

Welcome

A Happy New Year to all our readers! Let us hope for something more than we got in 2009, although with an election looming the fear must be that whoever wins will take all the hard options early knowing they will have plenty of time to recover before the next election. As you can see, I have my 'Eastenders' attitude already!

Once we know the election date we will notify you of the date of our 'Election Employment Seminar', taking a look at what we can expect under our (new) Government. We know Labour will continue to push through its' Equality Bill (if not already through) and the Conservatives have already stated they will be looking to re-introduce a European opt out on social and employment legislation.

In the meantime, we look at some recent developments in different areas of discrimination law.

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Sexual Orientation -v- Religion

Two recent decisions have highlighted the difficulties for employees when measures put into place by their employers to ensure equality conflict with their religious beliefs.

In *McFarlane v Relate Avon Ltd*, Mr McFarlane worked for Relate as a counselor. Relate provided confidential sex therapy and relationship counseling as part of its counseling services. Mr McFarlane was a committed Christian and raised the possibility of being exempted from working with same-sex couples where sexual matters were the issue. Relate was of the view that such an exemption would conflict with its equal opportunities policy and required Mr McFarlane to confirm that he would continue to work with same sex-couples. Mr McFarlane was equivocal in his response and Relate dismissed him. He therefore lodged a number of claims, including direct and indirect discrimination contrary the Employment Equality (Religion or Belief) Regulations 2003. The employment tribunal dismissed the discrimination claims.

With regard to the claim of direct discrimination, the employment tribunal held that Mr McFarlane was dismissed not because of his faith but because of his refusal to comply with his employer's equal opportunities policy - Relate would have treated anyone, regardless of religion, in the same way. With regard to the indirect discrimination claim, this was rejected on the basis that Mr McFarlane's dismissal was a proportionate means of achieving a legitimate aim - providing services regardless of sexual orientation. Mr McFarlane appealed to the Employment Appeal Tribunal (EAT).

The EAT upheld the employment tribunal's findings. In doing so, it held that the fact that an employee's motivation for the conduct in question is his belief does not mean that the belief is the motivation for the employer's conduct.

In the case of *Ladele v London Borough of Islington and anor*, Mrs Ladele worked for Islington Council as a Registrar of Births, Deaths and Marriages. When civil partnerships were introduced, she refused to carry them out on the ground that such unions were contrary to her Christian beliefs. The Council threatened her with dismissal and Mrs Ladele brought various claims under the Employment Equality (Religion or Belief) Regulations. An employment tribunal found that Mrs Ladele had suffered direct and indirect discrimination and harassment by reason of her religious belief. The Council appealed.

The EAT allowed the Council's appeal on all grounds, holding that it had not been motivated by Mrs Ladele's religious belief. The EAT further held that while requiring all registrars to perform civil partnership ceremonies placed those of Mrs Ladele's religious belief at a particular disadvantage, this was justified by the Council's desire to provide its services in a non-discriminatory way. Mrs Ladele appealed to the Court of Appeal but her appeal was unsuccessful. In dismissing the appeal, the Court gave the view that the Equality Act (Sexual Orientation) Regulations 2007 meant that, having been designated a civil partnership registrar, it was unlawful for Mrs Ladele to refuse to perform them.

Stigma Damages in Claims of Discrimination

It has been the case for the past 12 years that in a claim of unfair dismissal, an employee can be awarded compensation for the stigma caused by their employer's unlawful conduct (*Malik v Bank of Credit and Commerce International*). That principle has now been extended to claims of discrimination.

In *Chagger v Abbey National plc and anor*, Mr Chagger was made redundant by Abbey National in circumstances which the employment tribunal held amounted to race discrimination (amongst other things). At the remedies hearing, Mr Chagger presented evidence of his extensive attempts to find similar work and claimed that his failure to do so was caused by the stigma of having brought a discrimination claim against Abbey National. The employment tribunal made an award of £2,794,962.27, which included future loss based on the assessment that Mr Chagger would never work in the financial services industry again. Abbey National appealed against both liability and remedy.

The Employment Appeal Tribunal (EAT) dismissed the liability appeal but upheld Abbey National's challenge to the compensation award. The EAT held that stigma loss was the result of third party conduct for which Abbey National could not be liable. Furthermore, EAT believed that the employment tribunal should have considered making a reduction to the compensation to reflect the chance that Mr Chagger would have been dismissed in any event absent any discrimination. The amount of loss actually resulting from the dismissal was remitted for the employment tribunal to reconsider. Mr Chagger appealed.

Abbey National argued that it should not be held liable for the discriminatory conduct of third parties who refused to employ Mr Chagger due to the stigma of his claim. The Court of Appeal rejected that argument. Employees who suffered a stigma when searching for a new job as a result of having brought a discrimination claim against a previous employer are entitled to be compensated for that loss by that employer. However, the Court considered that such loss would not ordinarily need to be considered as a separate head of loss; it would be a factor to be taken into account when assessing how long the claimant would remain out of work. An employment tribunal would only award specific compensation based on stigma loss where it was the only head of future loss. This could occur, for example, where an employment tribunal finds that a claimant would definitely have been dismissed even if there had been no discrimination.

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