



Discrimination Law Developments
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Scope of talk



recent and forthcoming cases on:

- religious belief
- disability
- harassment
- victimisation
- retirement/ age discrimination




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Recent legislative reforms



- abolition of discrimination questionnaires
- scrapping of liability for third party harassment
- tribunal fees



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Religion and belief in the courts



- *Eweida & Ors v UK* (ECtHR) – some obligation of accommodation, though not of discriminatory beliefs
- working time?: *Mba v Merton* (CA, 23 October 2013) (Tribunal found that, in specifying that a) staff of both genders be available, b) staff left in charge should have sufficient experience, and c) there should be continuity of care wherever possible, the Respondent’s aim was legitimate, and that requiring staff to work Sunday shifts in line with their contracts was a proportionate means of achieving that aim - **proportionality analysis**)
- B&B case *Bull & Anor v Hall SC*



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Religion and belief in the courts



10(1) Religion means any religion and a reference to religion includes a reference to a lack of religion.

(2) Belief means any religious or philosophical belief and a reference to belief includes a reference to a lack of belief...

• *Henderson v GMB* (pending at the EAT): Claimant dismissed in connection with his issue, contrary to union instructions, of written instruction to MPs to participate in day of action. His appeal is against a finding that he was fairly dismissed because he was unmanageable, though a “substantial part” of the reason was his “left wing democratic socialist” views. The union is cross-appealing against the finding that he was discriminated against contrary to the 2010 Act



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Disability update



- Cases C-335/11 and C-337/11 (*Ring*)
 - Prohibition on disability discrimination to be interpreted in light of UNCRPD
 - Covers illness (cf earlier decision in *Chacon Navaz*)
 - UNCRPD: “limitation which ... may hinder the full and effective participation of the person concerned in professional life on an equal basis with other workers...”
 - Cf “normal day to day activities”
- *Gallop v Newport CC* CA judgment awaited
 - the scope of “knowledge”
 - the role of OH
- obesity and disability
 - *Walker v Sita* (2013, EAT)
 - Case-254/13 *FOA* (awaited)



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Harassment



- S40(2) Equality Act 2010 (pre-amendment)
- Liability where "a third party [not a fellow employee] harasses B in the course of B's employment", and A (the employer) "fails to take such steps as would have been reasonably practicable to prevent the third party from doing so" in circumstances where "A knows that B has been harassed in the course of B's employment on at least two other occasions by a third party; and it does not matter whether the third party is the same or a different person on each occasion".
- post-amendment
- *Sheffield CC v Norouzi* (2011); EAT applied *R (EOC) v SSTI* (2007), which concerned directive 2002/73 (sexual harassment) to race: an employer may be liable for failing to take action in respect of a continuing course of conduct by a third party of which the employer had knowledge
- Will this extend to private sector? Scope for interpretation of the 2010 Act?

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Victimisation



108 Relationships that have ended

- (1) A person (A) must not discriminate against another (B) if—
 - (a) the discrimination arises out of and is closely connected to a relationship which used to exist between them, and
 - (b) conduct of a description constituting the discrimination would, if it occurred during the relationship, contravene this Act.
- (2) A person (A) must not harass another (B) if [as above]...
- (4) A duty to make reasonable adjustments applies to A [if B is] placed at a substantial disadvantage as mentioned in section 20.
- (6) For the purposes of Part 9 (enforcement), a contravention of this section relates to the Part of this Act that would have been contravened if the relationship had not ended.
- (7) But conduct is not a contravention of this section in so far as it also amounts to victimisation of B by A.

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Post-employment victimisation



Rowstock Ltd v Jessemey [2013] IRLR 439

Onu v Akwivu [2013] IRLR 523

CA decision awaited ...

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Retirement/ age discrimination



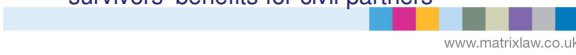
- **January 2013 Irwin Mitchell survey:**
 - of the two thirds of employers who had operated a compulsory retirement age before April 2011, over 80% had removed it.
 - Over half of employers would have preferred a default retirement age, 60% at 61-65.
- **April 2013 Eversheds survey**
 - 1/3 employers thought the abolition of the default retirement age had had a negative impact, generally because of difficulties of succession planning and inter-generational fairness, also because of redundancy costs and costs of performance management
 - 1/3 employers felt the effect had been positive (savings on recruitment and training costs and time spent on retirement issues)
 - 56% reported that more employees stayed past the previous retirement age
- **In July 2013 the ONS reported that the number of 65+ people in work had exceeded 1 million for the first time.**



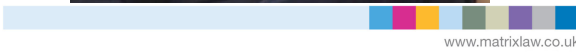
Other developments



- **Case C-81/12 ACCEPT [2013]**
 - scope of “direct” discrimination
 - liability for discrimination by non-employees
- **pregnancy and surrogacy**
 - Case C-363/12 *Z v A Govt Dept*
 - Case C-167/12 *CD v ST*
- **Walker v Innospec Ltd (EAT, pending)**
 - SO challenge to lack of retrospectivity of survivors’ benefits for civil partners



And on a lighter note...



!!!!????!!...



McCririck v Channel 4 (ET)

- “McCririck has said that no one from Channel 4 ever asked him to tone down his act, to be less outrageous or sexist”
Guardian 7 October 2013



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