Employment Newsletter
Feb-March 2013

This newsletter is for circulation among the Equality Liaison Officers. Please note that this does not form any legal advice or conclusive views on employment law matters. Merits of a claim will turn on its own facts and circumstances. Please seek legal advice for individual member cases. The intention of this newsletter is to keep ELOs abreast with the changes in the dynamic field of employment law.

Introduction

Welcome to the second newsletter of 2013. This issue will focus on some recent key decisions and publications with new developments.

Striking the right balance between two rights

Eweida and Others v The United Kingdom (link)

Four Christians brought religious discrimination cases in the European Court of Human Rights (ECtHR) – i) Eweida (E) was a check-in staff of British Airways (BA) who was sent home in Sep 2006 for wearing a visible cross which was in breach of company's uniform policy. She was eventually permitted to return to work after BA amended their uniform policy allowing her to display the cross, ii) Chaplin was a nurse prohibited from wearing a cross while handling patients because of the danger to patients from cross-contamination and chances of patients breaking it, iii) Ladele was a registrar who was disciplined for refusing to carry out civil partnerships, iv) McFarlance was a relationship counsellor and was dismissed for refusing to work on sexual issues of same sex couples. All the four Claimants lost their claim before EAT and Court of Appeal.

Before the ECtHR they argued that they were manifesting their faith protected by Articles 9 (freedom of thought, conscience and religion) and 14 (prohibition of discrimination) of the European Convention of Human Rights (ECHR). The Court accepted that all the 4 Claimants were manifesting their religion, however, since the manifestation of religion may have an impact on the convention rights of others, limitations could be placed in accordance with Article 9 (2) i.e., prescribed by law and are necessary in a democratic society in order to achieve a legitimate aim. ECtHR also observed that discretion should be provided to member states in deciding where to strike the right balance between conflicting rights under the Convention.

'E' won the case as there was no evidence that wearing of other religious items such as turbans and hijabs had any negative impact on BA's policy and the fact that they amended the policy to accommodate E's manifestation of religion shows that their policy was merely to project a corporate image and was not of crucial importance.

'C' did not win the case as in her situation health and safety of patients were of primary concern and limiting her manifestation of religion was necessary in pursuit of a legitimate aim, i.e, health and safety. Similarly, L and M also lost their cases as the Court opined that domestic courts should have wider discretion in striking the right balance of conflicting rights and the employer's actions against L and M was important so as to prevent discrimination against people because of their sexual orientation.

Comment: The outcome of these cases did not come up as a surprise. The ECtHR has stressed that domestic courts should be allowed wider discretion in striking the right balance between conflicting rights. The case of Bull v Hall (non employment case arising out of B&B's refusal of gay couple to stay in a double bed because they were not married), is on its way to the Supreme Court. Hopefully this case should provide some observations as to the application of Article 9 in assessing justification (proportionality test) in indirect discrimination cases.

Requirement to work on Sunday – objectively justified

MBA v The London Borough of Merton (link)

Claimant (C) was a care worker at a registered children's home (R) employed under a contract which required her to work on Sundays. R accommodated C's wish not to work on Sundays for two years and then decided that C should share Sunday rota with other staff. When C refused to work on Sundays, she was given a final written warning. C resigned and brought a claim for indirect religious discrimination.

The ET found that R's aim to ensure appropriate gender balance and seniority mix on each shift, cost-effective service within budget, fair treatment of all staff and continuity of children being cared for, was legitimate and their requirement to work on Sunday was a proportionate means of achieving that legitimate aim. M appealed to EAT.

EAT upheld the decision of ET. EAT further observed that in deciding proportionality, the tribunal should balance the employer's needs and impact on the disadvantaged group, i.e., Christians generally.

Comment: The view of the EAT that in assessing proportionality a Tribunal needs to take only group disadvantage (disadvantage of Christians generally and not individual disadvantage) need not necessarily be the correct approach in light of ECtHR's decision in Eweida wherein application of Article 9 of ECHR and individual disadvantage was given importance. Equality practitioners are awaiting clarification in future cases in this respect.

Definition of disability under Equality Act

Aderemi v London and South Eastern Railway Ltd (link)

Claimant (C) was a station assistant with the Respondent (R) and as part of his job he had to stand for long hours. Consequently C suffered from back problems resulting in periods of off sick and was unable to stand for more than 20-25 minutes at work. C was later dismissed on capability grounds. C brought disability discrimination claim to ET.

To avail protection under discrimination provisions of Equality Act, C had to satisfy the definition of disability. ET found that although C had physical impairment it did not have substantial and long term adverse effect on his ability to carry out daily activities (definition of disability). C appealed to EAT.

EAT allowed the appeal and held that ET incorrectly focussed on activities C could do, rather than what he could not do. Standing for long period at work is required in many jobs and therefore could be considered as normal day-to-day activities under the definition. EAT overturned ET's decision and sent the case to a new ET to decide.

Comment: A worker is disabled under the Equality Act 2010, if s/he has a physical or

mental impairment which has a substantial and long term adverse effect on his/her ability to carry out normal day-to-day activities. The statutory "*Guidance on matters to be taken into account in determining questions relating to the definition of disability"* helps in deciding whether a particular individual meets the definition. The EAT in this case observed that substantial in the definition means more than minor or trivial. The Guidance provides assistance to decide what could be classed as substantial and not substantial. This does not mean that there is a sliding scale between the two. The question is whether the effect is trivial or insubstantial, if the answer is 'no' then it is substantial.

Industrial relations and collective agreement – not a sole ground for justification

Kenny & Ors v Ministry of Justice (link)
The 14 claimants (C) in this case are civil servants assigned to clerical duties in posts reserved for members of the Irish police force. The trade union of C lodged a claim for equal pay on the basis that they were paid less than the police officers in clerical posts.

In the first instance the Labour Court found that although there was indirect sex discrimination it could be objectively justified due to police's operational needs and an agreement with police staff associations. C appealed to High Court who referred various questions to the European Court of Justice (ECJ/CJEU) including - whether and to what extent collective agreement and good industrial relations can be relied on as legitimate justification of difference in pay.

ECJ observed that difference in payment for women compared to men is contrary to Equal Pay Directive unless the difference is justified by reasons unrelated to gender. The right question is not justifying the rate of payment but justifying the difference in pay. ECJ further opined that any agreement or regulation should be in accordance with equal pay directive and should not be the only reason for justifying discrimination. It is for the domestic court to decide to what extent industrial relations needs to be considered for the justification defence.

Comment: This case indicates that mere collective agreements of staff association cannot be a sole reason for justifying an indirect discrimination. Undoubtedly any such agreement needs to comply with Equality legislations.

Publications

Guidance on Religion or Belief
The Equality and Human Rights Commission (EHRC) has published a guidance note on Religion and Belief in work place in response to the ECtHR decision in *Eweida and Others*. This good practice guide aims to help employers understand how to comply with the Court judgment when recognising and managing the expression of religion or belief in the workplace. It specifically addresses the following questions:

- How will an employer know if a religion or belief is genuine?
- What kind of religion or belief requests will an employer need to consider?
- What steps should an employer take to deal with a request?
- What questions should employers ask to ensure their approach to a religion or belief request is justified?
- Do employees now have a right to promote their particular religion or belief when at work?

- Can employees refrain from work duties?

The Guidance can be found at (link)

Pre-employment questionnaires

The EHRC published guidance and a research report on pre-employment questionnaires used by employers to collect information about a job applicant's health. This is specifically prohibited under Section 60 of the Equality Act 2010 unless it is exempted.

Employer's guidance (link)
Applicant's guidance (link)
Research report (link)

Government to strengthen whistle-blowers' protection

In February 2013, the Government announces its intention to amend the Enterprise and Regulatory Reform Bill (ERRB) to protect whistle-blowers from harassment and bullying by fellow workers. At present the protection is only from harassment or bullying by employer. The proposed changes include i) requirement of disclosure to be in the public interest, ii) making employer responsible for fellow workers acts, iii) provide a defence to the employer if they could show that they took all reasonable steps to prevent any disadvantage caused by the fellow worker, iv) remove the requirement of "good faith" for a disclosure to be protected but allowing ET to reduce compensation by 25% if disclosure was not made in good faith.

Other changes

Other changes proposed in the ERRB which was expected to come into force in March and April 2013 mainly removal of equality questionnaire procedure and third party harassment (as stated in last newsletter) is put on hold as the Bill is still with House of Lords at the report stage.

Publication of same sex marriage Bill

The Marriage (Same-sex couples) Bill has been introduced in the Parliament and had its first reading on 24 January 2013.

The Bill will:

- enable same-sex couples to marry in civil ceremonies;
- ensure that those religious organisations that wish to do so can opt in to conduct marriage ceremonies for same-sex couples;
- protect those religious organisations that do not wish to marry same-sex couples from successful legal challenge

For more information click (link)

ET fees

There is now clear indication that the employment tribunal fees will be introduced from July 2013. This came out in the Ministry of Justice Digital Strategy document (December 2012 and amended in Jan 2013). Please click link and see page 8 paragraph 6.1.1 point 3 which says *"**Fee payment (starting with employment tribunal fees):** this will be introduced in July 2013, and we will digitise this service and the processes that support it.*" Also, see page 19 (says delivery times subject to change) and page 25 also says "*From July 2013 people bringing a claim or an appeal to an employment tribunal will be required to pay a fee for using this service, and one of our four exemplar services will be developing online fee payment for this service."*

There has not been any parliamentary debate or draft regulation in place. MOJ has confirmed that they intend to bring it in July 2013, it is expected that there will be something in place by April 2013 with more clarity.

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