



Equalities briefing six: Dual discrimination



Anna Beale and Olivia-Faith Dobbie examine whether an individual can bring a discrimination claim which alleges that the discrimination was on the basis of the *combination* of two different protected characteristics.

In recent months there has been renewed interest in whether such ‘combined’ discrimination is covered by our existing legislation. This has been occasioned partly by the recent high-profile age/sex discrimination claims in *O’Reilly v BBC*, and partly by section 14 of the Equality Act 2010, which will, if it is brought into force, introduce a limited explicit prohibition of combined discrimination. It remains unclear whether this provision will be implemented by the government.¹

This viewpoint examines the extent to which it is possible to bring a claim of combined discrimination under our current anti-discrimination laws.

For many commentators, concerns about a lack of protection for individuals subjected to combined discrimination arose following *Bahl v The Law Society and others*². An employment tribunal (‘ET’) found that Dr Bahl, a black woman, had been subjected to both direct race and direct sex discrimination, without drawing a distinction between the two. This decision was overturned by both the EAT and the Court of Appeal, on the basis that the tribunal had failed to consider the two claims independently.³

Does this decision mean, as some commentators suggest, that no claim of ‘combined’ direct discrimination can be brought under the current legislation? In the strict sense, it does. If a woman claims sex and race discrimination, she has to point to evidence from which the tribunal can infer that the less favourable treatment was on the ground of sex, and (separately) on the ground of race. If discrimination cannot be found on either ground considered independently, she will lose.

¹ The Government Equalities Office has now removed this section from the list of provisions the Government is still considering, but has not added it to the list of provisions the Government has decided not to take forward; see http://www.equalities.gov.uk/equality_act_2010.aspx However in his Budget Statement on the 23 March 2011 George Osborne said “...in today’s Plan for Growth we take action: * £350 million worth of specific regulations will go – including the Equality Act’s costly dual discrimination rules...” see http://www.hm-treasury.gov.uk/2011budget_speech.htm

² [2004] IRLR 799

³ See paragraph 135 of the Court of Appeal’s judgment.

However, the strict answer is potentially misleading, as illustrated by the recent ET decision in *O'Reilly v BBC and another*⁴. Ms O'Reilly, a former Countryfile presenter, alleged that she had been removed from the programme due to the *combination* of her age and sex. The BBC argued that if the ET were to find that the reason for removing Ms O'Reilly was truly due to the *combination* of her age and sex, this would not amount to unlawful discrimination because combined discrimination is not prohibited under the pre-Equality Act legislation.

The ET found this argument to be flawed because the particular protected characteristic need not be the sole, or even the principal reason why a person suffers detrimental treatment in order for a claim on that ground to succeed. If a claimant is able to show that her sex is part of the reason for detrimental treatment, she will succeed in a sex discrimination claim. If she proves that age was part of the reason, she will succeed in her age discrimination claim. Both claims can succeed, taken separately, which will lead to a conclusion that the treatment was both on the ground of age and on the ground of sex – thus allowing a tribunal to make a finding of discrimination on multiple grounds. On the facts of *O'Reilly*, the ET found that only age discrimination was made out.

In our view, this analysis of the law is correct. It has the further advantage of directing attention towards what is likely to be the most effective method of determining multiple discrimination claims, namely, focusing on “the reason why” a person was treated less favourably, rather than focusing on the comparative exercise. Combined discrimination claims do not fit easily within the traditional comparator approach, especially if it is necessary to construct a hypothetical comparator. For example, a black woman who claims that she has been subjected to discrimination on the ground of her race and her sex might argue that the appropriate comparator is a white man – but the different treatment of such an individual could be on the ground of his sex, his race or both. The construction of such a comparator does not resolve the causation issue. As such, the intuitive way to approach this sort of claim is to focus on the reason why the treatment has occurred. As the courts have recognised over the years, the “reason why” is often multi-faceted – and could certainly encompass two, or even more, discriminatory grounds.

What is the position when a claimant relies on more than one protected characteristic in an *indirect* discrimination claim? In *Ministry of Defence v DeBique*⁵, the EAT considered a claim based on indirect sex and race discrimination. Ms DeBique contended that, as a single mother who came from St Vincent and the Grenadines, she had been placed at a particular disadvantage by the combination of a PCP requiring her to be available to work 24/7 (contrary to the SDA 1975) and a PCP preventing the families of foreign and Commonwealth soldiers from coming to reside in the UK to provide childcare (contrary to the RRA 1976). The combined effect of the two PCPs meant it was very difficult for Ms DeBique to arrange childcare at short notice so as to be available for work 24/7. The MoD argued that Ms DeBique could not rely on a particular disadvantage caused by the combination of two PCPs which related to different protected characteristics.

The ET rejected this argument, and the EAT dismissed the MoD's appeal. The key to understanding this decision is the ET's finding that the 24/7 PCP, taken alone, could be justified – but that considering that PCP in isolation failed properly to reflect Ms DeBique's particular disadvantage. The disadvantage to her as a female was compounded by the 'immigration' PCP, which meant that (unlike British nationals)

⁴ Case no. 2200423/2010, 10th January 2011.

⁵ [2010] IRLR 471

she could not rely on assistance with childcare from her family. Relaxation of either PCP would have resolved the problem. Viewed in this light, the decision is, in truth, based on the justification limb of the indirect discrimination test, rather than an acknowledgement of dual indirect discrimination claims. The 24/7 PCP could not be justified in the light of the existence of the immigration PCP, and vice-versa.

There is no reason why this type of analysis could not be adopted in cases involving disadvantage arising out of PCPs which impact on a combination of other protected characteristics.

Conclusion

In our view, given that a discrimination claim will succeed where a claimant can show that a protected characteristic was *part* of the reason for the treatment suffered, the recognition of true “combined discrimination” and/or the bringing into force of s.14 of the Equality Act 2010 will have minimal practical impact.. In our opinion, there will be only a small minority of cases in which explicit recognition of combined discrimination would assist, such as discrimination based on stereotyping (for example, of gay men or Muslim women).

However, without any such recognition, claimants who have suffered discrimination which is truly due to the combination of two protected characteristics are arguably left without an effective remedy. Whilst such claimants may succeed at trial and may obtain compensation, they are denied the catharsis and vindication which could flow from a judgment which acknowledges the true reasons for their disadvantage.