

Review

Employment



It looks increasingly unlikely that the “dual discrimination” provisions set out in the Equality Act 2010 will be coming into force this April. They were certainly noticeable by their absence when the Coalition Government issued its Equality Strategy at the beginning of December, outlining forthcoming legislative changes. But does it matter? Two recent cases, albeit at Tribunal level only, suggest that existing discrimination legislation may already provide claimants with an adequate remedy.

In July 2009 amendments were made to the Equality Bill to outlaw dual discrimination, i.e. discrimination based on a combination of two protected characteristics, such as age and sex or sex and religious belief. The Government said that such a provision was necessary to deal with a gap in the law for those who experienced discrimination because of stereotypical attitudes or prejudice relating to their particular combination of protected characteristics. The Explanatory Notes to the Equality Bill gave the example of a black woman who was passed over for promotion to work on Reception because her employer did not think that black women perform well in customer-facing roles. The Notes say that if the employer could point to a white woman appointed to the role in question, that would see off the sex claim and if it could also show that there was a black man in a similar role that would knock out the race claim. Therefore, goes the thinking, the woman needs to be able to compare her treatment because of race and sex combined in order to demonstrate she had been subjected to less favourable treatment.

There is, however, an argument that such a woman could rely on the existing legislation and still achieve the same result. Take, for example, the recent claim brought against the BBC by a 51-year-old former Countryfile presenter. In *O’Reilly v BBC* Ms O’Reilly claimed she had not been offered a presenting role when the show moved to a new primetime slot because of the combination of her age and sex, i.e. because she was a woman over 40. As a starting point the Beeb argued that her claim should fail because the dual discrimination provisions were not in force. The Tribunal, however, gave this argument short shrift. It said that on the BBC’s analysis it would be unlawful for an employer to have policies in place which said that neither women nor people over 40 could apply for a particular job (which would obviously be direct sex and age discrimination) but not one which excluded “women over 40” on the basis that not all women nor everyone over 40 had been excluded. It said that such a result would be “surprising” and would not accord with a Tribunal’s obligation to “root out” discrimination. If Ms O’Reilly had been overlooked for a presenter’s job because she was a “woman over 40”, said the Tribunal, then this constituted unlawful direct sex and age discrimination because both her sex and her age had clearly played a part in the decision.

In the end the Tribunal was satisfied that Ms O’Reilly’s gender played no part in the BBC’s decision not to offer her a presenting job on the new show. It said that a man of the same age would also have been overlooked because the BBC was clearly looking for a younger age profile for its presenters, in an attempt to attract a wider audience. On that note it is interesting to see that whilst the Tribunal accepted that the BBC’s desire to appeal to a wider (including younger) audience was a legitimate aim for age discrimination purposes, it was not proportionate for it to “do away with older presenters simply to pander to the assumed prejudice of some younger viewers”. It is to be presumed that the BBC would be expected to address that aim through programming content and style before seeking to achieve it by manipulating the age of its presenters. Ms O’Reilly’s age discrimination claim was therefore upheld.

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A Tribunal adopted a similar approach last year in *Khan v Ghafoor t/a Go Go Real Estate* in which it held that a female Muslim employee dismissed for refusing to wear a headscarf at work had suffered direct discrimination on grounds of both sex and religion or belief. If she had not been a woman or had not been a Muslim then the requirement would not have been imposed. Therefore both factors separately contributed to the dismissal.

Whilst only Tribunal decisions (and thus not binding) these cases suggest that even if the dual discrimination provisions do not come into force in April employers may still face an increase in the number of claims presented on a dual discrimination basis. This does not mean that employers need to consider each and every combination of protected characteristics which could arise in order to ensure they do not discriminate unlawfully. Provided they make decisions based on relevant considerations and not on stereotypical or irrelevant factors they should be confident they will not breach the law.

It goes without saying that employers should always document their reasons for recruitment/promotion/dismissal decisions, just in case they are subsequently challenged. This is one area where the BBC came in for a bit of panning in the *O'Reilly* case. Its key witnesses claimed that Ms O'Reilly had not been selected for one of the new presenting roles because she did not meet the criteria for the position, in particular the requirement to have television network experience so as to make her familiar to a primetime audience. They were, however, unable to point to any documentation to support their assertion. Quite the opposite, in fact - none of the email correspondence between the key decision-makers made any reference to the assessment of the presenters against any criteria. The BBC tried to explain this away by saying that this was simply "the way things are done" in the media world. The Tribunal accepted that an absence of documents did not in itself mean that discrimination had taken place, but the absence of any documentation plus a failure to apply a formal procedure meant that it was much more difficult for the BBC to explain its decisions and to state with clarity the basis for them. It was therefore a fairly easy step for the Tribunal to infer that discrimination had taken place.

We are currently seeing an increase in the number of grievances in which age discrimination is asserted. This is consistent with statistics from the Ministry of Justice which show that the number of age discrimination claims has almost doubled in the last few years from 2,949 in 2007/08 to 5,200 in 2009/10. This trend is set to continue, especially with the abolition of the statutory Default Retirement Age later this year. The "good news" (using the term loosely!) is that unlike other forms of direct discrimination, employers can justify age discrimination, but Tribunals will expect to see clear evidence to support assertions that age was a relevant (hence potentially justifiable) factor in the decision-making process.

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FURTHER INFORMATION

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