



WELCOME TO THE AUTUMN ISSUE OF RJW'S POLICE FEDERATION EQUALITY MATTERS

In this update the spotlight is on the new Equality and Human Rights Commission, which starts work this month. We also report on the progress of the government's Discrimination Law Review.

We review the cases on religious discrimination four years on, focusing on dress codes in particular.

There have been a number of important decisions recently in cases brought by police officers. We include a report of the EAT's decision in a DDA claim brought by a chief inspector whose dyslexia disadvantages him in promotion exams. There is also a case report on what we believe is the first tribunal victory in an age discrimination claim by a police officer, as well as our regular Equality Case Watch.

Finally, not all cases end with reported decisions, and indeed often an earlier resolution can be more beneficial for all concerned. We report our positive experience of the judicial mediation scheme.

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 issues that you would like covered in future editions of this update.

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NEW BROOMS FOR EQUALITY

Britain's new Equality and Human Rights Commission, the EHRC, starts work this month.



What is the EHRC?

The EHRC was established on 1 October 2007. It will replace the Commission for Racial Equality, the Equal Opportunities Commission and the Disability Rights Commission and it will be responsible for all strands of anti-discrimination work (race, gender, disability, religion or belief, sexual orientation and age) as well as for human rights.

Why did the EHRC come into being?

With the newer areas of anti-discrimination law (sexual orientation and religion or belief in 2003 and, more recently, in 2006, age) at least one new enforcement body was necessary. However, rather than establish further new commissions or divide the new areas amongst the existing commissions, the government decided to set up a single body responsible for both old and new areas of anti-discrimination law and practice.

The EHRC will be expected to be better able to challenge discrimination overlapping the various areas, to carry over good practice from one area of anti-discrimination to the other areas and, with just one responsible body, to make better use of resources. It is intended to be a single port of call for all victims of discrimination. The additional responsibility for human rights brings in an area which obviously touches upon all the other areas of discrimination and also an area in which there had been calls for a commission to be established. The additional responsibilities obviously bring additional costs, and the EHRC has twice the budget of the legacy commissions combined.

What will the EHRC do?

The EHRC's role, as set out in the legislation by which it is being established, is to encourage and support the development of a society in which:

- people's ability to achieve their potential is not limited by prejudice and discrimination
- there is respect for and protection of each individual's human rights
- there is respect for the dignity and worth of each individual
- each individual has an equal opportunity to participate in society
- there is mutual respect between groups based on understanding and valuing diversity and on shared respect for equality and human rights

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DYSLEXIA AND THE MEANING OF DISABILITY

This summer saw an important decision on the question of disability for the purposes of the Disability Discrimination Act 1996 ("DDA"). Mr Paterson, a chief inspector in the Metropolitan Police Service (MPS) who suffers from dyslexia, brought a claim that the MPS had failed to make reasonable adjustments to the examination process for promotion from chief inspector to superintendent. However, the employment tribunal, considering the question of disability as a preliminary point, found that the claim fell at the first hurdle, as Mr Paterson was held not to be disabled. Mr Paterson appealed to the Employment Appeal Tribunal.

The Tribunal's Decision

The employment tribunal held a pre-hearing review to consider whether Mr Paterson was disabled for the purposes of the DDA. The tribunal accepted that Mr Paterson had throughout his life had a degree of dyslexia and that it would continue. The MPS had obtained a medical report before the exam which diagnosed "mild dyslexia". The key issue was whether Mr Paterson's dyslexia had a "substantial adverse impact on his day to day activities".

Another expert instructed by RJW on behalf of Mr Paterson for the purposes of the tribunal claim emphasised that "even slight problems with memory and literacy can, however, have a greater impact when someone is working at an advanced level". The tribunal said this was uncontroversial and concluded that they had no doubt at all that Mr Paterson's degree of dyslexic difficulties are disadvantageous to him in comparison with other colleagues competing for superintendent positions and that his difficulties have become more marked at a senior position.

However, the tribunal then went on to find that Mr Paterson's dyslexia did not as a matter of fact have a substantial adverse impact on his day to day activities. Although there was a substantial disadvantage with respect to him carrying out the promotion examination, this was not a day to day activity. In reaching that decision, the tribunal held that the correct comparator was the ordinary average norm of the population as a whole, rather than Mr Paterson's colleagues competing for promotion.

Appeal

Lying at the heart of Mr Paterson's appeal was the simple assertion that once the tribunal had found that because of his disability he would be at a definite disadvantage in comparison with his work colleagues in performing the assessments required for promotion, then the only possible conclusion was that he was disabled within the meaning of the legislation. Any other conclusion would mean that because of the effects of his dyslexia, he would in practice face a glass ceiling; he would not be able to compete adequately in the promotion stakes beyond a certain level.



The EAT agreed. In reaching its decision, the EAT gave guidance on what should be regarded as a "normal day to day activity". It held that taking an assessment or examination can properly be described as a normal day to day activity since the act of reading and comprehension is itself a normal day to day activity. The EAT relied on the recent decision of the ECJ in the case of *Chacon Navas v Euresit Colectividades SA 2006 IRLR 706*, in which the ECJ held that there should be protection against "situations in which participation in professional life is hindered over a long period of time". Since Mr Paterson's disability may adversely affect his promotion prospects, then it must be said to hinder participation in professional life and therefore day to day activities.

The EAT found that the purpose of the legislation, at least in part, is to assist those who are disabled to overcome the disadvantages which stem from a physical or mental impairment. The approach suggested by the tribunal did not achieve that. The proper comparators were Mr Paterson's colleagues competing for promotion. The EAT therefore allowed the appeal and substituted a finding that Mr Paterson was disabled. The case has now been remitted to the tribunal for determination of the claim on its merits.

This decision gives very helpful guidance on what can amount to "normal day to day activities" for the purpose of whether a person is disabled under the DDA. The finding that the reading and comprehension involved in carrying out an assessment or examination is a normal day to day activity provides greater protection to those people who suffer from impairments such as dyslexia, particularly in terms of the protection afforded by the DDA in relation to career progression. It will be a decision of key importance for disabled officers at all stages of their careers, and those advising them.

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What are the EHRC's duties?

The EHRC's duties, again set out in legislation, include promoting an understanding of the importance of equality and diversity, encouraging good practice, promoting equal opportunity and encouraging good relations between members of different groups (ie groups with common attributes in respect of age, disability, gender, race, sexual orientation, religion or belief). The EHRC also has a duty to monitor the effectiveness of existing anti-discrimination law and human rights law and to provide advice and recommendations to the government about changes in the law.

What powers does the EHRC have?

The EHRC will provide information and advice, publish codes of practice covering the various areas of discrimination. It can also conduct inquiries leading to reports relating to general equality and human rights issues.

Another of the EHRC's responsibilities is to investigate allegations that a person has committed a specific unlawful act. If the EHRC is satisfied that the unlawful act has taken place, the EHRC can serve an unlawful act notice, and require the person concerned to prepare an action plan to remedy the situation. A failure to comply can lead to criminal sanctions. The EHRC also has the power to seek injunctions to restrain unlawful behaviour.

Ensuring that public sector organisations comply with their statutory duties to promote race equality, gender equality and disability equality is another duty. Like its predecessors, the EHRC also has the power to bring legal proceedings to prevent unlawful advertising, provide legal assistance to victims of discrimination, intervene in legal proceedings and assist with conciliating disputes.

Who's in charge?

The EHRC is based in London, although it also has Welsh and Scottish offices. The Chief Commissioner of the EHRC is Trevor Phillips, the former Chair of the Commission for Racial Equality. The Deputy Chief Commissioner is Baroness Margaret Prosser of Battersea, who has over 20 years experience as a senior trade union official with the TGWU and is a former TUC president. There are 12 other Commissioners at present, with a very wide variety of experience. These include academics, former trade union officials, former senior civil servants, former human resources directors and a member of the Employment Appeal Tribunal. We are pleased to report that one member of RJW's employment department, Barry Clarke, has been appointed to one of the statutory committees that provides advice and guidance to the new commission.

The EHRC's website contains further information and can be found at www.equalityhumanrights.com.

KEEPING FAITH: RELIGIOUS DISCRIMINATION FOUR YEARS ON

The protection against discrimination on grounds of religion or belief has now been in place for four years. In this article we review some of the issues arising from the case law during that time.

The Employment Equality (Religion or Belief) Regulations 2003 (the Regulations) were implemented to give effect to obligations under the EC Equal Treatment Framework Directive (No 2000/78). The Regulations prohibit discrimination by an employer on the basis of religion or belief whether directly, indirectly, by harassment or victimisation.

Religion includes any religion (or a lack of religion). Belief is defined as "religious belief or philosophical belief". Again, this includes a lack of belief. Following a recent amendment to the legislation, there is no need to show that the belief is similar to a religious belief. The width of the definitions gives rise to considerable debate on the extent of protection afforded. In one tribunal decision, a belief in loyalty to one's native flag was held not to be covered. In another, a belief in charitable causes was 'too vague' to be covered.

AGAINST THE ODDS?

Since the implementation of the Regulations, only a very small handful of religion/belief cases have succeeded at tribunal.

Since 2003:

- 1,300 religious discrimination claims have been lodged
- this compares with over 70,000 sex discrimination claims in the same period

During 2006/7:

- 80 religious discrimination cases reached a final hearing; and
- only 12 were successful.

Religious discrimination in various areas is apparent from the case law. There are a number of cases in which hours or days of work come into conflict with religion or belief. In *Williams-Drabble v Pathway Care Solutions Ltd and anor ET 2004* for example, the Employment Tribunal found that Ms Williams-Drabble had been indirectly discriminated against by her employer when the shift pattern was permanently altered for all staff so as to prevent her from attending church on a Sunday.

A requirement to work some Saturdays was also found by an employment tribunal to be discriminatory in *Fugler v Macmillan - London Hairstudios Ltd ET 2004*. The requirement placed those of the Jewish faith at a disadvantage. Although the employer had a legitimate aim (serving clients on a Saturday) its approach was not proportionate as it should have considered how the Claimant's duties could be rearranged for Yom Kippur which fell on a Saturday.

There have also been reported cases about the provision of food and drink. In *Williams v Five Rivers Child Care Ltd ET 2005*, the tribunal found that the practice of serving pork dishes did not place the Claimant, or others of his religion, at a disadvantage. The fact that there was always an alternative meal available was an important factor in the reasoning.

Similarly in *Khan v Direct Line Insurance plc, ET 2005* the fact that alcohol was offered as a sales incentive, even though a non-alcoholic prize was available on request, was not found to be discriminatory. The disadvantage to Muslims of having to ask for an alternative prize was so trivial that it should be properly ignored.

However, the area on which most of the reported cases (and publicity) focus is dress/appearance codes. Dress codes were seen when the Regulations were first brought in as one of the most obvious areas for religious discrimination. *Mohmed v West Coast Trains Limited (EAT 0682/05)*, the first case of purported religious discrimination to go to the Employment Appeal Tribunal, was concerned with this issue. Mr Mohmed claimed that his dismissal from West Coast Trains was due to his refusal to cut his beard, which his religion required to be longer than one fist's length. The employer claimed that they had dismissed Mr Mohmed on grounds of his "general lack of enthusiasm" and pointed to a Sikh colleague who also had a long beard,

but was able to keep his beard "in a tidy manner". The EAT upheld the ET's finding that the Claimant was not dismissed on grounds of his religion, and the appeal failed.

The case of *R (Shabina Begum) v Head teacher and Governors of Denbigh High School [2006] UKHL 15*, a case brought in the High Court under the Human Rights Act, also raised interesting issues about dress codes. Miss Begum was forbidden from wearing the full jilbab at school, which in her view infringed her right to manifest her religion. The House of Lords held that the school had not interfered with Miss Begum's right to manifest her religion. They found that the decision to prohibit the jilbab could be justified. The case emphasises the need for a reasoned and balanced approach to decision making in this area.

In *Azmi v Kirkless Metropolitan Council EAT 2007*, the EAT upheld the tribunal's finding that Ms Azmi was not discriminated against when asked by her employer to remove her full-face veil. Ms Azmi was employed as a bi-lingual teaching assistant. It was felt that the teaching assistance she provided when veiled was less effective as the children could not see and respond to non-verbal communication. She was instructed not to wear her full-face veil in the classroom, when teaching, and was suspended when she refused. The EAT agreed with the tribunal that there was no less favourable treatment and that asking the Claimant to remove her veil was a proportionate means of achieving a legitimate aim.

As the number of claims brought under the Regulations increases year on year, we can anticipate further cases on these and similar themes in the future. The very low percentage of successful claims, however, highlights just how difficult an area this is.



DISCRIMINATION LAW REVIEW – TOWARDS A SINGLE EQUALITY BILL

The current laws prohibiting discrimination on grounds of sex, sexual orientation, race, religion/belief, disability and age are all set out within separate pieces of legislation. Whilst there are common themes and principles which arise in all these strands of discrimination law there are also differences. The Discrimination Law Review was launched by the Government in February 2005 to consider the possibility of creating a clearer and more streamlined legislative framework with a view to creating a Single Equality Act. One of the key aims is to produce better outcomes for those who currently experience disadvantage.



The DLR's proposals for the Single Equality Bill were put out for consultation earlier this year and the consultation period ended last month. The Government intends to publish a draft bill in the next parliamentary session which begins in November 2007.

JUDICIAL MEDIATION

Employment tribunals in Birmingham, London Central and Newcastle have been running a judicial mediation pilot scheme. The scheme, which started last year, aims to provide a better resolution for the parties in discrimination claims, without the need for long and complex tribunal hearings. Judicial mediation can be offered in tribunal claims for race, sex or disability discrimination, generally where there is an ongoing employment relationship. The consent of all parties is required, and the process is confidential so that if resolution is not attained, none of the parties are permitted to refer to the matters arising in the judicial mediation for the remainder of the proceedings. The process is facilitated by a tribunal chair who will have no further involvement in the case if mediation fails.

Our experience is that a predominant feature of discrimination cases is that the claimant feels bitterly aggrieved at their perceived treatment by the respondent. The judicial mediation process provides an opportunity for both parties to express their views of the treatment in an informal way but in a context where the legal issues are understood. Often, entrenched views can be broken down and common ground can be found. The resolution is not limited to remedies within a tribunal's power to order, the approach is much more flexible, like a negotiated settlement. Our experience of judicial mediation has been a very positive one, with three claims being resolved at an early stage on terms which the claimants were very happy with. We welcome this innovation which seems to us to provide a real alternative for claimants to resolve their employment disputes. We look forward to it being adopted more widely in time.

AGE FIRST

We have succeeded in a claim for disability and age discrimination which we believe may be the first successful age discrimination judgment in a claim by a police officer. The Claimant, who has a hearing disability, is fully operational save for firearms and noise hazardous environments. He applied to transfer to a large force from another force. His transfer application was rejected. The new force argued that it was justified in rejecting his application to ensure the effective resilience of the force, given that he may become restricted in the future. The force conceded liability for both age and disability discrimination.



Equality Case Watch

Here is a brief report of some of the many equality cases we have been involved in recently for Police Federation members.

DISABILITY DISCRIMINATION

In *Dolan v Chief Constable of Avon & Somerset Constabulary* we succeeded in challenging the implementation of the Unsatisfactory Performance and Attendance Procedures. Mr Dolan, a former inspector, brought a DDA claim against Avon & Somerset Constabulary. He suffered from psychological ill health and following his return to work on recuperative duties he was subject to the UPP and UAP which ultimately led to him resigning. Importantly, the tribunal found that it would have been a reasonable adjustment for the Constabulary to defer the implementation of the procedures until the officer had returned to full health.

The case of *Hart v Chief Constable of Derbyshire* has gone on appeal to the EAT and is due to be heard on 27 November. The case concerns the important question of whether a probationer must be capable of the full range of police duties including regular confrontational duties in order to be confirmed at the end of their probation period.

SEX DISCRIMINATION

We advise and act in many cases of sex discrimination. A common theme at present is the refusal to grant flexible working requests. We are advising both male and female officers in these situations.

We are acting in a case in which the question of liability for discrimination while the officer is on secondment has raised its head again. The officer was paid by her home force while seconded to a unit funded by the Home Office and run by another force. The question of which is the appropriate respondent is being considered as a preliminary issue and we will report the result in a future edition. The case serves as a reminder to those going on secondment to ensure they know the terms of their secondment!

We are currently waiting for the tribunal's decision in a claim against Sussex Police (*Lynford v Chief Constable of Sussex*). Ms Lynford, a firearms officer based at Gatwick, claims sexual harassment in the workplace by her male colleagues and supervisors for a period of over two years which resulted in her being on long-term sick leave. The case attracted considerable publicity during the hearing because of the nature of the treatment the Claimant received.

Whilst some claims like these do end in tribunal hearings, many more result in favourable settlements at an earlier stage.

RACE DISCRIMINATION

We are also waiting for the tribunal's decision in the case of *Richmond v Chief Constable of West Yorkshire*. Sgt Richmond claims race discrimination on the basis that he was passed over in favour of an Asian sergeant for promotion to a post policing an area of Bradford with ethnic tensions. The case illustrates the real complexities in this area of law, and suggests that good intentions can still lead to unlawful discrimination.

RELIGIOUS DISCRIMINATION

We are acting in several cases for Muslim officers who appear to have been targeted in the vetting process and have had their CTC removed without any underlying evidence being divulged.

SEXUAL ORIENTATION DISCRIMINATION

We continue to advise and act in sexual orientation cases. These claims can often be more complex and protracted because they frequently involve multiple discrimination, ie discrimination alleged to be on more than one ground. For example, a Claimant may allege that her treatment was on the ground that she is a gay woman. The question of the appropriate comparator can be particularly problematic in these circumstances. The government is currently considering as part of the Discrimination Law Review how multiple discrimination claims like these can be made more straightforward.