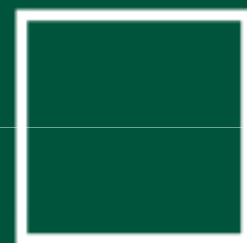


OLD SQUARE
CHAMBERS





**Institute of
Employment Rights**

**Equality Law
Update**

Stuart Brittenden



- **Recent cases: strand specific discrimination**
- **Public Sector Equality Duty (PSED)(April 2011)**
- **Specific Duties (September 2011)**



Age Discrimination

- **6 April 2011 – removal of default retirement age**
- **NOW: no automatic fair dismissal for ‘retirement’ OR bar to age discrimination claim**
- **Dismissals now for SOSR**
- **Discrimination? Employer Justified Retirement Age?**
- **ER can set age limit but subject to objective justification**
- **Is aim legitimate? What aims can be legitimate?**
- **Measure must be proportionate means of achieving legitimate aim**



- ***Wolf v Stadt Frankfurt am Main [2010] IRLR 244 ECJ***
- **Fire services - restriction of recruitment <30**
- **Justified**
- ***Seldon v Clarkson Wright & Jakes & SofS BIS [2010] IRLR 865 CA***
- **Justification: retirement age provides + likelihood of employment for young (recruitment) and reasonable promotion prospects (retention)**
- **Facilitates long-term employment planning (inter-generational fairness)**
- **Avoiding performance procedures (dignity)**



- ***Rosenblatt v Oellerking Gebäudereinigungsges [2011] IRLR 51 ECJ***
- **Part-time cleaner/automatic termination at age 65**
- **national court found this caused significant financial hardship to poorly paid EEs given size of pension**
- **ECJ - Automatic termination was justified**
- **Significance of collective agreement with TUs emphasised**
- **Note ECJ reasoning & scope for wider application:**



The scheme was:

“based primarily on the notion of sharing employment between the generations. The termination of the employment contracts of those employees directly benefits young workers by making it easier for them to find work, which is otherwise difficult at a time of chronic unemployment. The rights of older workers are, moreover, adequately protected as most of them wish to stop working as soon as they are able to retire, and the pension they receive serves as a replacement income once they lose their salary. The automatic termination of employment contracts also has the advantage of not requiring employers to dismiss employees on the ground that they are no longer capable of working, which may be humiliating for those who have reached an advanced age.”



- ***Fuchs v Land Hessen [2011] IRLR 1043***
- **Civil Servant prosecutors required to retire at 65**
- **CJEU finds no discrimination where aim was to establish a balanced age structure, encourage recruitment/promotion of younger people, preventing possible disputes re: fitness of employees to work beyond retirement age**
- **Contrast: *Prigge v Deutsche Lufthansa [2011] IRLR 1052*: automatic retirement age 60 for pilots**
- **Not justified: international/German legislation permitted flying until age 65 subject to make-up of crew. Safety grounds rejected**



- ***Woodcock v Cumbria PCT [2011] IRLR 119 EAT***
- **Premature dismissal of EE for redundancy so as to avoid cost of early retirement (saving £500k - £1m)**
- **Aim: avoiding EE obtaining a windfall upon redundancy**
- **Note: rejection of orthodox position that cost alone cannot provide basis for justification**
- **? CofA views**



- **“But we find it hard to see the principled basis for a rule that such considerations can never by themselves constitute sufficient justification or why they need the admixture of some other element in order to be legitimised. The adoption of such a rule, it seems to us, tends to involve parties and tribunals in artificial game-playing – ‘find the other factor’ – of a kind which is likely to produce arbitrary and complicated reasoning: deciding where ‘cost’ stops and other factors start is not straightforward ... If the matter were free from authority it would seem to us that an employer should be entitled to seek to justify a measure, or a state of affairs, producing a discriminatory impact – or, in the case of age discrimination, an act done of discriminatory grounds – on the basis that the cost of avoiding that impact, or rectifying it, would be disproportionately high.” (Underhill P)**



Disability Discrimination

- ***JP Morgan v Russell Chweidan [2011] IRLR 673 CA***
- **CA overturned finding of direct discrimination where EE complained that dismissal and lower bonus was a consequence of their disability/impact on ability to work**
- **NB ET found that a non-disabled EE would be treated the same**
- ***Malcolm* legacy – query position under s. 15 EqA 2010 discrimination arising from disability**



Religious Discrimination

- ? Does an EE's belief that they should wear a poppy amount to a philosophical belief capable of protection of *Lisk v Shield Guardian Co & Ors*
- ET applied principles in *Grainger plc v Nicholson*
- ET found that beliefs lacked cogency, cohesion and importance = no protection



- ***Power v Greater Manchester Police Authority***
UKEAT/0087/10/ZT – spiritualism covered, but claim failed because dismissal was not for belief, but because of the expression of the beliefs
- ***Cherfi v G4S Security Services Ltd*** ***UKEAT/0379/10/DM*** – security guard refused permission to attend Mosque on Friday during work. ER action justified for operational reasons: ER risked £ penalties, loss of contract, and alternatives explored



Sexual Orientation

- ***Grant v HM Land Registry [2011] IRLR 748 CA***
- **EE disclosed sexual orientation to colleagues @ Lytham office**
- **EE moved to Coventry – new manager told others of his sexual orientation**
- **ET found manager did not have harassing purpose**



- **“having made his sexual orientation generally public, any grievance the claimant has about the information being disseminated to others is unreasonable and unjustified.”**
- **“... by putting these facts into the public domain, the claimant takes the risk that he or she may become the focus of conversation and gossip...”**
- **“... the claimant was no doubt upset that he could not release the information in his own way, but that is far from attracting the epithets required to constitute harassment. In my view, to describe this incident as the tribunal did as subjecting the claimant to a ‘humiliating environment’ when he heard of it some months later is a distortion of language which brings discrimination law into disrepute.” (per Elias LJ)**



Equal Pay Developments

- ***Abdulla v Birmingham City Council [2011] IRLR 309 HCt***
- **ET limitation period (usually 6 months). Potential to bring claim in ordinary court as breach of contract claim (6 year limitation)**
- **Court to decide whether it is more ‘convenient’ for case to be heard in ET. NB it cannot be more convenient for claim to be sent to ET where it is known that ET will decline jurisdiction on time points**



- ***Ashby v Birmingham City Council [2011] IRLR 473 HCt***
- **NB dilution of *Abdulla*? *Ashby* says in assessing whether it is more convenient for claim to be heard in ET (where it would otherwise be out of time) the Court should take into account:**
 - **(1) reasons why proceedings had not been issued in ET within time, and**
 - **(2) whether “they acted reasonably in failing to do so”**



The Landscape

- **Public Sector Equality Duty (PSED): s 149**
- **Implementation: 5 April 2011**
- **Precursor: s. 71 RRA; s. 76A SDA; s. 49A DDA**
- **Now duty is widened to cover all protected characteristics**
- **Note: onus is to have ‘due regard’ to specified matters – not to eliminate all discrimination**



Content of PSED: s. 149 EqA

S149 (1) instructs public bodies to have ‘due regard’ to three specified matters in the exercise of their functions:

- **eliminating conduct that is prohibited by EqA, including breaches of non-discrimination and equality rules in occupational pension schemes and equality clauses or rules in terms of work**
- **advancing equality of opportunity; and**
- **fostering good relations between people who share a protected characteristic and people who do not share it**



Advancing equality of opportunity: s. 149(3) EqA

- **remove or minimise disadvantages suffered by persons who share a relevant protected characteristic**
- **taking steps to meet the needs of persons who share a relevant protected characteristic that are different from the needs of persons who do not share it; and**
- **encouraging persons who share a relevant protected characteristic to participate in public life or in any other activity where participation is disproportionately low**



Fostering Good Relations: s 149(5)

- **involves having due regard to the need to tackle prejudice and promote understanding**
- **Eg public authority takes steps to facilitate understanding between particular groups**



Explanatory Notes: some examples

- **Targeted training/mentoring for disabled people to enable them to stand as local councillors where participation is low**
- **Gov't dept provides staff with education/training with the aim of fostering good relations between transsexual staff and others**
- **Local authority reviews its internet-only access to services or focuses adult learning IT courses on older age groups to meet the different needs of this group and/or advance equality of access**
- **School reviews its bullying strategy to capture homophobic bullying**
- **NHS local awareness campaigns for groups**



Who is covered?

- **Sched 19 lists public authorities covered – ‘pure public’**
- **List can be amended by Minister**
- **‘hybrids’ – s. 149(2)**
- **Covers those who are not public authorities but who exercise public functions**
- **BUT only in so far as they perform public functions**



Who is not covered: exclusions: Sched 18

- **House of Commons/Lords**
- **Secret Intelligence Service**
- **General Synod of Church of England**
- **UK Border Agency's immigration functions but only in respect of race (excluding colour)**
- **Age is excluded where functions relate to the provision of education, benefits, facilities, services to children in schools**
- **Provision of accommodation, benefits, facilities, services pursuant to Children Act 1989**



Specific Duties

- **Designed to buttress PSED**
- **S. 153 EqA confers power to set specific duties**
- **Equality Act 2010 (Specific Duties) Regulations 2011**
- **Implementation (for most provisions): 10 September 2011**
- **Applies only to public authorities**



Content of Specific Duties

- **Public Authorities are required to publish TWO categories of information**
- **(1) Relevant information demonstrating compliance with PSED under s. 149 - by 21 January 2012 (excl schools)**
- **Information must include material relating to persons who share a protected characteristic who are:**
 - **(a) its employees (but only where + 150 employees)**
 - **(b) other persons who are affected by policies/practices (public, service users etc...): reg 2(4)**
- **(2) Publication of Equality Objectives by 6 April 2012 (to be set and published at least every 4 years)**



Workforce Transparency: reg 2(5)

- **Subject to forthcoming EHRC guidance/CofP**
- **Note: recognition of culture vs disclosing sexual orientation/religion**
- **success rates of job applicants by protected characteristic**
- **take-up of training opportunities**
- **applications for promotion and success rates**
- **applications for flexible working and success rates**
- **return-to-work rates after maternity leave**
- **grievance and dismissal**
- **other reasons for termination like redundancy and retirement**
- **length of service/time on pay grade, and**
- **pay gap information for other protected groups**



Information about people affected by policies

- **Home Office – suggests the following information could be provided**
- **the number of people with different protected characteristics who access and use services in different ways**
- **customer satisfaction levels and informal feedback from service users with different protected characteristics**
- **results from consultations with interested parties**
- **complaints about discrimination as well as complaints by category of people with different characteristics**
- **service outcomes for people with different characteristics**



Publication of objectives: reg 3

- **Publication of one or more objectives in furtherance of s. 149 duty**
- **Publication by 6 April 2012 and at least 4 yr intervals**
- **Objectives must be specific, relevant, measurable**
- **Number of objectives should be proportionate to size eg Gov't dept vs rural school**
- **Engagement/consultation with groups before objectives determined**
- **Publication (reg 4) must be accessible, free of charge**
- **Web & other formats**
- **Can be incorporated into other documents eg annual report/business plan**

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