

## PARK COURT CHAMBERS

### DISCRIMINATION CASE LAW REVIEW: MAY 2010

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## **AGE DISCRIMINATION**

**“First occasion on which age discrimination has been considered in a substantive appeal in Court of Appeal”**

**Failure to achieve increased numeration and status due to the requirement of a law degree for all legal advisers a consequence of retirement and not a consequence of indirect discrimination**

### **HOMER V CHIEF CONSTABLE WEST YORKSHIRE [2010] EWCA Civ 419 (23 February 2010)**

C was a 61 year old legal adviser without a degree who claimed that a PCP (that in order to reach the top pay grade with resultant increased status, legal advisers had to have a degree) placed him at a substantial disadvantage when compared with younger workers: he would not have time to obtain a degree (and so reach the top grade with increased status) prior to his retirement at 65 years.

Regulation 3(1)(b) of the **Employment Equality (Age) Regulations 2006** provides:

- “(1) For the purposes of these Regulations, a person (A) discriminates against another person (B) if –
- (b) A applies to B a provision, criterion or practice which he applies or would apply equally to persons not of the same age group as B, but
    - (i) which puts or would put persons of the same age group as B at a particular disadvantage when compared with other persons, and
    - (ii) which puts B at that disadvantage, and A cannot show the treatment or, as the case may be, provision, criterion or practice to be a proportionate means of achieving a legitimate aim.”

### **LEEDS ET**

C succeeded in his claim of indirect discrimination.

It was held that C had suffered the particular disadvantage with others in his age group that they were prevented from reaching the Third Threshold and were therefore prevented from achieving the appropriate status of that Threshold and equally were prevented from accessing the financial benefits of increased remuneration.

AS regards the issue of whether the provision, criterion or practice was a “proportionate means of achieving a legitimate aim”, the ET was satisfied that R was pursuing a legitimate aim – “to facilitate the recruitment and retention of staff of the appropriate calibre within the PNLD”. However, R failed to establish proportionality, mainly because of a failure to adopt a reasonable alternative namely “to impose a law degree or similar qualification or alternatively to set such a high level of both practical and theoretical legal experience as to amount to an equivalent of a law degree or similar”.

**The EAT** allowed R’s appeal on the “particular disadvantage” issue, finding that the approach of the ET had been vitiated by legal error. Whilst C’s proximity to retirement meant that he would not be able to obtain the financial advantage associated with the top grade, this was the *“inevitable consequence of age; it is not a consequence of age discrimination”*.

**The Court of Appeal** upheld the decision of the EAT

### **Maurice Kay LJ**

The central question was: **did the introduction and application of the law degree provision put C and others in his age group at a particular disadvantage?**

Maurice Kay LJ had no difficulty in accepting that it was C’s retirement at 65 that prevented him from obtaining the benefit of increased remuneration prior to intended retirement at 65. However he had more difficulty on the question whether the submission is was effective in the context of a disadvantage deriving from an erosion of status between the introduction of the provision, criterion or practice and intended retirement at the age of 65 – a point not considered by the EAT.

However, in his judgment, the claimed disadvantage in relation to status was not sustainable because, on close analysis, it was no different from the perceived disadvantage in relation to remuneration.

The fact that, as a man in his sixties, he would not have time to enjoy the status between graduation and retirement is no different from the fact that he would have no opportunity to enjoy the increased remuneration.

Put another way, C's case was not one of a particular disadvantage but one of a claim for more favourable treatment on account of age.

**Lord Justice Mummery:**

The inability to satisfy the law degree provision was not a particular disadvantage resulting from the application of that provision to persons of their *age*. The particular disadvantage complained of results not from age at all, but from the fact of impending withdrawal from the workplace at 65.

The inability to acquire, by use of the law degree, the status and financial rewards of appointment was the result of the fact of retirement, not of the age of the persons in the group."

"That outcome might seem to be unfair to persons of his age group comparing their lot with that of members of the comparator age group. However, the object of the 2006 Regulations (and the Equality Directive 2000/78/EC which they implement) is not to legislate against the general unfairness of age, whether juvenile or geriatric."

**No detriment where C had no intention of taking job**

**MS M E KEANE v INVESTIGO AND OTHERS (UKEAT/0389/09)**

The Claimant was a 51 year-old accountant who over a short period in mid-2007 responded to 20 or more advertisements posted on-line for accounting jobs. In each case the advertisement was one which made clear that it was aimed at recently qualified accountants and thus that the responsibilities were appropriate for someone of comparatively limited experience.

The R argued that C did not genuinely want any of the jobs for which she applied: the applications were made, partly, perhaps, to make a point about age discrimination, but partly with a view to making a claim in the tribunals which R would pay money to settle.

The Tribunal dismissed her claims on the basis that she had no interest in the vacancies and was making the applications only in order to be able to claim compensation and that she had accordingly suffered no detriment. On the same basis it ordered her to pay the Respondent's costs.

**The EAT held**, Underhill J presiding, that the Tribunal was fully entitled on the evidence before it to reach the conclusion that it did. An applicant for a job who has no interest in accepting it if offered has no claim for discrimination if the application is unsuccessful.

The Eat could not see how an applicant who is not considered for a job in which he or she is not in any event interested can in any ordinary sense of the word be said to have suffered a detriment

Nor could they see any reason why as a matter of policy it was necessary to give some extended meaning to the concept of detriment in this context.

## **DISABILITY DISCRIMINATION**

### **Reasonable adjustment to swap jobs and/or medically retire C**

#### **CHIEF CONSTABLE OF SOUTH YORKSHIRE POLICE v MR M D JELIC (UKEAT/0491/09/CEA)**

This appeal concerned the extent of a Chief Constable's duty of reasonable adjustments under the **Disability Discrimination Act** towards a serving police officer with chronic anxiety syndrome.

The Employment Tribunal found that in the particular circumstances of the case it would have been reasonable (1) to swap the jobs being undertaken by the Claimant and another police constable in the circumstances; or alternatively (2) to medically retire the Claimant on a police pension and immediately re-employ him in a civilian support staff role in the Force.

The Chief Constable appealed on several grounds, the main challenge being that the Tribunal was precluded as a matter of law from deciding that either of these could be reasonable adjustments under the Act.

Such a measure fell well outside anything contemplated as reasonable by the DDA, and in particular section 18B, which contains important guidance as to the lengths to which a reasonable employer should go in accommodating a disabled person, and which refers only to transferring a disabled person to fill an "existing vacancy".

If Parliament had intended an employer to be required to create a vacancy for a disabled person, by removing another employee from his post, then the legislation would have said so expressly.

**The EAT**, Cox J presiding, dismissed the appeal:

The reference to transferring an employee to fill an "existing vacancy" is illustrative, but not determinative, of the employer's duty in relation to deployment in any particular case.

"What is required of employers in relation to adjustments is, of course, limited to what is reasonable. In the course of his submissions Mr Jones advanced a number of different, hypothetical scenarios in seeking to make good his submission that swapping jobs is "a step too far" and outside the scope of the DDA. In relation to some of them he may well be right. It may well not be a reasonable adjustment, for example, for an employer to require a woman working flexible hours due to childcare responsibilities to swap her job with that of a disabled person working longer hours. Equally, it may not be reasonable to force someone out of a job for which they are well suited to one that they are not, in order to accommodate a disabled employee. However, in our view these examples serve only to emphasise the fact specific nature of the inquiry to be undertaken in every case."

**Dismissal unfair where R failed to consider C's defence to watching pornographic material at work of diabetic induced automatism but not disability discrimination**

**THE CITY OF EDINBURGH COUNCIL v MR ALISTAIR DICKSON (UKEATS/0038/09/B1, Underhill J)**

C, a diabetic, was employed by Edinburgh City Council, latterly as a community learning and development worker, based at the community wing of a school.

C's manager received a complaint from the organiser of a youth club whose members had been visiting the computer suite at the school the previous afternoon.

The complaint was to the effect that the Claimant had been seen both by children and by the adults accompanying them viewing images of sexual activity on one of the computers at the suite: the description of the material makes it clear that it was seriously pornographic.

C was dismissed for watching pornographic material on a computer at work. He advanced the defence that he was suffering a hypoglycaemic episode and not responsible for his actions. His employer rejected this defence.

The Claimant brought proceedings in the ET claiming both for unfair dismissal and that his dismissal constituted unlawful discrimination on account of his disability.

**The ET** held that the dismissal:

1. Was unfair because the decision-taker refused to "engage with" the defence notwithstanding material adduced in support of it; and that if the defence had been properly considered it would have been accepted; reinstatement ordered
  
2. Constituted direct disability discrimination, alternatively disability-related discrimination.

It made an award for injury to the Claimant's mental health and/or to his feelings in the sum of £25,000, together with interest.

**The EAT held:**

1. The Tribunal were entitled on the evidence before it to reach the conclusions that it did, and to order reinstatement.
  
2. The Council's conduct did not constitute either direct or disability-related discrimination.

The fact that the explanation which the Council rejected related to the Claimant's disability did not mean that the rejection was on the ground of that disability or of a reason related to it.

The Tribunal's thinking seems to have been that because the explanation which the Council (unreasonably) rejected was a "disability explanation" it followed that the rejection was on the ground of that disability.

The fact that the rejected explanation related to the Claimant's disability does not mean that the rejection was on the ground of that disability. The fact that an employee's disability is part of the story does not mean that it formed part of what motivated the decision-taker – "his mental processes".

The question is *why* the Council rejected the Claimant's explanation.

In this case there was no reason whatsoever to suppose that it did so *because* the Claimant was a diabetic.

**Does being forced to have your hair cut sexually discriminate against men?**

**MR A DANSIE v THE COMMISSIONER OF POLICE FOR THE METROPOLIS  
(UKEAT/0234/09/RN, HHJ Peter Clark)**

C commenced training as a police constable at the Hendon Training Centre on 17 March 2008. Prior to commencing that training he inquired, at an assessment visit, as to whether his hair length would be acceptable to the Force and was told that it would comply with the Force's new Dress Code Policy, the Policy dated 13 April 2005. That Policy, which replaced an earlier Code which was not in terms before the Tribunal stated, among other objectives, that:

**"The standard of dress should be smart, fit for the purpose and portray a favourable impression of the service."**

A separate Manager's Guidance on the Dress Code included:

**"Hair must be neat, not allowed to cover the ears and ... worn above the collar. For safety reasons, ponytails are not permitted and long hair must be neatly and securely fastened up and worn relatively close to the head."**

When the Claimant reported at Hendon his hair, which was shoulder length, was slicked back on his head and tied in a bun on the back of his head.

Having commenced the training programme, the Claimant was told to have his hair cut. He was threatened with disciplinary action if he did not comply, which he did in order to avoid such action and removal from the programme.

It was common ground that a female recruit would not, in similar circumstances, have been required to have her hair cut.

The Claimant contended that, in being forced to have his hair cut, he had been unlawfully discriminated against on grounds of his sex in that he had been less favourably treated and suffered detriment contrary to sections 1(2)(a), 2(1) and 6(2)(b) of the **Sex Discrimination Act 1975** (SDA) and/or harassed, contrary to sections 4A(1)(a), 4A(5), 4A(6) and 6(2)(a) of the Act. He claimed a declaration and compensation.

**The EAT held:**

A difference in treatment between the sexes on one particular aspect of the Dress Code is not necessarily more favourable treatment of a member of one sex compared with a member of the other sex.

A code which applies a conventional standard of appearance is not in and of itself discriminatory; looking at the Code as a whole, neither sex must be treated less favourably as a result of its enforcement.

The Tribunal was entitled to conclude that a female comparator who failed to comply with a gender neutral dress/appearance code necessary for this disciplined service, particularly when on basic training at Hendon, would have been treated in the same way as the Claimant; that is, she would have been required to comply with the Code as it affected her in the same way as the Claimant was required to comply with the Code as it affected him.

## **RACE DISCRIMINATION**

### **Employer liable for stigma loss/Polkey reductions in discrimination cases**

#### **BALBINDER SINGH CHAGGER v ABBEY NATIONAL PLC [2009] EWCA Civ 1202**

C was employed by R from November 2001 as a qualified chartered accountant and trading risk controller until his dismissal for redundancy with effect from 18 April 2006. He presented a complaint to the ET alleging unfair dismissal, race discrimination, and breach of contract. The ET found that all the claims were established against R.

Initially, C had limited his claim for future loss of earnings flowing from the discriminatory dismissal to a little under £300,000. This was based on the premise that a reasonable period over which to assess future loss would be 24 months. Subsequently, however, he changed his position and submitted a fresh schedule of loss claiming that the consequence of his discriminatory dismissal was that he had lost the ability to pursue his career. He assessed that loss at some £4,000,000.

The rationale for this change of position was the experience which C had when seeking to mitigate his loss. The Tribunal made extensive findings about that:

- He had applied for 111 roles and had been considered for even more than that;
- They were not limited to the market risk control field in which he had operated, and some were of a lower status than his Abbey job;
- He had made applications to Abbey itself, and had been unsuccessful;
- He had offered to work on a voluntary basis in a number of their departments in order to increase his employability;
- He had used a large number of recruitment agents, up to about 26 in all, but all his attempts to mitigate failed.

C identified a number of particular difficulties which he felt were damaging his prospects in the job market. Four matters in particular were identified:

- first, the stigma attached to him for taking legal proceedings against an employer;
- second, the issue surrounding his departure;
- third, the length of time for which he was unemployed; and
- fourth, the fact that for someone with his experience, the roles which he was seeking would generally be filled by internal promotion rather than external recruitment.

As far as the stigma contention is concerned, he identified and gave evidence about four specific companies which he believed had refused him employment at least in part because he had taken proceedings against Abbey.

C was awarded compensation amounting to £2,794,962.27 which was calculated on the premise that C would never again be able to obtain employment in his chosen field in the financial services industry.

R appealed both the liability and aspects of the remedies decisions.

**The EAT** rejected in its entirety the appeal on liability, but upheld aspects of R's appeal on remedy.

C appealed to the Court of Appeal the decision insofar as it related to remedies.

1. C contended that *Polkey v A E Dayton Services Ltd* [1988] AC 344 had no application to cases where there had been a finding that the dismissal was discriminatory;
2. C contended that he was entitled to recover stigma loss, i.e. loss arising from the stigmatisation of having taken proceedings against his former employer. The responsibility for the effects of that stigma should lie with the dismissing employer and not the employer who has been unlawfully influenced by the Claimant taking proceedings.

## **Court of Appeal**

### Polkey

The Court of Appeal rejected the appeal on the *Polkey* issue. There was a genuine redundancy situation and there were two candidates from which one would be selected. It is pertinent to note that C had not claimed that he was necessarily superior to the other candidate. His complaint was that he had not been fairly considered alongside her. There was plainly a realistic prospect that he would have been dismissed even if the selection had been on a non-discriminatory basis, and the Employment Tribunal had to assess that prospect. The matter was remitted to the employment tribunal to determine what the prospects were of C being dismissed even had there been no discrimination. The compensation that would otherwise have been awarded will then have to be reduced by the proportion reflecting that chance.

### Stigma loss

Should the dismissing employer bear what is termed “stigma loss”? Or should the employee be expected to recover that from the employers who stigmatise him?

The crucial question is whether the position is altered by the fact that the actions of the third party employers are unlawful. Legally, the question is whether these unlawful actions break the chain of causation, or whether they cause the loss flowing from them to be too remote. The answer to that question is inevitably influenced by considerations of policy.

The original employer must remain liable for so-called stigma loss which is, in principle, recoverable. It is doubtful whether Parliament in passing the victimisation provisions intended thereby to weaken the extent of the protection which the discriminated victim would have against his own employer.

**Liability for the actions of a third party agency worker**

**MAY & BAKER LTD t/a SANOFI-AVENTIS PHARMA v MRS F OKERAGO (UKEAT/0278/09/ZT, HHJ Birtles)**

The Respondent was a manufacturer of drugs. The Claimant was employed by R as a pharmacy inspector. She complained amongst other things that her employer was directly liable for the actions of Terri Dower, a white woman, who in July 2006 had asked her what she was doing here and told her to go back to her own fucking country when she responded “my country” in response to a question. She further complained that R had failed to deal adequately with her grievance about the same.

The Tribunal found R directly liable for the actions of Ms Dower, an agency worker pursuant to Section 32 of the Race Relations Act 1976 which provides:

**“32. Liability of employers and principals**

- (1) Anything done by a person in the course of his employment shall be treated for the purposes of this Act (except as regards offences thereunder) as done by his employer as well as by him, whether or not it was done with the employer’s knowledge or approval.**
- (2) 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 of this Act (except as regards offences there under) as done by that other person as well as by him.**
- (3) In proceedings brought under this Act against any person in respect of an act alleged to have been done by an employee of his it shall be a defence for that person to prove that he took such steps as were reasonably practicable to prevent the employee from doing that act, or from doing in the course of his employment acts of that description.”**

R appealed on the ground that R could not be directly liable for the actions of Ms Dower pursuant to Section 32 of the Race Relations Act 1976 because she was not in employment with R within the meaning of section 78(1), there were no findings that Ms Dower was an agent for the purposes of Section 32, R had not aided and abetted Ms Dower, and no findings had been made as to whether R was directly liable for the actions of a third party.

**The EAT upheld** the appeal and found:

1. R was not liable under Section 32 of the **Race Relations Act 1976** for the actions of Ms Dower because she was not an employee pursuant to Section 78 of the Act and which provides:

**“‘Employment’ means employment under a contract of service or of apprenticeship or a contract personally to execute any work or labour and related expressions shall be construed accordingly.”**

2. There was no or no adequate findings of fact in the judgment of the Employment Tribunal which could enable it to reach a conclusion that Ms Dower was an agent of the Appellant company for the purposes of section 32(2). There was no attempt to address or apply section 32(2) and no consideration of the concept of agency at all. It follows that there cannot be liability under section 32(2).
3. Therefore R was not vicariously liable for Ms Dower’s actions pursuant to Section 32 of the **Race Relations Act 1976**.
4. R could not have ‘aided and abetted’ Ms Dower pursuant to Section 33 of the **Race Relations Act 1976** because its failure to deal with the grievance was post the event and there was no complaint as regards R’s conduct prior the event;

**“33. Aiding unlawful acts**

- (1) **A person who knowingly aids another person to do an act made unlawful by this Act shall be treated for the purposes of this Act as himself doing an unlawful act of the like description.**
- (2) **For the purposes of subsection (1) an employee or agent for whose act the employer or principal is liable under section 32 (or would be so liable but for section 32(3)) shall be deemed to aid the doing of the act by the employer or the principal.**
- (3) **A person does not under this section knowingly aid another to do an unlawful act if -**
  - (a) **he acts in reliance on a statement made to him by that other person that, by reason of any provision of this Act, the act which he aids would not be unlawful; and**
  - (b) **it is reasonable for him to rely on the statement.**
- (4) **A person who knowingly or recklessly makes a statement such as is mentioned in subsection 3(a) which in a material respect is false or misleading commits an offence, and shall be liable on summary conviction to a fine not exceeding level 5 on the standard scale.”**

5. Finally, the Tribunal made no direct findings as to whether R was liable for unlawful race discrimination by a third party where the employer has sufficient control over the circumstances to have prevented it: See **Burton v De Vere Hotels** [1997] ICR 1 and **Pearce v Governing Body of Mayfield Secondary School** [2003] ICR 937.



## **DISCRIMINATION ON THE GROUND OF RELIGIOUS OR PHILOSOPHICAL BELIEF**

### **No discrimination on the ground of religious belief when R dismissed C, a Christian, for refusing to marry same-sex couples**

#### **LILLIAN LADELE v THE LONDON BOROUGH OF ISLINGTON , Neutral Citation Number: [2009] EWCA Civ 1357, CA**

C was one of R's registrars of Births, Marriages and Deaths until she resigned in 2009. The Civil Partnership Act 2004, which introduced civil partnerships between same sex partners, came into force on 5 December 2005.

C held "the orthodox Christian view that marriage is the union of one man and one woman for life", and she "could not reconcile her faith with taking an active part in enabling same sex unions to be formed", believing it to be "contrary to God's instructions". In anticipation of the 2004 Act coming into force, C told R that she would not want to officiate at civil partnerships.

R took the view that, in refusing to perform civil partnerships, C was in breach of Islington's published "Dignity for All" equality and diversity policy which provided that there should be equality and freedom from discrimination and harassment (on the grounds, among others, of sexual orientation and religious belief) for all staff. C was thereafter dismissed for gross misconduct.

C claimed that it was she who was not being accorded appropriate dignity, and that she was suffering discrimination as a result of her religious beliefs.

**The Court of Appeal** held:

#### **Claim for direct discrimination**

1. The ET's conclusion C suffered direct discrimination by being required by Islington to conduct civil partnerships, is as the EAT said, in paragraph 52 of Elias J's impressive and cogent judgment, "quite unsustainable". As he went on to explain, C's complaint "is not that she was treated differently from others; rather it was that she was not treated differently when she ought to have been", and her complaint was "about a failure to accommodate her difference, rather than a complaint that she is being discriminated against because of that difference". As

Elias J said in the next paragraph of his judgment, “[i]t cannot constitute direct discrimination to treat all employees in precisely the same way”.

2. It is not possible to infer from that fact that the real reason they acted as they did was C’s belief rather than her conduct. It was likely part of Islington’s motivation in acting as they did was the complaints from the gay registrars, that does not support the contention that Islington was influenced by C’s beliefs, as opposed to what she refused to do as a result of those beliefs.

### Indirect discrimination

3. The only issue was whether Islington could justify its policy decisions to designate all their registrars civil partnership registrars, and then to require all registrars to perform civil partnerships.
4. The PCP had the legitimate aim in the light its Dignity for All policy of wishing to ensure that all their registrars were designated to conduct, and did conduct, civil partnerships as they regarded this as consistent with their strong commitment to fighting discrimination, both externally, for the benefit of the residents of the borough, and internally in the sense of relations with and between their employees.
5. On the issue of proportionality, as the EAT said “[o]nce it is accepted that that the aim of providing the service on a non-discriminatory basis was legitimate – and in truth it was bound to be – then ... it must follow that [Islington] were entitled to require all registrars to perform the full range of services.”
6. Permitting C to refuse to perform civil partnerships “would necessarily undermine the council’s clear commitment to” what the EAT described as “their non-discriminatory objectives which [they] thought it important to espouse both to their staff and to the wider community”.
7. The fact that Ms C’s refusal to perform civil partnerships was based on her religious view of marriage could not justify the conclusion that Islington should not be allowed to implement its aim to the full, namely that all registrars should perform civil partnerships as part of its Dignity for All policy;
  - C was employed in a public job and was working for a public authority;

- she was being required to perform a purely secular task, which was being treated as part of her job;
  
- C's refusal to perform that task involved discriminating against gay people in the course of that job;
  
- she was being asked to perform the task because of Islington's Dignity for All policy, whose laudable aim was to avoid, or at least minimise, discrimination both among Islington's employees, and as between Islington (and its employees) and those in the community they served;
  
- C's refusal was causing offence to at least two of her gay colleagues;
  
- C's objection was based on her view of marriage, which was not a core part of her religion; and
  
- R's requirement in no way prevented her from worshipping as she wished.

**No breach of Religion Regulations where Christian employee dismissed for refusing to provide Psycho-Sexual Counselling to same-sex couples**

**MR G G McFARLANE v RELATE AVON LTD (UKEAT/0106/09/DA, Underhill J.)**

C, a Christian and the former elder of a large multicultural church in Bristol, believed that it follows from Biblical teaching that same-sex sexual activity was sinful and that he should do nothing which endorses such activity.

He joined R in May 2003 as a volunteer counsellor, and after undergoing basic training he became a paid employee in August of that year. He was required to, and did, sign up to its equal opportunities policy. He initially worked in marital and couples counselling.

The Claimant refused to undertake Psycho-Sexual-Therapy work with same-sex couples and R accordingly initiated the disciplinary procedure. The Claimant was thereafter summarily dismissed for failure to comply with Relate's Equal Opportunities policy and Professional Ethics policy in relation to work with same-sex couples and same-sex sexual activities.

C brought a claim against Relate alleging unfair dismissal and discrimination contrary to the **Employment Equality (Religion or Belief) Regulations 2003** which was rejected by the Tribunal. C appealed.

**The EAT held** that an employee does not have an unqualified right to manifest his religion.

*Direct discrimination*

The Claimant was treated as he was not because of his Christian faith but because of his perceived unwillingness to provide PST counselling to same-sex couples.

He was treated in the same way as any non-Christian who had evinced such an unwillingness:

“The fact that the employee's motivation for the conduct in question may be found in his wish to manifest his religious belief does not mean that that belief is the ground of the employer's action.

Take the case of an employee who wears an item of jewellery or clothing with a religious significance. In the absence of any other context, it may be permissible to infer that an

employer who dismisses an employee for wearing the item in question does so because of an objection to the belief so manifested: the protestation “I don’t mind you being a Christian/Muslim, but I object to you wearing a cross/veil” might, without more, be rejected as spurious.

If, however, it appeared from the context that there was some other ground for the objection – such as a general policy about the wearing of jewellery or practical reasons why the wearing of a veil was regarded as inappropriate – the position would be entirely different. In such a case any claim would have to be on the basis of indirect discrimination.”

### Indirect discrimination

As regards indirect discrimination the Respondent had unlawfully discriminated against the Claimant within the meaning of reg. 3 (1) (b) unless it could show that the application to the Claimant of that PCP was a proportionate means of achieving a legitimate aim – or, in the usual shorthand, whether it was justified.

The legitimate aim relied upon by R was the provision of a full range of counselling services to all sections of a community regardless, among other things, of their sexual orientation.

It must be justifiable for a body in the position of Relate to require its employees to adhere to the same principles which it regards as fundamental to its own ethos and pledges to maintain towards the public, all the more so where observation of those principles is required of it by law.

Permission to appeal was refused by Latham LJ in the **Court of Appeal** on 29<sup>th</sup> April 2010 who stated that he was bound by the decision in *Ladele* and commented that to give effect to the applicant’s position would necessarily undermine Relate’s proper and legitimate policy.

**Compelling a Christian to remove her cross not indirect discrimination because no disadvantage and justified in any event**

**EWEIDA v BRITISH AIRWAYS PLC [2010] EWCA Civ 80**

C, a devout practising Christian, worked part-time as a member of check-in staff for the Respondent since 1999. As her job was customer facing, she was required to wear uniform. Until 2004 the Claimant's uniform included a high necked blouse, and she wore a silver cross on a necklace underneath the blouse when she wished to.

In 2004 the Respondent introduced a newly designed uniform which included provision for an open neck, but which prohibited the wearing of any visible item of adornment around the neck. Thereafter the Claimant went to work on at least three occasions with the cross visible under her uniform. When asked to conceal it she did so. When on 20 September she refused to conceal the cross, she was sent home.

The Claimant remained at home, unpaid, from 20 September until the following February. She initiated and pursued the Respondent's grievance procedures. A storm of media attention, much of it hostile to the Respondent, led the Respondent to reconsider its uniform policy and to introduce an amended policy on 1 February 2007. The amended policy permitted staff to display a faith or charity symbol with the uniform.

The Claimant returned to work on 3 February 2007 and remained employed by the Respondent.

In her claim form C put her case against BA's dress code in this way:

"The Claim is for Indirect Discrimination on grounds of religion or belief .....

*(b) This policy prevents the open wearing of a Cross by Christians. British Airways have applied their policy to permit adherents of other faiths to openly wear religious clothes that manifest their religious beliefs in the workplace;*

*(e) The policy is a 'provision, criterion or practice' (PCP) which places i) Christians, and ii) the Claimant at a 'particular disadvantage'; the 'decision' to refuse the wearing of a discreet Cross is a PCP; the disrespect of the Christian faith is a PCP;"*

The question before the ET was whether, by adopting a staff dress code which forbade the wearing of visible neck adornment and so prevented the Claimant from wearing with her uniform a small, visible cross, British Airways indirectly discriminated against her pursuant to Regulation 3 of the **Employment Equality (Religion or Belief) Regulations 2003**.

Regulation 3 of the **Employment Equality (Religion or Belief) Regulations 2003** provides:

- “(1) For the purposes of these Regulations, a person (“A”) discriminates against another person (“B”) if –**
- b) A applies to B a provision, criterion or practice which he applies or would apply equally to persons not of the same religion or belief as B, but -**
    - (i) which puts or would put persons of the same religion or belief as B at a particular disadvantage when compared with other persons,**
    - (ii) which puts B at that disadvantage, and**
    - (iii) which A cannot show to be a proportionate means of achieving a legitimate aim.**

**By Reg. 2(1), “religion” means any religion and “belief” means any religious or philosophical belief.”**

**The ET** rejected the Claimant’s claim.

*No group disadvantage*

The Claimant had failed to show that Christians had been placed at a disadvantage. The tribunal heard evidence from a number of practising Christians in addition to the Claimant. None, including the Claimant, gave evidence that they considered visible display of the cross to be a requirement of the Christian faith. The Claimant herself described it as a personal choice rather than as a religious requirement.

There was no reason whatever why the tribunal should infer that there were others whose religiously motivated choice, not of whether but of where they should wear a symbol of their faith, was of such importance to them that being unable to exercise it constituted a particular disadvantage.

There was no evidence that the provision created a barrier for Christians, and ample evidence to the contrary.

There was no evidence of Christians failing to apply for employment, being denied employment if they applied for it, or failing to progress within the employment of the Respondent.

### PCP Not Justified

The employment tribunal explained why they would not have found the material requirement of the dress code justified if they had found that it placed Christians in general at a disadvantage.

They considered that the aim of the uniform code was undoubtedly legitimate. But they took the view that the prohibition of visible symbols was not proportionate because the eventual review which resulted in a relaxation of the code to permit the visible wearing of religious and other symbols could have taken place sooner had the (assumed) discriminatory impact of the code been analysed before November 2006.

They concluded that they would not consider the requirement proportionate because it fails to distinguish an item which represents the core of an individual's being, such as a religious symbol, from an item worn purely frivolously or as a piece of cosmetic jewellery. They did not consider that the blanket ban on everything classified as 'jewellery' struck the correct balance between corporate consistency, individual need and accommodation of diversity.

On appeal C argued that "persons" in sub-paragraph (i) includes a single individual. Even if on the evidence, therefore, C alone was disadvantaged by the dress code, the test of indirect discrimination is met. R cross-appealed on the ground that the PCP was justified in any event.

**The Court of Appeal** rejected the appeal.

### Need for group disadvantage

If C was right, no evidence of group disadvantage would ever be necessary: one would simply read "persons" as if it were "any person". In that event, however, sub-paragraph (i) could have been omitted entirely without changing the meaning of the regulation.

The 2003 Regulations were designed to implement the Framework Directive 2000/78/EC and there was no indication that the Directive intended either that solitary disadvantage should be sufficient – the use of the plural ("persons") makes such a reading highly problematical – or that any requirement of plural disadvantage must be dropped.

There was no reason to depart from the natural meaning of Reg. 3. That meaning is that some identifiable section of a workforce, quite possibly a small one, must be shown to suffer a particular disadvantage which the Claimant shares.

*PCP Justified*

On the footing on which the indirect discrimination claim was now advanced, namely disadvantage to a single individual arising out of her wish to manifest her faith in a particular way, everything in the tribunal's findings of fact shows the rule to have been a proportionate means of achieving a legitimate aim.

### A belief in climate change

#### GRAINGER PLC & OTHERS v MR T NICHOLSON, (UKEAT/0219/09/ZT, Burton J.)

The Claimant was employed by the Respondent until his employment was terminated on grounds of redundancy.

The Claimant claimed that his dismissal was unfair and that he was discriminated against contrary to the **Employment Equality (Religion or Belief) Regulations 2003**, because of his asserted philosophical belief about climate change and the environment which the Claimant described as follows:

“2. I have a strongly held philosophical belief about climate change and the environment. I believe we must urgently cut carbon emissions to avoid catastrophic climate change.

3. It is not merely an opinion but a philosophical belief which affects how I live my life including my choice of home, how I travel, what I buy, what I eat and drink, what I do with my waste and my hopes and my fears. For example, I no longer travel by airplane, I have eco-renovated my home, I try to buy local produce, I have reduced my consumption of meat, I compost my food waste, I encourage others to reduce their carbon emissions and I fear very much for the future of the human race, given the failure to reduce carbon emissions on a global scale.”

The issue was whether the belief assertedly held by the Claimant, was capable of being a belief for the purposes of the **2003 Regulations** which provides at para 3:

**“(1) For the purposes of these Regulations, a person (“A”) discriminates against another person (“B”) if ... (a) on the grounds of the religion or belief of B ... A treats B less favourably than he treats or would treat other persons.”**

Paragraph 2(1) reads as follows:

**“(1) In these Regulations –**

- i. “religion” means any religion,**
- ii. “belief” means any religious or philosophical belief,**
- iii. a reference to religion includes a reference to lack of religion, and**
- iv. a reference to belief includes a reference to lack of belief.”**

Regional Employment Judge Sneath held that the Claimant was entitled to pursue a claim under the **Employment Equality (Religion or Belief) Regulations 2003** (“the 2003 Regulations”).

R appealed.

The main issues were:

1. How far, if at all, the belief said to qualify for protection under the Regulations is required to be similar to a religious belief?
2. What limits (if any) should be placed upon the words “philosophical belief”?

**The EAT** held:

- It is necessary, in order for the belief to be protected, for it to have a similar status or cogency to a religious belief.
- A religious belief is not required to be one shared by others (“ A person could, for example, be part of the mainstream Christian religion, but hold additional beliefs which are not widely shared by other Christians, or indeed shared at all by anyone.”).
- A *philosophical belief* being protected does not need to constitute or “*allude to a fully-fledged system of thought*”.
- There is nothing in the make-up of a *philosophical belief* which would disqualify a belief based on a political philosophy.
- A political philosophy must be “*worthy of respect in a democratic society and not incompatible with human dignity*” and “*a belief consistent with basic standards of human dignity or integrity*”. Therefore a political philosophy which could be characterised as objectionable: a racist or homophobic political philosophy for example, would not amount to a political philosophy.
- If a person can establish that he holds a *philosophical belief* which is based on science, as opposed, for example, to religion, then there is no reason to disqualify it from protection by the Regulations.
- The existence of a positive *philosophical belief* does not depend upon the existence of a negative *philosophical belief* to the contrary (see: John Bower’s reference to the car guzzling believer in the development of natural resources).

## **SEX DISCRIMINATION**

### **Meek compliance –tribunal must give reasons as to why it preferred the evidence of one witness over another on issue central to the case**

#### **JACKSON GRUNDY ESTATE AGENTS v MRS K HALL (UKEAT/0423/09/CEA, HHJ Clark)**

The Respondent appealed against the findings of an Employment Tribunal that the Claimant was unfairly dismissed as sexually discriminated against in the omission of the Respondent to offer her employment. The Respondent argued that the decision was not Meek compliant in that the Tribunal had failed to give reasons as to why it preferred the evidence of one witness over another on the central issue of whether R had offered to the Claimant employment.

The judgment of Sedley LJ in **Anya v University of Oxford** [2001] IRLR 377, paragraph 24, where he approved this observation by Morison J (President) in **Tchoula v Netto Foodstores Ltd** (EAT 6 March 1998 - (unreported) was approved:

**"A bald statement saying that X's evidence was preferred to Y's is, we think, both implausible and unreasoned and therefore unacceptable; and it might appear to have been included simply to try and prevent any appeal. It seems to us likely that there will be a great deal of background material which is non-controversial. There is no need to recite at length in the decision the evidence which has been received. What a tribunal should do is state their findings of fact in a sensible order (often chronological), indicating in relation to any significant finding the nature of the conflicting evidence and the reason why one version has been preferred to another. It is always unacceptable for a tribunal to assert its conclusion in a decision without giving reasons."**

**No right to limit claim of sex discrimination extending over 6 years and said to be a continuing act, to 2 years**

**MISS M FRANCO v BOWLING & CO SOLICITORS ( UKEAT/0280/09/DM, HHJ McMullen)**

The Tribunal limited the Claimant's claim for sex discrimination to a period of 2 years, thereby excluding 4 years of actions said to form part of a continuing act that being a glass ceiling on her promotion to salaried partner throughout 6 years.

The EAT held what had occurred in this case was not within the jurisdiction of an Employment Judge sitting alone conducting a CMD.

Parties are enjoined to take the advice of Mummery LJ in **Metropolitan Police Commissioner v Hendricks** [2003] ICR 530 and not to take preliminary points on time but to leave those to a full hearing.

“What the judge has done here is to limit the nature of the Claimant's case. Put in simple terms, the Claimant is contending that there was a glass ceiling, so that throughout her career she was not to be made a salaried partner. On the judge's finding at the moment she will have to make that point in respect only of a period which begins on 28 March 2006. That is both unreal and unfair. The impact on an employment tribunal of a complaint that spans 6.2 years is going to be very different from one that is said to last for two. The Claimant's power to put that point is severely curtailed. In effect, as Mr Gullick correctly argues, the Claimant's claim to make a case about the regime under which she worked extending back to six years, has been struck out and replaced by one limited to two.”

**Injury to feeling need not result from knowledge that it was an act of discrimination**

**MR G TAYLOR v (1) XLN TELECOM LTD (2) MR T FITZPATRICK (3) MS T PINFOLD (4) MRS S HUTCHINSON (UKEAT/0385/09/ZT, Underhill J.)**

The Claimant, a black team leader in the broadband division of the Respondent, lodged a formal grievance against R. Although initially his grievance did not allege any kind of racial discrimination, in the course of a grievance appeal meeting he complained of racially offensive conduct on the part of one of his managers. The grievance was rejected. Following a probation review meeting the Claimant was suspended; and by letter dated 27 May he was dismissed with immediate effect, ostensibly for poor performance.

The claim issued a claim against R alleging that his dismissal was unfair and that it constituted unlawful victimisation contrary to the **Race Relations Act 1976**.

The Tribunal held that the Claimant had been dismissed partly because he had made a complaint of racial discrimination.

However it declined to make any award of injury to feelings or personal (psychiatric) injury because although there was evidence that the Claimant had suffered, the Claimant had in his evidence attributed his distress to the dismissal and its manner generally and not to the element of victimisation (of which indeed he was arguably unaware at the time).

That conclusion was reached reluctantly and on the basis that the ET was bound by the observation of Lawton LJ in **Skyrail Oceanic Ltd v Coleman** [1981] ICR 864 that “any injury to feelings must result from the knowledge that it was an act of sex discrimination ...”

**The EAT** held that the Claimant was entitled to recover for any injury to feelings and personal injury attributable to the act complained of, namely, the dismissal, without the need to attribute the injury specifically to knowledge of the element of discrimination, and that **Skyrail** was not authority to the contrary.

**Pregnant workers are not automatically entitled to a work assessment under Regulation 16 Management of Health and Safety at Work Regulations 1999 in the absence of evidence that the work involved a risk as to health and safety to the expectant mother.**

**MS L O'NEILL v BUCKINGHAMSHIRE COUNTY COUNCIL (UKEAT/0020/09/JOJ, HHJ Ansell)**

The Claimant that she had been sexually discriminated against on the ground that during her pregnancy the Respondent failed to carry out a risk assessment pursuant to Regulation 16 of the **Management of Health and Safety at Work Regulations 1999** and failed to reduce the risk to the Claimant and her unborn child.

Regulation 16 of the **Management of Health and Safety at Work Regulations 1999** provides that expectant mothers ought to be risk assessed at work where the work she was undertaking presented a risk to her and her baby from processes or working conditions, or physical, biological or chemical agents and risk from any infectious or contagious disease.

**The ET** found that in law Section 3A **Sex Discrimination Act 1975** did not confer any form of special protection to pregnant workers, including that of a risk assessment.

**“3A Discrimination on the ground of pregnancy or maternity leave**

**(1) In any circumstances relevant for the purposes of a provision to which this subsection applies, a person discriminates against a woman if –**

- (5) at a time in a protected period, and on the ground of the woman’s pregnancy, the person treats her less favourably...; or**
- (6) on the ground that the woman is exercising or seeking to exercise, or has exercised or sought to exercise, a statutory right to maternity leave, the person treats her less favourably ....”**

Furthermore, the failure to complete a risk assessment did not amount to sex discrimination because regulation 16 related to ‘work ... of a kind which could involve risk from any processes or working conditions, or physical, chemical or biological agents or risk ‘from any infectious or contagious disease’.

**The EAT** upheld the decision

There was no general obligation to carry out a risk assessment on pregnant employees with the result that failure to carry out such a risk assessment was discrimination per se.

It may be prudent for employers to carry out risk assessment for all pregnant workers but it is clear from the language of the Directive and the UK Regulations that the obligation to carry out a risk assessment of a pregnant worker would only be triggered in certain circumstances.

The following preconditions would have to be met (a) that the employee notifies the employer that she is pregnant in writing, (b) the work is of a kind which could involve a risk of harm or danger to the health and safety of a new expectant mother or to that of her baby, (c) the risk arises from either processes or working conditions or physical biological chemical agents in the workplace at the time specified in a non-exhaustive list at Annexes I and II of **Directive 92/85/EEC**.

## **PROTECTED DISCLOSURES**

### **Protected disclosure made whilst C not an employee or worker of R a qualifying disclosure where detriment suffered during later employment of C by R**

#### **BP PLC v 1) MR P ELSTONE 2) PETROTECHNICS LTD (UKEAT/0141/09/DM, Langstaff J.**

The central issue of law in this case was whether a Claimant could claim under Section 47B of the **Employment Rights Act 1996** to have suffered a detriment by the actions of his employer in respect of a protected disclosure about his concerns in respect of safety issues which was made at a time when he was neither an employee nor worker of that employer.

Section 47B of the **Employment Rights Act 1996** provides as follows:

- “(i) **a worker has the right not to be subjected to any detriment by any act, or any deliberate failure to act, by his employer done on the ground that the worker has made a protected disclosure.**
- (ii) **.....this section does not apply where –**
  - (a) **the worker is an employee, and**
  - (b) **the detriment in question amounts to dismissal (within the meaning of Part X)**
- (iii) **For the purposes of this section....“worker”, “worker’s contract”, “employment” and “employer” have the extended meaning given by Section 43K”**

Section 43B, under the title “disclosures qualifying for protection” defines what is a “qualifying disclosure”:

- “(1) **In this Part a “qualifying disclosure” means any disclosure of information which, in the reasonable belief of the worker making the disclosure, tends to show one or more of the following-**
  - (a) **that a criminal offence has been committed, is being committed or is likely to be committed,**
  - (b) **that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject,**  
...

- (d) **that the health or safety of any individual has been, is being or is likely to be endangered,**
- (e) **that the environment has been, is being or is likely to be damaged, or**
- (f) **that information tending to show any matter falling within any one of the preceding paragraphs has been, is likely to be deliberately concealed...”**

**The EAT** held that the statute provides within its terms that the disclosure need not relate to the employer, nor to the employer’s business, nor need it be made to the employer himself.

Sections 43A and 43B define a qualifying disclosure as one which is made “by a worker”. There is no express requirement that the worker be in any particular employment (let alone that of the employer referred to in section 47B), just as there is now established to be no requirement that a qualifying disclosure be about his present employer, or made to his present employer, or made at any particular time

The protection against a worker suffering detriment is however plainly related to his own current employment. He would not otherwise qua worker suffer a detriment.

**CERI WIDDETT/CATHERINE KNOWLES**

**PARK COURT CHAMBERS**

**10<sup>th</sup> May 2010**