



## UPDATE ON PREGNANCY AND SEX DISCRIMINATION CASES

2010 / 2011

### INTRODUCTION

- 1.1 Most of the significant cases in this area over the last year have concerned pregnancy discrimination. A wide range of questions have been considered, including the employer's obligation to conduct risk assessments of pregnant employees, the handling of redundancies during the protected period, as well as the related question of whether discrimination on the grounds of IVF treatment is prohibited.
- 1.2 Indirect sex discrimination has also been a recurrent theme, with particular focus on the selection of the appropriate pool for comparison.
- 1.3 Of course, the single most important development, in this and all areas of discrimination law, has been the enactment of the Equality Act 2010. Whilst many of the cases below are related to the previous legislation, they will, almost without exception, remain relevant to the equivalent provisions under the new Act.

### PREGNANCY DISCRIMINATION

- 1.1. In **O'Neill v Buckinghamshire County Council** [2010] IRLR 384, the EAT considered the employer's duty to conduct a risk assessment of pregnant employees contained in **Regulation 16** of the **Management of Health and Safety at Work Regulations 1999**.
- 1.2. The EAT held (following *Madarassy v Nomura International plc* [2007] IRLR 246):
  - 1.2.1. There is no general obligation to carry out a risk assessment on pregnant employees.
  - 1.2.2. The obligation is only triggered when the following preconditions have been met:

- the employee should notify the employer that she is pregnant in writing;
  - the work is of a kind which could involve risk of harm or danger to the health and safety of a new expectant mother or to that of her baby; and
  - the risk arises from either the processes or working conditions or physical, biological or chemical agents in the workplace at the time.
- 1.2.3. Where the duty is triggered, a failure to carry out a risk assessment would constitute sex discrimination.
- 1.2.4. Although there is a requirement to inform a pregnant worker of the results of the risk assessment, and to provide the employee with comprehensive and relevant information on the risks to their health and safety identified by the assessment, a meeting with the employee is not required before the obligation to carry out a risk assessment was satisfied.
- 1.3. In **Simpson v Endsleigh Insurance Services Ltd**, UKEAT/0544/09/DA, the EAT considered **Reg 10** of the **Maternity and Parental Leave Regulations 1999**, which governs the employer's obligation to offer a suitable alternative vacancy when an employee is made redundant whilst on maternity leave.

- 1.4. **Reg 20** of the 1999 Regs provides:

**Regulation 20 - Unfair dismissal**

**(1) An employee who is dismissed is entitled under section 99 of the 1996 Act to be regarded for the purposes of Part X of that Act as unfairly dismissed if -**

**(a) the reason or principal reason for the dismissal is of a kind specified in paragraph (3), or**

**(b) the reason or principal reason for the dismissal is that the employer is redundant, and regulation 10 has not been complied with."**

- 1.5. **Reg 10** provides:

**Regulation 10 - Redundancy during maternity leave**

**(1) This regulation applies where, during an employee's ordinary or additional maternity leave period, it is not practicable by reason of redundancy for her employer to continue to employ her under her existing contract of employment.**

**(2) Where there is a suitable available vacancy, the employee is entitled to be offered (before the end of her employment under her existing contract) alternative employment with her employer or his successor, or an associated employer, under a new contract of employment which complies with paragraph (3) (and takes effect immediately on the ending of her employment under the previous contract).**

**(3) The new contract of employment must be such that -**

**(a) the work to be done under it is of a kind which is both suitable in relation to the employee and appropriate for her to do in the circumstances, and**

**(b) its provisions as to the capacity and place in which she is to be employed, and as to the other terms and conditions of her employment, are not substantially less favourable to her than if she had continued to be employed under the previous contract.”**

1.6. The central issue was whether or not there was a suitable alternative vacancy which R should have offered to C and the interaction between Reg 10(2) and Reg 10(3). The EAT held:

1.6.1. The ET was right to hold that the issue of whether the alternative vacancy was ‘suitable and appropriate’ for the employee (the **Reg 10(3)(a)** issue) and the issue of whether the terms and conditions of the vacancy ‘were not substantially less favourable to her’ had to be considered together.

1.6.2. The ET and EAT rejected the argument, advanced on behalf of C, that the correct approach is (1) to establish whether the vacancy is ‘suitable’, in which case it must be offered to C and (2) to go on to consider the terms and conditions of the vacancy. Para 27:

**‘The requirement of the suitability set out in Regulation 10(2) can only sensibly be tested by the requirement that it is coupled with a new contract of employment, which complies with Regulation 10(3). To suggest that 10(3)(a) can be looked at, apart from Regulation 10(3)(b), seems to import a two-stage process into the regulation which is not apparent from its wording. The regulation itself, in our view, protects those on maternity leave in preference to those who are in fact still working and the necessity to provide an equivalent post is protected by the requirement as to term, this being not less substantially favourable.**

- 1.6.3. The EAT rejected a submission that the 'suitability' of the vacancy should be considered from the employee's perspective. The correct test is an objective one. Query whether the language the EAT uses suggests a 'band of reasonable responses' test. Para 31:

**It seems to us that the Tribunal were absolutely correct to focus on an objective decision made by the employer, since under the regulations there is no requirement on the employee to actually engage in this process, although clearly the employer would have to consider what it knew about the employee's personal circumstances and work experience. It seems to us that at the end of the day it is up to the employer, knowing what it does about the employee, to decide whether or not a vacancy is suitable. Ms Palmer suggested this places a very difficult task on employers when deciding, for example, whether or not to offer a more senior post to an employee who is on maternity leave.**

- 1.6.4. The EAT (at para) 31 comments that it is 'by no means satisfied' that an employer can test suitability by assessment and interview.
- 1.7. The (surprising) consequence of this appears to be that, if R can point to an aspect of the terms and conditions which is 'less favourable', then there would appear to be no obligation on it to offer the job to C, even if the 'less favourable' term is acceptable to her. This is difficult to reconcile with a purposive approach to the legislation.
- 1.8. In **Gassmayr v Bundesminister für Wissenschaft und Forschung** [2011] 1 CMLR 7 (Case C-194/08), the ECJ considered whether a pregnant employee is entitled to be paid for duties they can no longer perform because of pregnancy.
- 1.9. The case concerned a junior hospital doctor, who was pregnant and was, under national legislation designed to protect the health of the woman and her unborn child, required to stop working for part of her pregnancy (the equivalent of a maternity suspension under **Ss.66-70 ERA**; the equivalent remuneration provision is contained in **s.69 ERA**).
- 1.10. If she had remained at work, she would have been entitled to payments in respect of on-call duties outside normal working hours, which were additional to her basic salary and to which she was only entitled when she actually performed the on-call duties. She argued that she should continue to receive full pay whilst on maternity suspension as though she were actually working, including the supplementary on-call payments. She relied on **Article 11 of Council Directive 92/85/EEC** ('The Pregnant Workers Directive') which provides:

**“In order to guarantee workers within the meaning of Article 2 the exercise of their health and safety protection rights as recognised in this Article, it shall be provided that:**

**1. in the cases referred to in Articles 5, 6 and 7, the employment rights relating to the employment contract, including the maintenance of a payment to, and/or entitlement to an adequate allowance for, workers within the meaning of Article 2, must be ensured in accordance with national legislation and/or national practice;**

**2. in the case referred to in Article 8, the following must be ensured:**

**(a) the rights connected with the employment contract of workers within the meaning of Article 2, other than those referred to in point (b) below;**

**(b) maintenance of a payment to, and/or entitlement to an adequate allowance for, workers within the meaning of Article 2;**

**3. the allowance referred to in point 2(b) shall be deemed adequate if it guarantees income at least equivalent to that which the worker concerned would receive in the event of a break in her activities on grounds connected with her state of health, subject to any ceiling laid down under national legislation;**

**4. Member States may make entitlement to pay or the allowance referred to in points 1 and 2(b) conditional upon the worker concerned fulfilling the conditions of eligibility for such benefits laid down under national legislation.**

**These conditions may under no circumstances provide for periods of previous employment in excess of 12 months immediately prior to the presumed date of confinement.”**

1.11. The ECJ held:

1.11.1. **Article 11** has direct effect. **Article 11(1)** refers to the maintenance of ‘a’ payment and not ‘the’ pay of the worker concerned (para 61).

1.11.2. That provision leaves the Member States a certain degree of latitude when defining the conditions for the exercise and implementation of the entitlement to an income for the pregnant workers (para 67).

- 1.11.3. Where the Member States and, where appropriate, management and labour choose, in accordance with **Article 11**, to ensure that a pregnant worker who is granted leave or is prohibited from working in accordance with art.5(3) receives an income in the form of a payment, an adequate allowance or a combination of the two, that income must in any event be made up of that worker's basic monthly salary and the pay components or supplements relating to her occupational status, such as allowances relating to the seniority of the worker concerned, her length of service and her professional qualifications (para 72).
- 1.11.4. Under the relevant Austrian legislation, a pregnant worker is entitled to pay equivalent to the average earnings she received in the 13 weeks preceding the prohibition on working. However, the on-call duty allowance to which the worker was entitled during that reference period is not taken into account in calculating those average earnings. That legislation is not precluded by **Article 11** (paras 74-75).
- 1.12. In a Spanish case, **Roca Álvarez v Sesa Start España ETT SA** (Case C-104/09), the ECJ ruled that a working father in Spain was entitled to take so-called 'breastfeeding leave' even though the mother of his child was self-employed. The ECJ held that linking his entitlement to the employment status of his partner – when no such restriction applied to female employees wishing to take breastfeeding leave – amounted to sex discrimination contrary to the EU Equal Treatment Directive No.76/207 (since consolidated into Directive 2006/54). In making it harder for men to qualify for the leave, the national law perpetuated the traditional roles of men and women by keeping men in a subsidiary position when it came to assuming parental duties. This decision has a possible knock-on effect for parental leave rights in Great Britain; namely, that men might be able to claim that it gives them the right to the same enhanced benefits during paternity leave as their employer would pay to a woman on maternity leave.
- 1.13. In **Sahota v The Home Office**, UKEAT/0342/09/LA, the EAT considered the question of whether discrimination on the ground that an employee is receiving IVF treatment is to be regarded as discrimination on the ground of her sex or of pregnancy.
- 1.14. The question arose in the present case as to whether the principle established in *Webb v Emo*, extends not only to pregnant employees but to those undergoing IVF treatment who are not pregnant – either because treatment has begun but ovum has not yet been implanted or because an implantation has failed but further implantation is contemplated. C contended that in such a case, as in the case of pregnancy, it is wrong to treat the position of a female employee undergoing such treatment as comparable with that of a man undergoing medical treatment, and that to subject such an employee to a detriment on the grounds that she is undergoing such treatment constitutes direct sex discrimination.

- 1.15. A similar argument was advanced in *London Borough of Greenwich v Robinson* (unreported, EAT/745/94), where an employee who took time off work to undergo IVF treatment contended that the absences in question should not count as sickness absence. The EAT rejected that argument. It held that infertility was a medical condition requiring medical treatment, and that any absence due to such treatment fell to be treated as sickness absence in the usual way. The situation was different from that considered in *Webb v Emo* [1995] ICR 1021: that case was concerned with absence due to pregnancy, which is not – as the Court had expressly held – a ‘pathological condition’.
- 1.16. C argued that the decision in *Robinson* was inconsistent with the more recent decision of the ECJ in *Mayr v Bäckerei und Konditorei Gerhard Flöckner OHG* [2008] IRLR 387. In that case the employee underwent follicular puncture with a view to implantation five days later. She was certified sick during that period. On the third day she was dismissed with immediate effect. The ECJ held that she was not entitled to protection under art. 10 of the Pregnancy Directive because she could not be said to be pregnant until implantation had occurred. But it held that she was entitled to be protected under the Equal Treatment Directive because the treatment in question ‘directly affects only women’.
- 1.17. The EAT held (para 12):
- 1.17.1. *Mayr* is not authority for the proposition that any less favourable treatment of a woman on the ground that she was receiving IVF treatment constituted sex discrimination. Its effect is confined to the particular circumstances of the case before the ECJ – i.e. that of an employee dismissed in the short interval between follicular puncture and an imminent first implantation attempt.
- 1.17.2. If C’s argument were accepted, it would cover any kind of gender-specific treatment. The ECJ had previously rejected in *Danmark A/S and Handels-og Kontorfunktionærernes Forbund i Danmark (HK) v Dansk Arbejdsgiverforening* [1992] ICR 333 the proposition that gender-specific illness, even one attributable to pregnancy or confinement, was protected by the Equal Treatment Directive and it was evident from para 49 that the Court in *Mayr* did not intend to go back on that decision.
- 1.17.3. Further, fertilised ova could be kept for a period of many years and there might, therefore, be a very long period during which implantation remained contemplated. There would thus be no definitive point at which it could be said that ‘pregnancy’ had come to an end, which would be inconsistent with the principle of legal certainty.

1.17.4. The ECJ in *Mayr* was evidently willing to make a limited, and closely defined, exception only for the 'important' stage 'between the follicular puncture and the immediate transfer of the in vitro fertilised ova'.

1.18. In **Nixon v (1) Ross Coates Solicitors (2) R. Coates**, UKEAT/0108/10/ZT, the EAT considered the correct approach to the test for harassment.

1.19. The Claimant complained that a colleague had spread gossip about the paternity of her child. She claimed this amounted to harassment under the SDA. The ET rejected the harassment complaint on the basis that, although the person responsible for the gossip, 'might have been ... indiscreet in a minor way ... we perceive of her nothing ... which could possibly be regarded as intimidating, hostile, degrading or humiliating.'

1.20. This is an unfortunate elision of the statutory test which defines harassment as conduct:

- which is unwanted;
- which is related to the claimant's sex or that of another person; and
- has the purpose or effect of violating her dignity;
- or of creating an intimidating, hostile, degrading, humiliating or offensive environment for her.

1.21. On the face of it, there is no consideration by the ET of the effect of the conduct as distinct from its purpose.

1.22. The EAT allowed the appeal and substituted a finding of harassment (para 51) on the basis that the gossip was:

**'uncomfortable for the Claimant ... it is connected with pregnancy. The evidence as to discomfort felt by the Claimant was not challenged. It does constitute a course of conduct, meeting the definition of harassment and the Tribunal was wrong not to see this.'**

1.23. It might be thought that 'discomfort' sets the bar for claimants lower than the statutory language of 'violation of dignity', 'humiliation' etc. This may have been the distinction which the ET was seeking to make in rejecting the claim, albeit using rather loose language.

1.24. In **Kulikaoskas v Macduff Shellfish**, UKEATS/0062/09/BI, the EAT considered whether a case may be brought of associative pregnancy discrimination by a man who alleged that he had been treated less favourably because of his partner's pregnancy. He alleged his dismissal was in response to his having advised his supervisor that his partner was pregnant, following an incident in which he was asked why he was assisting her in lifting heavy weights in the factory. His partner brought separate proceedings.

1.25. The EAT held:

1.25.1. no relevant claim for associative discrimination existed in these circumstances and the matter did not need to be referred to the European Court of Justice.

1.25.2. An important aspect of the decision of the ECJ in *Coleman v Attridge Law* [2008] IRLR 722 ECJ was that the less favourable treatment in question was liable to have a direct effect on the Claimant's disabled child, that is, a direct effect on the vulnerability which the relevant anti-discrimination law (the Framework Directive) is designed to protect.

1.25.3. It is plain that section 3A of the SDA does not, on the face of it, prohibit an employer from affording less favourable treatment to a man on the ground of a woman's pregnancy. The only basis for reading associative discrimination into section 3A would be if European law required it.

1.25.4. The approach in European Law has been to identify a feature that is unique to women, recognise that it is deserving of and requires special protection because of the risks specified above and to provide that, without the need for any comparison, certain specified forms of treatment of women when in the uniquely female state of pregnancy will amount to direct discrimination on grounds of sex. What has emerged is a separate code that deals with pregnancy and maternity (para 35). There is no indication of a continuing concern that more may need to be done to secure that protection, unlike the position with disability discrimination, for the reasons discussed in **Coleman**.

1.25.5. Further, and unlike **Coleman**, this is not a Framework Directive case. It concerns the Pregnant Workers' Directive and the recast Directive and the history of those Directives, together with the judicial consideration of the reason for affording special protection to pregnant workers (as referred to above), show matters in a different light.

1.26. Query whether this will remain the position under the Equality Act 2010.

1.27. The Explanatory Notes to the Act (at para 59) state that the definition of direct discrimination is broad enough 'to cover cases where the less favourable treatment is because of the victim's association with someone who has that characteristic (for example, is disabled), or because the victim is wrongly thought to have it (for example, a particular religious belief).' Pregnancy is one of the protected characteristics.

- 1.28. However, the EHRC Code on the Equality Act says this: ‘it is direct discrimination if an employer treats a worker less favourably because of the worker’s association with another person who has a protected characteristic; however, this does not apply to marriage and civil partnership *or pregnancy and maternity*. In the case of pregnancy and maternity, a worker treated less favourably because of association with a pregnant woman, or a woman who has recently given birth, may have a claim for sex discrimination [emphasis added]’
- 1.29. No explanation is given as to the basis of these assertions. On the face of it, there is nothing in the language of s.13 EA 2010 (the general definition of direct discrimination) which would exclude a claim of associative pregnancy discrimination or which otherwise suggests that pregnancy is to be treated differently from the other protected characteristics. However, s.25(5) EA 2010 (‘References to particular strands of discrimination’) provides that ‘Pregnancy and Maternity Discrimination is discrimination within section 17 or 18’). This suggests that s.13 does not apply to pregnancy at all. S.18 EA 2010 uses language which limits the protection to the pregnant woman herself.

## **VICTIMISATION**

- 1.30. The importance of **Martin v Devonshires Solicitors** UKEAT/0086/10/DA is threefold: it emphasizes again that the central question in a discrimination case is the ‘reason why’ question; the ‘but for’ test for causation in victimisation claims is not an all-purpose substitute for the statutory language; and a complainant does not acquire absolute immunity from the consequences of anything said or done in the course of making their complaint, merely by virtue of having made it.
- 1.31. The purpose of the victimisation legislation is to protect a genuine complainant from retaliation, but does that protection extend to all circumstances, irrespective of the surrounding circumstances?
- 1.32. On the face of it, if an employer dismisses because the employee has made a complaint of discrimination, he commits an act of victimisation, unless he can show that the original complaint was both false and made in bad faith (s.4(2) SDA 1975). Neither the old discrimination legislation nor the Equality Act 2010 provide for a defence of justification.
- 1.33. In the present case, the difficulty for the employer was stark. The employee had made serious (and very unusual) allegations of discrimination, including an allegation that two of D’s partners had harassed her by calling her a prostitute. The employer accepted that the dismissal was connected to the making of those allegations. They did not assert that they were made in bad faith, having been advised by way of a consultant’s report that the employee had a history of mental

ill-health and that the acts of which she complained were probably 'auditory hallucinations' connected to a psychotic episode.

- 1.34. On a straightforward 'but for' analysis of causation, it might be thought that the claim was bound to succeed. It did not. In a victimisation complaint, the EAT holds, the Tribunal must ask whether the making of the complaint itself was truly the reason for the dismissal or whether the reason was, in fact, some feature of it which can be treated as 'properly separable'.
- 1.35. An obvious example of a 'properly separable' feature is the manner in which a complaint is made, for example a complaint accompanied by threats of violence.
- 1.36. In the present case, the factors which the Tribunal held were 'properly separable' from the making of the complaint included: the falseness of the allegations; the fact that the employee would not accept that they were false and had no insight into her condition; her mental illness itself; and the risk that she might make further false allegations.
- 1.37. The threshold for the employer in establishing that a feature is 'properly separable' is, however, high. The separable features must go beyond what the EAT characterises as 'ordinary unreasonableness'. At para 22 the Underhill P. says this:

**'Employees who bring complaints often do so in ways that are, viewed objectively, unreasonable. It would certainly be contrary to the policy of the anti-victimisation provisions if employers were able to take steps against employees simply because in making a complaint they had say, used intemperate language or made inaccurate statements. An employer who purports to object to "ordinary" unreasonable behaviour of that kind should be treated as objecting to the complaint itself, and we would expect tribunals to be slow to recognise a distinction between the complaint and the way it is made save in clear cases. But the fact that the distinction may be illegitimately advanced made in some cases does not mean that it is wrong in principle.'**

- 1.38. This case is another instance of the appellate courts urging the adoption of a 'reason why approach' rather than a 'hypothetical comparator approach' in discrimination cases. At para 30, Underhill P. alludes to the growing body of case-law which casts doubt on the value of constructing a hypothetical comparator and expresses regret that 'there seems so far to have been little impact on the hold that the hypothetical comparator appears to have on the imaginations of practitioners and tribunals.' In the present case, the President holds at para 29:

**‘it does not matter how the Tribunal defined the hypothetical comparator if it was right to find that the Appellant was not dismissed by reason of having made a complaint of discrimination.’**

- 1.39. In **Pothecary Witham Weld v Bullimore** [2010] IRLR 572, the EAT confirmed that the reversal of the burden of proof applied to victimisation complaints under the SDA. This is likely now to be an academic point, since the **Equality Act 2010** expressly provides for this in respect of all victimisation complaints.
- 1.40. Of more interest is the EAT’s comments about the way Tribunals should deal with burden of proof arguments. They find (para 27) that:
  - 1.40.1. in a case where a claimant has raised a prima facie case for the purpose of s.63A, it must in principle be enough to say (with such reasons as may be appropriate) ‘we were not persuaded that his explanation was right’, rather than ‘we reject his explanation’.
  - 1.40.2. In cases where any discriminatory motivation may well be subconscious - something notoriously difficult to prove or disprove - a tribunal may reasonably prefer to go no further than to say that the burden of proof has not been discharged.
  - 1.40.3. It is mainly because of the difficulties of such cases that the burden of proof provisions have a useful function. Wherever possible, however, it is preferable for a tribunal to make positive findings one way or the other.

## **REMEDY**

- 1.41. A second appeal to the EAT related to the remedy decision in the same case: **Bullimore v Pothecary Witham Weld Solicitors (No.2)** [2011] IRLR 18 EAT.
- 1.42. C had left her employment with R, bringing claims of unfair dismissal and sex discrimination against them. She secured a job with another firm of solicitors, was made redundant from that job and was then offered, subject to satisfactory references, employment with another firm, Sebastian's. R provided a negative reference which gratuitously alluded to the fact that C had brought proceedings against them. Sebastian's subsequently altered its terms and conditions, adding a probationary period to the contract, which C refused to accept, and the offer of employment was effectively withdrawn.
- 1.43. The Tribunal ruled that C had been unlawfully victimised by both R and Sebastian's. Sebastian's settled before the remedy hearing. An award of £7,500 for injury to feelings was made against R. However, no award was made against R in respect of loss of earnings. The ET considered that the withdrawal of the job

offer by Sebastian's had broken the chain of causation and that R was not liable for subsequent losses. C appealed to the EAT.

1.44. The EAT held that the ET was wrong to conclude that R was not liable for the subsequent losses. The withdrawal of the new job offer was entirely foreseeable. As a matter of policy and fairness, R ought to be liable. The EAT held that:

1.44.1. questions of remoteness require a value judgment about whether a particular consequence of a wrongful act ought to sound in damages. It is not enough to analyse remoteness primarily in terms of causation. The modern approach is to seek to confine the language of causation to the purely factual issue of whether the damage would have occurred 'but for' the defendant's wrongful act.

1.44.2. Questions of remoteness are judged by different criteria, such as whether the consequences in question were 'direct' or 'natural' or foreseeable, though no single criterion is determinative in all cases.

1.44.3. The ultimate question is how far, in the circumstances of the particular case, the responsibility of the wrongdoer ought fairly to extend.

1.44.4. When an ex-employer gives, for an illegitimate reason, an adverse reference which leads to a prospective future employer deciding not to make, or to withdraw, a job offer to a candidate it is hard to see why that consequence should be regarded as too remote to attract compensation from the original employer: so far from being remote, it seems both close and direct.

1.44.5. A remedy against the prospective employer, i.e. the recipient of the reference, will not always be available.

1.45. The case was remitted to the same Tribunal to determine compensation for loss of earnings.

### **INDIRECT SEX DISCRIMINATION**

1.46. **MOD v DeBique** [2010] IRLR 471 concerned a female Commonwealth soldier from St Vincent and the Grenadines. She was a single mother and her child lived with her in the UK. Although initially arrangements were made which enabled her to make effective childcare arrangements, those arrangements broke down. In order to solve the problem, she wanted to bring one of her sisters – a national of St Vincent and the Grenadines – to the UK to help her look after her child. She was not allowed to do so. She was subjected to disciplinary sanctions for failing attend parade.

- 1.47. She complained of indirect race and sex discrimination. Two PCPs were applied to her: the '24/7' PCP, which required her to be available to be deployed 24 hours a day, seven days a week; and the 'immigration PCP' which, pursuant to UK immigration rules (incorporated into Army rules) prevented Commonwealth soldiers from bringing adult relatives to live with them for childcare purposes. UK national soldiers were permitted to have an adult relative living with them to provide childcare.
- 1.48. The ET upheld the claims. In doing so, they rejected R's argument that national immigration rules could not properly be regarded as a PCP; they considered the combined effect of the two PCPs; and they rejected R's argument that in selecting a pool which consisted of 'those of Vincentian national origin and of British national origin in the Army who are or may become single parents' the ET had erred in excluding all those soldiers of non-British and non-Vincentian national origin. R argued that the correct pool should have included all soldiers in the British Army who are or may become single parents, regardless of their national origin.
- 1.49. The EAT held:
- 1.49.1. It is irrelevant that the PCP identified arose from the operation of the immigration rules, or that those rules have a statutory source and are applied by the Secretary of State for the Home Department when making immigration decisions.
- 1.49.2. No universal principle of law dictates what the pool should be in any particular indirect discrimination claim. In reaching their decision as to the appropriate pool in a particular case, a tribunal should undoubtedly consider the position in respect of different pools within the range of decisions open to them, but they are entitled to select from that range the pool which they consider will realistically and effectively test the particular allegation before them.
- 1.49.3. It is not always necessary to rely on statistics, and the tribunal can and should take a flexible approach to disparity, having regard to the circumstances of the case and the underlying purpose of the legislation.
- 1.49.4. The employment tribunal had not erred in considering the combined effect of the two PCPs. The nature of discrimination is such that it cannot always be sensibly compartmentalised into discrete categories. Whilst some complainants will raise issues relating to only one or other of the prohibited grounds, attempts to view others as raising only one form of discrimination for consideration will result in an inadequate understanding and assessment of the complainant's true disadvantage. Discrimination is often a multi-faceted experience.

- 1.50. In **Pike v Somerset CC** [2010] ICR 46, the question of the correct pool was again in issue.
- 1.51. The claimant retired early as a full-time teacher, on health grounds, and returned to teach part-time while receiving a pension paid on the grounds of her incapacity. Under the relevant regulations, as a part-time teacher in receipt of a pension, her employment was not pensionable, and she brought claims against her employer and the Secretary of State, seeking access to the pension scheme, contending that, as there was no corresponding provision in respect of full-time employment and as more women than men would be disadvantaged by the provision, it constituted indirect discrimination, contrary to article 2 of Directive 97/80/EC 2, and was in breach of the equality clause implied in her contract of employment.
- 1.52. The PCP was not to be in receipt of a pension when teaching part-time in order to be eligible for the scheme. C contended this disadvantaged substantially more women than men. The ET decided that the correct pool was 'all members of the teaching profession to whom the pension scheme applied'. On that basis, it found the adverse disparate impact on women to be minimal and struck out the claim as having no prospect of success.
- 1.53. The Employment Appeal Tribunal allowed an appeal by C and held that:
- 1.53.1.the appropriate pool for comparison was full-time and part-time returners to teaching and that, having regard to the statistical evidence, the claimant had established that the PCP did have a disparate impact on women.
- 1.54. On appeal to the Court of Appeal by the employer and the Secretary of State, the CA held:
- 1.54.1.when making a comparison for the purposes of determining whether a provision was indirectly discriminatory, the pool should not include people who had no interest in the advantage or disadvantage in question;
- 1.54.2.by adopting as the appropriate pool of people for comparison the entire teaching profession, the employment tribunal wrongly brought into the equation people who had no interest in the relevant provision, since the teachers' pension scheme did not distinguish between teachers who were working full-time and those who worked part-time except in the case of those returning to teaching;
- 1.54.3.there was only one logical pool and that was all returners, the disadvantaged group being part-timers and the advantaged group being full-timers;

1.54.4. the parties having agreed before the employment tribunal that it should, if appropriate, draw its own conclusions about the statistical evidence, and the employment tribunal having indicated that, on the basis of the pool contended for by the claimant, it would have concluded the disparate impact issue in her favour, the EAT was right in finding disparate impact established and remitting the case for consideration of the issue of justification.

### **DIRECT DISCRIMINATION**

1.55. The question of whether enforcement of a gender-specific element of a workplace dress code amounts to direct discrimination came up in **Dansie v Commissioner of Police for the Metropolis**, UKEAT/0234/09/RN.

1.56. C was a male police officer in training. His shoulder-length hair was tied back in a bun. R's dress code required smart dress that portrayed a favourable impression of the service and a separate guidance document included a provision that hair should be neat, and long hair securely fastened up and worn close to the head.

1.57. C was instructed to have his hair cut and threatened with disciplinary action if he did not. He complied to avoid disciplinary action but complained to the ET of direct sex discrimination on the basis that a female colleague in the same circumstances would not have had to cut her hair. The ET dismissed the complaint and the EAT dismissed his appeal.

1.58. The EAT held:

1.58.1. It is an established legal principle that when considering whether a dress code is discriminatory, the code must be considered in its entirety. While enforcement of gender-specific provisions may result in one sex being treated less favourably than the other, there will be no finding of less favourable treatment if enforcement of the dress code as a whole does not treat one sex more favourably but results in equivalent standards.

1.58.2. R's dress code was gender neutral. A female police officer in training would have been required to comply with any provisions of the dress code which affected only women. C had not, therefore, been treated less favourably than a female colleague would have been.

**DAVID MASSARELLA**

**CLOISTERS**

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