Discrimination Law Association

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DISCRIMINATION LAW ASSOCIATION

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BRIEFING No 116 UPDATE ON MATERNITY RIGHTS following Halfpenny and IGE Medical Systems Ltd

BACKGROUND

1. Until *Kwik Save v Greaves* and *Crees v Royal London Mutual Insurance* [1988] IRLR 245, CA, a woman lost her right to return is she was unable to return on the day she had notified to her employer as her return date, even if this was due to a genuine illness. The Court of Appeal in *Kwik Save* and *Crees* ruled that a woman "returns to work" when she gives the employer the 21 days notice of return required by s82 of the Employment Rights Act 1996 ("ERA"). It was not necessary for the women to physically attend for work on the notified day. Once the s 82 notice had been given s 96 applied so that there was a deemed dismissal on the notified day of return. Where as in *Kwik Save* and *Greaves* the reason for the dismissal was that the employer considered the woman had no right of return, the dismissal was unfair.

2. In a welcome change of heart by the judiciary, the court said that to rule otherwise would produce results so absurd and unjust that it cannot have been part of the scheme of protection for female employees to allow an employer to do what was done in these cases without incurring liability. Although leave was given to the employers to appeal to the House of Lords, that appeal has not been pursued.

3. Both Mrs Greaves and Mrs Crees had complied with all the requirements in respect of statutory notices. Neither of them claimed sex discrimination.

SUMMARY OF THE FACTS IN HALFPENNY

4. MH started her employment in 1988 and in time became the Regional Administrator and "lynchpin" of her employer's Cheshire office. She became pregnant in the summer of 1994. She took sick leave for a pregnancy related illness in August 1994 and as her ill health continued she never returned to work prior to the birth of her baby in April 1995.

5. Her contractual sick leave entitlement was 30 weeks in any twelve month period. She complied with the statutory requirements in respect of notifying her employer of her pregnancy and in February 1995 she gave proper notice of her intention to return to work at the expiration of 29

weeks from the birth of the baby.

6. Her entitlement to maternity leave was triggered on 6 March 1995. She was in receipt of maternity pay until 10 July 1995. In September 1995 she informed her employers that she intended to return to work at the end of the period of extended maternity leave. She was told that would be 30 October 1995.

7. On 13 October she asked to extend her maternity leave on ill health grounds and provided a medical certificate for post natal depression. Her employers informed her that she retained her right to return to work until 27 November 1995. She remained unwell and asked for a further extension. Her employers replied that they were not obliged to hold her job open beyond 27 November 1995 and had decided not to do so. MH did not attend for work that day and on 29 November her employers wrote confirm that they would not prolong her leave and despite her further letters and a meeting in which she tried to persuade them to take her back they refused to do so.

HISTORY OF THE CASE

8. The ET dismissed MH's claims for unfair dismissal, breach of contract (non- payment of notice pay), and sex discrimination. It held that she was not dismissed but that her employment came to an end when her maternity pay ceased on 7 July 1995. Her sex discrimination claim failed as she was not an employee at the time. The ET stated that had she returned even for a day they would have found that she had been discriminated against as unlike a male employee on long term sick her employers did not allow her to return without obtaining medical reports or a prognosis and had denied her sick leave.

9. The tribunal relied on *Crouch v Kidson Impey* [1996] IRLR 79 to reach the conclusion that the contract did not continue beyond the period of maternity pay. In *Crouch* the employee left without exercising her statutory right to return and without her employer's consent. She was thus held to be in repudiatory breach of contract. It was held that in those circumstances when the employer ceased to pay her, in the absence of any other explanation, it was an acceptance of the repudiation and thus a discharge of the contract, (*Crouch* at p.82, para 8(4)). In the present case the Appellant was absent with the employer's consent until 27 November and in accordance with her statutory rights and her employer's arrangements. The explanation for the employer ceasing to pay her was that the employer's arrangements were that she should receive 18 weeks maternity pay and that the rest of her maternity leave was to be unpaid.

10. The EAT found that the contract continued until 27 November 1995 as had been the employer's case before the ET. However, MH's appeals failed as the EAT held following *Mcknight v Adlestones (Jewellers) Ltd* [1984] IRLR 453, that her contract was suspended when she went on maternity leave. When she failed to return to work on 27 November 1995 it came to an end by implied agreement and not by an act of termination.

THE COURT OF APPEAL'S JUDGMENT

11. Ward LJ having commented that " It is surely not too much to ask of the legislature that those who grapple with this topic should not have to have a wet towel around their head as the single most important aid to the understanding of their rights" gave judgment with which Walker LJ and Hirst LJ agreed.

UNFAIR DISMISSAL

12. The court followed the finding in *Kwik Save Stores Ltd v Greaves* and found that MH had exercised her right to return by giving her employer notice of the day she proposed to return as required by s 82 of the Employment Rights Act 1996. ("ERA"). Once having done that it was not necessary that she actually returned on that day in order for her to remain an employee. In refusing to allow her to return the employer was deemed to have dismissed her (s96 ERA), for the reason that they refused to allow her return. The contract was deemed to continue in force until the date of the refusal to allow her return.

13. MH was therefore dismissed. The reason that she was not allowed to return was the employers mistaken belief that they were not obliged to take her back. This was not a fair reason and consequently her dismissal was unfair.

14. The Court rejected the alternative submission made on MH's behalf that her dismissal was automatically unfair under s99 of the ERA because the reason for her dismissal was that she had taken maternity leave. The court held that maternity leave in this context was limited to the 14 weeks maternity leave (see ERA s235, s72 and s73) and not the right for those with at least 2 years service to take up to 29 weeks absence and have a right of return. They said that in MH's case the reason for her dismissal was not because she took maternity leave but because she did not return when she should have done. This finding made no difference in respect of the outcome for MH as she had succeeded in her claim of unfair dismissal in any event.

THE CONTRACT OF EMPLOYMENT

15. In exercising her statutory right to return to work after maternity leave by notifying her employer of the day when she intended to return it was held that MH revived her contract of employment which it was found was suspended when she went on maternity leave.In this respect the Court agreed with the analysis in *McKnight Adlestone (Jewellers) Ltd* [1984] IRLR 453. Her contract of employment with all its benefits and burdens was restored and she was restored to her job on terms and conditions not less favourable than would have been applicable to her had she not been absent from work after the end of maternity leave.

16. Accordingly whether MH was in breach of her contract by not attending at work depended upon the terms of her contract. In her case it was accepted that the reason she did not attend was because of ill-health and she had provided a medical certificate. As she had not exhausted her

contractual entitlement to sick leave as at that date, her employers had no lawful reason to dismiss her. Her dismissal was therefore in breach of contract and wrongful. Her date of dismissal for this purpose was 29 November when her employers wrote to say they would not prolong her leave.

THE SEX DISCRIMINATION CLAIM

17. For the same reasons as the court found her to be wrongfully dismissed, it held in respect of her claim of sex discrimination that MH continued in employment under a contract of employment which revived when she exercised her right to return by giving notice of the proposed day of return to her employer. She was dismissed at common law by the letter of 29 November 1995 telling her she could not return.

18. It was held that it was not automatically discriminatory to dismiss her as by 29 November she had "returned to work" from maternity leave by giving her notices of return. As from her "return to work" she was outside the protected period within which any discrimination arising from pregnancy or maternity was automatically discriminatory and her treatment was therefore to be compared to that of a man, *Hertz v Aldi* [1992] ICR 332..

19. The court upheld that finding of the ET that her treatment was less favourable than that afforded by the employer to a man in that they had made no attempt to procure medical evidence as to the likelihood of her returning to work and refused to allow her paid sick leave to which she was contractually entitled as they would have done with a man as evidenced by the treatment of the man she compared herself .It followed that MH succeeded in her claim of sex discrimination.

IMPLICATIONS

20. In cases where the woman complies with the statutory provisions as to giving notice of her pregnancy and notifies her employer of her proposed day of return, she retains her right to her return to her job even is she is unable to actually return on the due date because of ill- health (or it would seem for another good reason). If her employer refuses to allow her to return that is deemed to be dismissal. Her dismissal may not be automatically unfair but is likely to be unfair, applying the normal rules as the employer in these circumstances is unlikely to be able to show a fair reason for the dismissal.

21. In these circumstances the woman's contract of employment does not come to an end while she is on maternity leave and may be treated as suspended. It revives when she tells her employer of the day she intends to return to work and she then has all the rights and obligations of an employee. If she does not return on the due date whether she is in breach of contract has to be judged by the terms of her contract including matters such as the sick pay scheme. If she had entitlement to paid sick pay to attempt to dismiss her is likely to be in breach of contract .

22. Once she has notified her employer of the proposed date of return she is

entitled not be treated less favourably than a man in similar circumstances and failure to give her equal treatment will be sex discrimination. In many circumstances a woman may benefit from giving her notice of return at an early date so she benefits from an employee status for the rest of her maternity leave.

OUTSTANDING ISSUES

NON- COMPLIANCE WITH THE ERA REGIME.

23. What is the position of a woman who has not complied with the statutory regime. These recent cases will not help her and it would appear that her position will depend on a finding on the particular facts of her case as to whether her contract has continued or "automatically" terminated or terminated by deemed consent, see *Kelly v Liverpool Maritime Terminals* [1998] IRLR 310, *McKnight, Crouch, Hilton Hotels (UK) v Kaissi* [1994] ICR 578..

IF IT IS HELD THAT THE APPELLANT IS NOT AN "EMPLOYEE".

24. What is the position if it is held that the woman is not an employee in respect of any period relevant in respect of her claim of discrimination as may well be the case if she has not complied with the statutory notices? She may seek to rely on *Coote v Granada Hospitality Ltd* Case C- 185/97, ECJ, (judgment 22 September 1998) as supporting the proposition that the SDA should be interpreted so far as possible, to give protection to former employees who suffer discrimination arising from their employment relationship.

25. In *Coote* the ECJ held that discrimination by way of victimisation which arises from the employment relationship but manifests itself after the employment relationship, falls within the scope of Article 119 and the Equal Treatment Directive 76/207, (paragraph 22 of the judgment). It would appear to follow that the principle of equal treatment in Article 5 applies to the treatment of an employee by an former employer provided it arises from the employment relationship. This issue is dealt with explicitly by the Advocate General in paragraphs 13 to 22 of his Opinion..

26. In *Marleasing v La Comercial Internacional de Alimentacion* [1990] ECR I-4135, paragraph 8, it was held that in applying national law, in particular legislative provisions which were specially introduced in order to implement the directive, the national court is required to interpret its national law, so far as possible, in the light of the wording and the purpose of the directive in order to achieve the result pursued by the third paragraph of Article 189 of the Treaty of Rome. .

27. It would be for the national court to determine if the reference to "employment" in s6(2) of the SDA may be interpreted to encompass past employment in circumstances where the alleged discrimination arises from that employment.

THE PROTECTED PERIOD.

28. Although there was argument before the court as to whether, as was submitted for MH, the protected period during which pregnancy and maternity discrimination are unlawful without the need for a male comparator, extended to the notified day of return for women with two years service or was restricted to the mandatory 14 week maternity leave period, that issue was not determined by the court.

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DISCRIMINATION LAW ASSOCIATION

MARCH 1999

BRIEFING No 117 USING THE LAW TO CHALLENGE DISCRIMINATION AGAINST LESBIANS & GAY MEN

Following a number of unsuccessful legal test cases, lesbian, gay and bisexual people appear to have been left without any basic law to fight sexuality discrimination at work. While this caused great disappointment at first, advisers have now begun to re-examine what existing legal rights may be used by lesbian, gay and bisexual employees. This briefing paper is intended to be a contribution to this development.

1. REVIEW OF THE CURRENT LAW ON SEXUALITY DISCRIMINATION

It is now established that there is no specific legal remedy, under UK or EC laws, to counter sexuality discrimination against lesbian or gay employees. A number of test cases in 1997 had provided hope that the courts would agree that sexuality discrimination was actionable under sex discrimination laws. For some time, it was clear enough in reality, if not in law, that discrimination against gay men and lesbians was based on a person's gender. The courts have now rejected this view.

Despite previous positive comments, it was the European Court of Justice that ruled against lesbians and gay men (*Grant v South- West Trains Ltd.)* and held that they were not protected under European sex equality laws. Under Article 119, the court decided that they were not entitled to the same (financial) employment benefits as heterosexuals. In the court's judgment there is no reasoned argument why this should be the case. Following *Grant*, another case *Perkins* was withdrawn from being heard in the European Court of Justice. *Perkins* would have challenged the ban on the employment of lesbians and gays in the armed forces. After *Grant*, it was clear that the Court would not have regarded the ban as unlawful sex discrimination.

The British courts have not been silent on the issue of whether lesbians or gays can bring a legal claim under sex discrimination laws. In *Smith v Gardner Merchant Ltd*., the Employment Appeal Tribunal had affirmed the action of a tribunal that had decided that a gay man could not use the Sex Discrimination Act to bring a claim for discrimination. It appeared from that ruling that a gay man could not bring a case even if his claim included an argument that he had been discriminated against on the grounds of being a man.
This is how the law stood until July 1998 when the Court of Appeal re-considered *Smith v Gardner Merchant Ltd. (1998)* on appeal. The Court of Appeal made some important statements that now define the law on this issue. The Court laid out

guidelines for determining whether a claim under the Sex Discrimination Act can be brought. In deciding whether one sex is treated worse than the other, one compares the treatment of the opposite sex in a similar situation - like with like. If discrimination is based on sexuality discrimination the treatment of a lesbian must be compared with that of a gay man, or *vice versa.*

The Court was careful to note that in this case the appellant was not only complaining of sexuality discrimination but of sex discrimination as well. He was complaining of being treated less well than his female colleague. In this respect, the Court said the comparison should be with a woman and not a lesbian.

The Court rejected the idea that sexuality is included in the definition of sex discrimination. Nevertheless in deciding whether discrimination is based on sex or sexuality, the Court ruled that a tribunal should hear the facts before deciding whether to reject the claim.

2. DISCRIMINATION ON THE GROUNDS OF GENDER IS ACTIONABLE UNDER THE SEX DISCRIMINATION ACT.

Two common types of discrimination which lesbians and gay men experience is gender based and can be actionable under the Sex Discrimination Act.

Occupational sex discrimination

Refusing jobs to men or women because of their sex is direct sex discrimination - for example, refusing a gay man a job as a hairdresser or secretary, or not offering a job to a lesbian as a firefighter or security guard. Of course, there are genuine occupational gender qualification exceptions that permit recruitment of a person of a particular sex for jobs that require it. But it would be difficult to see that being a secretary or a firefighter was such exceptions.

Sexual harassment

In 1991, the European Commission adopted a recommendation on the protection of the dignity of women and men at work, and a code of practice on measures to combat sexual harassment. The code specifically identifies lesbians and gay men among groups particularly vulnerable to harassment. It states that it would be "impossible to regard such harassment as appropriate workplace behavior". Although the recommendation is not legally binding, tribunals *should* use it as an aid to interpreting the law where appropriate. When advisers do take cases of sexual harassment for lesbians or gay men, or unfair dismissal cases where this is relevant, it is always useful to refer explicitly to the code in case the tribunal panel has omitted to take the recommendation into account.

Porcelli v Strathclyde Regional Council, (1986), established that there is no need to supply a comparator in cases of sexual harassment. The correctness of this approach, however, has been thrown into doubt because of comments made in *Smith v Gardner Merchant Ltd.* The re-interpretation suggests that there is no need to carry out a comparison only if it is self-evident that the nature of harassment is *gender* specific and it is *sex* based. It therefore extremely important that advisers do

show that sexual harassment has taken place and that it is not purely discrimination based on sexuality.

70 lesbian and gay ex-service personnel are currently claiming sexual harassment at Croyden Employment Tribunal. The cases are being brought on the grounds that, whilst in the service, the lesbians and gay men had to suffer prurient and indecent questioning about their private lives. One applicant, for example, alleges that he was "treated like a dog" and suffered "verbal rape" in the Royal Navy because he was gay.

The results of these cases should give a clearer indication as to how tribunals will deal with cases of sexual harassment against lesbians and gay men, hopefully without the need to make comparisons between sexes.

3. GENERAL LEGAL RIGHTS

Even though a lesbian or gay man may have no direct legal remedy for discrimination they may be able to use other employment rights to bring some form of claim. Most of these legal claims will be argued under statutory rights, the principal ones referred to in this paper being unfair dismissal and sex discrimination. These rights are often qualified so a claim for unfair dismissal requires an employee to have been in employment for two years, but advisers should note that this rule is currently being challenged. New regulations are due to be introduced shortly to reduce the qualifying period to one year.

Examples of general legal rights that can be used include such claims as negligence claims, unfair dismissal and a failure to pay wages. Taking the latter example, the failure to pay wages or the deduction from pay is actionable by a claim to an industrial tribunal.

UNFAIR DISMISSAL

The remedy of unfair dismissal is actionable only if employment has ended. You cannot obtain an injunction to prevent dismissal; there is a limited right of an injunction to force an employer to adopt any contractual procedures to dismiss, this could extend employment until the earliest contractual date of termination.

The remedy of unfair dismissal and constructive dismissal is possible for employees who have been employed for two years or more. Advisers should be aware that even this qualification is being challenged in *R v Secretary of State for Employment ex parte Seymour Smith (1995)* and advisers should *consider making* claims where employees have been employed for less than two years but more than one year. The Government is proposing to introduce regulations shortly to reduce the qualifying period to one year.

RESIGNING FROM WORK AND CLAIMING CONSTRUCTIVE DISMISSAL.

An employer owes duties to employees to support them at work when faced with discrimination etc. (Wigan *Borough Council v Davies*). It is far from certain that

harassment itself from fellow employees will be a justifiable reason to resign and claim constructive dismissal.

Constructive dismissal relies upon the employee resigning from employment as soon as it is apparent that there has been a "fundamental breach of contract" by the employer. This is often a question of fact that sometimes can only be decided by a tribunal after the employee has resigned.

Often in harassment cases the employee doesn't resign immediately but may put up with the harassment or "go off sick" either genuinely or as a means to avert further discrimination. A long delay returning to work can and often will defeat a claim of constructive dismissal. Constructive dismissal often requires an employee to resign as soon as it is clear that the employer has breached "the contract of employment".

When resigning from employment is not a legal option, the employee is of course at risk of being sacked, possibly legally, for their absence from work. One tactic is to make it explicit, to the employer, that absence is due to the employers failure to take steps to make the workplace free of harassment and to request that steps are taken by the employer to make the work environment safe.

If the employer instead dismisses the employee, it is open to an employee to argue on the facts that while the dismissal was for absence it was not just and equitable to use this as a reason to dismiss.

If the harassment represents a serious danger to a person's health and safety, it could be argued that the dismissal was for a health and safety reason, which could be automatically unfair. However the latter argument is far from tested.

These arguments place a heavy burden on an employee to prove their case, but may give a remedy when a constructive dismissal claim won't.

DISMISSAL FOR A REASON RELATED TO THE EMPLOYEE BEING LESBIAN OR GAY

It is rare for employers to argue that they dismissed an employee simply because they were gay or lesbian. It is equally unlikely that a tribunal would uphold such a decision. If an employer is seeking to justify the dismissal of a lesbian or gay man it is more common to argue that a particular feature of their sexuality caused them to be unsuitable for their job. The most common arguments are that they were a risk to children or young people or in the case of gay men that they had a criminal conviction for a sexual offence.

4. RISK TO CHILDREN OR YOUNG PEOPLE

There is clear authority that if an employee is lesbian or gay and employed in a job where they are responsible or have access to young people or children, then it is legitimate to dismiss them if the employer believes that they are a sexual risk. (*Saunders v Scottish National Camps* [1980]).

The disturbing feature of *Saunders* is that, even if can be shown that the employers belief is mistaken at the tribunal, *the* employer's reason at the time of dismissal can still be upheld as fair. In terms of advisers dealing with cases involving teachers and social workers it is important to insist on fair hearings before any dismissal, then evidence on the issue can, at the least, be considered.

5. CRIMINAL CONVICTIONS FOR SEXUAL OFFENCES

It is not uncommon for employers to discriminate or dismiss gay men who have been convicted of a sexual offence, committed outside work, of which there is no heterosexual equivalent. The principal consensual gay offence being gross indecency. As a matter of law, it has been held fair for employers to dismiss employees for an offence of gross indecency, where the employer believed there to be evidence that a lecturer " could not control himself in public" and should not be trusted with young persons. (Gardiner v Newport County Borough Council [1974]).

The case is distinguishable on its facts, as the employee was a teacher. Advisers who represent gay men ought to argue that there is no relation with the alleged or proven conviction for a " gay offence " and their job. This is necessary in order to counter the type of prejudicial trust and confidence argument which will often be used by the employer.

6. FAILURE TO REVEAL CONVICTIONS.

The Rehabilitation of Offenders Act 1974 provides protection for employees which may assist them if they have been convicted of a gay only offence but only if it is a spent conviction.

Advisers ought to be aware of the limitations of the Act. Certain employment is excluded- e.g. teachers in state schools, most government employees and social workers who have contact with vulnerable adults or children. Meaning that such employees are required to reveal all convictions when requested to do so. Additionally, depending on the sentence received for the offence, the conviction may not have become spent. If this is the case, failing to disclose a conviction may not only be a fair reason to dismiss, it can also be a criminal offence (obtaining employment by deception) if, having been asked, they have not disclosed the conviction in the first place.

Alternatively if the conviction is spent, then a refusal to employ, or the dismissal of an employee for failing to disclose a spent conviction, will almost certainly be an unfair reason to dismiss.

7. SEX DISCRIMINATION ARGUMENT.

It is arguable that dismissing a man because he has committed an offence that can only be committed by a man is either an act of direct or indirect sex discrimination. This is by no means a straightforward argument. Advisers could either show that dismissing men for gender based offences was direct discrimination. Or they could seek to show that the employer applied a condition to men and women, namely that

they would not employ people convicted of (consensual sexual) offences and this had a disproportionate impact on men.

8. HARASSMENT AT WORK

The idea of suing an employer for harassment has been little explored and there are few reported cases. However there is a basis both in criminal and civil law to say that such behavior is unlawful. There are potential remedies for harassment which occurs at work and/or from by other employees. How this can be married with employment rights is difficult to predict.

9. HARASSMENT AS A CRIMINAL OFFENCE

Both the Criminal Justice and Public Order Act 1994 and the Protection of Harassment Act 1997 created several criminal offences of harassment. Neither of the laws need proof of the motive for the harassment.

Harassment has to be intentional but the 1997 Act defines intentional as including behaviour which someone ought to known (but is not necessarily proven to have known) would cause distress. Both laws cover workplace harassment and the 1997 Act would cover abusive telephone calls to someone's home.

10. CIVIL REMEDIES

As a general rule there is no reason why an employer cannot be sued for injury caused to an employee at work. The law of health and safety and the law of negligence provides that an employer needs at the least to make the workplace as safe as reasonably practical. However an employer does have a defense if he was not informed of the harassment.

There is also another limitation to a negligence action - you have to prove injury. In many cases the person leaves work in fear of injury rather than because of it. Those who can show stress caused by the harassment may have a claim but few fall within the level of psychiatric injury required by the law.

The 1997 Harassment Act seems to have now provided a more useful harassment remedy that is not dependent on proving injury before action can be taken. Indeed the 1997 Act also allows you to apply for an injunction.

11. EQUAL OPPORTUNITIES POLICIES

The creation of a climate of equal opportunities or diversity at some work places has done more than the law to improve lesbians and gay employment rights. Nevertheless there is now legal authority that an Equal Opportunities Policy could be used to enhance the legal rights of employees.

A recent case called *Secretary of State for Scotland v Taylor (1997)* held that an equal opportunities policy dealing with age discrimination was of legal effect and

was not simply a mission statement. On the other hand in *Grant v South-West Trains Ltd.* the judge found that an equal opportunities policy did not create legal rights to be protected from discrimination.

The cases can be understood on the factual basis that in *Taylor* it was clear that the Equal Opportunities Policy was incorporated into the employee's contract of employment: this was not the case in *Grant*.

There are a number of cases that LAGER has dealt with where the Equal Opportunities Policy has been referred to in a written contract of employment as binding on the employee. In these cases it would follow that the employer has an obligation to enforce the policy.

It remains to be seen what remedy, if any, the courts will provide when both the equal opportunities policy and the contract of employment are breached.

12. CONCLUSION

The new anti-harassment laws should help lesbians and gays. They ought to strengthen the obligation on employers to offer support to people suffering both discrimination and harassment at work. But if anything is clear about the anti-harassment laws so far, it is the fact that they haven't been used much! The only area where test cases may take place on the issue of sexuality is in the area of unfair dismissal law. But what is the right test case to take?

With the possible exception of sexual harassment claims, sexuality discrimination claims can only be brought under the Sex Discrimination Act in cases where it is shown that lesbians were treated worse than gay men or vice versa. Some may say that this is no more than a right to complain of sex discrimination, whereas others may say it covers some element of sexuality discrimination. Who knows how this new test will apply in practice. Will employers find it difficult to show that they treat lesbians and gays equally badly? Will lesbians and gays find it easy to show that one is worse off than the other?

While LAGER advises on individual cases, the views expressed in this article are not intended to be relied upon as legal advice in a particular case. Also, one area that this paper does not consider is any possible legal rights or remedies under the Human Rights Act. LAGER advisers are employment law specialists and the Human Rights Act falls outside of their remit.

Lesbian and Gay Employment Rights: 0171.704.2205

DISCRIMINATION LAW ASSOCIATION

MARCH 1998

BRIEFING No 118 DISABILITY DISCRIMINATION ACT UPDATE

GENERAL DDA ISSUES

The Government has now started taking practical steps to set up a Disability Rights Commission DRC. A budget has been allocated to establish the DRC, appoint the Commissioners and the DRC support staff.

At the Bar Council Disability Discrimination Law Conference on 13th February 1999 Margaret Hodge MP, the Minister for Disabled People, stated that the DRC will be up and running by April 2000.

The DRC will be modelled on the Commission for Racial Equality and the Equal Opportunities Commission and it's establishment is welcomed as a positive move forward by the disability rights movement who have long argued that the DDA 1995 lacks teeth. The DRC will have powers to investigate and pursue DDA claims, monitor the DDA and propose additional disability rights legislation.

The Government is also proud of it's undertaking to implement the remaining sections of the DDA according to an earlier timetable than that proposed by it's predecessors. This October it will become unlawful for service providers to discriminate against disabled people by failing to provide a service, or providing a lower standard of service due to it's policies, practices and procedures. Further, service providers will be under a duty to provide auxiliary aids [such as information leaflets on tape or in Braille] to enable disabled people to access their services.

EMPLOYMENT CASES

O'Neill v Symm & Co EAT/885/97

The Court of Appeal will not now hear this case because of a procedural technicality. The DDA Update in the **November/December 1998 DLA briefings** summarised the subject of the appeal, which focussed on the issue of an employers' knowledge of disability. The EAT disagreed with the applicant's submission that it was enough to show that her employer knew she was disabled and it was not necessary for them to know the specific nature of her impairment for them to have the relevant knowledge. We will have to wait for this issue to be decided upon in another case.

Clark v Novacold Ltd EAT/1284/97

The Court of Appeal will now be hearing this case on the issue of correct comparators for the purposes of the DDA at the end of February 1999.

Butterfield v Rapidmark Ltd EAT/131/98

Mr Butterfield was a disabled man whose impairment was epilepsy. There was no doubt from the Tribunal that he was disabled within the meaning of s1of the DDA. He and two non-disabled colleagues were dismissed by Rapidmark for poor performance in their jobs selling dance music to retail outlets.

Mr Butterfield complained to the Tribunal that Rapidmark had treated him less favourably for a reason relating to his disability (s5(1));that the less favourable treatment was not justified; that Rapidmark failed in their duties to make reasonable adjustments for him (s5(2) and s6) and that this discrimination led to his dismissal (s4(2)(d)).

The Tribunal found that Mr Butterfield's dismissal was less favourable treatment. They also found that Rapidmark's conclusions about his poor performance was arrived at without any reference to, or investigation of, his disability or medication. The Tribunal then went on to consider whether these findings constituted unlawful discrimination according to the DDA and in a majority decision they concluded that it did not. No inference of unlawful discrimination was to be drawn. The

The Tribunal was critical of Rapidmark's ignorance of how Mr Butterfield's condition impacted his job. However, this ignorance appeared to have convinced a majority of the Tribunal that Mr Butterfield's disability was therefore not a 'causative factor' at the point at which Rapidmark decided to dismiss him.

The EAT directed that the Tribunal should have followed the guidance steps set out in the EAT judgments of *O'Neill v Symm & Co Ltd* and *Morse v Wiltshire County Council* when deciding whether unlawful discrimination had occurred. These sequential steps are clearly set out in the November/December 1998 **DLA Briefing No.101.**

The EAT also noted the Tribunal's failure to address Mr Butterfield's complaint under s5(2) of the DDA. This is the section which outlaws less favourable treatment due to failure to make reasonable adjustments and was pleaded in Mr Butterfield's IT1.

The EAT concluded that the Tribunal had not given convincing reasons for dismissing Mr Butterfield's claim under s5(1) that he had been treated less favourably because of his disability; had not considered s5(2) and had not properly addressed all the DDA issues. The EAT were especially critical of the Tribunals failure to give reasons for drawing their inference that unlawful discrimination had not occurred notwithstanding their finding that Mr Butterfield had been treated less favourably! Mr Butterfield's appeal was therefore allowed and his complaint has been referred back to another Tribunal.

This case is further evidence of the significance of the procedural steps Tribunals must use established by the EAT in *O'Neill v Symm & Co* and *Morse v Wiltshire County Council.*

GOODS, SERVICES AND FACILITIES CASES

As most advisors will be aware by now there have been few of these 'services' cases that have reached court. Partly because not all relevant sections of the DDA have been implemented but also because of the difficulties with obtaining proper representation.

The case of a blind man who is alleging discrimination by a landlord who refused to rent him a room was lost at court, but is being appealed. The landlord had considered the bathroom too small for a blind person, said he assumed that a blind person could not go up steps and stated that his insurance would not cover 'people like you'. In the judgment negative reference was made to the pursuer, the blind man, because of his 'anti-discrimination agenda'!

Three deaf people who were refused service at a pub have issued proceedings. The landlord asserts that he refused to serve them because there had been trouble in local pubs caused by a group of deaf people and he had assumed that the three claimants were part of that group.

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MARCH 1999

BRIEFING No 119 ECJ RULES ON LEGALITY OF TWO-YEAR QUALIFICATION PERIOD FOR UNFAIR DISMISSAL: R v Secretary of State for Employment ex parte Seymour-Smith ECJ Case No. C-167/97 (unreported)

BACKGROUND

This case concerned a challenge to the legality of the two-year qualification period for unfair dismissal protection. The case started when Nicky Seymour Smith was abruptly dismissed on May 1st 1991 after 15 months employment. She complained of unfair dismissal but the Employment Tribunal refused to hear her case because she had not worked for the required period of two years. She challenged this rule by way of judicial review proceedings in the High Court. She claimed the two-year qualification period was indirectly discriminatory against women and was not objectively justifiable. This was because fewer women employees than men had two years continuous employment with the same employer. Consequently, fewer women could comply with the requirement to have two years continuous service, so it was indirectly discriminatory and contrary to European law.

The High Court did not accept that enough women were disadvantaged to make the rule indirectly discriminatory, however, they did find that the government had been unable to prove that they had any valid objective justification for the rule.

COURT OF APPEAL

The Court of Appeal concluded that the statistics between 1985 and 1991 persistently and continuously showed a considerably smaller number and proportion of women than men could comply with the two-year limit. This was contrary to the principle of equal treatment enshrined in the Equal Treatment Directive. The government argued that the two-year qualification period was objectively justified because it helped to create more jobs. The CA found there was no evidence to prove that the increase in qualification period had led to an increase in employment opportunities and was therefore not objectively justified.

The problem was raised here as to whether the protection for unfair dismissal and unfair dismissal compensation was governed by the Equal Treatment Directive or Article 119.

HOUSE OF LORDS

The government appealed to the House of Lords on the grounds that: -

- A former employee does not have standing to apply for a judicial review if s/he alleges that government legislation indirectly discriminates against her/him contrary to EC law,
- the CA was not correct to conclude that the applicants had shown indirect discrimination
- in a measure adopted in pursuance of the Government social policy a lesser standard of objective justification is necessary,
- the Court of Appeal was not correct to conclude that the government had failed to show objective justification for the imposition of a two year qualification period for unfair dismissal protection.

The applicants appealed to the House of Lords on the grounds that: -

- An award of compensation does constitute "pay" within the meaning of article 119,
- A statutory instrument, which is contrary to EC law, can be set aside (by order of certorari).

The House of Lords ruled that applicants could not rely directly on the Equal Treatment Directive in judicial review proceedings, as this would be to give direct effect to the directive against employers who were not emanations of the state. However, they referred to the ECJ the following questions: -

1. Does Article 119 cover unfair dismissal compensation?

2. Does Article 119 or the Equal Treatment Directive cover the conditions for entitlement to unfair dismissal compensation?

3. What is the correct test for the degree of disparate impact to be shown in indirect discrimination cases?

4. When should this test be applied?
   - when the measure is adopted?
   - when the measure is brought into force?
   - when the employee is dismissed?

5. What are the legal conditions for establishing objective justification for a government measure of social policy?

ECJ RULING/ANSWERS:

Question 1: Compensation for unfair dismissal is 'pay' and hence comes under Article 119

Question 2: The conditions determining whether an employee is entitled to compensation for unfair dismissal is covered by article 119. The conditions determining whether an employee is entitled to re-instatement or re-engagement following an alleged unfair dismissal are covered by the Equal Treatment Directive and not Article 119. The ECJ added that they considered that judicial review proceedings in respect of an alleged breach

of the Equal Treatment Directive by the government should be permitted (in contrast to the House of Lords ruling).

Question 3: In order to establish indirect discrimination the national court must decide if the measure has a "more unfavourable impact on women than on men". This should be done by looking at both the proportions of those who can comply and the proportions of those who cannot comply (in contrast to the provisions of section 1 (1) (b) SDA).

A smaller proportion could give rise to indirect discrimination where it can be shown to be part of a persistent and consistent pattern over a longer period. The Court commented that the differential of 77.45% of men who could comply compared with 68.9% of women did not appear on the face of it to be a considerable smaller percentage. However, this was a matter for the national court to resolve and they should do so taking into account the wider pattern (of which the statistics were part), whether they cover a large enough group of people, whether they are purely random or just short term phenomena and whether they are reliable.

The Court of Appeal has already found **in fact** that the statistics **did** amount to " a considerable and persistent difference between the numbers and percentages of men and women in the groups that did comply and the groups that did not comply". The House of Lords can only overturn this finding if they conclude that the Court of Appeal was wrong **in law**, in the light of the ECJ's judgment, to reach this conclusion.

Question 4: The legality of any measure can be tested at any time, when it is introduced, when it is implemented or when it is applied; as it must be lawful at all times. Hence it is for the national court, taking into account all the material, legal and factual circumstances, to determine the time at which the legality of a rule is to be tested.

Question 5: The government had argued that for a member state to objectively justify a social policy they should only have to show that it was “reasonably entitled” to consider that the provision (the two year qualification period) would assist a social policy aim. However, the ECJ re-affirmed that the legal criteria for a member State to show that a provision is objectively justified are: -

1. The measure chosen must reflect a necessary aim of social policy,
2. The choice of this aim must be unrelated to any discrimination based on sex, and
3. The government could reasonably consider that the means chosen were suitable for attaining that aim.

They went on to say "*mere generalisations* concerning the capacity of a specific measure to encourage recruitment are not enough…"

N.B. these criteria are the same as those laid down in *Rinner-Kuhn – v – FWW Spezial-Gebaudereiningung GmbH* [1989] and limited governmental discretion discussed in *Nolte – v – Landesversicherrungsanstalt Hannover* [1996].

IMPLICATIONS

The case will now have to return to the House of Lords for them to rule on whether the Court of Appeal reached the wrong conclusions in law. The House of Lords are not a fact-finding tribunal and hence cannot reach it's own decision on the statistics or the evidence on objective justification, although it can return the case to the Court of Appeal for a further finding on fact to be reached if the legal basis for the first finding of fact were unlawful.

It is disappointing that the ECJ chose to give no clearer guidance on the time at which measures should be tested as this is still an area of considerable confusion.
There are currently at least 2,997 complaints of unfair dismissal stayed in the Employment Tribunals pending the outcome of this case. Unfortunately, it seems likely that they will have to wait another year or so for the House of Lords to rule on this case.

The government have announced that they are going to reduce the qualification period to one year by introducing regulations by Easter.

This judgment is available in full on: http://www.curia.eu.int

Gay Moon
Solicitor

MARCH 1999

BRIEFING No 120 FAILURE TO CONSULT WOMAN ON MATERNITY LEAVE IS SEX DISCRIMINATION: McGuigan v T.G.Baynes & Son EAT/114/97 (unreported)

THE FACTS

Jacqui McGuigan, a legal executive for a firm of solicitors, was recruited as a PI lawyer in 1995. During her interview she was asked if it would cause problems with her work if either of her two children were ill. In December 1995 Ms McGuigan told the firm she was pregnant. She made it clear from the beginning she would be returning to work.

In February 1996, at a board meeting, the firm decided that either staffing had to be reduced or new work obtained. Nothing was said to Ms McGuigan who left on maternity leave on 26th April 1996 intending to return on 29th July.

At a meeting on 18th July, Ms McGuigan was told that she was being made redundant. There had been no consultation with any member of staff and no serious attempt to find suitable alternative work. It transpired that there had been a point scoring exercise with two PI solicitors (both men) and Ms McGuigan had scored lower. Ms McGuigan had also been scored down because of remarks she made at an appraisal about the lack of equal opportunities. This founded a claim of victimisation.

EMPLOYMENT TRIBUNAL DECISION

The tribunal dismissed the claims of automatically unfair dismissal and sex discrimination but upheld the claim of 'ordinary' unfair dismissal under s98(4) ERA.

EAT DECISION

The tribunal found that no decision was made about Ms McGuigan's redundancy partly in the hope that things would pick up and partly on the basis that she might not return after the birth. Following *O'Neill* (which held that pregnancy had only to be **an** effective, not the only, cause), the EAT held that

> 'But for her maternity leave, which was pregnancy related, the respondent would or might have consulted with her in accordance with their redundancy policy. That was less favourable treatment on the grounds of her sex; it is not appropriate to compare her case with that of the men ... who were also not consulted.'

'Further the fact that the appellant would have been selected for dismissal and not the other two men in the pool for selection is no answer to the detrimental effect of a failure to consult for the purpose of a direct sex discrimination claim'.

IMPLICATIONS

Failure to consult a woman who is on maternity leave will, in most situations, be direct discrimination. This will be the case where the woman would have been consulted but for her pregnancy or maternity leave or where other employees were consulted. The same principles apply where a woman is not consulted about a reorganisation at work which may affect her job or where she would have been considered for promotion, but for her absence.

VICTIMISATION

The EAT also held that the marking down of Ms McGuigan because of her remarks about equal opportunities was victimisation. There was no need to show that the appellant was put at a further disadvantage as a result of being marked down; the marking down in itself was a detriment.

COMPENSATION

There was no loss of earnings but the Employment Tribunal awarded £5,000 for injury to feelings (plus about £1,000 interest), saying that it was a serious form of discrimination, being an affront to Ms McGuigan's desire to pursue a professional career and care for her three children (1.2.99).

PS This case was funded throughout by *legal costs insurance* (Hambro, now Eastgate Assistance).

Camilla Palmer
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DISCRIMINATION LAW ASSOCIATION

MARCH 1999

BRIEFING No 121 WIDE DEFINITION OF RACIAL GROUNDS/CONSTRUCTIVE DISMISSAL: Weathersfield Ltd v Sargent [1999] IRLR 94

Mrs Sargent was appointed as a receptionist. She was told that the company did not hire vehicles to any "coloured or Asians". Mrs Sargent was so upset by the policy that she resigned but did not give reasons. The tribunal held that Mrs Sargent had been given an instruction to carry out a policy that was discriminatory and she had suffered a detriment as a result.

COURT OF APPEAL

The CA upheld the ET's decision saying that an employee is unfavourably treated on racial grounds if s/he is required to carry out a racially discriminatory trading policy, even though the instruction concerns others of a different racial group.

The CA also held that in order to establish a claim of constructive dismissal, there is no requirement as a matter of law that an employee must state his reason for leaving. In the present case, the tribunal were amply justified in holding that there was a constructive dismissal. The employee had been put in an outrageous and embarrassing position and it was understandable that she did not want immediately to confront the employers.

IMPLICATIONS

Employees who are offended by being asked to discriminate, particularly if as blatant as in this case, may claim discrimination, irrespective of whether they are of the same racial group as the targeted group. Whether this would apply if there had not been instructions for the applicant to discriminate is unclear. It would probably depend on the effect of the discrimination on the employee. For example, an employee who is offended by witnessing racial harassment may well have a claim.

The finding on constructive dismissal is also important. Many employees who have suffered discrimination, and particularly sexual and racial harassment, do not want to have to confront their employers with embarrassing details at a time when they are very upset. Provided it is clear why the employee left - and it was in response to the discrimination - this is enough. Ideally, however, the employee should give the reason either at the time or soon afterwards.

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MARCH 1999

BRIEFING No 122 NEW SHIFT PATTERNS INDIRECT DISCRIMINATION: Hale & Clunie v Wiltshire Healthcare NHS Trust

BACKGROUND

- there are an estimated 12,000 full-time registered nurse vacancies in Great Britain (*RCN 1998 survey of NHS trusts*)

- almost 60% of nurses are caring for dependent children and/or adults; however, only about one third of employers provide childcare, which is often expensive and sometimes fits uneasily with shift patterns (Institute of Employment Studies (IES) survey 1998 *Changing Times: a survey of registered nurses*)

- 33% of nurses work internal rotation, i.e. a combination of day and night shifts in a given period (as contrasted with two day shifts and a separate night shift), which is up from 23% in 1994; two thirds of those nurses surveyed said that it was not their preferred pattern of working (IES 1998 survey and *"Debating the future of the permanent night shift"* Ian Brooks, Journal of Management in Medicine, Vol 11 No 2 1997*)*)

- Government health ministers have made repeated pronouncements since 1997 emphasising the importance of family friendly employment policies, and criticising, in particular, shift patterns that effectively exclude many nurses from the NHS workforce.

THE CASE

The applicants were employed for many years by Wiltshire Healthcare NHS Trust as part-time night nurses at the Melksham Hospital, a small community hospital, and one of a number under the management and control of the Trust. Both were married with school-age children. Working two nights each week, they were able to arrange child care, though the position was not ideal.

In 1992 the Trust's Director of Operations decided to progressively introduce internal rotation throughout its hospitals. This was considered to be the most effective way of using nursing staff. Even though this is widespread throughout both the NHS and independent healthcare sector, the employment tribunal in this

case was struck by the respondent's failure to produce any research evidence suggesting the benefits of internal rotation.

In February 1998 the trust issued a consultation document setting out proposals for the Melksham Hospital, which included a reduction in the number of beds, and the introduction of a rotating shift pattern (a 10 hour night shift and two 8 hour day shifts). The requirement applied to all nursing staff (registered nurses and health care assistants). Limited consultation with those staff took place during February of that year, which nevertheless revealed that night staff with young children or carer responsibilities would have difficulty with the new shift requirement. However, the tribunal found that the Trust's project team with responsibility for implementing the proposals "never really weighed up the advantages and disadvantages [of those proposals] in the light of the representations by the nursing staff".

During interviews in February and March 1998 the applicants made clear that their family commitments made it impossible for them to work rotating shifts and, for a number of reasons, the Trust was unable to find them alternative employment. They were dismissed by reason of redundancy with effect from 30 June 1998.

The first hurdle which the applicants faced in challenging the new rotating shift system under the Sex Discrimination Act 1975 (SDA) was the absence of any male nurses working at the Melksham Hospital. Accordingly, the claim had to be one of marital discrimination contrary to section 3 SDA.

In determining the relevant pool the tribunal rejected the use of national statistics, as the only people to whom the requirement would apply were existing employees. It also rejected a pool comprising all of the nursing staff employed by the Trust across its various hospitals, influenced by a serious flaw in the respondent's statistics in this respect. Accordingly, it identified the relevant pool as all the nursing staff working at Melksham.

Of that relevant pool of women nurses, 39 were married and 5 were unmarried. Whereas 10 of the married nurses were unable to comply, all of the unmarried nurses could comply. Accordingly, the difference was 25.6%, which the tribunal `had no hesitation` in finding to be a `considerable difference`. They also accepted that the applicants were in fact unable to comply with the new shift pattern because of their childcare responsibilities.

Finally, in determining the issue of `justifiability` of the new shift pattern, the tribunal cited the usual authority of *Hampson -v- Department of Education and Science* [1989] IRLR 69 CA in which Balcombe L.J. held that:

> *"..... `justifiable` requires an objective balance between the discriminatory effect of the condition and the reasonable needs of the party who applies the condition".*

In rejecting the respondent's arguments for justifying the change, the tribunal highlighted the following:

- the failure of the respondent to produce any research or analysis in support of rotating shifts

- the fact that the applicants were not contending that internal rotating shifts had no advantages over the `traditional` system of two day shifts and a separate night shift (in terms, for example, of overall care of patients, professional development of registered nurses and flexibility of shift systems); but were arguing that a more flexible implementation had been required taking into account the needs of those with childcare and other responsibilities

- research evidence that those nurses who willingly choose permanent night work have fewer heath, domestic and social problems than those forced to work either permanent nights or rotating shifts (University of Sheffield 1996 survey for Department of Health - unpublished)

- the respondents made ”no attempt to devise a flexible system”, and “many options” were available but not considered

- finally, none of the respondent’s arguments for justification applied to unqualified nursing staff (i.e. healthcare assistants).

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DISCRIMINATION LAW ASSOCIATION

MARCH 1999

BRIEFING No 123 DISCRIMINATION IN SERVICES – USING THE SMALL CLAIMS COURT: Bushnell v Bristol Omnibus Company & others

Ms.B was a passenger on a City Line bus in Bristol when she had a dispute about the price of a ticket believing she had been overcharged. When she tried to get her change, the bus driver refused and tried to drive off before she got off the bus. On alighting from the bus the driver shouted back “black cow” at Ms. B. The matter was reported to the Police who cautioned the driver under S.4 of the Public Order Act. Ms.B also complained to the bus company who did nothing about the complaint. No disciplinary action was taken against the driver.

Proceedings were issued at the Bristol County Court under s.20 of the Race Relations Act 1976. The case was issued by Fixed Date Summons and damages limited to under £3000. At pre-trial review it was agreed the matter be referred to arbitration.

This means that the issue of costs, in the event of the case being dismissed, would not affect Ms. B, as the matter would be heard as an arbitration matter and the “no costs” rule would apply. As a Law Centre that does not charge clients supported the case, Ms. B would not be liable for any costs if the case was dismissed.

Having issued proceedings the respondents entered a defence and counterclaim. They admitted that the second respondent (the driver) had racially abused Ms. B but sought to justify it on the basis that she had been aggressive, belligerent and had threatened and thrown money at the drivers head. His reaction in abusing Ms. B would have been the same towards a white person omitting the racial element. They also claimed against Ms. B under the protection form Harassment Act 1997, claiming she had harassed the driver by her behaviour.

After detailed preparation for trial the case was settled at the doors of the court just minutes before trial was due to start. The terms of the settlement were that Ms.B receives £1250 compensation for injury to feelings, a personal apology from the driver. There was no “no confidence” clause, so the case was widely publicised in the local and national press.

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MARCH 1999

BRIEFING No 124 GRIEVANCE PROCEDURE JUSTIFIES DELAY IN STARTING DISCRIMINATION CASE: Aniagwu v London Borough of Hackney & Owens [1998] EOR 48

Mr Aniagwu alleged that his manager, Mr Owens, who had refused him a top-up car loan, had racially discriminated against him. He brought a grievance but the grievance committee turned this down on March 20th1997. He appealed against this decision but his internal appeal was not dealt with promptly. On June 26th 1997 Mr Aniagwu applied to the Employment Tribunal alleging that the decision to dismiss his grievance was racial.

The ET dismissed his complaint because they said that it was out of time and they did not consider that it was "just and equitable" to consider his complaint. However, they did find that one of the reasons for the complaint being out of time was that the applicant had been hoping to resolve the matter through the internal procedures and had only brought the complaint to the ET when he became frustrated by his employers delay. He appealed to the EAT.

The EAT decided that it was "just and equitable" to hear a race discrimination complaint outside the three month time limit where the reason for the delay was because the applicant was attempting to resolve his grievance through the employer's internal grievance machinery.

IMPLICATIONS

This means that a worker pursuing an internal grievance *in respect of a discrimination complaint* will not need to issue tribunal proceedings prematurely merely in order to avoid missing the deadline for industrial tribunal complaints to be issued.

This has been a problem for workers wanting to resolve complaints internally as they have had to issue industrial tribunal proceedings within three months of the event/s complained of in order to preserve their right to raise the matter at an ET if it is not satisfactorily resolved by internally. It is possible to issue ET proceedings, get them adjourned pending the determination of the grievance procedure, and notify employers that the proceedings have been issued merely to preserve the workers rights should the internal procedure fail to resolve the problem. However, employers frequently do react badly to the issueing of ET proceedings alleging discrimination and this can diminish the chances to resolving the problem internally. Hence this is a judgment to be welcomed as beneficial to both workers and their employers.

However, advisors should note that this *does not apply to non-discrimination complaints (i.e. unfair dismissal)* where the test for the extension of the time limit for the issuing of ET proceedings is whether it was not "reasonably practicable" to bring the complaint in time and the complaint is brought within such time as is reasonable. This is a more restrictive test and does not encompass situations where a complaint is issued out of time because the resolution of an internal grievance procedure is awaited (see *Palmer and Saunders v Southend-on-Sea Borough Council* [1984] IRLR 119).

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MARCH 1999

BRIEFING No 125 ECJ RULES UK TWO-YEAR LIMIT ON BACK-PAY FOR EQUAL PAY CLAIMS UNLAWFUL: Levez v T.H.Jennings (Harlow Pools) Ltd [1999] IRLR 36

Ms. Levez started work as a Betting Shop Manager on February 18th 1991. Her wages were £10,000 per annum. In December 1991 she moved to another betting shop and her salary was increased to £10,800 p.a. She was told at the time that this was the same as that of her predecessor, Mr. Fuller, who in fact had been paid £11,400 p.a. Her salary did not reach this level until April 1992. In March 1993 she left. She discovered that she had been paid less than her male predecessor from December 1991 until April 1992. On September 16th 1993 she brought proceedings in the IT

The IT decided that she was entitled to be paid at the rate of £11,400 from the date that she started work on February 18th 1991. However, section 2(5) of the Equal Pay Act 1970 precluded awards of arrears of wages arising in a period over two years prior to the date of her application to the IT. As her application was dated September 16th 1993 this precluded any arrears of wages before 16 September 1991. She appealed against this decision to the EAT on the grounds that the limitation on recovering the arrears of pay was contrary to Article 119 and the Equal Pay Directive.

She argued that this limitation is less favourable than that for comparable domestic actions, for example, an action for breach of contract has a six-year limitation period and there are no limitations in race cases. She asked the EAT to refer questions to the ECJ as to whether this provision was consistent with Community law.

The ECJ ruled that: -

1. A rule of national law which limits the period for which back pay can be claimed for two years is unlawful in circumstances where the delay in bringing the claim is a direct result of the fact that the employer deliberately misled the employee about the level of wages paid to a comparator, and

2. A rule of national law which limits the period for which back pay can be claimed for an equal pay claim to two years, prior to the date of bringing the claim, is unlawful if, at the date when the proceedings were started, the procedural rules or other pre-conditions applying to the equal pay claim are less favourable than those applicable to similar domestic actions. It is for the national court to decide whether this is the case.

COMMENT

This case was slightly confused by the ECJ because of the employer's deception about the level of wages paid to the applicant's comparator. However, they have clearly held that if the procedural rules applying to an equal pay case (i.e. the period for which back pay can be claimed) are less favourable than the provisions in UK law for other similar domestic actions then that procedural rule will be unlawful. As the period for which back pay can be claimed in any breach of contract action in the County Court is six years it must follow that this provision is unlawful. However, the case has been referred back to the UK for the referring court to make this decision.

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DISCRIMINATION LAW ASSOCIATION

MARCH 1999

BRIEFING No 126 FAIRNESS AT WORK – THE EMPLOYMENT RELATIONS BILL

The Government has now published its Employment Rights Bill to implement the proposals in the Fairness at Work White Paper. It proposes the following changes: -

- Statutory maternity leave to be extended to 18 weeks
- Length of service required for the longer period of statutory maternity leave (40 weeks) reduced to one year
- All parents entitle to take up to three month unpaid parental leave during the first eight years of their child's life. This provision will also apply to adoptive parents
- All employees will have the right to take time off for "domestic emergencies" such as a child or elderly relatives sickness
- Trade unions will gain automatic recognition if more than half the workers in any 'bargaining unit' are members
- New statutory procedure for union recognition where there is majority support in the workforce and there are over 21 employees
- Protection for employees discriminated against because of trades union membership or taking part in lawfully organised industrial action
- Right for workers to be accompanied by a trade union official or fellow employee of his/her choice to any grievance or disciplinary proceedings
- Limit on compensation awards for unfair dismissal raised from £12,000 to £50,000
- No upper limit on compensation awards for whistleblowers who loose their jobs unfairly after disclosing corruption, fraud or other scandals in their organisation

- New provisions to protect workers taken on through employment agencies.

The Department of Trade and Industry say that *the qualification period for unfair dismissal claims* will be lowered from two years to one year by regulation. This regulation should be published by Easter 1999.

The **National Minimum Wage Act** will come into force on April 4th 1999. Although it is not a discrimination provision it may be relevant to members as a disproportionate number of women and people from racial minorities will benefit from it's provisions. Briefly, it provides that all "workers" (widely defined) over the age of 21 will be entitled to be paid at a minimum rate of £3.60 per hour. A lower rate can be designated for those workers between the ages of 18 and 21 years. A new Low Pay Commission will enforce these provisions or alternatively the worker can sue for underpaid wages as a breach of contract.

Gay Moon
Solicitor

DISCRIMINATION LAW ASSOCIATION

MARCH 1999

BRIEFING No 127 DISABILITY RIGHTS TASKFORCE – CALL FOR EVIDENCE

The Disability Rights Taskforce was set up by the Government to advise on how to fulfil its manifesto commitment to full civil rights for disabled people. I represent Trade Union Disability Alliance on the Taskforce.

We are considering the DDA's definition of a disabled person. This is a real chance to improve the law. I am trying to argue that this definition is too narrow and excludes people who suffer injustice for a reason related to an impairment, real or perceived. I need as many examples as possible of people who have experienced discrimination on this basis and who have been unable to achieve legal redress. I would be grateful if DLA members could provide me with any case studies by 23 March. These cases would only be discussed with the Minister, civil servants and taskforce members. They would not be discussed in public.

The other issue on which I would be grateful for practitioners' experience is the enforcement of discrimination cases in the small claims/county courts. A proposal, which is currently being considered, is moving the jurisdiction for DDA Part III cases to the employment tribunal (although only if sex/race discrimination claims were also to be heard in this venue). In favour is the simplified procedures and greater expertise of these tribunal, also that there is no risk of cost to deter potential applicants. One argument against this would be the availability of legal aid. In practice, of course this is extremely difficult to obtain. I would be grateful for practitioners' views and practical experiences.

Responses to:

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DISCRIMINATION LAW ASSOCIATION

MARCH 1999

BRIEFING No 128 NEW EU DIRECTIVE ON DISCRIMINATION?

Article 13 of the Amsterdam Treaty gives the European Council wide powers to legislate in the wider field of discrimination law :-

> "Without prejudice to the other provisions of this treaty and within the limits of the powers conferred by it upon the Community, the Council acting unanimously on a proposal from the Commission and, after consulting the European Parliament, may take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation."

The European Social Affairs Commissioner, Padraig Flynn, has announced that he is seeking to introduce: -

1. A new directive to deal with all types of discrimination in the employment field,

2. A new directive dealing specifically with race discrimination, and

3. An action programme to strengthen co-operation between the social Partners and to help to neutralise the growing problem of racism across Europe.

Commissioner Flynn intends to introduce these proposals in detail later in 1999 after the final implementation of the Amsterdam Treaty.

Gay Moon
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