

Discrimination by Association and Perception

The Equality Act 2010, the core provisions of which came into force on 1 October 2010, has harmonised and replaced previous discrimination legislation.

Previously, the position on discrimination by association was inconsistent across the various strands of discrimination law and far from clear. For example, the wording of the Disability Discrimination Act 1995 (DDA) was such that it afforded protection to disabled employees but not to an employee who was discriminated against because of his or her association with a disabled person. When the law was challenged on the basis that it did not implement properly the EU Equal Treatment Framework Directive (*Coleman v Attridge Law*), the courts decided that the DDA should be interpreted as if it did apply to adverse treatment by reason of the disability of another person.

The Act has now established that discrimination by association is unlawful, subject to the same exceptions that generally apply. Under the Act, discrimination occurs when the reason for one person being treated less favourably than another is one of the protected characteristics covered by the Act. This means that protection is afforded to someone who does not themselves have the protected characteristic but has suffered less favourable treatment because of their association with someone who does.

In the light of this change, employers should take care, for example, not to disadvantage employees with caring responsibility for a disabled child or for an elderly or disabled relative.

The new definition of discrimination also covers discrimination by perception, as protection is afforded to



someone who does not themselves have the protected characteristic but has suffered less favourable treatment because they were wrongly perceived to do so.

This change makes it clear, for example, that someone who is repeatedly taunted as being gay but is in fact heterosexual is protected under the Act.

Employers must show that they operate a zero-tolerance policy to discriminatory behaviour of any kind and ensure that decisions affecting employees cannot be challenged as having been made based on a discriminatory perception.

Third-Party Harassment at Work

Under provisions of the Equality Act 2010 that came into force on 1 October 2010, not only can employers be held legally responsible for harassment by one employee of another but they are also potentially liable for harassment of an employee by a third party, for example a customer or client. This protection previously only applied on the ground of sex. It has now been extended to cover disability, age, gender reassignment, race, religion or belief and sexual orientation.

The Act makes it unlawful for an employer to fail to take reasonably practicable steps to protect an employee from harassment by a third party because of a protected characteristic where such harassment is known to have occurred on at least two other occasions. The person responsible for

the harassment does not have to be the same on each occasion.

Employers should be aware of their responsibilities in this regard and have an up-to-date harassment policy in place. Make sure your workers know of the policy's existence and understand their responsibilities to make it work, for example by providing them with training. In addition, take steps to ensure that any visitors, clients, suppliers or customers who come into contact with your workers or job applicants are aware of the policy and comply with it, for example by displaying appropriate signs in your reception area.

Contact us for advice on any discrimination law matter.

Government Gives Go Ahead for Additional Paternity Leave for New Fathers

The Government has announced that the Additional Paternity Leave Regulations 2010 will be introduced according to the timetable proposed by the previous Government. The Regulations will allow new parents greater flexibility as to how they make use of the statutory period of maternity leave.

Currently, fathers who are employees are entitled to two weeks' paternity leave, provided they have worked for their employer for not less than 26 weeks ending with the week immediately preceding the 14th week before the child's expected week of birth. New mothers are entitled to 52 weeks' maternity leave, of which up to 39 weeks are paid.

The Regulations give new fathers the right to take additional paternity leave in the period between 20 weeks and one year after the birth of their child if the mother chooses to return to work with maternity leave outstanding and the father will have the main responsibility for caring for the child. Some of the father's leave may be paid if it is taken during the mother's 39-week maternity pay period. The period of leave must be continuous; the minimum allowed will be two weeks and the maximum 26 weeks. The changes apply equally to spouses, partners and civil partners of a child's mother or of an adoptive parent who has elected to take adoption leave.

An employee wishing to take additional paternity leave must give notice to their employer not less than eight weeks

before the start date chosen for the period of leave. This notice must include:

- a declaration confirming that the employee is either the child's father, is married to or is the partner or civil partner of the mother or parent taking adoption leave and that the reason for the leave is that the employee expects to have the main responsibility for caring for the child; and
- a declaration from the mother or parent taking adoption leave, which must include that person's name and address, the date on which they intend to return to work, their National Insurance number, confirmation of the information contained in the statement made by the employee requesting paternity leave and a statement that to the best of their knowledge the employee requesting leave is the only person exercising the entitlement to additional paternity leave in respect of the child and consenting to the employer processing the information given in the declaration.

Employers and HM Revenue and Customs will have the power to carry out checks on the information provided where necessary. However, business leaders have expressed fears that allowing new fathers to self-certify that they are eligible for leave increases the risk of fraudulent requests.

The new rights will apply to the parents of children due to be born or who are matched for adoption on or after 3 April 2011.

Agency Workers Regulations – No Changes

The Government has announced that legislation implementing EU Directive 2008/104/EC, usually referred to as the 'Agency Workers Directive', will come into force in the UK on 1 October 2011 without any changes.

The Government was considering making amendments to the Agency Workers Regulations 2010 in order to reduce the burden on employers. However, its ability to do so is constrained by the fact that the Regulations are based to a significant degree on an agreement brokered between the CBI and TUC by the previous Administration. There was specific agreement that agency workers in the UK would acquire the new rights once they have been in a given job for 12 weeks.

Employment Relations Minister Edward Davey said, "Due to this unique legal situation, any amendments proposed

to the Regulations touching upon the subject matter of the CBI and TUC agreement, which did not have the agreement of those parties, would face the risk of being set aside in the Courts in the event of a legal challenge. Were that to happen, the effect could be to call into question the very foundation for the fundamentals of the implementing legislation, crucially including the 12-week qualifying period itself."

After discussions with the CBI and the TUC, it has not been possible to find a way forward that would be acceptable to both parties.

The effect of the Agency Workers Regulations will be to provide equal treatment for temporary agency workers, compared with permanent workers, in terms of basic working and employment conditions (including pay, holidays, working time, rest periods and maternity leave) once they have

worked for the qualifying period of 12 weeks.

Benefits that agency workers will gain from the first day of their assignment include:

- information about vacancies so that they have the same opportunity as other workers to find permanent employment;
- equal access to on-site facilities, such as child care and transport services; and
- improved rights to protect the health and safety of new and expectant mothers, including the right to reasonable time off work to attend ante-natal appointments and adjustments to working conditions and working hours.

Contact us for advice on any contractual issues.

Redundancy Consultation

The Employment Appeal Tribunal (EAT) has ruled (*Pinewood Repro Ltd. v Page*) that for consultation during a redundancy selection process to be fair, an employee must be provided with sufficient information to be able to challenge his or her selection for redundancy.

Mr Page had worked for Pinewood Repro Ltd. for 23 years. The company suffered a loss of business which made redundancies necessary. To this end, a point scoring matrix system was agreed with the trade union.

After a preliminary grading had been carried out, Mr Page was informed that it was most likely that he would be selected for redundancy. He produced a list of questions, seeking an explanation as to why he had been chosen, and was given the scoring sheets for the whole department but no justification for the marks awarded. He then raised specific queries regarding the scores he had received for his ability, skill and experience and also his flexibility, to which the response was 'We believe that the scores given by the assessors are reasonable and appropriate'.

Mr Page appealed against the decision to make him redundant and again sought an explanation of his scores, but no further information was provided.

The Employment Tribunal (ET) found that he had been unfairly dismissed. In such circumstances it is necessary for an employer to provide an explanation of why an individual has received the scores he has so that he can take his arguments forward. Pinewood had failed to do this.

The EAT upheld the ET's decision. Whilst it is not the ET's role to examine under a microscope the marking system used in a redundancy process, it must decide whether an employee has been given a fair and proper opportunity to understand fully the matters about which he is being consulted and to express his views accordingly. This may well include being given sufficient information to be able to challenge the scores given to him in the completion of a redundancy exercise.

Contact us for advice on any redundancy matter.

Unfair Dismissal – Time Off Work for Dependants

Section 57A(1) of the Employment Rights Act 1996 entitles an employee to take a reasonable amount of time off work in order to take action which is necessary for dependants, for example if they are ill or injured or if there is a disruption in the care arrangements made for them. It is automatically unfair dismissal to dismiss an employee for seeking to exercise his or her statutory right to take unpaid time off work in these circumstances.

In a recent case, an employee was awarded £8,705 in compensation by the Employment Tribunal (ET) after she was dismissed for taking time off work to care for her son.

Alison Balch commenced part-time work at a Royal Mail delivery and sorting office in Aberdeen. During her six-month trial period she called in sick seven times on account of her son's asthma. At the end of the period, she was dismissed 'on the grounds of failure to demonstrate suitability for employment in particular regarding your poor level of attendance'. Ms Balch was given no formal warning concerning her attendance, however.

Ms Balch's line manager had failed to carry out a performance review after she had completed three months' work. Although a review had been prepared at that time, it was not discussed with her until the six-month review took place. Both reports were critical of her attendance record. She had explained that her absences were necessary because her five-year-old son suffered from asthma, but she was dismissed from her job.



Neither Ms Balch's contract of employment nor the company's procedures made any mention of an employee's right to take time off to help dependants.

The Employment Judge found that the principal reason for Ms Balch's dismissal was that she had taken time off work in order to take action necessary to help her son when he was ill and ruled that she had been unfairly dismissed.

Under the Equality Act 2010, it is unlawful to discriminate against a fit employee because they have taken time off work to look after a disabled child. A child under the age of six may be deemed disabled under the Act even where their impairment does not have a substantial and long-term adverse effect on their ability to carry out normal day-to-day activities if the condition would have that effect on a person aged six years or over.

TUPE – Temporary Cessation of Economic Activity

The Employment Appeal Tribunal (EAT) has ruled (*Wood v London Colney Parish Council*) that where the economic activity of a bar was temporarily suspended, owing to the loss of the premises licence, this did not prevent a relevant transfer for the purposes of Regulation 3(1)(a) of the Transfer of Undertakings (Protection of Employment) Regulations 2006 (TUPE).

Mr Wood was employed as a bar steward by a social club. He was the only employee and the licensee. He was dismissed after the club lost its premises licence and surrendered its lease to the owner of the premises, the London Colney Parish Council.

Shortly afterwards, the Council set up a new management committee and made an application for a new premises licence for the club. A personal licence was granted to one of the councillors and the bar was subsequently re-opened. No full-time bar steward was appointed, however, in order to save money.

Mr Wood claimed that there had been a relevant transfer for the purposes of TUPE and he had been unfairly dismissed.

By a majority, the Employment Tribunal held that there was no relevant transfer because the bar, an economic activity, did not retain its identity at the date of transfer because at that date an essential element of its operation – namely a premises licence – was missing.

On appeal, the EAT drew attention to the guidance given in the case of *Cheeseman v Brewer*, which was that 'the decisive criterion for establishing the existence of a transfer is whether the entity in question retains its identity, as indicated, amongst other things, by the fact that its operation is actually continued or resumed'. In the EAT's view, in this case there was a temporary cessation of the bar. It was clear that the Council intended to obtain a new premises licence and to re-open the bar itself, operating in precisely the same way as it had before.



The economic entity did not therefore cease but was merely temporarily suspended until the bar was re-opened.

The case was remitted for further hearing on the merits of Mr Wood's unfair dismissal claim.

If you are involved in a business transfer, always take timely advice to make sure you fully understand the legal implications.



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