rely on discrimination law in its broadest forms are white, middle aged, perfectly healthy gentlemen who brought the employment law reforms in to begin with...

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Chambers & Legal News

Chambers Update

Chambers is currently experiencing a significantly increased flow of employment-related work. Consequently, we welcome applications from experienced employment lawyers who share our ethos and commitment to providing accessible justice. For a confidential conversation, please contact Robert Spicer, Head of Chambers.

Polly Lord, our legal researcher, is growing her experience in housing and property related legal issues; successfully conducting negotiations with a range of utilities companies and local authorities. We are therefore now able to provide advice and representation in a wider range of legal areas.

To see how we can help your legal problem, call Emma our Head Clerk at Chambers.

Bristol Update

The big news this month is the release of Bristol City Council's plans to transform the city centre to allow for the new rapid transit bus network. The £8 million proposed overhaul will see the centre change from the figure of eight road layout outside the Hippodrome, extending up towards Lewins Mead, to a two way system. For the detailed plans, refer to Bristol City Council's website. Consultation on the plans closes on 13 July 2012

Legal News Update

It has been a busy few months for employment law reforms, with the most recent release being the controversial Beecroft Report which was published earlier this month. The full report can be accessed from BIS, and a summary of it is on our website. Let us hope that the proposals contained within it stay just that, proposals.

Dates for your Diary

Chambers will be closed on June 4th Bank Holiday apart from emergencies. Chambers will be open as normal on Tuesday June 5th.

June 27th 2012 — Seminar on discrimination at 10am.
All welcome. Please confirm by calling or emailing Chambers.

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