Parker & Co

Employment Update

January 2010

Welcome to the latest edition of Parker & Co's Employment Update. This quarter we focus on two EAT cases on discrimination, two recent Court of Appeal decisions on stigma loss and harassment, and a further two EAT decisions on pregnancy rights.

Discrimination update

In these two EAT decisions, the scope of the disability and religious belief legislation is explored.

The EAT has upheld the Employment Tribunal's decision in *Coleman v Attridge*, previously referred to the European Court of Justice. This case confirmed that employees who are associated with disabled people but not disabled themselves, for example carers, are protected from direct discrimination (i.e. discrimination "on the grounds of") and/or harassment as a result of their association with the disabled person.

In July, the ECJ also indicated that the principle applies in relation to discrimination by association on the grounds of religion or belief, age or sexual orientation.

In *McFarlane v Relate Avon Limited*, the EAT held that Mr McFarlane had not been discriminated against on the grounds of his religious belief as he was dismissed because of his apparent unwillingness to provide counselling in respect of sexual issues/dysfunction (rather than simply relationship issues) for same-sex couples, and not because of his Christian faith. He was treated in the same way as someone not of the Christian faith would have been treated had they refused to provide such services.

The parties agreed that the requirement to provide such counselling was a "provision criterion or practice" for the purposes of indirect discrimination and that Mr McFarlane as a Christian was thereby at a disadvantage. However, the indirect discrimination was considered justified, as Relate were legitimately seeking to provide services equally and therefore had to require its staff to provide those services to all.

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Discrimination claims and stigma loss

The Court of Appeal holds that stigma damages can be recovered from a former employer following discrimination.

In *Chagger v Abbey National*, the Court of Appeal held that employees are entitled to compensation for stigma they suffer in their search for work following discrimination proceedings. Mr Chagger was awarded nearly £2.8million for unfair dismissal and race discrimination. The award included significant future loss after extensive mitigation efforts showed the stigma of having litigated meant he was unlikely to work in the financial services industry again.

The EAT held the ET was wrong to award compensation for anything other than lost earnings and should have considered reducing the award to reflect the possibility that Mr Chagger would have been dismissed for a fair and non-discriminatory reason in any event. While it agreed with the EAT on the second point, the CA held that Mr Chagger's loss was properly assessed by asking when he might obtain a job on equivalent salary, regardless of whether this period is longer or shorter than the time he would have been employed by Abbey National but for his discriminatory dismissal.

However, in relation to stigma loss, despite the "considerable force" the CA saw in arguments that Abbey National should not be liable for the victimisation of Mr Chagger by other potential employers, the CA held loss was recoverable. Precedent had established in an unfair dismissal case that if stigma results from the unlawful way an employer runs its business, it could be liable for losses arising from other employers not wanting to recruit its former employees. The CA felt it would be unsatisfactory and artificial not to apply the same principles to discrimination. Ordinarily it is a factor for the ET to consider when projecting how long it will take a claimant to find new employment.

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Protection from Harassment

The Court of Appeal considers the circumstances in which liability can arise under the Protection from Harassment Act following workplace harassment.

In *Veakins v Keir Islington Ltd*, the Court of Appeal has held that when deciding whether conduct constitutes harassment under the Protection from Harassment Act 1997, the Court's primary focus is on whether the conduct is oppressive and unacceptable, but it must remember that the conduct should be sufficient to sustain criminal liability.

Ms Veakins was a trainee electrician who gave unchallenged evidence that she had been humiliated, embarrassed, victimised and demoralised at work by her supervisor. She suffered from depression for which she was prescribed medication and received counselling. The Court heard undisputed evidence from a consultant psychiatrist accepting that Ms Veakins' dealings with her supervisor caused her depression.

Overturning the Recorder's decision at first instance, Lord Maurice Kay, who gave the leading speech, stated that the proven conduct was "oppressive and unreasonable" and if a prosecution took place, it would establish criminal liability. He stated that the "reduction of a substantially reasonable and usually robust woman to a state of clinical depression is not simply an account of "unattractive" and "unreasonable" conduct... or "the ordinary banter and badinage of life".... It self-evidently crosses the line into conduct which is "oppressive and unreasonable"". Lord Maurice Kay considered that Ms Veakins' supervisor's "extraordinary conduct must have been motivated by a desire to do whatever she could to force out an employee for whom she had a profound personal dislike".

Remitting the case for damages to be assessed, Lord Maurice Kay concluded by noting that while he doubted the legislation was intended to cover workplace harassment, it was not expressly excluded. However, he did not expect many workplace cases to lead to liability under the Act.

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Pregnancy: Cases on Risk Assessments and IVF Treatment

The EAT provides guidance on an employer's duty to conduct a risk assessment for a pregnant employee, and considers the rights of women undergoing IVF treatment.

The EAT, in *O'Neill v Buckinghamshire County Council*, has decided that for an employer to be legally obliged to conduct a risk assessment for a pregnant worker under the Management of Health and Safety at Work Regulations 1999, the following conditions must be met:

- the employee provides written notification of her pregnancy to her employer;
- the work undertaken could involve a risk of harm or danger to the health and safety of the expectant mother or her baby;
- the risk arises from either processes, working conditions or physical, chemical or biological agents in the workplace.

While it may be good practice, pregnant workers are not therefore automatically entitled to an assessment if there is no evidence that their work actually involves a risk to health and safety. The EAT did not rule out the possibility that if an employer failed to conduct a risk assessment when obliged to so, then it would be guilty of sex discrimination.

In *Sahota v Home Office*, the EAT reviewed whether IVF treatment should be considered as equivalent to pregnancy for the purposes of the Sex Discrimination Act, meaning that a claimant need not identify a comparator. The EAT's view was that a woman undergoing IVF treatment is clearly to be regarded as pregnant for the period following the implantation of the fertilised ova. However, before implantation, less favourable treatment may constitute sex discrimination during the advanced stage between the follicular puncture and the immediate transfer of the in vitro fertilised ova into the uterus, as set down by the ECJ in *Mayr v Backerei und Konditorei Gerhard Flockner OHG*.

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News in brief & what's coming up

Compensation & statutory payment limits:

→ From February 2010, the cap for unfair dismissal compensation will fall to £65,300 following a decrease of 1.4% in the RPI.

→ The limit on weekly pay for the purposes of redundancy payments and the unfair dismissal basic award will remain at £380 until at least February 2011.

→ From April 2010, statutory adoption, maternity and paternity pay and Maternity Allowance will all rise to £124.88, but statutory sick pay will remain at £79.15.

The *Vento* guidelines: The *Vento* guidelines, which provide ETs with guidance when awarding compensation for injury to feelings in discrimination cases, have been revised to take account of inflation. The bottom band is now £500 – £6,000, the middle band £7,000 – £18,000 and the top £19,000 – £30,000.

Climate change - a philosophical belief?: In *Grainger plc and ors v Nicholson*, Mr Nicholson's asserted that his belief that carbon emissions must be cut to avoid catastrophic climate change was capable of amounting to a philosophical belief for the purposes of the Employment Equality (Religion or Belief) Regulations 2003. Mr Nicholson considered his belief was sufficiently coherent and important, arguing it was not merely opinion because it affected most aspects of his life, including his choice of home, his travel and what he ate. The EAT decided that a genuinely held belief of this nature, which is of a similar status or cogency to religious belief, is capable of constituting a philosophical belief. Crucially such a philosophical belief must be "worthy of respect in a democratic society, not be incompatible with human dignity and not conflict with the fundamental rights of others". Therefore, this case should not open the door to protection for those with, for example, homophobic or racist political philosophies.

Contingency Fee Agreements – new proposed regulations: Following concern about the abuse of no win, no fee agreements draft Regulations have been published to govern their use. Likely to be implemented in April 2010, the Regulations would render unenforceable any contingency fee agreement that does not comply with certain specific requirements. Before signature, the client is to be informed of specific matters including other methods of available funding and the circumstances in which the client may seek a review of the costs and expenses incurred. Claimants will be allowed to terminate the agreement at any time leaving their liability limited to the reasonable costs actually incurred for work undertaken to the point of termination.

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Contact us

If you have any questions arising from the articles or on other areas of employment law, please call or email us and we will be happy to discuss them with you.

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