Equality Act Update- Notes for a talk to the Equality Network event, Sheffield 5 December 2012

1. About Collingwood Legal

Based in Newcastle upon Tyne, Collingwood Legal is a specialist employment law firm. We offer the best quality advice and excellent client service taking a fresh approach to dealing with employment law issues.

Our business is based upon the strength of our relationships and reputation. Our lawyers are employment law experts and we work with a broad range of employers both in and outside of the North East of England. Our clients range from public sector organisations, manufacturers and professional bodies to large Education and charitable bodies.

The firm is recognised by the law firm reviewing "bible" The Legal 500 in their most recent report for 2012/2013 as having *"an excellent and professional team"*.

Liane Atkin is an Associate Solicitor with Collingwood Legal and has over 9 years' experience as a specialist employment law solicitor. Before joining Collingwood Legal Liane worked as a specialist employment law solicitor at a large commercial firm in Newcastle. Liane has also worked as a senior lecturer in law at Northumbria University where she specialised in teaching employment law on both undergraduate and post graduate courses, including an Equality module as part of one of the university's master's degrees.

2. Outline of the Session

The main focus of this training session is to provide an update on the Equality Act 2010 ("Equality Act"), this will mainly look at recent cases within the last year which are relevant to this legislation.

The cases that will be looked at may not all be directly relevant to your practice, but they do provide a flavour of how the higher courts are approaching issues of equality and may influence your approach. They involve interesting facts and, by using cases which refer to different 'protected characteristics', I intend to make the presentation as interactive as possible.

Whilst I come to the session with a specialist employment law background meaning much of the content is viewed from that perspective, a large proportion of the principles will be relevant to other services and education as well.

3. Introduction

The number of discrimination claims has been rising but they did slow down last year. Age discrimination claims increased by 32% in 2011 but, as indicated, these dropped from 6800 in 2011 to 3700 in 2012.

It is expected that the increase in the qualifying period to bring an unfair dismissal claim from 1 year to 2 years' service will increase the number of discrimination claims brought by individuals. It is thought that individuals who do not qualify to bring unfair dismissal claims may try to bring their claim within the scope of the Equality Act however, this will only account for a small percentage of claims as the bulk is likely to remain unfair dismissal.

Claimants who do bring a discrimination claim under the Equality Act and are successful in doing so can be awarded unlimited compensation, unlike unfair dismissal claims which are subject to an upper limit on the compensatory award element of £72,300.

Successful claimants may be awarded a sum of compensation which is often broken down as follows:

a) Financial Losses

i) Loss of earnings - an award for compensation will normally be predominantly for financial losses which will cover loss from the date of the discriminatory act to a particular time (such as the tribunal's award) and can also cover future loss. There is no statutory cap on discrimination compensation awards.

The purpose of compensation is to put the claimant in the position that they would have been in, but for the discrimination therefore loss of earnings is not based simply on the claimant's salary at the date of the discrimination, but on what they would have earned in the future.

ii) Other financial loss – compensation awards can also include an element for loss of pension and also benefits the claimant enjoyed such as permanent health insurance, company car or expenses.

b) Injury to Feelings

An award for injury to feelings is separate from any award for financial losses and is claimed in 'bands' dependent on the assessment of the extent of the discrimination. These were established in the landmark case of *Vento v Chief Constable of West Yorkshire Police (No 2)* [2003] IRLR 102 (CA) as below:

Band	***Vento*** *(December 2002)*	***Da'Bell*** *(September 2009)*
Top band for the most serious cases, such as where there has been a lengthy campaign of harassment. Awards can exceed this only in the most exceptional cases.	£15,000 - £25,000	£18,000 - £30,000
Middle band for serious cases which do not merit an award in the highest band.	£5,000 - £15,000	£6,000 - £18,000
Bottom band for less serious cases, such as a one-off incident or an isolated event.	£500 - £5,000	£600 - £6,000

N.B. In the case of *Da'Bell v NSPCC* UKEAT/0227/09, the EAT set out new inflation-adjusted guideline figures to reflect the increases in inflation between 2002 and 2009.

c) Potential compensation for personal injury

In *Sheriff v Klyne Tugs (Lowestoft) Ltd* [1999] IRLR 481, the Court of Appeal confirmed that damages for personal injury can be claimed as part of discriminatory compensation.

The majority of personal injury claims in this context will be concerned with psychiatric injury and medical evidence is likely to be needed to establish the cause of the injury.

There are two types of damages available for personal injury claims:

i) General damages - these are intended to cover such things as pain and suffering, and loss of amenity.

ii) Special damages - these are available for financial loss arising out of the injury, such as medical expenses and loss of earnings.

d) Aggravated and Punitive damages – this is awarded in exceptional circumstances only.

i) Aggravated damages – these are awarded in the most serious cases where the behaviour of the respondent has aggravated the claimant's injury and are designed to compensate the claimant for injury and not to punish the respondent. They can be awarded where the respondent has acted in a "high-handed, malicious, insulting or oppressive manner" (*Broome v Cassell & Co Ltd* [1972] AC 1027 (HL)). The tribunal will focus on the aggravating effect of the respondent's behaviour /conduct on the claimant's injury to feelings.

Examples of employers' actions which could lead to aggravated damages being awarded are:

- Attempting to cover up or trivialise the wrong-doing;
- The manner of conducting internal procedures, including failure to investigate complaints or take them seriously;
- Promoting or otherwise rewarding the perpetrators of the discrimination; and
- Using the claimant as a scapegoat.

In *British Telecommunications PLC v Reid* [2004] IRLR 327, the Court of Appeal upheld a tribunal's decision to award an employee aggravated damages of £2,000, in addition to an injury to feelings award of £6,000, where the employee who had discriminated against the claimant went unpunished, remained in post and was subsequently promoted above the claimant.

ii) Punitive /Exemplary damages – these are awarded by a tribunal to punish the respondent but are only available in extremely limited cases, where the compensation itself is insufficient punishment and the respondent's conduct is either oppressive, arbitrary or unconstitutional action by servants of the government, or calculated to make a profit which could exceed the compensation otherwise payable to the claimant.

By way of example, the median compensation awarded in discrimination claims is between £5-6,500; age discrimination claims £12,697; and the highest award in a sex discrimination claim between 2011 and 2012 was £289,167.

However, in my practical experience the most frequent area that I am asked to advice on is in relation to disability and age discrimination, as well as maternity but to a lesser extent.

Case law update, level of compensation

Michalak v Mid- Yorkshire Hospitals NHS Trust and others ET/1810815/2008

The brief facts of this case are as follows:

- Polish obstetrician,
- maternity leave in 2003,
- concerted campaign to get rid of her by way of unfounded complaints /allegations against her,
- led to suspension for prolonged period.

The Tribunal awarded the Claimant a sum of £7180 which incorporated a basic award for unfair dismissal and an amount for loss of statutory rights, and an award for unlawful race and sex discrimination by the four respondents (held to be jointly and severally liable) which amounted to £**4,452,206.60,** this included an award for loss of earnings and pension up the age of 68 years of age (the Claimant was aged 51 at the time of the hearing). This is the highest award yet for workplace discrimination.

As can be seen, discrimination cases can be extremely costly, not only in terms of the potential amount of unlimited compensation an employee could be awarded, but also the legal costs incurred in defending any claim, the management time that will be required and the serious damage that can be done to a businesses' workforce moral and also its external reputation.

4. Types of Discrimination

Simply by way of a reminder, the various types of discrimination covered by the Equality Act are listed below. However, as most of you will be aware of these, I will focus on recent case law which relates to various different 'protected characteristics'.

- Direct discrimination
- Indirect discrimination
- Harassment
- Victimisation
- Discrimination arising from disability
- Failure to make reasonable adjustments (disability only)

5. Application & Selection

As a starting point, employers should be aware that the Equality Act applies to them from the beginning of a recruitment process in terms of the application and selection of an employee.

Employers should be objective in considering job applications and adopt a standard and non-discriminatory approach to this task to avoid falling into a trap of discriminating in the initial stages of a workplace relationship.

Some tips to ensure this include: any individuals conducting a shortlisting exercise not being able to view the candidates' personal details; and a fair and objective set of selection criteria should be adopted as far as possible.

It is worth noting that a person cannot succeed in a claim for discrimination if they had no intention of applying for a job, or taking the job if they did apply. This measure was designed to put off opportunist claimants and serial litigants.

6. Case law update – Unsuccessful job applicants

Meister v Speech Design Carrier Systems GmbH C-415/10 ECJ

- This case considers whether an unsuccessful job applicant can get disclosure of information on whether an employer engaged another individual at the end of a recruitment process.

- The claimant was a Russian National who applied for a post as a Software Developer with the Respondent. Her application for the job was rejected without an interview. The claimant brought claims for discrimination on the grounds of sex, age and ethnic origin and sought disclosure of the respondent's files to show that she was more qualified than the individual who was appointed and thereby proving the discrimination. However, it was not disputed that her qualifications met the requirements of the job but the Court of Justice of the European Union held that there was no right entitlement to access another individual's file.

- However, it is worth pointing out that this judgment was fudged in that the CJEU said that refusing disclosure of such documents must not compromise the objectives of the directives otherwise it could add to a presumption of direct or indirect discrimination.

In reality, therefore, it is more advisable to disclose such information in order to avoid the assumption that an employer has something to hide. However, in doing so it may be worth considering redacting documents from a confidentiality point of view before disclosing to avoid breaching any other individuals' rights.

7. Case law update – Protected characteristic: marital status

Hawkins v Atex Group UKEAT/0302/11/LA

- The claimant was employed for less than a year by a company which her husband managed. As the result of a policy being introduced which prohibited the employment of close relatives, the claimant and her daughter were dismissed.

- The EAT found that there was no discrimination because the rule or criterion applied by the employer was no concerned with married women i.e. the policy and decision were not motivated by the fact the claimant was married to a manager, but that, in the EAT's view, it was driven by the close relationship they enjoyed not because of her marital status.

Conflicts with….

Dunn v Institute of Cemetery and Crematorium Management UKEAT/2011/0531

The EAT's ruling in the above case seems to depart from the rationale established in this case, whereby it was considered that a detriment arising from being married to a specific person (rather

than simply by being married) could found a marital discrimination claim. For example, where a husband is dismissed from his job and as a result his wife is also dismissed where she was employed for tax purposes, the fact that she was married to that particular individual would allow her to bring a claim for marital discrimination.

However, the EAT in ***Hawkins*** suggested that this view was incorrect.

8. Case law update – Protected characteristic: age

In terms of age discrimination, the issues surrounding this particular 'characteristic' have been going on for many years pre-Equality Act however, many of the principles established under old legislation will still be relevant today.

Seldon v Clarkson Wright & Jakes 2012] UKSC 16 SC

- Mr Seldon joined the solicitors' practice in 1971 and became a partner the next year. The partnership's policy in retirement stipulated that employees retire on 31st December after they have reached the age of 65, which meant Mr Seldon was due to retire on 31st December 2006. Mr Seldon was forced to retire by the partnership, against his wishes, and subsequently brought proceedings to the Employment Tribunal.
- The partnership argued that their retirement of the claimant was not age discrimination as the decision was objectively justified as a proportionate means of achieving its legitimate aims including succession, workforce planning and maintaining employee dignity. This argument by the respondent was successful at the Employment Tribunal.

Mr Seldon appealed unsuccessfully to the Employment Appeal Tribunal and the Court of Appeal.

Supreme court

- On Appeal to the Supreme Court it was held, dismissing Mr Seldon's appeal, that the test to justify direct age discrimination is narrower than the test to justify indirect discrimination and that employers must show that the legitimate aim they argue must be capable of being a public interest aim rather than simply an individual business need to improve competitiveness or reduce costs, for example.

The outcome of this is that the following legitimate aims were held to be acceptable by the Supreme Court and should be borne in mind by employers (albeit that the automatic retirement age referred to here is no longer in force):

i) Intergenerational fairness – by this the court was referring to the prevention of job blocking and the facilitation of workforce planning so that there was a realistic expectation of when vacancies would arise; and
ii) Dignity – i.e. avoiding the need for an employer to dismiss an older employee of grounds of incapacity or poor performance which fosters a supportive work culture and avoids humiliation.

Supreme Court's decision

- The Supreme Court accepted that the objective justifications put forward by the respondent were legitimate aims on the basis of the guidance outlined above, however it then referred the

case back to the Employment Tribunal to assess whether they were a proportionate way of achieving these aims.

Proportionality –see also the case of *Homer v Police National Legal database [2012] UKSC,* this case involved an introduction of a policy that required a law degree for promotion above a certain level. Mr Homer was 62 and argued that he would have reached retirement age by the time he could realistically achieve a part time law degree. It was found that this was discriminatory on grounds of age as it was not proportionate to require a law degree. The Supreme Court said it would look at aspects of whether a decision is appropriate and necessary separately and consider whether less discriminatory measures would achieve the aim. In this case high experience could have been considered as equivalent.

Age…. Myth or Fact?

1. Staff turnover levels are higher in older employees – myth, opposite is true

2. Older employees have fewer accidents - fact

3. Older employees have lower levels of short-term sickness - fact

4. Worker productivity declines once an employee reaches 65 – myth - research shows that older worker productivity does not usually decline, at least up to the age of 70, where these workers have received the same level of training as younger colleagues.

5. Younger workers are more successful in training than older workers – myth

6. Older workers tend to block opportunities for younger workers – myth in larger organisations (normally). More likely in small organisations operating on fixed budgets.

9. Case law update – Protected characteristic: pregnancy

The two cases referred to below demonstrate some important points in terms of disability on the grounds of pregnancy, however the cases are both awaiting judgement and so they are limited in their impact at present.

RKA v Secretary of State for Work and Pensions

- Due to a medical condition meaning the claimant could not naturally conceive a child, she and her husband transferred embryos created via IVF to a surrogate and their son was born in January 2012.
- On seeking confirmation of leave RKA was informed she was not entitled to statutory paid leave to care for her new-born child but was offered 52 weeks unpaid leave. When she contacted her employer in May 2012 to discuss returning to work RKA was advised that she was at risk of redundancy as unpaid leave did not qualify as 'protected leave' and so she did not gain the added protection afforded to women on maternity /adoption leave during the redundancy process. She was made redundant in July 2012 and has been unable to return to work.
- When RKA queried this treatment with Iain Duncan Smith MP, the Department of Work & Pensions responded by saying that the benefits referred to were related to: "*time off in the later stages of pregnancy and [to] prepare for, and recover from, childbirth in the interests of health and that of their baby*" which did not apply to the claimant. RKA went on to query how this could apply to adoption leave, given in that circumstance the mother had not been

pregnant or given birth but it appears no substantive response was received other than to advice that the outcome of government consultation would be forthcoming. However, the bill on this subject was not passed and so an outcome of the claim under the Human Rights Act 1998 is awaited.

Warby v Wunda Group plc.

- The employer and claimant met in January 2010 to discuss a disagreement between the two about the terms of her employment and wages. During this meeting both parties formed the view that the other was lying and a further march was held in March 2010. At that meeting the claimant asserted that her wages were being changed to her detriment because she was pregnant. The employer then accused the employee of lying about a miscarriage she had suffered some time earlier. The employee brought a claim in the Employment Tribunal for direct discrimination and harassment on the grounds of her sex.

- The Tribunal found that by accusing the employee of lying about her pregnancy and miscarriage the employer had created an environment that would satisfy the definition of harassment contained within the Sex Discrimination Act 1975 (applicable at the time).

- However, the Tribunal further found that the reason for the employer's actions was that the employer considered it to be an example of the claimant's dishonest behaviour and accordingly dismissed the employee's claim as the action was not because of the claimant's pregnancy.

- The claimant appealed to the Employment Appeal Tribunal on the basis that the words used by the employer had been inherently discriminatory. However, it was held on dismissal that the context in which words were said was central and that the words referred to her, whilst relating to her pregnancy were in the context of her dishonesty and so were not discriminatory.

The appeal on this case is due to be concluded this week.

Associative Discrimination

Kulikaoskas v Macduff Shellfish and Duff [2011] ICR 48

- The claimant in this instance was dismissed after 1 month of employment and he alleges this was due to his partner's pregnancy.

- The claimant advised the management that his partner was pregnant following a query being made of him as to why he was assisting her with heavy lifting in the factory. He therefore claims he was dismissed because of his association with his partner, who has brought a separate claim on the basis that she was dismissed by reason of her pregnancy.

- The claimant's representative argued that associative discrimination does apply where one person suffers less favourable treatment because of the pregnancy of another person. However, the Employment Tribunal (and also the Employment Appeal Tribunal) found that no relevant claim for associative discrimination existed in these circumstances and dismissed the claimant's case declining to refer the matter to the European Court of Justice.

- Mr Kulikauskas appealed to the Inner House of the Court of Session who have referred a number of points to the ECJ.

Whilst this case was also brought under the Sex Discrimination Act 1975, the commentary in terms of associative discrimination is likely to apply and a similar result would still be reached today under the Equality Act.

10. Dismissal, Redundancy & Maternity Leave

Turning to women on maternity leave, this is a very sensitive issue and one that crops up regularly in practice, therefore I have set out some key points to consider when dealing with a situation in which a female member of staff is on maternity leave during a redundancy process.

- Ensure women on maternity leave are not excluded from any on going redundancy process if they would have been affected if they had, but for their maternity leave, been at work. In order to achieve this it is pivotal to be certain that these women:
    - Are always informed of developments; and
    - Form part of any necessary consultation process.

- When coming to score pregnant women in a redundancy process caution should be exercised. They should only be treated more favourably than male colleagues to the extent that this is reasonably necessary to remove the disadvantage caused by their condition, not to treat them so favourably that it amounts to direct discrimination of the male colleague.

    - For example if a woman on maternity leave is given an inflated maximum score for one of the selection criteria and a man is given his actual score, this would amount to direct discrimination against the man. The inflation exercise was not a proportionate way of removing the disadvantage caused by the maternity leave and a less discriminatory alternative should have been considered in reducing the disadvantage caused i.e. considering measuring the female's actual performance in the period before her maternity leave (*de Belin v Eversheds [2011] IRLR 448*) .

- As regards the duty on an employer to consider suitable alternative employment, where a woman is on ordinary /additional maternity leave and is at risk of redundancy, she must be offered *any* suitable alternative vacancy in preference to other employees.

  If she is not offered this, she can claim automatic unfair dismissal and may have a claim for discrimination at Employment Tribunal

11. ACAS Guidance, Pregnancy & Redundancy

ACAS has published detailed guidance on dealing with and managing redundancy situations for those on maternity leave as recently as August 2012. This guidance refers to, in a step-by-step format, how to deal with each element including consultation and selection.

Myth or fact?

a) Pregnant women and women on maternity leave cannot be made redundant?

Myth – In a genuine redundancy situation where there is no suitable alternative work available, then the individual can be made redundant provided the reason is not their pregnancy.

b) If a pregnant woman is made redundant, her employer does not have to pay her maternity pay as well?

If the woman qualifies for statutory maternity pay and she is made redundant before she goes on maternity leave (but after the 15th week before the baby is due) then SMP will be due to her as well as a redundancy payment. However, if the woman is entitled to contractual pay then this would end when the contract does.

c) Does everyone have to go through the application process for a job after a reorganisation?

Myth – This is not always the case. In a redundancy situation, if suitable alternative employment is identified then this should be offered to employees on maternity leave without the need to go through the application process (as outlined above at (a)). If there is no suitable alternative employment, then the woman will be subject to the same application process for available jobs as all other employees.

d) If an employee is on maternity leave, an employer should not contact her about work related issues?

Myth – An employer is able to and should keep in touch with all employees, even those on maternity leave, where they are at risk of redundancy. As a practical point, it is good practice to arrange and agree with the employee before they go on maternity leave how and when this contact will take place i.e. by letter or by email and at certain time, or on particular days.

12. Case law update – Protected characteristic: disability

"Disability" is defined as a long term physical or mental impairment which has a substantial adverse effect on an individual's ability to do day to day activities.

Given the scope of disability and the large amount that can be said on it, including a variety of ways of dealing with and a discussion of reasonable adjustments, I propose to focus on recent case law which demonstrates key points.

Sussex Partnership NHS Foundation Trust v Norris UKEAT/0031/12

- The question of whether a life-long condition which made the sufferer more prone to having infections which, if not treated by medication, could lead to substantial and adverse effect on the individual's ability to perform day to day activities was considered in this recent case.

- The individual suffered from Selective IgA, an impairment which caused an increase in susceptibility to infection but it was considered that the increased rate of infection did not have the effect defined under the Equality Act as it was the infections causing the impact on ability to carry out day to day activities, not the condition itself. The conclusion was that the deficiency did not have the required effect itself, and so there was no disability.

X v Mid Sussex Citizens Advice Bureau [2011] IRLR 335

- The Claimant was an unpaid volunteer with the CAB who also suffered from HIV, which it was accepted was a disability for the purposes of the Disability Discrimination Act 1995. She was asked some time after completing the required training programme in 2006 to cease attending as a volunteer. She therefore claimed to the Employment Tribunal on the basis that she had been discriminated against because of her disability.

- However, both the Employment Tribunal and on appeal to the Employment Appeal Tribunal held that the claimant did not have a legally binding contract or a relevant 'work placement' with the CAB and therefore the protection from discrimination afforded in this legislation did not apply to her.

- On further appeal to the Court of Appeal ([2009] EWCA Civ 340) the claimant argued that her role as a volunteer fell within the definition of an 'occupation' under the European Framework Employment Directive and that consequently the DDA should be interpreted accordingly. The Court of Appeal set aside the Employment Tribunal's decision and referred the case to the Employment Appeal Tribunal to consider the scope of "occupation" as well as "work placement".

- **NB Update- the Supreme Court has this week upheld the Court of Appeal decision and found that volunteers do not fall within the scope of the definition of 'occupation'.**

13. Practical tips – disability

Should an employer disregard disability related sickness absence?

- An employer is not automatically obliged to disregard all disability related sickness absences. Before doing so, employers should think whether this would be a reasonable adjustment and whether it can be objectively justified.

    - For example, a woman has a recent diagnosis of type 1 diabetes (meaning she was insulin dependent) and has a number of short sickness absences whilst she learns to adapt. As a result of the diagnosis, her employer obtains a medical report from her GP who assesses that her diabetes should be under her control within a couple of months.

    - It would therefore reasonable to discount these short periods of disability related absence.

    - To discipline the individual for the sickness absence would be discrimination arising from a disability and would have to be objectively justified.

Should an employer extend contractual sick pay?

- Disabled employees on sick leave should be paid any contractual sick pay during their absence in the same way as non-disabled employees who are absent due to sickness.

- There is no automatic obligation on employers to pay sick pay beyond the expiry of this period.

- Employers may want to consider disregarding disability related absences and /or extending company sick pay as reasonable adjustments (despite case law stating this is not necessary), particularly where it is arguable that the employer has caused the sickness absence or the delay in returning to work by delaying /failing to make reasonable adjustments.

14. Case Law Update- Race

- *Hounga v Allen[2012] EWCA*

- Case involved a Nigerian national who was employed as an au pair without a work permit. She knew her own employment was unlawful.

- The Court of Appeal decided whether she could claim race discrimination, they decided they would be condoning illegality if they allowed her to do so and decided she could not pursue the claim.

- *Begraj v Heer Manak Solicitors*
- This case involved two employees of different caste.
- Caste is not a protected characteristic under the Equality Act at present although the Secretary of State has the power to add this. This case was brought under race/ religion protected characteristics.
- The two employees were a solicitor and a practice manager of a firm of solicitors. One was of the Jat caste (a higher caste) and one was dalit (known as 'untouchable'). They entered into a relationship and were subjected to increased workload, warned against marriage and a colleague made a toast at their wedding of "jat girls are going down the drain". He was sacked and she resigned and made a claim.
- This case was heard earlier in 2012 and a decision is awaited.

15. Case Law update, religion and belief

Redfearn v UK[2012] ECHR

- Party political membership is not currently covered under the religion and belief protected characteristic.
- In this case an employee who worked for SERCO working in transport for adults and children was dismissed due to his role as a BNP councillor. This was due to safety concerns arising from his risk of attracting attack.
- A case was bought to the European Court of Human rights which held that the UK has an obligation to provide protection against dismissal motivated by an employee's membership of a political party, notwithstanding the fact that the views of that party may be offensive. This could affect how tribunals are able to interpret the definition of philosophical beliefs going forward.

Eweida/ Chaplin v UK

- Combined cases of BA staff/ Nurse who wished to wear cross outside of clothing and were disciplined for doing so. Also linked with Ladele/Macfarlane cases which was registrar/ relate counsellor who refused to carry out duties which they saw as condoning homosexuality and were dismissed.

- Issue of Article 9 of the Human Rights Act, freedom to manifest religion. Argued that a manifestion of belief will only apply where it is an actual requirement of the religion and it was argued that to wear a cross is not a requirement of Christianity. Judgment awaited

16. Case Law update, Victimisation

- *University and College Union v Croad, UKEAT 2012*
- Is it unlawful victimisation for a trade union to refuse to fund litigation for discrimination where the employee has similar allegations against the Trade Union?
- Not in this case, the employee had complaints about disability discrimination against her employer and also raised allegations against the union.
- It was not victimisation to withdraw support as there was a conflict of the interest for the Union to continue to act and also, factually in this case the support had been withdrawn before the allegations were raised.

17. Case law update, Tribunal process

Dean v Dionissiou-Moussaoui [2011] EWCA

- Should a Tribunal award costs where 'scandalous and vexatious' claims are struck out at PHR for jurisdictional issues (e.g time limit missed)?

- Not necessarily if the claims are contested and the evidence is not tested.

Metropolitan Police v Shaw[2011] UKEAT

- Whistle blowing case but same principles would apply in a discrimination case.
- Held in this case that aggravated damages are part of injury to feelings award. They are not punitive and should only be awarded to the extent that aggravating features increase the impact on the employee's injury to feelings.
- Tribunals should consider:-
    - Manner the wrong was committed, was it high handed, malicious or oppressive?
    - Motive behind the behaviour
    - Subsequent conduct (e.g. not taking a complaint seriously)

18. Proposals for change

- Clearly this is a time of real change for employment law generally (as always!). Certain changes came into force in April 2012, including the two year service rule for bringing an unfair dismissal claim. This may well increase discrimination claims as claimants seek to find a way to circumvent the two year rule.

- Proposals have been introduced for fees being charged to bring a claim, it is likely there will be exceptions to these (e.g. if someone is on job seekers allowance) and also that it is likely to cost more to bring a complex discrimination claim than a simple unfair dismissal claim. See link to press release on fees;- http://www.justice.gov.uk/news/press-releases/moj/employment-tribunal-fees-set-to-encourage-mediation-and-arbitration

- Compromise agreements are likely to become settlement agreements, this is likely to include template forms although this is unlikely to amount to more than a name change in reality.

- See link to ACAS for a useful summary of forthcoming changes to employment law generally;- http://www.acas.org.uk/index.aspx?articleid=3909 , also for a more detailed analysis see http://www.bis.gov.uk/assets/biscore/employment-matters/docs/a/12-1155-analysis-measures-delivered-in-comparison-beecroft-report

- In relation to the Equality Act specifically the following changes have been proposed and are likely to come into force in Spring 2013:-

    - Abolition of the third party harassment provisions
    - Abolition of the Tribunal wider powers to make recommendations
    - Abolition of the questionnaire process

- David Cameron recently announced in a speech to CBI that Equality Impact Assessments would be abolished;- http://www.number10.gov.uk/news/speech-to-cbi/ , and http://www.bbc.co.uk/news/uk-politics-20400747

- The public sector equality is currently being reviewed by government with a report being due in Spring 2013….clearly the outcome of this report should be reviewed but it seems from David Cameron's speech that it is likely that a decision to abolish equality impact assessments could be approaching.

Liane Atkin, December 2012