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## Welcome to the latest issue of your free employment law update.

With the school holidays coming up, how do you manage your employees requests for additional time with their kids and flexible working arrangements?

If you would like to talk through best practice, just give me a call on 01743 452871.

Regards

*Nigel*

## In this month's issue we look at:

**RACE DISCRIMINATION** We provide an overview of race discrimination which includes changes made under the 2010 Equality Act [\[more...\]](#)

**RETIREMENT LETTER** Under the age regulations, employers must follow a specific procedure when they want to compulsorily retire an employee. A court has now said that they must also tell employees what to include in their letter when exercising their right to request to stay on. [\[more...\]](#)

**PROPORTIONATE TREATMENT** Although employers can give women who are pregnant special treatment, we look at a case in which the court said that the "special treatment" provisions are limited to what is proportionate. [\[more...\]](#)

**IN BRIEF** The UK, along with 13 other European Union member states, appear to have stopped the Pregnant Workers Directive in its tracks indefinitely. [\[more...\]](#)

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## **RACE DISCRIMINATION**

### **What does the Equality Act outlaw?**

The Equality Act outlaws all forms of race discrimination in the workplace, including selection for a job, training, promotion, work practices, dismissal or any other disadvantage because of race

### **Who is protected and when?**

The Act covers all employment and applies to apprentices, those working under a contract of employment and the self-employed working under a contract personally to do the work.

Ex-employees can also make a claim against a former employer, if they are complaining about something that was closely connected to their employment provided that they submit their claim within 3 months of the date of the act of discrimination complained of.

There is no qualifying period of service required under the Act, so workers are protected from the time they apply for a job and from their first day in the job.

### **What is direct racial discrimination?**

Direct race discrimination occurs when an employer treats a worker less favourably than someone else because of race.

The definition covers anyone discriminated against because they are perceived to be of a particular race or because they are associated with someone of a particular race.

Claimants have to compare themselves to someone else of a different racial group, who can be real or hypothetical, but who is (or was) in the same situation as the claimant for comparative purposes.

### **What is indirect race discrimination?**

Indirect race discrimination occurs when an employer operates a "provision, criterion or practice", which on the face of it is neutral in relation to race, but in practice works to the disadvantage of someone of a particular racial group.

As with direct discrimination, the employer does not have to have intended to discriminate on the ground of race to be caught by the law. Unlike direct discrimination, however, employers can defend indirect discrimination if they can objectively justify it for good reasons on non-racial grounds.

The onus is on employers to show that the "provision, criterion or practice" they have used in their business is, when looked at objectively, proportionate to the aim that they are trying to achieve.

### **What is racial harassment?**

Racial harassment occurs when one person subjects someone else to unwanted conduct

related to race that has the purpose or effect of violating a person's dignity or of creating an intimidating, hostile, degrading, humiliating or offensive environment.

The harassment does not necessarily have to relate to the race of the claimant themselves - a person could be harassed, for instance, because of the race of a friend or a relative.

The definition includes the spoken or written word, jokes, graffiti or other unwanted behaviour.

Employers may be liable for harassment by third parties such as clients or customers, if they knew that the worker had been subject to harassment on two previous occasions and had not taken any reasonably practicable steps to prevent further acts. The government has announced its intention to consult to remove this "unworkable requirement" (to take such steps to prevent persistent harassment by a third party over whom they have no direct control)

### **What is victimisation on the ground of race?**

The law provides protection for workers from acts of victimisation by employers as a consequence of the worker doing one of the following:

- bringing proceedings under the Act or previous discrimination legislation
- giving evidence or information in connection with proceedings under the Act that someone else has brought
- making an allegation of race discrimination under the Act or previous discrimination legislation

The victimisation provisions do not apply if they relate to an allegation that is false and is not made in good faith.

### **Are there any exceptions?**

There are two main exceptions

- The occupational requirement
- Positive action

### **What is the occupational requirement?**

Employers can discriminate on grounds of race if they can show that there is an occupational requirement to do with the nature or context of the work, if it is a proportionate means of achieving a legitimate aim.

The occupational requirement applies only to direct discrimination in recruitment, promotion, transfer and training and not to the way in which an employer affords access to benefits, facilities or services.

### **What is positive action?**

Positive action means treating someone with a protected characteristic more favourably during the process of recruitment or promotion than someone without that characteristic.

This means that employers can choose the person with the protected characteristic provided that:

- The person is “as qualified” as the other candidate
- The employer does not have a recruitment or promotion policy of treating people of the underrepresented group more favourably
- The more favourable treatment is a proportionate means of achieving a legitimate aim.

As these provisions are voluntary, employees cannot bring a claim on the ground that the employer did not apply positive action during the recruitment or promotion process (although they may be able to claim discrimination).

### **What is the public sector equality duty?**

Public bodies and private companies carrying out public functions are under a duty to consider equality when making day to day decisions both in terms of service delivery and employment. This consists of a general duty and specific duties.

The general duty has three aims and requires public bodies to have due regard to the need to:

- eliminate unlawful discrimination, harassment and victimisation and other conduct prohibited by the Act
- advance equality of opportunity between people from different groups
- foster good relations between people from different groups

The specific duties are designed to help public bodies comply with the general duty. Broadly these require specified public bodies to publish information on how the general duty is being met, set equality objectives and engage with others such as employees and unions when setting the objectives.

[\[Back to contents \]](#)

## **RETIREMENT LETTER**

The 2006 Employment Equality (Age) Regulations set out the procedure that employers must follow when they want to compulsorily retire an employee. In **Bailey v R&R Plant Ltd** the Employment Appeal Tribunal (EAT) said that employers must also tell employees what to include in their letter when exercising their right to request to stay on.

### What happened?

On 11 July 2008, Mr Bailey, a vehicle engineer with the company since 1999, was told that as the company retirement age was 65, he would have to retire on or before his 65th birthday on 20 January 2009.

On 18 July 2008 the company wrote to him, confirming that if he wanted to stay beyond 20 January, he would have to apply in writing. Mr Bailey replied on 14 August saying that he wanted to continue working full time for the foreseeable future. However, as the company could only offer part-time work, his employment terminated on 20 January.

He claimed unfair dismissal and age discrimination.

The tribunal decided that Mr Bailey's request letter did not satisfy the requirements of schedule 6, paragraph 5 of the regulations. This states that employees have the right to request not to retire on the intended date, but they must put their request in writing and state that "it is made under this paragraph". Relying on the decision in **Holmes v Active Sensors**, it said that Mr Bailey's letter should have made specific reference to the regulations.

As tribunals had to follow the clear wording set out in the regulations (despite the "onerous burden" it put on claimants), it had no option but to find that Mr Bailey had failed to invoke the right to request procedure.

The EAT agreed with the tribunal that the words in paragraph 5 were "clear in their meaning" and mandatory. A request under that paragraph therefore had to be in writing and must state specifically that it is being made "under this paragraph".

But how were employees supposed to know that? The answer, said the EAT, lay in paragraph 2(1)(a) which placed a duty on employers to inform the employee of the conditions for a valid request. "Thus, for example, the employer must notify the employee that a request under para.5 must be in writing and must state that it is made under that paragraph".

The EAT reasoned that, as paragraph 5 is a statutory, procedural right, employees must be told the conditions that are essential for exercising it, and as schedule 6 clearly envisaged that employers would, in general, initiate the procedure and inform themselves about the requirements, then it made sense for them to ensure their employees knew as well.

That being so, the company's letter of 18 July did not comply with the duty set out in paragraph 2 of schedule 6 and the dismissal was unfair.

[\[Back to contents\]](#) ]

## PROPORTIONATE TREATMENT

Section 2(2) of the 1975 Sex Discrimination Act states that a man cannot complain of sex discrimination because of the "special treatment afforded to women in connection with pregnancy or childbirth". In **Eversheds v De Belin**, the Employment Appeal Tribunal (EAT) said that the "special treatment" provisions are limited to what is proportionate.

### What happened?

Mr De Belin was told in September 2008 that either he or his colleague, Ms Reinholz, would be made redundant. The company used various performance criteria, including one

called "lock up". Mr De Belin scored 0.5 on this test.

As Ms Reinholz had been on maternity leave for more than six months at the time lock up was measured, the company applied its usual policy for candidates for redundancy on maternity leave and awarded her the maximum score of 2. Mr De Belin's overall score at the end of the exercise was 27; that of Ms Reinholz was 27.5. He was therefore selected for redundancy.

Mr De Belin claimed that by applying a more favourable score to Ms Reinholz on grounds of her maternity she was treated more favourably because of her sex. The company said that it was required by law to give her the maximum score to offset any disadvantage because she was on maternity leave.

Mr De Belin claimed sex discrimination and unfair dismissal.

The tribunal upheld his claim. It said that by giving Ms Reinholz a notional maximum score while confining Mr De Belin to his own actual score, Eversheds unlawfully discriminated against him on the grounds of his sex. It followed that if her score was unfairly inflated, it was not within the range of reasonable responses for Eversheds to dismiss him. So not only had it discriminated against him, it had also unfairly dismissed him.

The EAT agreed with the tribunal. It said that although employers are obliged to sometimes treat women who are pregnant or on maternity leave more favourably than their colleagues in order to ensure they are not disadvantaged because of pregnancy, maternity and childbirth, it was important not to give that protection wider scope than was required.

It was necessary to read the words "special treatment afforded to women in connection with pregnancy or childbirth" as referring only to treatment which constituted a proportionate means of achieving the legitimate aim of compensating the woman for the disadvantages occasioned by her pregnancy or her maternity leave.

The question therefore was whether the "means" adopted by Eversheds to resolve the problem caused by Ms Reinholz's absence as at the measurement date were proportionate.

In the EAT's view, the "means" had gone beyond what was reasonably necessary and there were alternative ways of removing any maternity-related disadvantage without unfairly disadvantaging Mr De Belin.

[\[Back to contents \]](#)

## **IN BRIEF**

The UK, along with 13 other member states of the European Union (EU), appear to have stopped the Pregnant Workers Directive in its tracks indefinitely.

The 14 states refused to adopt a progress report to the Employment and Social Affairs Council (EPSCO) last month and the UK government now hopes that the Commission will drop the directive altogether as discussions cannot progress unless ministers agree a "common position".

In its original proposal for a directive two years ago, the Commission suggested increasing the minimum level of maternity leave in the EU from 14 to 18 weeks, in line

with standards developed by the International Labour Organisation.

But on 20 October last year, the European Parliament adopted its first reading position on the directive. It voted to set the minimum leave period at 20 weeks, with women receiving full pay for the entire time.

The Council of Ministers discussed that decision at the EPSCO meeting in December. The UK joined the Czech Republic, Denmark, Estonia, Germany, the Netherlands, Slovakia and Sweden in signing a formal minutes statement which expressed concern about the proposals.

The situation now is effectively a stalemate. Under the Ordinary Legislative Procedure (formerly known as the "co-decision" procedure) the European Parliament and the Council of Ministers each adopt a first reading position based on a proposal from the Commission.

Subsequent stages of the legislative process aim to reconcile the positions of the two institutions. Until the Council adopts its first reading position, these proposals cannot move on.

[\[Back to contents \]](#)

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