

Discrimination Law 2018 Review

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Two thousand and eighteen was a busy year for discrimination lawyers culminating in the decision by the Supreme Court in *Lee v Ashers Bakery* [2018] UKSC 49. The case, which is discussed in more detail in this Bulletin centred on a bakery's refusal to supply a cake iced with the words, "Support Gay Marriage". The Supreme Court held that this was not direct discrimination because of sexual orientation, as this "message" case concerned nobody's actual sexual orientation (straight people also support gay marriage). The case also had implications for employment discrimination, but in this respect it is marked more for what it did not say. First, the Court omitted to apply *English v Sanderson Blinds* [2008] EWCA 1421, where a majority held there can be liability for *harassment* where the conduct relates to *nobody's* (real or perceived) protected characteristic. Curiously, the Supreme Court cited both majority and minority judgments, offering no opinion on either. The decision must now leave in doubt the status of *Sanderson*. Is it, a) applicable to direct discrimination, save for "message" cases, b) confined to harassment, or c) bad law? One now wonders what would be the fate of a *worker* disciplined or dismissed, for refusing similarly to ice a cake out of religious conviction. In *Islington BC v Ladelle* [2010] 1 WLR 955 (CA), it might be recalled, a registrar disciplined for refusing to carry out (same-sex) civil partnership ceremonies lost her claim of religious discrimination in deference to her employer's equality policy. Could our disobedient worker succeed on the distinction that his is a "message" case?

Second, the Supreme Court "acknowledged" a separate claim of direct discrimination because of political opinion (a form of discrimination specific to Northern Ireland), but the baker's freedoms of expression and religion (under the European Convention on Human Rights, arts 9 and 10) overrode this ([48] and [56]). Notable here was the absence of valuable guidance on how to interpret discrimination legislation (under the Human Rights Act 1998, s 3) when it violates Convention rights. Perversely, a Supreme Court case left employment law less certain than before.

The discussion in *Lee v Ashers* assumed that "perceived discrimination" is actionable (although not in that case). Indeed, Explanatory Note 63 to the Equality Act 2010 ("EA 2010") suggests an example where, "an employer rejects a job application from a white man who he wrongly thinks is black, because the applicant has an African-sounding name". But it was only this year that a case arose directly on the matter. In *Chief Constable of Norfolk v Coffey* [2018] ICR 812 (EAT), a police officer was refused a transfer because of an incorrect perception that her hearing impairment, while not currently having a substantial adverse effect, would do so in the future. The EAT held that the refusal amounted to direct (disability) discrimination. The decision not only recognises perceived discrimination, but does so in the field of disability, thus refuting doubts expressed by Underhill J (*J v DLA Piper* [2010] ICR 1052, [62]) that because the legal definition of disability is so complex, the requisite elements (notably, impairment/substantial/long term) may never enter the defendant's thinking.

The complex definition can lead to problems even where the employer (or its adviser) is not fully aware of the facts. In *Gallop v Newport City Council* [2013] EWCA 1583, [43], Rimer LJ warned that it is the employer that must make the factual judgment as to whether an employee is disabled - "he cannot simply rubber stamp the adviser's opinion that he is not." In *Donelien v Liberata UK* [2018] EWCA 129, [32], Underhill LJ considered that some balancing guidance was needed: "...it seems that there was some concern following the decision in *Gallop* that it raised a serious question about whether employers ... were entitled to attach weight to advice from occupational health consultants... In my view it is plain that Rimer LJ did not intend generally to discount the value of such advice." Thus, employers may place "great" reliance on *reasoned* advice in appropriate cases. What they must not do is rely on unreasoned advice as a "rubber stamp".

A further cause of action for disability discrimination lies in EA 2010, s 15, "discrimination because of something arising from the disability". In *City of York Council v Grosset* [2018] EWCA 1105, it was held that a claimant need only to show that (i) the employer treated the employee unfavourably because

of an identified “something”, and (ii) whether that “something” arose in consequence of the employee's disability. A teacher with cystic fibrosis and thus vulnerable to stress was given extra duties. As a result, he made a mistake in showing an X-rated film to 15-year-old pupils. He was dismissed for this, but won his claim under s 15. The Court rejected the school's argument that in addition to the above requirements, the claimant had to show that the school was aware that the impairment caused the mistake (the “something”). The Court further noted that the accompanying justification test was an objective one for the tribunal to decide, and *not* one based on the “range of reasonable responses” test associated with unfair dismissal. Here, although the school had a legitimate aim of safeguarding pupils, dismissal was a disproportionate response.

Uniquely, direct discrimination can be objectively justified if the protected characteristic is age. However, the courts have developed a dual approach. It is particularly generous to employers encouraging or compelling retirement, while adopting the customary strict approach when assessing claims by younger workers. In two related cases, involving changes to pension structures disfavouring younger workers, the EAT found that social policy considerations did not preclude a proportionality test. In *Lord Chancellor v McCloud* [2018] IRLR 284, [167], retired judge Sir Alan Wilkie upheld the ET finding that reform of judicial pensions had an “extremely severe impact... on the claimants [that] far outweighed the public benefit of applying the policy consistently across the whole public service pension sector...” In the second case, *Sargeant v London Fire and Emergency Planning Authority* [2018] IRLR 302, [83], the ET had granted the Government a wide margin of discretion instead of assessing the changes for proportionality. This was an error of law, Sir Alan Wilkie found, and remitted the case. (Note, both decisions have been appealed.)

Inter-generational fairness (opportunities for younger workers) is a well-established (if questionably evidenced) legitimate aim in defence of direct age discrimination. In *Air Products plc v Cockram* [2018] EWCA 346, the employer operated a “good leaver” payment scheme, for employees who retire “on or after a customary retirement age” of 55 (recently raised from 50). Unaware of the change, Ms Cockram resigned at 50 and claimed that the loss of the payment was unjustified direct age discrimination. With little evidence in support, it was held that the scheme's twin aims of retention and intergenerational fairness were legitimate, and that the scheme was proportionate. The “retention” aspect was “surely so obvious that it barely requires evidence at all” (see [28]-[31]). Even though the age of 55 was adopted to align the scheme with a new pension plan, it could be “directly related” to the social policy of intergenerational fairness ([33]), citing *Seldon v Clarkson Wright & Jakes* [2012] UKSC 16, [75]). Any particular chosen age is somewhat arbitrary in nature, having disproportionate effects, such as on those retiring at 54 after a long service, or those with a short service, retiring at 55 and collecting the good leaver payment. But, “bright line” rules were a common feature of benefits payable on retirement, and the existence of that rule would usually justify the treatment resulting from it (following *Seldon*, [65]). Finally, given that those with a short service could collect the payment, and vice versa, it was conceded that the employer's subsidiary aim of “rewarding experience and loyalty” was more grossly disproportionate; but this was disregarded as a “minor component” ([34]-[35]). These three cases represent the approach favouring younger workers. There are two objections to this: the inconsistency of the application of an equality principle; and in any case, the UK Government's social policy - encouraging the retention of workers beyond the retirement - does not recognise “inter-generational fairness”.

The contrast is starker on the matter of justifying generalisations, an antithesis of discrimination law. In a sex discrimination case, *C-409/16 Kalliri* [2018] 2 CMLR 1, the Greek police required officers to be at least 1.7m tall, because the job required “physical attributes”. Predictably, the requirement put women at a disadvantage. The Court of Justice of the European Union (CJEU) noted that not all tasks required physical attributes (e.g. traffic control), and in any case, height was not a necessary indicator of physical strength ([38]-[39]). The decision has echoes of the classic American case, *Dothard v Rawlinson* 433 US 321 (S Ct 1977) where height and weight requirements for prison guards were not justified, as there were more accurate ways of measuring the physical strength required. This approach is quite different from the acceptance of generalisations for older workers, which assumes that job

performance falls away after a certain, somewhat arbitrary, age. Just a year earlier, in Case C-285/15, *Sorondo* [2018] ICR 302, the Court justified a requirement that Basque police officers must be under 36 because “from the age of 40 onwards, the operational performance of police officers ... declines” ([42]).

This uncompromising approach to sex discrimination defences is less apparent when it comes establishing an equal pay claim. The good news was that back in January 2018, *McNeil v Commissioners for HM Revenue & Customs* [2018] ICR 1529 confirmed, albeit *obiter*, that the “*Armstrong* heresy” had no place in equal pay claims (see Michael Malone, *Emp. L.B.* 2018, 144, 3-6). What drew less attention were the facts of *McNeil*. The claimants challenged a length of service pay scale, as more women than men were clustered around the bottom quartile while more men than women were clustered around the top quartile. This was the result of a historic dominant male presence in the posts in question (now being addressed). To the casual observer, this may appear sufficient to obligate the employer to justify the pay scale; it is received wisdom that women are less likely to accumulate a long service in any one job. But no, the EAT held, albeit with 77 densely reasoned paragraphs (plus a 48 paragraph appendix). The length of service scale was only one of several contributors to a worker’s basic pay. Given that “basic pay” was a contractual term, and that the equal pay statutory regime is contractual in nature, only this term could be challenged. Thus, for Simler J, the “cluster” statistics may have been an *indicator* of unequal pay, but more was needed, such as “a comparison of average basic pay within the relevant grades” ([50]). *These* statistics, representing a seven year period, disclosed no significant disparity. The ruling comes to this: just as employers cannot “lump together” terms to show that an overall package was equally favourable for men and women (say, less pay but longer holidays; see *Hayward v Cammell Laird* [1988] AC 894 (HL)), claimants cannot “subdivide” a single term of basic pay ([54]). This contractual aspect of equal pay is confined to sex discrimination, and so not faced by equal pay claims based on other protected characteristics (direct and indirect discrimination being statutory torts). Although EA 2010, s 71, permits recourse to “conventional” direct discrimination (s 13) where the equality clause “has no effect”, this would be of no help to *McNeil*’s claim, being rooted in indirect discrimination. An appeal has been lodged, and in addition to the competing statistical models, the Court of Appeal might have to entertain an argument that the contractual requirement, if restricting a claim, should be disapplied in deference to the Recast Directive 2006/54/EC (art 4), which provides conventional models of discrimination for equal pay.

Finally, an all too familiar wretched tale of the exploitation a vulnerable migrant in domestic service. In *Mruke v Khan* [2018] EWCA 280, the Court of Appeal followed Supreme Court authority (*Taiwo v Olaigbe* [2016] UKSC 31, [26]), that such treatment is not directly discriminatory because of race (nationality), but because of something else, such as “immigration status”. In *Mruke*, it was “a package of socio-economic characteristics she had: ... uneducated, illiterate and very poor” ([45]). According to *Taiwo*, neither is it *indirectly* discriminatory where such treatment would apply to *all* workers, rather than just the vulnerable ones, although this might be distinguishable in future cases (*Taiwo*, [32]-[33]). Having been dismissed at an earlier hearing, indirect discrimination was not raised in *Mruke* ([11]). The *Taiwo* approach to the most exploited migrant workers may appear heartless, although the ruling on indirect discrimination might be easily distinguished. If, as the Courts insist, there is no racial element in the treatment, then a policy of exploiting those with a vulnerable immigration status must be facially neutral, and be likely to put foreign workers at a disadvantage when compared with UK workers. Thus, representatives in such cases should not be deterred from pleading indirect (racial/nationality) discrimination.