IER Equalities Conference

Equality and the law – recent cases and precedents Title

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Introduction

The long awaited Equality Act 2010 finally came into force on 1 October 2010. Its main purpose was to harmonise and improve anti discrimination law. The Government Equalities Office ("GEO") put it like this:

> "The Equality Act provides a new cross cutting legislative framework to protect the rights of individuals and advance equality of opportunity for all; to update, simplify and strengthen the previous legislation; and to deliver a simple modern and accessible framework of discrimination law which protects unfair treatment and promotes a fair and more equal society."

However, that commitment was not all it seemed. Immediately below this paragraph is another which makes clear "the key priorities of the Coalition Government is to support economic recovery and remove unnecessary burdens on business." Within weeks of the Act coming into force the Government reneged on its commitment to equality. By backtracking on the Labour Government's legislation the ConDem Government clearly showed that it saw equality as a burden on business.

By 17 November 2010 Theresa May, Home Secretary and Minister for women and Equalities announced that the Government would not be implementing the provision[1] which would require public bodies to have due regard to the inequalities of outcome which result from socio economic disadvantage when making decisions of a strategic nature.

This decision was quickly followed by a further announcement on 2 December 2010 - the Government would not be implementing the provisions[2] which would require employers with 250 or more employees to report on the gender pay gap.

Basic drafting errors also appeared which amongst others made it unclear as to whether or not employees would be protected from victimisation after they had left employment. Although the GEO has stated that this was not the intention and that victimisation does apply to those who have left employment amendments will have to be made to the legislation all at great cost. Meanwhile further announcements reneging on commitments to equality continued apace.

In particular, the Government announced in the new year that despite having just drafted, consulted and published new regulations implementing the specific public sector equality duties to support the general public sector equality duty, they were to be

[1] S1 Equality Act 2010

[2] S. 78 of the Equality Act 2011

redrafted less than a month before they were due to come into force on 17 March 2011. This was done even though the Equality and Human Rights Commission ("ECHR") had no doubt spent a great deal of money drafting five sets of guidance on how these specific duties – now confined to the dustbin - would come into force.

This was quickly followed by a further announcement on 23 March 2011 that the provision on dual discrimination would not be implemented and consultation to remove the provision on third part harassment would begin.

It is clear then that equality is not safe in this Con Dem Government's hands. So we must look to the courts for refuge for equality.

As the legislation was only implemented eight months ago it still remains to be seen as to how the Tribunals will interpret the simplified and expanded provisions of the Equality Act and how far old case law will be relied on when determining new points.

This paper focus's on the recent case law which provides some indication as to how the courts may interpret the provisions under the Equality Act. In particular, it considers the case on :

- Associative Discrimination,
- Direct Discrimination and the comparator test in cases of disability
- Perception Discrimination,
- Indirect discrimination and the justification defence,
- Third party harassment; and
- Liability for others.

Associative Discrimination

Just to recap the Equality Act simplified the provision on direct discrimination.

Section 13 provides that a person is subject to direct discrimination if they are treated less favourably "**because of**" a protected characteristic. The protected characteristics being age, disability, gender reassignment, marriage and civil partnership, pregnancy and maternity, race ,religion or belief sex and sexual orientation.

You may recall that this clarification in the law followed the decision in *EBR Attridge Law LLP and ors –v- Coleman UK EAT 0071/09* where the EAT upheld the Tribunal's finding that an employee with a disabled son was subject to direct discrimination and harassment **because of her association** with her disabled son. This followed the reference to the Court of Justice of the European Union[3] which held that the direct discrimination and harassment provisions under the then Disability Discrimination Act 1995 should be interpreted in light of the European Equal Treatment Framework Directive[4] as applying not only to those who have a disability but also to those who are associated with a person with a disability.

Recent case law has indicated that there might be limits as to how this will apply to other protected characteristics. In particular, in the case of *Kulikaoskas v MacDuff Shellfish and anor UKEAT0062/09*, the EAT considered whether a claim for associative discrimination could be brought by the partner of a pregnant woman. In this case the male partner of a pregnant worker (who both worked at MacDuff Shellfish), claimed that he was dismissed because he had helped her lift heavy objects and that this amounted to associative pregnancy discrimination. However, the EAT considered that Mr Kulikaoskas' case was different from that of Ms Coleman. In particular, the EAT held that the claim he had brought was under s. 3A of the Sex Discrimination Act 1976 which provides for protection from discrimination on the ground of a woman's pregnancy. Furthermore any interpretation of EU law fell to be considered under the Pregnant Worker's Directive[5] and the Recast Directive[6] and not the Framework Directive (which does not cover sex discrimination) wand specifically limits protection to a woman, in relation to pregnancy discrimination. The EAT did consider whether that would mean that a lesbian partner would be protected and found that she would not . Therefore male partners would not be covered either.

[3] Formerly known as the European Court of Justice which name changed following the treaty of Lisbon

[4] Directive No. 2000/78

[5] Directive No. 92/85

[6] Directive No. 2006/54

In light of this decision it seems that a man would not succeed in claiming associative pregnancy discrimination under s. 18 of the Equality Act. S, 18 provides protection for "a woman" who is treated unfavourably because of pregnancy. However, a man in the same position as Mr Kulikaoskas, may be able to claim associative direct discrimination on the protected characteristic of sex under s 13 of the Act. Although pregnant women are prevented from bringing a claim of direct sex discrimination under s. 13 during the protected period[7] , there is no similar restriction for those associated with pregnant women in the direct discrimination provisions. As such a man may be able to claim that because of his association with a pregnant woman he has been subject to either associative pregnancy discrimination under s 13 of the Equality Act 2010 or associative sex discrimination. The ECHR Statutory Employment Code of Practice which Tribunals should take into account when determining claims in the Employment Tribunal states at paragraph 8.16 that , "*a worker treated less favourably because of association with a pregnant woman, or a woman who has recently given birth, may have a claim for sex discrimination*" . This seems to suggest that a claim can only be brought as an associative sex discrimination claim. Until the law is clarified claims like those of Mr Kulikaoskas should be brought as associative sex discrimination and in the alternative associative pregnancy discrimination under s. 13 of the Equality Act.

Having said this whether a man will succeed in a claim of associative sex discrimination will depend on how a person who was not associated with a pregnant woman had been or in the case of a hypothetical comparator, would have been, treated in not materially different circumstances. So in the case of Mr Kulikaoskas if a man doing the same job as Mr Kulikaoskas was or would have been dismissed for lifting heavy items because it was not his job, a claim for associative direct discrimination would not succeed.

The issue of comparators is likely to continue to cause problems for those with a disability who bring claims of direct discrimination or perceived discrimination under the Equality Act.

Direct discrimination "because of" the protected characteristic.

Many commentators raised concerns about the Government's decision to retain the need for a worker bringing a claim of direct discrimination to have to compare how they had been treated either with an actual or hypothetical comparator in not materially different circumstances[8].

Two recent case have shown the problems that are likely to continue to arise particularly in the case of direct discrimination and perception discrimination because of disability.

[7] The protected period is from when the pregnancy begins until the end of maternity leave.

[8] See s. 23 of the Equality Act 2010

In the case of *Aitken v Commissioner of Police of the Metropolis UKEAT/0226/09* the EAT rejected an argument that bad behaviour should be excluded from the characteristic of the comparator on the grounds that the bad behaviour was a symptom of the disability. In this case Mr Aitken had obsessive compulsive disorder ("OCD") and brought a claim of direct disability discrimination after he was disciplined for aggressive and threatening behaviour at a Christmas party and subsequently recommended for medical retirement. Mr Aitken argued that the employer had made a stereotypical assumption about his disability and that it was not appropriate to compare him with someone who was equally aggressive in the same circumstances. However, Judge Slade rejected this argument on the basis that when making a comparison for the purpose of ascertaining whether a disabled person has been treated less favourably on grounds of disability the disability is to be removed from the equation. Although the aggressive behaviour was related to his disability the aggressive behaviour was not his actual disability and therefore should be included as a characteristic of the comparator. On that basis the EAT agreed with the Employment Tribunal that a person who did not have a disability but who had acted in the way Mr Aitken had at the Christmas party would not have been treated any differently.

However, this approach to the comparator in a disability discrimination case is very different to that taken by the Court of Appeal in the case of *Aylott v Stockton-on Tees Borough Council [2010] EWCA Civ 910 CA*. This case concerned a worker who had bipolar disorder. Mr Aylott lodged grievances against his colleagues for bullying behaviour which were not upheld. He then had a period of sickness absence following which he returned to work in a different post and was subject to performance monitoring. Following a heated discussion on his return to work he was subsequently off sick again and finally dismissed. He brought a claim of direct disability discrimination. The Tribunal upheld Mr Aylott's complaints of direct discrimination. In doing so they considered that someone with bipolar with the same level of sickness absence would not have been treated in the same way as Mr Aylott. They also found that actions taken by the employer were based on stereotypical assumptions. The Council appealed. In upholding the appeal the EAT considered the issue of the comparator and held that the appropriate comparator was someone who did not have bipolar but who was in a different job and subject to performance monitoring. Mr Aylott appealed. The Court of Appeal approached the issue of comparator and whether the treatment was on the ground of disability as one question namely, "Did the claimant, on the proscribed ground, receive less favourable treatment than others?" In answering this question the Court held that the answer to the question lay in the Council's reason for dismissing him. As the Tribunal had identified that the reason for his dismissal was the stereotypical view of Mr Aylott's disability this was enough to found a claim of direct discrimination and the Court overturned the finding of the EAT. In coming to this decision Mummery LJ commented that " there are dangers in attaching too much importance to the construct [of a hypothetical comparator]" as a separate issue".

The Court fell short of doing away with the comparator test altogether but it follows the same line of reasoning adopted by Lord Nicholls in *Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] IRLR 285*[9] and again by Mr Justice Elias in the EAT case of *London Borough of Islington v Ladele [2009] IRLR 154.* Clearly given that *Aylott* is higher authority, it is to be hoped that this same approach is adopted in cases under the Equality Act when determining the question as to whether some is treated less favourably because of the protected characteristic of disability. Whether the Tribunals will do so remains to be seen. In the meantime, union representatives can use this case to challenge employers who adopt stereotypical views of workers with disabilities.

Perception Discrimination

These cases also raise the issue as to how Tribunals will approach the issue of perception discrimination where the prohibited characteristic is disability. In the now well known case of *English v Thomas Sanderson Blinds [2009] IRLR 206* the Court of Appeal held that a claim could be brought under the then Employment Equality (Sexual Orientation) Regulations 2003 where a man was subject to homophobic banter and being treated as if he were gay even though he was not. In doing so the Court effectively held that it is not the Claimant's sexual orientation which is important but the reason for the treatment.

However, two recent EAT decisions indicate that Tribunals may not follow the same approach in claims where the protected characteristic is disability. In the case of *Aitken v Commissioner of Police of the Metropolis UKEAT/0226/09* referred to above, in addition, to the issue of comparators, Mr Aitken argued that the employer treated him less favourably because of a perception that his disability involved a threat to others. The EAT rejected that argument on the basis that the Tribunal found that the employer acted as they did due to the seriousness of the incident at the Christmas party and a fear of further similar actions by Mr Aitken. The EAT having rejected an argument that the employer acted on the basis of a perception of Mr Aitken's disability of OCD further considered that the decision of *Coleman* (above) did not apply to a claim of perception discrimination and so dismissed that claim.

In *J v DLA Piper UKEAT 0263/09,* the Claimant in that case brought a claim of direct discrimination when the DLA withdrew a job offer after she had disclosed to the HR manager that she had a history of depression. The main issue in J's case was as to whether she had a disability as defined under the then Disability Discrimination Act 1995.

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[9] 'employment tribunals may sometimes be able to avoid arid and confusing disputes about the identification of the appropriate comparator by concentrating primarily on why the claimant was treated as she was' (paragraph 10).

The Tribunal struck out her claim on the basis that she was not disabled as defined. J appealed. In addition to an argument that the Tribunal had erred in law by not finding that she had a disability, J also argued that the DLA had discriminated against her because they held a perception she was disabled. The EAT refused to consider the argument as it was not raised at the Tribunal and therefore could not be raised for the first time on appeal. However, the EAT took a similar view to the EAT in *Aitken* holding that the decision in Coleman did not necessarily extend to cover perception discrimination and that would be a matter for the Court of Justice of the European Union to determine. The EAT declined to refer the matter to the European Court in this case.

It seems that what troubled the EAT in *J v DLA Piper* is as to whether or not a Tribunal has to be satisfied that the person holding the perception of disability has to make a determination that the disability they perceive the person to have satisfies the definition of disability. In plainer terms does the Tribunal have to find in a claim for perception discrimination that the perceived disability is a disability as defined in s 6 of the Equality Act 2011. That is a question which is still to be determined.

Given these difficulties with direct discrimination and perception discrimination because of disability union representatives should consider the new ground of discrimination, namely discrimination arising from disability. Under s. 15 of the Equality Act 2010, a disabled worker may bring a claim in an Employment Tribunal if they are treated unfavourably because of something arising in consequence of their disability and the employer cannot show that the unfavourable treatment is a proportionate means of achieving a legitimate aim. There is no need for a disabled person to show how a person without a disability has been or would have been treated in not materially different circumstances.

Having said this a claim on this ground can only be brought by a disabled person (and not someone associated with a disabled person). Furthermore, an employer can defend a claim either if they did not know or could not reasonably have been expected to know that the worker had a disability and/or they can show that the unfavourable treatment was justified. This provision does mean that an employee who is dismissed on grounds of capability due to absence related to their disability could argue that the dismissal amounted to discrimination arising from disability. The issue would then be as to whether the employer could justify the dismissal. We look at the case law on justification in relation to indirect discrimination below.

Indirect Discrimination

The principles of indirect discrimination are harmonised across the protected grounds and now apply to disability discrimination and gender reassignment.

The test is set out in s 19 which provides that indirect discrimination occurs where a provision, criterion or practice (commonly referred to as a PCP) is applied equally to all workers, but which:

i) puts or would put those who share the protected characteristic at a particular disadvantage when compared with those who do not share the protected characteristic;

ii) actually puts the worker with the protected characteristic at a disadvantage; and

iii) where the employer cannot show that the PCP is a proportionate means of achieving a legitimate aim.

The most common example of indirect discrimination is where a woman who used to work full time returns from maternity leave and has her request to work part time, on her return, refused. In that case it is generally argued that by refusing her request;

i) the employer has applied a PCP of working full time which puts women at a particular disadvantage than men because women are the main carers for children and so less likely to be able to comply with the PCP of full time working than men who work full time;

ii) she is actually put at a disadvantage (e.g. because she won't be able to return to work unless she can work part time due to the fact that there is no other childcare available) and;

iii) which the employer cannot justify (say in a case where the employer operates flexible working).

As can be seen whether women are put at a particular disadvantage depends on being able to compare herself with the pool of men. The pool is defined by the PCP. In the above example the pool is those men who can work full time.

However a recent case has challenged this approach. *Hacking and Paterson and anor v Wilson UKEAT0054/09* is a case concerning a property manager who, following her return to work from maternity leave, made a formal request for flexible working. The EAT took the view that the PCP was the benefit namely the request to work flexibly in order to accommodate childcare arrangements. As such, the pool for comparison was not all those property managers could work full time but all those property managers who at the relevant time wanted flexible working to be available. As the Tribunal had in the EAT's decision applied the wrong pool the case was remitted back to the Employment Tribunal to determine whether on this pool Ms Wilson would have been put at a particular disadvantage. It is likely that by narrowing the pool in this way it is going to be harder

for Mrs Wilson to show that women would be put at a particular disadvantage compared to men who request flexible working and have their request refused. In particular, men who share childcare responsibilities may be able to show that a refusal of a request for flexible working puts them at a similar disadvantage. Having said this, the approach taken by Lady Smith focusing on the request to work flexibly as a benefit rather than the requirement to work full time as an obligation and so narrowing the pool for comparison is seriously questionable. Union representatives should be prepared to challenge employers who rely on this argument pointing out that it is fundamentally flawed and not widely accepted as the correct approach.

Dual Discrimination

As stated in the introduction to this paper, the ConDem Government announced that it will not be implementing the dual discrimination provision set out in s.14 of the Equality Act. This is the provision that would have enabled workers to have brought claims on combined grounds such as a black woman being able to claim the combined effect of sex and race. However there is some positive case law on this point.

In the case of *Ministry of Defence –v- DeBique UKEAT/0048/09* the EAT held that a single mother from St Vincent and the Grenadines was indirectly discriminated against by the army when she was unable to comply with a requirement to work 24/7 (the sex discrimination PCP) and because her sister was not allowed to stay in service accommodation to help her look after her child because she was a foreign national (the race PCP). In particular, the EAT upheld the Tribunals finding that she had been discriminated against on the combined grounds of indirect race and sex discrimination based upon the combined effects of the requirement to work 24/7 and the provision that foreign and common wealth soldiers were restricted from having their foreign relations live with them in army barracks to look after children. Although previous case law[10] has held that in a case where there is discrimination on a number of grounds each ground has to be considered separately there is some scope for arguing a more flexible approach to comparators should be taken where the issue of less favourable treatment is considered first. As such this case can be used to argue a claim of dual discrimination under the indirect discrimination provisions even though it is not in the Equality Act[11].

Having said this union representatives should still gather evidence as to how someone would have been treated in respect of each ground of discrimination particularly in direct discrimination cases.

[10] *Bahl –v- Law Society & ors [2004] IRLR 799*

[11] The Government's decision not to implement the dual discrimination provisions only applied in relation to direct discrimination

Justification defence

The sting in the tail in indirect discrimination cases is that employers can argue that the discrimination is justified.

In order to establish a justification defence an employer has to be able to show that the unfavourable treatment in a claim of indirect discrimination is a proportionate means of achieving a legitimate aim. It is established in European case law that budgetary considerations do not in themselves constitute a legitimate aim justifying indirect discrimination[12]. Similarly, in *Cross v British Airways plc [2005] IRLR 423*, the EAT held that an employer seeking to justify a discriminatory provision, criterion or practice under the Sex Discrimination Act 1975 cannot rely solely on considerations of cost. However, the EAT did consider that cost may be allowed where it forms one of a combination of reasons. This has become known as the 'costs plus' approach.

In a recent case *Woodcock v Cumbria Primary Care Trust UKEAT/0489/09* the President of the EAT considered the issue of cost as a justification defence in a case concerning a claim for age discrimination. In this case Mr Woodcock was given notice of dismissal for redundancy before a redundancy consultation meeting so that the 12 months notice would take effect before his 49th birthday. The reason for this was that if notice was given after Mr Woodcock turned 49 he would still be employed after his 50th birthday and so would be entitled to an enhanced redundancy package. Mr Woodcock argued that the Tribunal was wrong to find that his claim for age discrimination was justified on grounds of cost alone on the basis of the decision in *Cross* (above). In dismissing Mr Woodcock's appeal the EAT commented that that considerations of cost can by themselves constitute sufficient justification without the need for some other aim alongside cost[13]. Although they determined that it was not necessary for them to consider the point in Mr Woodcock's case finding as they did that the decision to give notice early was a proportionate means of achieving a legitimate aim of preventing Mr Woodcock from receiving a windfall. Clearly the comments of the EAT are worrying especially given that employer's may seek to rely on cost as a justification defence to dismissing older employees now that the default retirement age as been abolished. However, it must be remembered that the

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[12] *Kutz-Bauer v Freie und Hansestadt Hamburg [2003] IRLR 368*, *Steinicke v Bundesanstalt fur Arbeit [2003] IRLR 892* and *Schonheit v Stadt Frankfurt am Main [2004] IRLR 983*

[13] See para 32 of the EAT decision

comments are not binding and employer's should not be ale to succeed in defending a claim purely on grounds of cost. Union representatives should remind employers who raise costs as a defence either in appeals against dismissals or in grievance hearings in cases of discrimination, that the existing case law provides that cost alone is not a justification defence.

Third Party Harassment

Despite the ConDem Government's attempt to withdraw from the explicit provisions in the Equality Act[14] which provide that an employer may be liable for harassment of employees by third parties, such as clients or customers, recent case law usefully reminds employers that even if these provisions were to be removed they may still be liable.

A recent Employment Tribunal case held that an employer can be liable for the discriminatory acts of a third party. In the case of *Weeks v Commissioner of Police of the Metropolis ET Case No. 2200740/2010* Ms Weeks was employed as a civilian for the Metropolitan Police Service ("MPS") as a senior crime researcher in a multi agency unit. Her line manager was employed by the City of London Police. Ms Weeks brought a claim of sex discrimination because of the way her line manager treated her. At a preliminary hearing the Tribunal had to determine whether the MPS were liable under the Sex Discrimination Act 1976 for the acts of the line manager given that it was not his employer. The Judge noted that the line manager was responsible for formally assessing her performance, determining the hours she worked and dealing with her application for flexible working amongst others.

In finding that those were matters which could only be determined by the employer or by someone authorised by the employer, the Employment Judge found that the line manager acted with the consent and authority of Ms Week's employer and as its agent. As such, MPS were held to be liable for the acts of discrimination by her line manager under s 41 (2) of the Sex Discrimination Act 1976[15]. In so finding the Employment Judge concluded that "any other conclusion would result in permitting sex discrimination to take place against the Claimant in the workplace and her having no recourse to complain of that and to seek a remedy." Clearly, in this case, the degree of control her line manger had was a significant fact which lead to a finding that the line manager was acting in his capacity as agent for her employer.

[14] S. 26 of the Equality Act 2010

[15] S 41(2) provides that "Anything done by a person as agent for another person with the authority (whether express or implied, and whether precedent or subsequent) of that other person shall be treated for the purposes this Act as done by that other person as well as by him." There is a simplified provision under s. 109 of the Equality Act 2010.

Although this case is only a Tribunal decision and not therefore binding on other courts, it can be used by union representatives to challenge employers who refuse to hear grievances of discrimination on the grounds that the alleged discriminator/harasser is not their employee.

This case follows a much earlier case *Gravell v London Borough of Bexley UKEAT 0587/06* where the EAT held that an employer can be liable for racial harassment by customers. In this case a white woman of British/ English nationality, who was employed as a prevention and advice officer within the housing department, brought a claim of race discrimination after she was told to ignore racist comments from customers and not to challenge such behaviour. She was subject to a number of racist text messages and a customer twice used the term "Paki" all of which she found offensive. The EAT overturned a Tribunal's decision to strike out her claim holding that a policy of not challenging racist behaviour by customers had the effect of creating an offensive environment for her and could therefore constitute racial harassment under S.3A of the then Race Relations Act 1976. S 3 A is the freestanding right to claim harassment that is harmonised in s. 26 of the Equality Act.

More recently in the case of *Lisboa v Realpubs Ltd and ors UKEAT0224/10*, the EAT held that an employee could be subject to direct discrimination where an employer implements a non discriminatory policy in a discriminatory way. In this case the employer rebranded a former gay pub. In doing so the employer recruited more women staff (with the loss of male staff) and encouraged staff to seat families in the window so that they could be seen from outside on the basis that this would attract a wider type of clientele. Mr Lisboa who is gay resigned and claimed constructive dismissal and sexual orientation discrimination on the ground that he was under pressure to co-operate with a policy which made the pub less attractive to gay customers and staff.

These cases are a salutary reminder that employers cannot evade their legal obligations to protect employees from discrimination and harassment even if the ConDem removes the provision on third party harassment under the Equality Act 2010.

Liability for others

In the case of *Week's* (above) we have seen that an employer can still be liable for the acts of a third party where the third party acts as agent for the employer. A question arises as to whether this argument can be applied in the case of agency workers. In *Muschett v HM Prison Service [2010] IRLR 451* it was held by the Court of Appeal that, an agency worker could not bring a claim of discrimination. In particular, the Court of Appeal held that as there was no contract between the Prison Service and Mr Muschett, he could not bring a claim under the employment provisions of the Race Relations Act 1976. An issue as to whether he could have brought a claim as a contract worker was not considered because this was not before the Court of Appeal.

However, applying the same principles as the Employment Judge applied in *Week's* the EAT held in the very recent case of *Mahood v Irish Centre Housing Ltd UKEAT 0228/10* that an employer could in principle be liable for the discriminatory acts of an agency worker. In that case Mr Mahood who was Irish and protestant worked as a project worker with ICH Ltd a small charity providing supported housing for vulnerable adults. He worked alongside another temporary project worker who had been hired through an Employment Agency. Mr Mahood complained to ICH Ltd about T who had mimicked his accent and behaved aggressively towards him. ICH warned T about his behaviour and said that the agency would be informed. An altercation took place between Mr Mahood and T with the result that T's engagement ended and Mr Mahood was sent home. Mr Mahood brought claims under the Race Relations Act 1976 including a claim that ICH was vicariously liable for the acts of T. In holding that ICH Ltd could be liable for the race discrimination claim the EAT held that T could have been acting ICH's agent and remitted the case back to the Tribunal to determine the point.

However, these provisions are not without their limits. In the case *of X v Mid Sussex Citizens Advice Bureau [2011] EWCA Civ 28* the Court of Appeal held that a volunteer for a Citizen's Advice Service was not covered by the Disability Discrimination Act 1995. In particular the Court held that she was not in 'employment', since she had no contract. Nor could it be argued that the voluntary work was "an arrangement" made by the respondent for determining to whom it would eventually offer employment. As the provisions in this are replaced by equivalent provisions in the Equality Act 2010 the decision will apply to volunteers who wish to bring claims of discrimination on any one of the nine protected characteristics set out in the Act.

Conclusion

As the Equality Act was meant to simplify and harmonise the provisions of the previous discrimination legislation much of the case law under the old provisions will continue to apply. As generally applied before and as the case of *X v Mid Sussex Citizens Advice Bureau [2011] EWCA Civ 28* shows where a determination is made in respect of one protected characteristic it is likely to be binding on all protected characteristics.
What is not yet known is how the Tribunals will apply the new aspects of the Equality Act such as claims for discrimination arising out of disability or claims for disability discrimination which arise after the employer has used a pre-employment health check ostensibly to comply with the duty to make a reasonable adjustment. It may be that by this time next year there is a new body of case law under the Equality Act 2010. Much though will depend on the ConDem Government's proposals for reform in the Employment Tribunals[16] . That being the case it will be up to union representatives to use the developing case law to challenge discriminatory practices in the workplace.

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[16] See "Resolving Workplace Disputes : A consultation" by the Department for Business Innovation and Skills January 2011