



EMPLOYMENT NEWS HEADLINES

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In this issue we report on a couple of interesting cases where the higher courts have found no discrimination on the grounds of a protected characteristic. Although both cases are fact specific, they demonstrate that discrimination is not always as straight forward as it may initially appear.

NO DISCRIMINATION IN REFUSAL TO BAKE CAKE IN SUPPORT OF GAY MARRIAGE– LEE V ASHERS BAKING COMPANY LTD & ORS (SUPREME COURT)

This first case has been widely reported in the popular press. It concerns a bakery in Northern Ireland which was owned by Christians who disagreed with same sex marriage. Mr Lee, a gay man, ordered a cake requesting that the message “support gay marriage” be placed on the cake. The owners of Ashers bakery, although initially taking the order, later cancelled it and provided Mr Lee with a full refund due to their religious beliefs.

Mr Lee brought a claim for discrimination on the grounds of sexual orientation and political belief. The case was successful at County Court and the Court of Appeal however, the Supreme Court has now unanimously overturned the Court of Appeal’s decision finding no discrimination direct or associative in nature. It highlighted the following in reaching this conclusion:

- It found that the refusal to bake the cake was not due to Mr Lee’s actual or perceived sexual orientation but rather a profound disagreement with the message that had been requested;
- The refusal would have been to anyone who requested that message regardless of their sexual orientation. It was not against a particular person or group of people. Mr Lee was not, therefore, treated differently to anyone else based on any protected characteristic. There was no direct discrimination;
- The Court ruled there was no associative direct discrimination either as Mr Lee was not associated with a specific person or persons with the protected characteristic nor was he discriminated against *based* on that ground. Although the message related to sexual orientation it was not sufficient to satisfy the test. The Court did not go on to provide any definitive guidance on associative discrimination;
- On the issue of political belief, the Court found, based on Article 9 of the European Convention on Human Rights, that although Mr Lee could not be refused goods due to his sexual orientation or belief, the bakery owners could not be “obliged to supply a cake iced with a message with which they profoundly disagreed”.

The case shows that what may initially appear discriminatory may not always be. It is also an important reminder to businesses that the Equality Act 2010 applies in the provision of goods or services.

DELAY IN ILL-HEALTH RETIREMENT NOT DISCRIMINATION – DUNN V SECRETARY OF STATE FOR JUSTICE & ANOR (COURT OF APPEAL)

For any claim of discrimination to succeed it must be demonstrated that any detriment suffered was either directly or indirectly due to the protected characteristic of or associated with the claimant. In other words, there must be a causal link between the protected characteristic and the detrimental treatment.

In this case, Mr Dunn was a prison officer who suffered from a disability due to a heart condition, there was a lengthy delay to the process of his retirement on the grounds of ill health and as a result he brought a claim for disability discrimination. The Court of Appeal has reaffirmed the Employment Appeal Tribunal's findings summarised below:

- It found that Mr Dunn did suffer a lengthy, unfair and unreasonable delay to his ill-health retirement;
- However, on a review of the thinking and motivations of the decision makers, it concluded that this was primarily due to incompetence and inefficient procedural processes rather than Mr Dunn's disability or ill-health;
- Based on the specific facts of this case, it found there was no discrimination on the grounds of Mr Dunn's disability. There was an absence, on the facts, of the necessary causal link.

This case is a reminder that employers should always apply its processes and procedures in a fair and consistent manner.

ETHNICITY PAY REPORTING CONSULTATIONS PUBLISHED

Earlier this year the first cycle for larger employers with 250 or more employees to publish and comply with gender pay reporting obligations was completed. The Government has now published a consultation document to see if similar mandatory ethnicity pay reporting requirements should be introduced. This has come about due to an audit and review last year which revealed ethnic pay disparities. The consultations highlight a broadly similar approach to gender pay reporting, specifically, issues for consideration are:

- Method of reporting data e.g., comparing average hourly earnings of ethnic minority employees as a percentage of that of white employees;
- Breakdown of ethnic groups or retain ethnicity as a single group and how this classification should be determined;
- Breakdown of ethnicity pay information within £20,000 pay bands or pay quartiles;
- The size of the employer that should have a mandatory reporting obligation whether that is the Government favoured 250 employees or smaller or larger numbers;

- The requirement to publish contextual data to explain the findings and also whether an action plan to narrow the disparities should also be reported;
- Types of Government support for employers who will find these obligations challenging and whether implementation should be phased.

The consultation will close on 11 January 2019.

NEW GUIDANCE ON REFERENCES PUBLISHED BY ACAS

Unless the employment is in a regulated industry, such as financial services, the general rule is there is no legal obligation for an employer to provide a reference to a former employee. That said, obtaining references is an established and integral part of any recruitment process. The current trend for employers is to keep a reference request from a new prospective employer factual with details such as, name, job title or description, start date and end date.

Acas has now published a useful guide that provides clarity around the do's and don't of providing and requesting employment references. Some highlights are:

- When requesting references, employers should always obtain permission from the job applicant to approach a former employer;
- A job offer should be made *conditional* on a satisfactory reference. This enables the employer to withdraw the offer if the reference is not satisfactory without the need for giving notice. It is important, however, to remember that job applicants have the right to request access to interview and recruitment data and this should be considered carefully before a decision is taken;
- Where employers provide something more than the standard basic data identified above, they should ensure the reference is accurate, fair and consistently applied. This is particularly relevant where a former employee may be protected under law and a bad reference or even a refusal to give a reference may be construed as a "detriment" warranting a claim.
- A standard policy for giving and receiving references is recommended.

Details to the new guidance can be found here: <http://www.acas.org.uk/index.aspx?articleid=6584>

PARENTAL BEREAVEMENT ACT RECEIVES ROYAL ASSENT

Regular readers of Maxlaw Global news will remember the proposal to formalise parental bereavement leave and pay started out as a Private Members Bill on which we reported in Issue 12 at the end of last year. On 13th September 2018 the *Parental Bereavement (Leave and Pay) Act 2018* received Royal Assent and it is expected that detailed regulations, yet to be published, will bring the act into force in April 2020. We can now confirm some of the highlights:

- The right to parental bereavement leave will be an immediate day one right for all employees who suffer the death of a child under 18 years of age or stillborn after 24 weeks of pregnancy;
- The leave entitlement will be two weeks leave;

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- How the leave can be taken (i.e., days or blocks of time) is yet to be determined;
- The leave must be taken within 56 days from the child's death, the notification rights surrounding leave will also be set out in the regulations;
- The leave is applicable for each child if there has been the death of more than one child;
- Subject to certain eligibility criteria, there is an entitlement to statutory bereavement pay.

Under the Employment Rights Act 1996, employees do have an existing right to 'reasonable' unpaid time off to deal with emergencies including deaths and some employers do have a compassionate leave policy already in place. This, however, is an entirely new statutory right for parents and employers should start to review any existing policies to ensure they are ready for this change.

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