November 2009

Review

Employment

'Associative discrimination' – latest developments

Employers and HR staff will recall no doubt recall the case concerning Sharon Coleman and her former employer Attridge Law in which Ms Coleman alleged that she had been discriminated against for trying to take time off to care for her disabled son. It went all the way to the European Court of Justice which held that the Equal Treatment Directive protects employees in her position, ie, those who are not themselves disabled but who are prejudiced by association with someone who is. The matter was then referred back to the Employment Tribunal for it to consider whether the Disability Discrimination Act 1995 could be interpreted in line with the Directive. The Tribunal subsequently held that it could and gave Ms Coleman permission to proceed with her claims.

Attridge Law (now known as EBR Attridge Law LLP) appealed to the Employment Appeal Tribunal against the Tribunal's decision that it had the jurisdiction to hear Ms Coleman's claim. In its judgement dismissing the appeal, the EAT disagreed with the way that the Employment Judge had effectively re-drafted the relevant provisions of the DDA 1995 and set out the following suggested amendments:

- A new sub-section (5A) to be added to s.3A (Meaning of "discrimination") - A person also directly discriminates against a person if he treats him less favourably than he treats or would treat another person by reason of the disability of another person;
- A new sub-section (3) to be added to s.3B (Meaning of "harassment") - A person also subjects a person (A) to harassment where, for a reason which relates to the disability of another person (B), he engages in unwanted conduct which has the purpose or effect of - (a) violating A's dignity, or (b) creating an intimidating, hostile, degrading, humiliating or offensive environment for him. Sub-section (2) applies to this sub-section, save that the relevant perception is that of A.
- Sections 4(1) and (2) (discrimination by employers) to be amended to add into the introductory words after "a disabled person", the phrase "or in a case falling within s.3A(5A), any person".
- S.4(3)(a) and (b) (harassment by employers) to be amended to add after "a disabled person", the phrase "or in a case falling with S.3B(3), any person".

In suggesting the above amendments, the EAT noticeably did not use the term 'association' (as used by the Employment Judge) – stating that it preferred to avoid language that encouraged Tribunals to become bogged down in discussion of what does or does not amount to an "association". Instead the test for the necessary degree of proximity is that set out above, ie, whether the treatment "relates to" the other person's disability. As now, causation will be at the heart of the question.

Subject to any further appeal by EBR Attridge Law, the EAT's decision confirms that pending approval of the Equality Bill employers also face the prospect of **non**-disabled employees bringing claims against them under the DDA 1995. Do note that the EAT's decision does not actually amend the black-and-white text of the DDA (many EATs would wish for such power!) but merely warns that future cases will be treated as if the DDA read as amended.

Meanwhile, the Equality Bill – published in April and currently at the Report Stage in the House of Commons – includes proposals to outlaw associative discrimination in employment in respect of race, sex, marriage and civil partnership, pregnancy and maternity, gender reassignment, disability, sexual orientation, religion or belief and age. The Government hopes that the Bill will be approved prior to the end of the current Parliament and that it can begin implementing it from October 2010. How much of it would survive any change of Government remains to be seen.

"...employers also face the prospect of non-disabled employees bringing claims against them under the DDA 1995."

Government review of the default retirement age

The Government announced earlier in the year that it was bringing forward its review of the default retirement age of 65 (DRA) contained in the Employment Equality (Age) Regulations 2006 from 2011 to 2010. The decision to bring forward the review date was instrumental in the High Court's September ruling in the in the 'Heyday' case that the default retirement age **can** be justified, at least for the time being.

As part of its review process, the Government has commissioned a research project intended to provide an insight into employers' age-based practices, in particular the use of the DRA. It is therefore seeking evidence on the following:

- the operation of the DRA in practice;
- the reasons why businesses use mandatory retirement ages;
- the impacts (both positive and negative) on businesses, individuals and the economy of raising or removing the DRA;
- the experiences of business operating without a DRA; and
- how could any costs of raising or removing the DRA be mitigated and benefits realised?

The Government is asking for submissions by **1 February 2010**. Further details can be obtained on the Department for Business, Innovation and Skills website.

"...the Government has commissioned a research project intended to provide an insight into employers' age-based practices."

Injury to feelings compensation bands increased

In the recent case of *Da'Bell v National Society for the Prevention of Cruelty to Children*, the EAT increased the 'Vento' bands used by Employment Tribunals to assess compensation for injury to feelings in discrimination cases to take account of inflation.

The revised bands, which apply with immediate effect, are as follows:

TOP	£18,000-30,000	Applies to the most serious cases, e.g. where there has been a lengthy campaign of discriminatory harassment on the grounds of sex or race.
MIDDLE	£6,000-18,000	Used for serious cases that do not merit an award in the highest band.
LOWER	£500-6,000	Used in less serious cases e.g., where the act of discrimination is an isolated or one-off occurrence.

FURTHER INFORMATION

For more information relating to this article, please contact:

Sue Nickson
Chief Operating Officer and International Head of Human Capital
E: sue.nickson@hammonds.com

Matthew Lewis
Partner & Head of Leeds Human Capital (Employment)
E: matthew.lewis@hammonds.com

David Whincup
Partner & Head of London Human Capital
E: david.whincup@hammonds.com

Nick Jones
Partner & Head of Manchester Human Capital
E: nick.jones@hammonds.com

Teresa Dolan
Partner & Head of Birmingham Human Capital (Employment)
E: teresa.dolan@hammonds.com