



The Bar Tribunals and Adjudication Service Newsletter, Edition 2

Introduction

This is the second edition in a series of newsletters for the Bar Tribunals and Adjudication Service panel members. This edition has been provided by William Chadwick to update and expand on information provided at the induction Equality and Diversity training session.

Briefly, this edition provides information in **1.** about changes to the Equality Act 2010 and clarifies a number of matters discussed during the roll out of training sessions in the early part of this year. The opportunity has also been taken in **2.** to correct and/or clarify a small number of points contained in the first briefing. Finally, *breaking news* about other related matters is outlined at **3.** of this newsletter update.

1. The Equality Act – Recent announcements and initiatives

The Protected Characteristics

Age

During the training courses, we referred to provisions within the Equality Act 2010 relating to age. On 1 October 2012 age became a protected characteristic and therefore an individual will be able to seek redress in law if discriminated against on the grounds of age when in relation to the provision of services and public functions. For further advice see <https://www.gov.uk/equality-act-2010-guidance> . It is now unlawful to discriminate on the basis of age unless:

- the practice is covered by an exception from age discrimination
- good reason can be shown for the differential treatment (objective justification)

This move on age discrimination is designed to ensure that only harmful treatment that results in genuinely unfair discrimination because of age is prohibited. It does not outlaw the many instances of different treatment that are justifiable or beneficial. These exceptions can include:-

- age-based concessions
- age-related holidays
- age verification
- clubs and associations concessions
- financial services
- immigration
- residential park homes
- sport



These specific exceptions are in addition to:

- general exceptions already allowed by the Act¹
- positive action measures²
- objective justification³

There are no specific exceptions to the age discrimination requirements for health or social care services, although any age-based practices by the NHS and social care organisations need to be objectively justified, if challenged.

Disability

We have been asked to clarify our coverage of *reasonable adjustments* relating to disability. We are pleased to do so and simply confirm that as a matter of law *reasonable adjustments* relate to the protected characteristic of disability. They do not relate to pregnancy, age or ethnicity. We were simply trying to make the point in our training courses and supporting briefing that whilst it is not in itself a technical legal requirement to do so, it would certainly be best practice to nonetheless consider reasonable allowances for those characteristics.

A recent case involving a diabetic night watchman has thrown into sharp focus the rights and responsibilities of **both** the employer and employee in determining *reasonable adjustments* in disability cases. In *Crossland v OCS Group & Anor* UKEAT/0340/12/SM an Employment Appeal Tribunal (EAT) determined that a Tribunal was entitled to decide that the Claimant had little prospect of establishing that it would be a reasonable adjustment for the Respondents to relieve him of his obligation to patrol the exterior of the premises under disability discrimination law. <http://www.employmentcasesupdate.co.uk/site.aspx?i=ed15766>

This case is important. Many employers consider making reasonable adjustments for all disabled employees, whatever their circumstances, to try and 'level the playing field' and make the workplace as inclusive as possible. But it is not right to assume that employers are automatically under a statutory duty to make adjustments once an employee is found to be disabled. As this case demonstrates, for the duty to apply, the employee must be placed at a 'substantial disadvantage'. There is much debate over what is considered to be %substantial+in relation to %substantial disadvantage+so in this respect BTAS is keen to encourage a best practice as opposed to strict compliance with the letter of the law approach.

¹ a statutory authority exception allows differential treatment that would otherwise be considered age discrimination, where it is required by law. For example, exceptions to prescription charges and eyesight tests (based on age) are provided for in legislation as is the age of entitlement for the state pension and concessions such as free bus passes.

² Service providers can also take positive action to alleviate disadvantage experienced by people of particular ages, reduce their under-representation in relation to particular activities or meet their particular needs.

³ I.e.: it is possible to justify treatment that would otherwise be direct age discrimination where it is a proportionate means of achieving a legitimate aim.



Race

We reported during the training that the Coalition Government were considering the response to their 2012 consultation document as to whether caste should be included within the Protected Characteristic of Race.

Last month, the House of Lords agreed an amendment to the Enterprise and Regulatory Reform Bill which would make caste discrimination unlawful under the Equality Act. MPs overturned the first Lords vote, but after Peers supported the amendment in a second vote, the Government is re-considering whether caste will in the future be treated as an aspect of race.

The Government Equalities Office and Department for Communities and Local Government have appointed *Talk for Change*, a community interest company, to engage with communities affected by caste discrimination and to run an educational programme. The aim of this programme is to raise awareness of the channels of help and redress that are already open to those who feel they have been discriminated against or harassed as a result of caste. The Government confirmed it had also been in discussions with the Equality and Human Rights Commission which will be examining the nature of caste prejudice and harassment, and the extent to which the problem might be addressed by legislative or other solutions. The findings will be published later this year.

We also take the opportunity of correcting a definition of race in our training materials. Reference was made to a *census definition* of race (page 19 of Equality and Diversity Fact Sheet). However, the census does not define race; it relies on self-definition. We should have made it clearer that the 2011 census, like its predecessors, provided a number of ethnic categories (Sections 15 and 16) which are indeed very often emulated by private and public sector employers/service providers in their equality and diversity monitoring forms covering race.

Religion or Belief

We reported extensively during the training on the crop of cases that had just been decided by the European Court, including *Ewida v British Airways plc* [2010] EWCA Civ 80. There is nothing further to report at this stage.

Sex

Nothing of significance to report since the previous training course

Sexual Orientation

Nothing of significance to report since the previous training course

Gender Identity

Nothing of significance to report since the previous training course

Marriage and Civil Partnerships

Nothing of significance to report since the previous training course



Pregnancy and Maternity

We reported in our training briefing that ~~pregnancy and maternity discrimination cannot be treated as sex discrimination~~. We further reported that this is still supported by ACAS guidance on the topic. However, in *Dekker v VJV-Centrum* (1991), which is a European Court of Justice (ECJ) case, it was held ~~as employment can only be refused because of pregnancy to women, such a refusal is direct discrimination in grounds of sex~~. It seems that here, the ECJ characterised pregnancy and maternity discrimination as sex discrimination. Indeed, many cases have been brought under the head of sex discrimination where the facts relate to discrimination on grounds of pregnancy and maternity, including cases heard after the enactment of the Equality Act. IMPACT training has drawn the attention of ACAS to this matter and await their clarification and/or amendment to their guidance. However, advice notes on the website of the Equality & Human Rights Commission, including their ~~starter kits~~ for employers and service providers on the Equality Act as well as further guidance from the Government Equalities Office (GEO) now reflect *Dekker* and developments subsequent to the case.

Other Specific Provisions in the Equality Act

We reported during the training that the questionnaire procedure used under the Equality Act, and the concept of third party harassment, were to be repealed by the Coalition Government this month. It is still the intention of Ministers to repeal the provisions but an announcement was made recently that these initiatives will now be taken forward within an amended parliamentary timetable. It is expected that these matters will now be finalised in July of this year. We want to stress again that claims can still be brought against employers who fail to prevent harassment being carried on by third parties, where the basis of the harassment is one of the protected characteristics set out under the Equality Act.

During the training, we also reported on aspects of the ~~Red Tape Challenge~~ launched by the Prime Minister on taking office. One aspect of the ~~Red Tape Challenge~~ concerns the Public Sector Equality Duty. The Prime Minister has in the past been critical about the practice of equality impact assessment processes which are often used to help discharge the Public Sector Equality Duty. Although undertaking an analysis of the effects on equality assessment is not a legal requirement under the ~~paying due regard~~ clause to equality matters, cases on the meaning of the previous general equality duties make it clear that the analysis has to be undertaken before making the relevant policy decision, and include consideration as to whether any detrimental impact can be mitigated. However, a review of the Public Sector Duty is now underway and it is expected that further announcements will be made in May of this year.

2. Corrections and/or Clarifications on issues arising from the training and not already outlined above

Genuine Occupational Requirements, referred to in our training materials are now called Occupational Requirements. They no longer require the protected characteristic to be ~~central~~ to the job. There is therefore no longer a need for the requirement to be indispensable or central; it simply needs to be *a proportionate means of achieving a legitimate aim*. We cited ~~translation services~~ as an example of where such a requirement could be applied; this is pertinent to the services barristers provide. We accept that clarification is therefore necessary here. If one were requiring the services of someone who for example spoke French (for translation purposes) it is unlikely to be considered acceptable to require a French person only and exclude an English person who speaks French. That would not be a proportionate means of achieving a legitimate aim.



3. Breaking News on other related matters since the training courses

Tribunal Reforms

The Coalition Government's programme of reform policies for employment and equality laws continues apace. During the training we told you of changes to take effect from April 2014 involving ACAS having a statutory role before any employment tribunal is convened. The Government has announced further tribunal reforms, some of which are now likely to come into force this summer.

The new employment tribunal package includes:-

- new strike out powers to ensure that weak cases that should not proceed to full hearing are halted at the earliest possible opportunity;
- guidance from the Employment Tribunal Presidents to help ensure that judges deal with hearings in a consistent manner which ensures parties know what to expect;
- making it easier to withdraw and dismiss claims by cutting the amount of paper work required; and
- a new procedure for preliminary hearings that combines separate pre-hearing reviews and case management discussions. This will reduce the overall number of hearings and lead to a quicker disposal of cases saving time and costs for all parties.

It is expected that the new rules will come into force this summer. The Government has also published an update report Employment Law 2013: progress on reform which sets out its vision of a flexible, efficient and fair labour market. The report outlines key achievements to date and looks ahead to future work on the Government's Employment Law Review: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/141918/13-P136-employment-law-2013-progress-on-reform1.pdf

Agency Workers

Agency workers are set to have better anti-discrimination rights after an Employment Tribunal awarded an agency worker who went sick a £35,892.08 pay-out for disability discrimination and unfair dismissal. The tribunal case, funded by the Equality and Human Rights Commission (EHRC), heard that agency worker Corinda Pegg had been dismissed after 44 weeks service with Camden Council due to absences caused by depression. After a series of bereavements she was absent from work for a week receiving mental health residential care. On her return to work, she was sometimes late and, when questioned by her manager, explained that this was due to her disability. The case went to an Employment Appeal Tribunal on the legal question of whether equality law protects agency workers from being discriminated against by the organisation to which they are supplied. The judge said that, as Ms Pegg was under an obligation to work for Camden Council, it was subject to a legal duty not to discriminate. The compensation was awarded when the case returned for a full Employment Tribunal hearing. EHRC officers say this case clarifies that agency workers are entitled to the same degree of protection from discrimination at their place of work as permanent employees.



New Parental Leave Rights

New parental leave rights were introduced on 8 March 2013. The right to unpaid parental leave increases from 13 weeks to 18 weeks. This right applies to every employee who is the parent of a child and they are entitled to up to 18 weeks unpaid parental leave during the first five years of the child's life. Adoptive parents are also entitled to parental leave and they must take the leave by the fifth anniversary of the adoption or by the child's 18th birthday, whichever occurs sooner. Unpaid parental leave can include schooling problems, adjustment in childcare arrangements, the need to spend more time with their children or attending medical appointments. During this time, employee rights will be protected, such as holiday entitlement or notice of termination. It is also important to be aware that from 2015, parents will be able to share maternity/paternity benefits under the Government's proposed shared parental leave scheme, and according to recent research the majority of men in the UK would consider taking paternity leave.

Dismissal on grounds of political opinion

Since the training courses, the Government has confirmed that it will amend the Enterprise and Regulatory Reform Bill to remove the two-year qualifying period for unfair dismissal claims where the alleged reason for dismissal is *political opinion or affiliation*, to take account of the European Court of Human Rights decision in *Redfearn v United Kingdom*. In this case, a bus driver was sacked after he was elected as a local councillor for the British National Party. The European Court of Human Rights (ECHR) said that it was a breach of his human rights to not have the opportunity to claim unfair dismissal due to being sacked for his political opinion.

He did not have the required one year's service (the qualifying period at the time, now increased to two years for employees whose employment commenced on or after 6 April 2012) to bring a claim. The Government has confirmed it will not appeal the ruling, and will amend legislation to comply with the ECHR's decision. The additional protection for those dismissed because of political opinion or affiliation will come into effect two months after the Enterprise and Regulatory Reform Bill receives Royal Assent and will apply to dismissals on or after that date.

Finally, could we thank everybody for their hard work during all the training sessions and to say we were gratified with both the informal and formal evaluation reports of the various sessions. If you require any further information, do get in touch at trainingqed@aol.com

Putting this information in to the context of the Bar Tribunals and Adjudication Service and our policies and procedures, we are committed to a fair distribution of sitting opportunities. This will be achieved by;

Only administrative staff who have undergone training on the need to consider the Equality Duty in the course of performing their duties shall be permitted to convene panels and allocate sitting opportunities. Staff will follow Equality Duty compliant guidance in performing this function. The aim of BTAS is to convene panels in a fair and non-discriminatory way so that across a year, as far as possible, there is equality of opportunity for each panel member and clerk in terms of sitting on panels. Sitting opportunities will be monitored and any significant differences across protected characteristics will be investigated and appropriate action taken.



The Registrar shall monitor the system of allocation of sitting opportunities across all the protected characteristics not less than twice per year and shall report to the Chair of Disciplinary Tribunals and the Chair of the Inns Conduct Committee with the results of such monitoring.+

When sitting as a panellist BTAS similarly expects you to be committed to fair and unbiased decision-making by;

- make sure that as a panel you remain unbiased throughout and that there are no real or perceived conflicts of interest;
- be fair minded and willing to hear the full facts of the case before reaching a decision;
- be prepared to take into account appropriate expert advice, where provided;
- make sure proceedings are fair and proportionate;
- ensure that decisions are transparent and sanctions applied in a transparent and consistent manner; and,
- know and understand the legal requirements and good practice of equality and diversity as they relate to proceedings.