

Discrimination – recent cases

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Overview

- ▶ Cases over the last year
- ▶ By PC
 - ▶ Religion/belief
 - ▶ Age
 - ▶ Sexual orientation
 - ▶ Disability (victimisation)
- ▶ Procedure
 - ▶ Burden of proof
 - ▶ Interim relief
 - ▶ Time limits
- ▶ Quick round-up of ET cases

Religion/belief

- ▶ Mackereth v DWP & anor [2022] EAT 99
 - ▶ Doctor assessing claimants for disability-related benefits
 - ▶ Commitment to supremacy of Bible
 - ▶ Genesis 1:27
 - ▶ Lack of belief in “transgenderism”/“gender fluidity”
 - ▶ Conscientious objection to transgenderism
 - ▶ Refused to commit to using preferred pronouns
 - ▶ Effectively resigned
 - ▶ Claimed direct discrimination/harassment/indirect discrimination

Religion/belief

▶ Mackereth (cont.)

▶ ET

▶ All 3 beliefs failed Grainger V

▶ Grainger plc v Nicholson [2010]

▶ (v): “worthy of respect in a democratic society, be not incompatible with human dignity and not conflict with the fundamental rights of others”

▶ In any event C would fail on all claims of discrimination

▶ On harassment on the facts

▶ On direct discrimination

▶ By analogy with Islington BC v Ladele [2009] ICR 387

- Failure to accommodate difference

▶ On indirect discrimination

▶ Legitimate aims and proportionate means

Religion/belief

▶ Mackereth (cont)

▶ EAT

- ▶ Drew on Forstater v CGD Europe [2022] ICR 1 (EAT)
 - ▶ There C's belief that sex was immutable satisfied Grainger V
 - ▶ Not enough that belief or statement has potential to shock or disturb section or even most of society
 - Article 17 ECHR relevant only at high level
 - ▶ E.g. totalitarianism, advocating Nazism, forcibly deporting all non-white people
 - ▶ Therefore C's belief did satisfy Grainger V
 - ▶ And ET had fallen into error on other aspects of Grainger
 - ▶ Whether belief meets Grainger criteria cannot be relative to particular employment context

Religion/belief

▶ Mackereth (cont.)

▶ But...

- ▶ Appeal failed on all substantive elements
- ▶ ET's approach to harassment, direct discrimination and indirect discrimination was unimpeachable
 - ▶ Findings of fact against C
 - ▶ Permissibly drew distinction between beliefs and way in which he manifested those beliefs (Page v NHS Trust Development Authority [2021] EWCA Civ 255)
 - ▶ Legitimate aims and proportionate means

Religion/belief

- ▶ Ali v Heathrow Express Operating Group & anor
[2022] EAT 54
 - ▶ C employed by R1
 - ▶ R2 responsible for security checks
 - ▶ Carried out test using bag with fake bomb and piece of paper with “Allahu Akbar” written in Arabic
 - ▶ Came to C’s attention
 - ▶ Alleged harassment and direct discrimination
 - ▶ ET dismissed claim
 - ▶ Only appealed harassment

Religion/belief

▶ Ali (cont.)

- ▶ EAT dismissed appeal
- ▶ ET had found unwanted conduct, but that C's perception just one of matters to consider, including "whether it is reasonable for conduct to have that effect"
 - ▶ R2 not seeking to associate Islam with terrorism; purpose was to make package seem obviously suspicious by drawing on recent incidents
- ▶ Not perverse
 - ▶ EAT noted Richmond Pharmacology v Dhaliwal [2009] ICR 724, EAT
 - ▶ "Quintessentially a matter for the factual assessment of the tribunal"
 - ▶ Above finding was one ET entitled to make

Age

- ▶ Pitcher v University of Oxford, University of Oxford v Ewart [2022] ICR 338, EAT
 - ▶ Two cases
 - ▶ Professors retired on reaching age of 67
 - ▶ “Employer justified retirement” age
 - ▶ Claims of direct discrimination
 - ▶ Both ETs concluded EJRA had legitimate aims
 - ▶ Pitcher: proportionate means – claim failed
 - ▶ Ewart: no evidence to point to achievement of legitimate aim – claim succeeded

Age

▶ Pitcher (cont.)

▶ EAT – both appeals dismissed

- ▶ Different tribunals can reach different conclusions on same measure adopted by same employer with same aims
- ▶ Function of EAT is not to rule on the policy, but to consider whether there has been an error of law
 - ▶ Even though “undesirable” for employer

▶ Here two major differences

- ▶ Ewart ET had benefit of statistical analysis showing not obvious that EJRA created vacancies
- ▶ Different evidence and focus as to continuing relationship with R

Age

▶ Pitcher (cont.)

- ▶ Moral: evidence is absolutely key (on either side)
- ▶ But no evidence required if “Cockram-obvious”
 - ▶ Air Products plc v Cockram [2018] IRLR 755
 - ▶ The assertion that excluding employees under 55 from financial benefits encourages them to stay with company till that age is “surely so obvious that it barely requires evidence at all”

Sexual orientation

- ▶ R (Cornerstone Fostering Services Ltd) v Ofsted
[2021] EWCA Civ 1390
 - ▶ Not employment case
 - ▶ C charity operated independent fostering agency
 - ▶ Would only recruit carers who were professed evangelical Christians who refrained from homosexual behaviour
 - ▶ Ofsted report: that contravened EqA 2010 and HRA 1998
 - ▶ C sought declaration that unfounded in fact and law

Sexual orientation

- ▶ Cornerstone (cont)
 - ▶ CA upheld 1st instance decision
 - ▶ Recruitment policy amounted to direct discrimination
 - ▶ Focus must be on objective factual criteria that are applied
 - ▶ “As clear an instance of direct discrimination ‘because of’ a protected characteristic as can be imagined
 - ▶ Irrelevant that part of broader belief system
 - ▶ False distinction between sexual behaviour and sexual orientation
 - ▶ Proportionality considered in context of discrimination as well as alleged breach of Convention rights
 - ▶ Cornerstone failed in all respects
 - ▶ Other issues considered in case

Disability (victimisation)

- ▶ Warburton v Chief Constable of Northamptonshire Police [2022] ICR 925, EAT
 - ▶ C applied to be police officer
 - ▶ Referred to bringing ET disability discrimination proceedings against different force
 - ▶ Failed vetting
 - ▶ ET found:
 - ▶ Protected act
 - ▶ But no detriment and no causation

Disability (victimisation)

▶ Warburton (cont.)

▶ EAT allowed appeal

▶ ET misstated tests on victimisation, causation, and wrongly introduced comparators

▶ Detriment

▶ As defined in Shamoon v RUC [2003] ICR 337, HL

▶ Is the treatment such that a reasonable worker would or might take the view that in all the circumstances it was to his detriment?

- So not wholly objective

▶ Not necessary to establish any financial or economic consequence

▶ Placing vetting on hold would be detriment

- Although ET reasoning very confused

Disability (victimisation)

- ▶ Warburton (cont.)

- ▶ Causation

- ▶ Review of authorities such as Nagarajan, Khan, Bailey, Martin,
 - ▶ PA must have “significant influence” on detriment; may be genuinely separable decision
 - ▶ ET got it hopelessly wrong

Burden of proof

- ▶ Royal Mail Group Ltd v Efobi [2021] UKSC 33
 - ▶ Old legislation:
 - ▶ “...the complainant proves facts from which the tribunal could, apart from this section, conclude in the absence of an adequate explanation that R has committed such an act of discrimination...”
 - ▶ s.136 Equality Act 2010:
 - ▶ “...if there are facts from which the court could decide, in the absence of any other explanation, that a person contravened the provision concerned, the court must hold that the contravention occurred”
 - ▶ Did the change in wording make a substantive change in the law?

Burden of proof

- ▶ Royal Mail v Efobi (cont.)
 - ▶ C failed in various applications within Royal Mail
 - ▶ Failed in direct discrimination claim in ET
 - ▶ EAT allowed appeal on basis that law had changed by virtue of s.136
 - ▶ R appealed
- ▶ In the meantime CA decision in Ayodele v Citylink [2017] EWCA Civ 1913
 - ▶ No change in law
 - ▶ So CA in present case bound to allow appeal

Burden of proof

▶ Royal Mail v Efofi (cont)

- ▶ As per Ayodele, change was required because old wording not entirely clear: not apparent that all evidence to be considered at first stage, not just that adduced by C
- ▶ But use of “if there are facts” cannot remove burden of proof
 - ▶ No need to state that in s.136 as general law of evidence in all civil cases that court must find something asserted by party as fact if and only if truth shown by sufficient evidence to be more probable than not
 - ▶ S o C always has burden of proving facts from which inference can properly be drawn

Burden of proof

- ▶ Royal Mail v Efofi (cont.)
 - ▶ Also useful dicta on drawing adverse inferences in absence of witnesses
 - ▶ Is not governed by legal criteria
 - ▶ ET free to draw or decline to draw inferences from facts of case using common sense
 - ▶ Relevant considerations
 - ▶ Is witness available?
 - ▶ What relevant evidence could they give?
 - ▶ What other relevant evidence is there?
 - ▶ In this case ET entirely justified in not drawing adverse inferences from absence of decision-makers

Interim relief

- ▶ Steer v Stormsure Ltd [2021] ICR 1671, CA
 - ▶ C complained of sexual harassment, resigned
 - ▶ Claimed constructive dismissal, amount to sex discrimination
 - ▶ Sought interim relief
 - ▶ Accepted that no right under EqA
 - ▶ Alleged breach of art. 14 in failure of domestic law to provide remedy
 - ▶ Effectively fast-tracked to EAT, where failed
 - ▶ Appeal proceeded on assumed facts

Interim relief

▶ Steer (cont.)

▶ CA dismissed appeal

- ▶ There is a “small and select” group of substantive claims where Parliament has conferred jurisdiction on ET to grant interim relief; that is not discrimination (R (Hooper) v Secretary of State for Work and Pensions [2005] 1 WLR 1681, HL)
- ▶ Article 14 also fails on grounds of “other status”, adequate remedies and justification
- ▶ Interim relief protects employees who have done certain acts in a representative capacity, or on behalf of workforce, or in public interest
- ▶ Up to Parliament to extend interim relief jurisdiction

Time limits

- ▶ Parr v MSR Partners LLP [2022] ICR 672, CA
 - ▶ C equity partner in R accountancy firm
 - ▶ Normal retirement date of 30 April following 60th birthday
 - ▶ 6 months prior to that C enters into “de-equitization agreement” where loses equity partner benefits
 - ▶ Will continue as normal partner
 - ▶ 4 months later R decides to sell business
 - ▶ C learns of this 7 months later and brings age discrimination claim
 - ▶ ET holds demotion from equity partner result of operation of discriminatory rule amounting to continuing conduct
 - ▶ EAT allows R’s appeal

Time limits

- ▶ Parr (cont.)
 - ▶ CA dismisses C's appeal
 - ▶ The act of de-equitization is what is complained of
 - ▶ No doubt that a dismissal would be a one-off act even though may suffer lifelong loss of pay and pension
 - ▶ No reason why a demotion should be any different
 - ▶ Irrelevant that remained in contractual relationship

Tribunal cases

- ▶ Forstater – won her case in ET on direct discrimination and victimisation
- ▶ Burke v Turning Point Scotland – long COVID can be disability
- ▶ Menopause:
 - ▶ PC connected to sex, disability (possibly age)
 - ▶ Cases
 - ▶ Rooney v Leicester City Council – EAT authority on disability [2022] IRLR 17
 - ▶ Best v Embark on Raw – harassment, although principally whistleblowing on COVID
 - ▶ Donnachie v Telent Technology – meets definition of disability
 - ▶ Sokolova v Humdinger Ltd – justification defence succeeded