

Welcome to the Autumn 2011 edition of Equality Matters where we take a detailed look at recent case law developments in flexible working disputes.

We also examine the recently published specific public sector equality duties, and take a look at the Government's latest proposals in relation to employment tribunal reform, including its proposals to allow employers to have retirement discussions. We consider whether specifically prohibiting caste discrimination should be on the Government's agenda, and have our

usual round up of current equality cases for Police Federation members.

This update is aimed at Equality Representatives, but please feel free to circulate to any other Federation members who may find it useful.

We would welcome any feedback or suggestions for subjects you would like to see covered in future editions.

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Public Sector Equality Duty Specific Duties

The general equality duty in section 149(1) of the Equality Act 2010 came into force on 6 April 2011 and requires public bodies to have due regard to the need to eliminate discrimination, advance equality of opportunity and foster good relations across the protected characteristics.

Following this the Equality Act 2010 (Specific Duties) Regulations 2011 came into force on 10 September 2011. The specific duties apply to certain listed public bodies including chief constables and police authorities.

Such public bodies are required to:

- Publish information demonstrating compliance with the general public sector equality duty (section 149(1) of the Equality Act 2010) by 31 January 2012 and every year thereafter. The published information must include information relating to persons who share a relevant protected characteristic and who are (a) employees or (b) other persons affected by its policies and practices. It must be published in a manner that is accessible to the public.
- Prepare and publish objectives for achieving the public sector equality duty aims set out in section 149(1) by 6 April 2012 and every 4 years thereafter. The objective(s) must be specific and measurable.

It should be borne in mind that whilst the Welsh Government has published separate far more prescriptive specific duties for certain Welsh public bodies, as policing is not a delegated function the Welsh police forces are governed by the more general Westminster specific duties.

National Default Retirement Age Removed

The Government has now removed the default retirement age of 65 that could be applied to certain employees (but not police officers). All employers now need, in theory, to be able to objectively justify the ages at which they require their workers to retire. The Government has, however, also recently suggested it may legislate to allow employers to have "protected conversations" with workers as to their intentions to resign. More detail is awaited but concerns have been raised as to the extent to which it will allow employers to "hide" discriminatory conduct.

Flexible working: case update



Many forces have recently been restructuring shift patterns which has had a knock on effect for officers who are, or who wish to, work flexibly.

Unlike standard employees, police officers do not have a statutory right to request flexible working, although Home Office Guidance recommends that requests should be dealt with in a similar manner. Challenges for female police officers are usually brought as indirect sex discrimination claims. For male officers a direct sex discrimination claim may be a possibility. Flexible working issues are often key for disabled officers. There can also be implications in terms of officers' religious beliefs. Flexible working disputes tend to be determined upon their own facts, particularly upon whether the employer can justify the decision reached. Many cases therefore do not go to appeal.

Here we take a look at some interesting recent first instance employment tribunal decisions which give a flavour as to how employment tribunals are approaching these kinds of practical issues.

Indirect sex discrimination

Indirect sex discrimination involves establishing that the force have applied a "provision, criterion or practice", (such as a requirement to work a particular shift pattern) which does or would apply across the board, but which would place women at a particular disadvantage when compared with men. Often such disparate impact is evidenced by statistics which still tend to demonstrate that women bear the brunt of child care responsibilities and so are less likely to be able to meet the provision, criterion or practice. An employer will have a defence if they can objectively justify the imposition of the provision, criterion or practice by demonstrating it was a proportionate means of achieving a legitimate aim.

Recent issues tackled by tribunals include the following:

- In *Lloyd v Shepherd-Smith t/a Homesitters Administration (2010)* the tribunal rejected an employer's argument that a flexible working request, to work 1 day less a week, had to be rejected because "the culture of the business required a personal touch". It would be feasible even in a customer facing role to have a system in place of hand-over notes and a named individual that customers could contact on the claimant's day off.
- In *Watson v Paperbox Stores Ltd (2011)* and *Karim v Laura Ashley (2011)* tribunals considered arguments by employers that they need to change employee's shift patterns because of a need to provide "flexibility" and cover at short notice. In *Watson*, the tribunal accepted that flexibility could be a legitimate aim but it was not achieved by proportionate means in circumstances where there had been no discussions with the claimant about available options. In *Karim* the tribunal accepted there was a need to cut costs but likewise the employer's new rota was not a proportionate means of achieving such cuts when the employer had not considered the discriminatory effects of the new rota or whether there were other means to achieve the aim.
- In *Sheterline v Autonomy Systems Limited (2010)* the tribunal was concerned with a claimant whose place of work had been closed and she had been offered relocation to London. The claimant offered to work at home 3 days a week and in the office 1 day and was refused on basis the employer's standard policy was no home working was allowed. The ET rejected justification

arguments based on her "accessibility" to other office based employees, that she would miss out on available resources at the workplace, or upon the suggestion that "employee contributions are significantly higher when office-based" on the basis that these factors would be relevant to almost every home working situation. It accepted that there was a potential argument concerning the security of customer information but that the employer had not given any consideration to ways of dealing with security concerns.

Direct Sex Discrimination

A direct sex discrimination for a male officer involves establishing that a similar request made by a female officer would have been treated more sympathetically. A key issue is usually whether female comparators in similar circumstances who have been treated more favourably can be identified.

In *Armstrong v DB Regio Tyne and Wear Ltd* the tribunal upheld a claim by a male train driver who had been permitted to work a set shift pattern to allow him to care for his disabled child on certain set days each week. There was a take over and his new employer reviewed all train driver rosters placing the claimant on the main rotating roster. The tribunal accepted that he had been treated less favourably than female comparators who, in the review, had been allowed to stay on the "flexible roster" because of their similar childcare commitments. The tribunal concluded that the employer had favoured female drivers' applications over male colleagues, and that male drivers had to fight much harder to try to stay on the flexible roster.

Disability

Employers are under a duty to make reasonable adjustments to alleviate disadvantage faced by disabled workers in the workplace as a result of workplace arrangements or other provisions, criterion or practices applied by the employer. What is a reasonable adjustment will vary from case to case but often it can involve flexible working considerations.

For example, in *Gibson Shipbrokers Ltd v Staples (2008)* the EAT upheld the tribunal's finding that the employer had failed to make reasonable adjustments which included a phased return to work, a reduction in working hours or duties, additional support, home working, use of new technology, reduced travel and a suitable alternative post. The tribunal had found that if such adjustments had been made then Mr Staples would have been able to return to work. The EAT also confirmed that whilst no one adjustment alone may have achieved this the employer should have considered a combination of adjustments.

Religion/Belief

Workers may ask for some flexibility in work because of their need for religious observance. Previous editions of Equality Matters have looked at some of the complicated case law concerning direct and indirect discrimination on grounds of religion and belief. In *Cherfi v G4S Security Services Ltd (2011)* the EAT upheld a finding that a practice requiring employees to remain on site for the full duration of a shift was justified. It was accepted that this caused particular disadvantage to Mr Cherfi as Muslim employee who had previously been allowed to leave the site and attend his local mosque during his paid lunch break. The decision was, however, justified as the client had insisted that a specified number of security guards be on site at all times and it was accepted it was impractical to employ another security guard for the lunch hour alone. Account was also taken of the fact that there were alternative options open for Mr Cherfi.

In contrast *Abdulle v River Island Clothing Company (2011)* is an example of a successful claim involving an employee who had for some time been given short breaks and lunch breaks to accommodate her need for a time for prayer. A temporary manager faced with staff shortages asked her to work a full day and refused her request to be allowed a prayer time in the middle of the day stating that the needs of the business must take priority. The Tribunal accepted that the requirement to work during her time for prayer put Muslims at a disadvantage. The Tribunal also accepted that the manager in question was under pressure and her comment did not reflect any conscious or unconscious bias on her part but that the employer should have had better systems in place, such as a simple note being recorded of the agreed arrangements with the employee. Whilst it upheld the claim it also noted that in general it did not consider that an employee of any faith was entitled to a 100% cast iron right to particular time off every day and that in a crisis situation a routine arrangement may have to be varied but that such procedures should be set out in writing to the benefit of all parties.

It is also worth noting that the EHRC has made an application to intervene in two cases going before the European Court of Human Rights of Ladele and Eweida (reported in previous editions of Equality Matters). The EHRC argues that the courts have set the bar too high for individuals to prove discrimination with the result that freedom of religion or belief is being compromised. The EHRC suggests that clearer legal principles, including provision for "reasonable accommodations", would help employers to determine what can be justifiable in religion or belief cases and avoid the need to resort to litigation.



Equality Case Watch

In our regular case watch column, we outline some cases of interest on equality issues in which we are acting for Police Federation members.

Disability Discrimination

A MPS officer has recently succeeded in a disability discrimination claim when his application for a specialist post was rejected because of a previous period of sickness absence for depression/anxiety. The tribunal was critical of the MPS' failure to follow its own policy, and found there was ill informed prejudice and intolerant attitudes towards mental health conditions.

The trend in cases concerning officers with dyslexia and other conditions such as dyscalculia and visual processing disorders continues. We act both for student officers facing regulation 13 dismissals and confirmed officers who often seem to face a reluctance to offer adjustments tailored to the needs of the individual.

An associative discrimination claim is being run for a male officer who is the primary carer of his disabled child. The claimant argues he has been refused promotion on grounds of his child's disability.

Sex Discrimination

A claim has recently been issued for a female officer returning from maternity leave who was not provided with suitable facilities to breast feed her child and whom, it is alleged, was placed under pressure to stop breast feeding in order that she could take medication for a medical condition and thereby return to operational duties.

Religion/Belief and Race Discrimination

A decision is awaited in a claim recently heard by the tribunal against the MPS alleging that the claimant had been subject to race discrimination and sexual orientation discrimination whilst working in the counter-terrorism unit at Heathrow. We have been advising an officer where misconceptions have been made about her spiritualist beliefs. A successful resolution was achieved by negotiation including removal of restrictions placed upon the officer.

Sexual Orientation Discrimination

We have been advising a student officer who was threatened with misconduct/regulation 13 proceedings as a result of a previous relationship with an unsuitable individual in circumstances where it was argued that a heterosexual officer who had similarly engaged in a past relationship with an unsuitable individual would not have faced such action.

Whistleblowing

We are acting in various whistleblowing cases where officers have made disclosures about the practices of senior officers and who allege that they have then been subject to detrimental treatment as a result, including preventing a promotion.

Tribunal Reform



On 3rd October 2011, the Government announced two important changes, intended to reduce the number of employment tribunal claims and boost the economy.

First, the qualifying period for the right to claim unfair dismissal will be extended from one to two years on 6th April 2012.

Whilst some commentators have welcomed the move, concerns have been expressed that raising the qualifying period from one year to two will only result in a slightly reduced number of Tribunal claims each year. Between the period April 2010 to March 2011, there were approximately 48,000 unfair dismissal claims issued. It has been suggested that the increase in the qualifying period will only lead to a reduction of approximately 2000 claims per year.

It has also been suggested that raising the limit in this way will only result in more discrimination claims (for which there is no qualifying period) being issued.

Second, fees will be introduced for tribunal claims. It has been suggested that this will be from April 2013. Whilst details of this remain sketchy, it has been suggested that:

- An upfront fee of £250 will be payable when the ET1 is lodged

- A further fee of £1000 will be payable by the claimant when the hearing is listed
- Higher fees will be payable if the claim is for over £30,000 (it remains to be seen how this could be assessed when proceedings are first lodged)
- Fees will be refunded if the claimant wins and forfeited if they lose; and
- The fees will be waived for those with no money (no detail has been given about how this will be assessed/what the income or capital limit will be).

Critics have commented that it is unnecessary

to introduce fees as the Tribunal's power to manage vexatious claims and/or litigants is already well provided for by the awarding of costs or the ordering of a deposit.

However, if recent "leaked" press reports are to be believed, it may be that the government still does not feel that it is going far enough with Tribunal reform. Proposals prepared for Downing Street by venture capitalist Adrian Beecroft suggest scrapping the current rules around unfair dismissal, making it easier for employers to sack under performing employees. If adopted by the Government (although it has been suggested that this is unlikely), it remains to be seen how this will serve to boost the economy.

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Equality Matters is for general guidance only and should not be treated as a definitive guide or be regarded as legal advice. If you need more details or information about the matters referred to in this fact sheet please seek formal legal advice. This information was correct at time of going to press May 2011.



Caste Discrimination

The first reported case of caste discrimination has been heard in the Birmingham Employment Tribunal. The case concerns a married couple who alleged they were poorly treated by their employers because the husband was deemed to be a lower caste than his wife. The allegations include that the couple were discouraged from marrying and received hurtful marks when they did so. The case is of particular interest as the extent of protection against caste discrimination is currently unclear. The Government has the power to activate a clause in the Equality Act which would expressly add caste to the current definition of race. To date it has, however, chosen not to do so despite being in receipt of independent research suggesting that caste discrimination is a problem in the UK. Unless and until the Government trigger the amendment to the Equality Act success in such cases will depend upon whether the tribunals can be convinced that caste discrimination is already covered by the existing prohibition of discrimination on grounds of race or religion/belief.