



# EMPLOYMENT LAW BULLETIN

2009 - Issue 1



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Welcome to this Issue of the Employment Law Bulletin produced by the Employment Practice Group at 3 Hare Court.

We have a growing reputation for our efficient and unstuffy approach, aiming to provide sensitive and commercial advice for both employers and employees. We particularly benefit from the breadth of experience within Chambers and regularly advise and act as advocates in cases which intersect with personal injury, human rights, professional disciplinary and administrative proceedings as well as commercial actions in the High Court. At all times we strive to provide practical advice. In this issue:

**Sarah Crowther** sets out some of the implications of employees' use of the internet in the employment sphere and highlights some of the ways employers and employees alike can avoid pitfalls in this important and developing area;

**Andrew Young** writes on the Employment Equality (Age) Regulations 2006 and the *Heyday* litigation;

**Tom Poole** examines the issue of the employment status of agency workers, with particular reference to the Court of Appeal decision in *James v Greenwich LBC*;

**Daniel Clarke** summarises the effect of the Sex Discrimination 1975 (Amendment) Regulations 2008;

**Daniel Tivadar** reviews the Court of Appeal decision in *Oyarce v Cheshire CC* on the burden of proof in victimization claims;

**Sara Ibrahim** analyses the House of Lords decision in *Lewisham LBC v Malcolm* on the definition of disability-related discrimination and also provides a summary of the Employment Act 2008;

**Clara Johnson** reviews the important ECJ decision in *Coleman v Attridge Law* on discrimination by association; and

**Cressida Jauncey** reviews the ECJ decision in *Firma Feryn* on whether the statement of a discriminatory recruitment policy is actionable in itself.

Please see the back page of this Bulletin for members of the Employment Practice Group, and for other contacts at 3 Hare Court. We hope that you will also visit our website at [www.3harecourt.com](http://www.3harecourt.com) for further details of members of Chambers and the services we provide.

For further copies of this Bulletin, to have a copy e-mailed to you, or to register to receive future issues, please contact our Marketing Director at [lizheathfield@3harecourt.com](mailto:lizheathfield@3harecourt.com).

We hope that you find this Bulletin informative and interesting. As ever, we welcome your feedback.

**Daniel Clarke**  
Editor

## EMPLOYMENT IN THE INTERNET AGE

By Sarah Crowther



For Generation Y, e-mail, text and SMS are old school. Instead, social networking sites such as *Facebook*, *MySpace* and *Bebo* are now fundamental to the way in which they organise their social lives. Many also have blogs or personal websites and upload video and audio content onto sharing sites. Others share information by file sharing.

Yet there is often little understanding by users that their actions in the virtual world impact on their “real” lives. The permanence of information on the internet and in email is often overlooked by employees who are beguiled by the informality of e-communication. The dividing line between an individual’s professional and personal lives has been blurred. A humorous, but striking, example of the practical import of this blurring occurred last month. A Sydney call centre worker updated his “status” on *Facebook* to declare that he had a hangover and was therefore taking a “Sickie Wool!” Unfortunately for him his line manager promptly illustrated his *Facebook* “friendship” with him by dismissing him.

These developments pose interesting questions in the employment sphere, some of the most important of which are considered below.

### **Can a potential employer look at an applicant’s blog?**

A common misconception amongst those who communicate using the web is that their personal sites are confidential. In fact potential employers routinely check applicants’ websites, blogs and social networking pages. As a matter of legal principle there is nothing to preclude such searches. Posting personal information on a publicly accessible website without security restrictions is equivalent to taking out an advert.

Social networking sites rely on the individual user setting their own personal security preferences. Mistakes are easily made. 18 year-old Ashley-Paul Robinson, a footballer for Crystal Palace, posted his intention to move to Fulham on his *Facebook* profile - thus informing not only his 194 *Facebook* ‘friends’ but also approximately 2.7m members of the “London” network.

His employer was understandably unimpressed with this release of commercially sensitive information.

Employees should therefore exercise considerable caution before publishing. Even those who take steps to protect their identity are not necessarily safe. Employers on the other hand might not be wise to grub around extensively on the internet for information regarding a potential candidate. Quite apart from the difficulty of avoiding mistaken identity, how can the employer be sure that the content is true? Content may well have been uploaded by third parties with ulterior motives. This was precisely the scenario in *Applause Store Productions v Raphael* [2008] EWHC 1781 (QB).

There could still be some content in which a blogger or poster has a legitimate expectation of privacy even though it appears on a site which a potential employer could access. Information regarding sexual orientation or religious belief may appear on a social networking site. It would be illegal discrimination for a potential employer to take account of this information when deciding how to progress a candidate’s application.

### **Can an employer discipline or dismiss in respect of conduct on the internet?**

A common concern for employers is what action they can take should they suspect that an employee is misbehaving in the virtual world. Where such behaviour takes place in the course of employment and would easily be identifiable as misconduct in the “real” world, there is little difficulty in following standard disciplinary or dismissal procedures, for example, work-related internet-based conduct which amounts to bullying, sexual or racial harassment or obscenity.

However, matters become more complicated where the behaviour takes place outside work in course of the employee’s personal life. It is in these situations that the employer would have to link conduct to a breach of the employment contract – usually by dint of the impact on a legitimate interest of the employer’s business.

### **Bringing the employer into disrepute?**

An excellent example was the case of Ellen Simonetti, the Delta Airlines flight attendant whose blog “Queen of the Sky” resulted in the termination of her employment. The Queen of the Sky reported various adventures apparently all part of her experience as a flight attendant, accompanied by photographs of Ms Simonetti in uniform (who later insisted her Queen of the Sky character was merely fictional). Delta Airlines were not

impressed: they relied on the misuse of their uniform and logo to establish a case for dismissal on grounds of bringing the company into disrepute.

In the UK such conduct is more likely to be categorised as a breach of trust and confidence but it is easy to see how employees might get themselves into trouble along similar lines. The whistle-blowing provisions will not generally be of assistance to an employee in circumstances where the disclosure could reasonably have been made to the employer rather than the public at large.

#### **Misuse of employer's property?**

Another avenue for employers is where the alleged conduct takes place using property belonging to the employer which has been misused. In this area prevention is better than cure. A good internet and e-communications policy will have clear guidance on use of social networking, virtual reality and P2P sites (and most likely access to the same will be restricted). Equally there should be parameters for reasonable usage (in terms of time, content and purpose) of Blackberries, laptops, mobile phones and other equipment issued by an employer.

However, a well-drafted policy alone will not render a subsequent dismissal for breach fair and non-discriminatory. It is important to enforce policies and not simply use them as a smokescreen for dismissal on other grounds.

If an employee is seriously over-using internet and email resources during work time, it may be that he is in breach of his contractual obligation to render the services which he has promised to provide. Such a breach is unlikely to form grounds for instant dismissal. All but the most extreme case would justify some form of lesser disciplinary sanction and an opportunity to improve behaviour.

#### **Monitoring employee's usage**

In practice difficult questions of enforcement arise. The only real method is to monitor internet usage which immediately raises questions of privacy and free speech.

E-mail and internet activity falls within the scope of an employee's Article 8 rights, even if sent from or received at work, unless an employee has been given due warning that his activity is liable to monitoring. Following secondary legislation on the point, an employer is legally entitled to monitor e-mail and internet traffic for the purpose of ascertaining whether it forms part of the legitimate business of the employer so long as

all reasonable efforts have been made to inform the employee that such interception may take place.

Once the snapshot of activity has been taken, the evidence will need to be preserved and subjected to expert analysis before it can be used as part of an investigation or disciplinary proceeding.

#### **Post-termination covenants**

Finally, employers should review their post-termination contractual covenants to bring them in line with the internet age. In *Hays Specialist Recruitment v Ions* [2008] EWHC 745 the employee during the course of his employment had joined site *LinkedIn* and uploaded the employer's contacts into his own personal network. Using these contacts it was alleged that he was able to obtain a competitive advantage against his former employer following the termination of his employment. It is obviously difficult for an employer to assert that contact information is confidential once it is uploaded onto a networking site without express provision for the same in a contract of employment.

### **AGE DISCRIMINATION AFTER THE EMPLOYMENT EQUALITY (AGE) REGULATIONS 2006**

*By Andrew Young*



The Employment Equality (Age) Regulations 2006, which came into force on 1 October 2006, are intended to give effect to the European Council Directive 2000/78/EC, which had as its stated purpose to establish a general framework for equal treatment in employment and occupation.

One of the most vexed issues which arises in connection with these Regulations and the underlying Directive is the extent to which it is still permissible for national governments to impose a universal retirement age, irrespective of the wishes of individual employees. This issue has already been the subject of one reference to the European court from Spain and there is currently a second reference awaiting determination in the so-called *Heyday* litigation brought by the English charity, Age Concern, against the UK Business Department. The aim of Age Concern in this litigation is to obtain a declaration from the

court that the Regulations made by the UK Government are *ultra vires*, on the basis that they fail to give proper effect to the limited power of national governments under the Directive to authorise a compulsory retirement age, and if that argument fails, to persuade the court to declare that the UK Government's justification for a general retirement age does not satisfy the test laid down by the Directive. The wider purpose of the action is to stimulate a debate which will have the political effect of persuading the UK Government to outlaw any general compulsory retirement age. On 23 September 2008 the Advocate-General's Opinion was delivered in this reference, which gives an indication of the likely ruling of the European court, although such Opinions are not always followed by the court.

It should be emphasized at the outset that the Council Directive, unlike the Regulations, is concerned with equal treatment in the employment field generally. Age discrimination is dealt with only in Article 6 of the Directive and then only in terms of a derogation from the general prohibition of discrimination contained in Article 2. Article 6(1) provides that differences of treatment on grounds of age shall not constitute discrimination:

"if... they are objectively and reasonably justified by a legitimate aim, including legitimate employment policy, labour market and vocational training objectives, and if the means of achieving that aim are appropriate and necessary."

Three specific examples of justified differences of treatment are then given, including one that approves the fixing of a maximum age for recruitment in certain circumstances, but nothing is said about a national retirement age.

This derogation is reflected in the Regulations by Regulation 3, which contains a general defence of justification for direct age discrimination, provided the discriminator can show that his actions are a proportionate means of achieving a legitimate aim and by Regulation 30, which excludes provisions for compulsory retirement at or over the age of 65 from the scope of the Regulations entirely. As stated in the explanatory memorandum to the Regulations, this provision is intended to allow employers to use a retirement age of 65 or above without having to justify doing so. At the same time, the UK Government introduced a new procedure, whereby all employees have the right to ask their employer to allow them to continue working beyond their normal retirement age and the employee has a statutory duty to consider this request and to respond reasonably to it. Therefore, the Government has adopted a

compromise between the two extremes of banning the use of a compulsory retirement age altogether (as has been done in some EU countries and as is advocated by Age Concern) and making a compulsory retirement age an exception to the general prohibition of age discrimination in employment.

One issue referred to the European court in the *Heyday* litigation has already now been determined in Age Concern's favour in the Spanish case of *Palacios de la Villa v Cortefiel Servicios SA* [2007] IRLR 989, namely the issue of whether the reference in Recital 14 to the Directive to its being "without prejudice to national provisions laying down retirement ages" meant that such provisions (which the Government submitted included the employment law reforms introduced in the UK) did not have to satisfy the justification test set out in the Directive. The ECJ held that this recital merely meant that member states were entitled to determine the issue of retirement age, but any such provisions would still be subject to the requirements of the Directive.

The answers proposed by the Advocate-General to the other questions referred to the ECJ by Davis J in the *Heyday* litigation in his recent Opinion are unhelpful to Age Concern. He concludes that the UK Regulations and the other provisions relied on by the Business Department are not incompatible with the Directive and that a requirement for automatic retirement at the age of 65 could be lawful, provided it can be objectively and reasonably justified in the context of national law by a legitimate aim relating to employment policy and the labour market and the means adopted to achieve that aim are not inappropriate or unnecessary. Given the nature of the ruling in the *Palacios de la Villa* case, it is surprising that the Advocate General does seem to have difficulty in finding that Regulation 30 is compatible with Article 6(1) of the Directive and it is likely that this aspect of the appeal will require more rigorous analysis from the ECJ.

This reasoning, if adopted by the European court as it probably will be, will throw the onus back onto the English courts to decide the difficult issue of whether the justification provided by the UK Government for a compulsory retirement age satisfies the test that it has been introduced in pursuit of a legitimate aim and that the means adopted in pursuit of that aim are both appropriate and necessary.

## ARE AGENCY WORKERS EMPLOYEES?

By Tom Poole



The question whether a claimant in an unfair dismissal case is or is not an employee within the meaning of the Employment Rights Act 1996 (the 1996 Act) is increasingly litigated before employment tribunals in unfair dismissal cases, particularly those on the books of employment agencies. This is hardly surprising given that the length of the qualifying period for protection has been reduced to one year making it possible for “temporary workers” to qualify for protection, the maximum award of compensation in unfair dismissal claims has been substantially increased and there has been an explosion of numbers in the workforce (estimated at 1.3 million) engaged to work under arrangements with employment agencies.

Since *Dacas v Brook Street Bureau (UK) Ltd* [2004] ICR 1437, with its emphasis on an implied contract of employment, the EAT have considered the status of agency workers in over ten substantive appeals. Unhappily, however, it remained extremely difficult for practitioners to advise claimants and respondents which way the wind might blow, often due to the unsatisfactory and incomplete evidence of the facts relevant to the legal analysis of the relationship between the worker, the agency and the end user. It is for this reason that the Court of Appeal considered it high-time to give authoritative guidance on the subject and did so when it handed down judgment in *James v London Borough of Greenwich* [2008] IRLR 302.

The issue on appeal was whether the ET erred in law in its decision that Ms James was not an employee of the respondent London Borough of Greenwich (the Council), for which, through a well-known employment agency (the agency), she performed paid work for a period of three years prior to the Council’s decision to replace her with another worker supplied by the agency.

In the absence of an express contract of employment, the ET faced the question whether it was necessary to imply a contract of employment between Ms James and the Council. The ET focussed on the absence of mutuality of obligations, notably the lack of any obligation on the Council to provide Ms James with

work and the fact that during her absence through sickness the agency provided another worker for the Council. In the circumstances, the ET found that there was no basis to imply a contract of employment between Ms James and the Council.

In its judgment reported at [2007] IRLR 1 68 the EAT held that no error in law in the ET decision was identified. Elias J gave some general observations on how tribunals might approach the implication of a contract with the end user and made clear his disagreement with the view expressed by Sedley LJ in *Dacas* that the mere passage of time could justify an implied contract between the worker and the end user as a matter of necessity. The EAT pointed out that “something more is required to establish that the tripartite agency analysis no longer holds good”.

Dismissing the appeal, the Court of Appeal held that, although Ms James could hardly be described as a “temporary worker”, the ET had correctly applied the test of necessity in assessing whether a contract of employment should be implied between her and the Council. The Court of Appeal also expressed its approval of the guidance handed down by the EAT, which is now likely to be instrumental in all future agency worker cases.

Moreover, the Court of Appeal analysed the state of the authorities. Mummery LJ held that *Dacas* is not authority for the proposition that the implication of a contract of service between the end user and the worker in a tri-partite agency situation is inevitable in a long term agency worker situation. It is only a possibility, the outcome depending on the facts found by the ET in the particular case.

The question of the employment status of an agency worker post-*James* was considered recently by the EAT in *Beck v (1) Camden London Borough Council (2) Supporta Care Ltd* (UKEAT/0121/08/ZT). In this case HHJ Peter Clark endorsed the observations of Mummery LJ in *James* as to the very limited scope for successful appeals where the correct test of necessity has been applied by the ET as, in the EAT’s view, it had been in *Beck*.

In conclusion, the question whether an “agency worker” is an employee of an end user must be decided in accordance with common law principles of implied contract and, in some very extreme cases, by exposing sham arrangements. Practitioners will do well to remember that labels are not a substitute for legal analysis of the evidence and successful appeals unlikely where the ET has applied the correct test of necessity.

As a post-script, although the question of the status of agency workers can be answered by application of common law principles of implied contract, there is a growing tension between the need for a flexible labour market and the unsatisfactory growth of a two tier workforce. There are plainly arguments of social and economic policy as to whether the present position under Part X of the 1996 Act should be maintained, particularly where the individual renders services to the same person for a significant period of time. However, unless and until Parliament alters the position, practitioners must continue to advise in accordance with the principles of the law of contract, as set out clearly in the judgments of Mummery LJ and Elias J in the EAT, and analyse carefully the specific facts of each case.

## SECOND TIME LUCKY – THE SEX DISCRIMINATION 1975 (AMENDMENT) REGULATIONS 2008

By Daniel Clarke



On 6 April 2008 the Government brought into force the Sex Discrimination 1975 (Amendment) Regulations 2008 (the 2008 regulations), which make significant amendments to the Sex Discrimination Act 1975.

Their background is slightly unusual. In October 2005 the Government brought into force the Employment Equality Regulations 2005 (the 2005 regulations) which were designed to implement an EC Directive passed in September 2002 (2002/73/EC, the Directive). However, the Equal Opportunities Commission did not consider that the 2005 regulations properly implemented the Directive. Although there was a great deal of consultation and communication between Government and the EOC it was unable to convince the Government that this was the case.

Accordingly, following the bringing into force of the 2005 regulations, the EOC brought judicial review proceedings in which judgment was given by Burton J in May 2007 (*Equal Opportunities Commission v Secretary of State for Trade and Industry* [2007] EWHC 483 (Admin)). In very large part the

Court upheld the EOC's contentions. The Government was forced to think again and to re-legislate by bringing into force the 2008 regulations. The principal changes are as follows.

### Definition of harassment

First, the definition of harassment under the 1975 Act is considerably widened. The 2005 regulations sought to amend the 1975 Act so that a person subjects a woman to harassment if "on the ground of her sex", he engages in unwanted conduct that has the purpose or effect of violating her dignity or of creating an intimidating, hostile, degrading, humiliating or offensive environment for her.

The High Court held that, in the light of the Directive, this was too narrow in 2 ways. First, "on the ground of" required the sex of the complainant to have been the "but for" cause of the unwanted conduct. Secondly, the reference to "her sex" meant that the unwanted conduct had to have been directed at the complainant (rather than at a third party). The High Court held that neither of these restrictions were required by the Directive. Accordingly, they have now been removed. The wording of the Directive, which the 2008 regulations (regulation 3) now transplant into the 1975 Act, is much broader - a person subjects a woman to harassment if: "he engages in unwanted conduct *that is related to her sex or that of another person* and has the purpose or effect of violating her dignity...", etc.

### Liability for third party harassment

Secondly, the 2008 regulations also widen the scope for liability for harassment in another very significant way. The previous position in English law was that an employer could not be vicariously liable under the 1975 Act for discriminatory acts or omissions of third parties such as customers, clients, contractors or visitors (*Pearce v Governing Body of Mayfield Secondary School* [2003] ICR 937).

Following the High Court decision the 2008 regulations (regulation 4) amend the 1975 Act to provide that an employer is to be treated as subjecting a woman to harassment if a "third party" (broadly defined as any person other than the employer or another of his employees) subjects the woman to harassment in the course of her employment and the employer has failed to take such steps as are reasonably practicable to prevent the third party from doing so. The regulations provide the additional requirement that the employer must have known that the woman had been subject to such harassment on at least 2 previous occasions (although not necessarily by the same third party).

### **Discrimination on the ground of pregnancy or maternity leave**

Thirdly, in claims based on discrimination on the grounds of pregnancy or maternity leave the 2008 regulations eliminate the statutory requirement under the 2005 regulations for a comparator who is not pregnant or who is not on maternity leave (regulation 2). To succeed in a claim for discrimination under these heads a woman now need only show that she has been treated “less favourably” on grounds of pregnancy or maternity leave. She need not necessarily show that she would not have been treated thus had she not become pregnant or exercised a right to maternity leave.

### **Exception relating to terms and conditions during maternity leave**

Finally, the 2008 regulations provide that claims for discrimination in relation to terms and conditions of employment in relation to periods of additional maternity leave are now available to the same extent to which they are available in relation to periods of ordinary maternity leave (regulation 5). The amendments apply where a woman’s expected week of childbirth began on or after 5 October 2008.

It will be clearly seen that these are significant changes of principle, rather than minor tweaking, and the overall the scope of liability is much broadened. The change to the definition of harassment is perhaps the most significant of all. The definition of harassment adopted by the 2005 regulations has also been used in the equivalent provisions of other discrimination statutes or regulations (e.g. section 3A Race Relations Act 1976, section 3B Disability Discrimination Act 1995, paragraph 5 Employment Equality (Religion or Belief) Regulations 2003 and paragraph 5 Employment Equality (Sexual Orientation) Regulations 2003). In all those cases the Directives they purport to implement also use the same definition of harassment used in the Directive in this case, meaning in the light of the High Court decision they are all defective. The root of the problem, as was successfully argued before the High Court, is that the draftsmen failed to keep the concepts of discrimination and harassment separate and imported requirements of the former into the latter.

The wider definition would certainly have led to a number of past cases being decided differently. To give but one revealing example, in *Brumfitt v MoD* [2005] IRLR 4 a training officer who was found to have exposed the claimant to language which was “offensive and humiliating to her as a woman” was found, by dint of the generally unpleasant nature of his language and the fact that his audience was of mixed sexes, not to have discriminated against the claimant *on grounds of her sex*. The

claimant is likely to have succeeded in a claim based on *unwanted conduct related to her sex*.

### **OVER TO YOU – WHEN DOES THE BURDEN OF PROOF PASS IN VICTIMISATION CLAIMS?**

*By Daniel Tivadar*



The Court Appeal has decided in *Oyarce v Cheshire CC* [2008] EWCA Civ 434 that the reverse burden provisions of section 54A of the Race Relations Act 1974 (RRA) do not apply to applicants claiming that they have been discriminated against by way of victimisation. These claimants will therefore have to satisfy the ET on the balance of probabilities that they have been victimised. Only then will the burden shift to the respondent to show otherwise.

Reverse burden provisions provide a significant evidential assistance to claimants. If they apply, the claimant merely has to prove facts from which the ET could conclude that the respondent had discriminated. A person is victimised if they are treated less favourably because of having carried out a protected act, such as bringing a claim for discrimination, giving evidence in such a claim etc. In other areas of discrimination in the employment sphere, i.e. on the grounds of sex, disability, age, religion or belief and sexual orientation, reverse burden provisions apply.

Following *Oyarce*, in cases of victimisation under the RRA the claimants have to satisfy the normal civil burden of proof. This result reached by the Court of Appeal is surprising - however, no other outcome was open to the Court given the wording of the RRA and the Equal Treatment Directive itself.

Briefly, the facts were that Mrs Oyarce brought proceedings against Cheshire County Council complaining of a failure to give her the opportunity to apply for a particular post. She claimed that that failure was discrimination both (1) on grounds of race; and (2) by way of victimisation as she had previously brought proceedings under the RRA. The ET applied reverse burden of proof and upheld the victimisation complaint. The

Council successfully appealed to the EAT and Mrs Oyarce appealed to the Court of Appeal. The Equality and Human Rights Commission intervened.

Buxton LJ, delivering the lead judgment, set out Articles 8 and 9 of Equal Treatment Directive 2000/43/EC which provide for reversing the burden in cases of discrimination on racial and ethnic origin, but not in cases of victimisation. It is this Directive that the draftsman transposed into the domestic law by section 54A of RRA. It is trite law that the obligation on Member States is to ensure that sanctions are provided that are “sufficiently effective to achieve the objective of the Directive” – see e.g. *Marshall* [1993] ICR 22. The Court held that this obligation was complied with by enacting section 54A RRA.

The question then becomes whether the RRA provides greater protection than is required by the Directive. Having examined the relevant provisions of the RRA, the Court concluded that it did not. Section 54A applies to cases where the discrimination complained of is “on grounds of race or ethnic or national origins”. As Longmore LJ stated, this echoes section 1 of RRA (discrimination on racial grounds). It does not echo section 2, victimisation by reason of a protected act.

The Court’s analysis must be correct, as a claimant is not victimised because of her racial origin, but rather for raising the issue of the contravention of the RRA. The victimised person’s racial origin is completely irrelevant; it is her protected act, rather than her racial background that results in victimisation.

The Court’s conclusion does, nevertheless, produce some curious results: for example it means that a claimant, like Mrs Oyarce herself, who complains about both racial discrimination and victimisation will take advantage of the reverse burden provision in the former but not in the latter complaint.

It was further submitted on Mrs Oyarce’s behalf that the Court should consider the other areas of discrimination law, all of which reverse the burden in victimisation cases. Lord Bingham’s opinion in *Anyanwu v South Bank Student Union* [2001] ICR 391 was cited; his Lordship stated that it was legitimate if necessary to consider the Disability Discrimination Act 1995 and Sex Discrimination Act 1975 in resolving any issue of interpretation on the RRA. Buxton LJ, however, stated that this was a principle of construction and was irrelevant in a case where the words reversing the burden are missing; i.e. where there is nothing to construe.

Following *Oyarce* respondents’ representatives should emphasise that the claimants have to prove their RRA victimisation claims on the balance of probabilities before any burden passes to the respondent. In practical terms, however, the ET may listen to all the evidence together, decide whether a victimisation claim should be upheld or not and then fit their findings to the relevant test! Even if this is the case, it is important for legal representatives to be aware of the correct burden of proof, since the ET applying the wrong test may be a ground of appeal, as Mrs Oyarce’s case itself demonstrated.

## IDENTIFYING THE CORRECT COMPARATOR IN DISABILITY DISCRIMINATION CLAIMS

By Sara Ibrahim



The House of Lords decision in *London Borough of Lewisham v Malcolm* [2008] UKHL 43 has significantly changed the established interpretation of the Disability Discrimination Act 1995 (DDA). Prior to the decision in *Malcolm*, the correct comparators were set out in *Clark v Novacold* by the Court of Appeal which decided that the proper comparator was someone who was not disabled and to whom the reason for the less favourable treatment did not apply. However, the majority in *Malcolm* (with Baroness Hale dissenting) held that the case of *Clark v Novacold* had been wrongly decided and the correct comparator should be someone who is not disabled but whose circumstances are the same. The reason for the decision in *Malcolm* was undoubtedly influenced by the fact that the case was a housing matter and not an employment case.

*Malcolm* concerned a case where Mr Malcolm was granted a secure tenancy by Lewisham Council. It was an express term of the tenancy that Mr Malcolm was to use the flat as his principal residence. Mr Malcolm was a schizophrenic and during a period of time when he ceased taking his medication he sub-let the flat in breach of the terms of the tenancy. When the Council attempted to repossess the property, Mr Malcolm stated that he had sub-let the flat because of his Schizophrenia and was therefore a disabled person for the purpose of the DDA. He therefore argued that the Council was treating him less fairly as

a result of his disability and this amounted to discrimination under section 24(1) DDA.

What difference in practice does *Malcolm* make? Baroness Hale in her dissenting judgment was correct to say that in overturning the settled understanding set down in *Clark v Novacold* that the approach that is now to be followed by employment lawyers and tribunals is unclear. It is likely that claimants will invite the employment tribunal to follow the dissenting judgment of Baroness Hale which confers a much wider definition of what constitutes disability discrimination and to distinguish *Malcolm* as a housing case. Baroness Hale quoted an excerpt from *Hansard* in her dissenting judgment that gave the example of two employees who could not type sufficiently quickly, one because of arthritis and one because they had not been taught. It was stated that unless there was an amendment to the DDA to show that the treatment was for a reason relating to the disability and not necessarily the mere fact of disability, then the employee with arthritis may be able to be refused work on the basis they cannot type as fast; a situation that arises from their disability. This suggested amendment was in fact reflected in the DDA and for that reason Baroness Hale argued the test in *Clark v Novacold* accorded with parliamentary intention. If the new test in *Malcolm* was applied then it will leave it open to an employer to argue that both employees are being treated in the same way because of their inability to type quickly. In reality the employee who is unable to type because of their disability (i.e. arthritis) is being refused employment or discriminated against for reasons arising from their disability. However, the much narrower test set out in *Malcolm* would only allow the typist with arthritis to succeed if they could prove that they were discriminated against on the basis of their disability and not their reduced typing speed.

Conversely, employers may welcome the new test in *Malcolm*. The new comparator introduced by *Malcolm* may dictate that incidents that were previously discriminatory under the DDA are now no longer automatically so. It should be noted that *Malcolm* concerned an allegation of indirect discrimination but in effect any indirect discrimination will be hard to establish. This was recognised by Lord Brown who said “I recognise, of course, that this approach to the section reduces its reach: it confines it largely if not entirely to the proscription of direct discrimination only.” With this in mind, it would be advisable where possible to establish that any discriminatory acts were directly and not indirectly discriminatory when acting on behalf of the Claimant.

The House of Lords also tackled the question of knowledge of the alleged discriminator in *Malcolm*. They held that it was

necessary for the alleged discriminator to have actual or at least imputed knowledge of the disability for their actions to be discriminatory. It should be noted that Baroness Hale qualified this definition and said that it did not have to be proven that the alleged discriminator knew that the disability was a disability within the meaning of the DDA. This overrules the previous decision that knowledge of a disability was irrelevant (*London Borough of Hammersmith and Fulham v Farnsworth*).

Given the significant shift that *Malcolm* represents it is likely that the way indirect discrimination cases are litigated will be different. In particular claimants may attempt to allege direct discrimination and in instances where this is not possible, that reasonable adjustments were not made. Regardless of the different approaches now adopted by employment lawyers, all seem to agree that *Malcolm* has muddied the water.

## DISCRIMINATION BY ASSOCIATION

By Clara Johnson



As long ago as December 2006 HHJ Peter Clark, sitting in the EAT, referred to the ECJ the preliminary issue of whether the Equal Treatment Framework Directive (2000/78/EC) protects not only disabled employees from direct discrimination and harassment, but also employees who are *associated* with someone with a disability.

In the case before him, which was not an unusual one on its facts, the Claimant, Sharon Coleman, was the legal secretary for Attridge Law and the primary carer for her disabled son. She alleged that she had been the victim of disability discrimination in contravention of her rights under the Disability Discrimination Act 1995 (DDA) because she had been treated less favourably than fellow employees with respect to flexible working hours. She also alleged that she had suffered abuse and insults about her son and had accordingly been the victim of harassment on the grounds of disability by association. It was this latter way of putting her case which was the subject of the reference to the ECJ.

On 31 January 2008 the Advocate-General delivered his Opinion. He considered that discrimination on the ground of disability by association was equally prohibited by the Directive. On 17 July 2008 the ECJ followed the A-G and ruled that the prohibition of direct discrimination laid down by the Directive was not limited to people who are themselves disabled. It is directly discriminatory for an employer to treat an employee, who is not himself disabled, less favourably than a comparable employee where the treatment is based on the disability of a child he or she cares for. Similarly, harassment related to the disability of the child is also covered by the Directive.

In the ECJ's view, the purpose of the Directive was to combat all forms of discrimination on grounds of disability. The principle of equal treatment enshrined in the Directive applies not only to a particular category of person but by reference to *grounds* of discrimination, which includes disability. An interpretation of the Directive limiting its application to people who were themselves disabled was liable to deprive the Directive of an important element of its effectiveness and to reduce the protection it was intended to guarantee.

There are, of course, a number of provisions, such as the right to reasonable accommodation pursuant to Article 5, which can only apply to disabled people. However, the decision considerably widens the scope of the Directive and in due course it may become necessary to amend the provisions of the DDA so as to include expressly the prohibition of discrimination by association.

Although the Court did not consider whether "indirect discrimination" under Article 2(2)(b) can be by association, it is likely that the applicability of associative disability will be considered in the context of indirect discrimination in the future thus widening the scope of the Directive and the DDA even further. It is also likely that the ruling will have bearing on other types of discrimination such as age and race. The decision may apply equally to employees who are also carers of elderly people.

Although quite clearly the decision does not give workers the *right* to flexible working hours if they care for a disabled person but only the right not to be treated less favourably than a fellow employee, the decision remains an important one for carers of disabled people. Employers will have to be mindful of those workers who also are carers of disabled, potentially elderly people, and ensure they respond to them appropriately and in accordance with the law.

## CAN THE STATEMENT OF A RECRUITMENT POLICY CONSTITUTE DIRECT DISCRIMINATION IN ITSELF?

By Cressida Jauncey



Following the ECJ's ruling in *Centrum voor Gelijkheid van Kansen en voor Racismebestrijding v Firma Feryn* (ECJ Case C-54/07) it appears that the answer is yes. The case concerned a Belgian door manufacturing and fitting firm whose director had given newspaper interviews indicating that its employment vacancies were not open to workers of Moroccan origin. Proceedings were brought by a Belgian equal opportunities and anti-racism body (broadly speaking the equivalent of the old EOC in the UK) alleging race discrimination contrary to legislation and seeking a declaration to that effect. The Belgian court held that it did not amount to discrimination, and dismissed the claim on the ground that it had not been shown that any particular person had been discriminated against. Instead, it was evidence of potential discrimination which could be used if a person of Moroccan origin applied for and failed to obtain a post with the firm.

On appeal by the claimant a reference was made to the ECJ for a preliminary ruling on the scope of Directive 2000/43, and the burden of proof and sanctions. The A-G's Opinion (12 March 2008) disagreed with the Belgian court's decision and stated that it risked undermining the effectiveness of the principle of equal treatment. Workers of Moroccan origin may be deterred from applying for employment upon reading a public statement such as this, which in itself constitutes direct discrimination.

On 10 July 2008 the ECJ ruled in agreement with the A-G's Opinion. Although Article 2(2)(a) of Directive 2000/43 defined direct discrimination as occurring where "one person is treated less favourably than another...in a comparable situation", it would be contrary to the objective of the Directive - to foster conditions for a socially inclusive labour market - to limit the scope of the Directive to cases where an unsuccessful candidate for an employment post had brought proceedings against an employer. Accordingly, there was also *prima facie* direct discrimination where a public statement had been made excluding candidates of a certain ethnic or racial origin from the recruitment process, even if no particular complainant could

be identified. Further, Article 8(1) of the Directive provided that where there were facts from which discrimination could be presumed, it was for the defendant to prove that there had been no breach of the principle of equal treatment. Thus, in the case of a statement by an employer that its policy was not to recruit certain racial/ethnic type workers, the onus is on the employer to show that it had not breached the principle of equal treatment by proving that its actual recruitment practice did not correspond to that stated policy. Article 15 requires that national sanctions for breach of anti-discrimination provisions have to be effective, dissuasive and proportionate, even where there is no identifiable victim, and these could include a declaration of discrimination accompanied by publicity, and an injunction accompanied if appropriate by a fine, or an award of damages.

The ruling seems to overturn the established UK position laid down in *Cardiff Women's Aid v Hartup* [1994] IRLR 390. This was an employer's appeal from a decision that the applicant had been unlawfully discriminated against under section 4(1)(a) Race Relations Act 1976 by an advertisement for a job vacancy for a "black or Asian woman". It was held that placing a discriminatory advertisement was not an act of discrimination which was unlawful, but merely indicated an intention to discriminate, and only the CEHR could bring proceedings against an employer for publishing a job advertisement that indicates an intention to discriminate unlawfully on grounds of race. It now appears that individuals can bring claims in their own right.

## A BRIEF SUMMARY OF THE EMPLOYMENT ACT 2008

By Sara Ibrahim



The new Employment Act 2008 received royal assent on 13 November 2008. Its most important function is to repeal the much-criticised statutory dispute resolution procedures and related provisions about procedural unfairness in dismissal cases.

### Statutory dispute resolution procedures and procedural unfairness

The statutory procedures came into force in October 2004 and

introduced mandatory 3-step processes to be followed in disciplinary and dismissal matters raised by an employer and grievances raised by an employee. They require written notification of the issue to the other side, a meeting between the 2 sides and (if appropriate) an appeal. Where either side fails to use the minimum statutory procedures, section 31 of Employment Act 2002 requires a tribunal to increase or decrease any award. The independent Gibbons Review concluded that the statutory procedures have, as a result of their mandatory nature, led to disputes becoming formalized and lawyers getting involved at an earlier stage than had previously been the case. Following a full public consultation the Government decided to repeal them.

Accordingly, the statutory dispute resolution procedures, set out in sections 29 to 33 and Schedules 2 and 4 of the Employment Act 2002, are to be repealed in their entirety. Currently the timetable for repeal suggests the new provisions will come into force in April 2009. Under the new regime, any default on the part of any employer or employee to attempt to resolve disputes will be measured against the revised ACAS Code of Practice on Disciplinary and Grievance Procedures. Any failure to act in accordance with the ACAS Code will enable a tribunal to either increase or decrease an award in its discretion by up to 25%.

Section 98A of the Employment Rights Act 1996 is also repealed in its entirety, so as to revert to the situation which applied previously based on the *Polkey v A E Dayton Services Ltd* [1988] AC 344 line of cases.

### Other changes

Additionally, the Employment Act 2008 makes provision made for more pre-claim conciliation and the time limits on post-claim conciliation to be removed, amends ETs' powers to reach a determination without a hearing (section 4) and allows tribunals to award compensation for financial loss in certain types of monetary claim (section 7). It also deals with the national minimum wage. Tougher penalties are introduced for those who fail to comply with the national minimum wage including fines that are to be unlimited in value. It is also intended that the most serious cases of non-compliance be tried by the Crown Court (see section 11 of the Act). Parliament has also taken the opportunity to amend section 174 of the Trade Union and Labour Relations (Consolidation) Act 1992 after the decision of the ECtHR in *ASLEF v UK* (Application No: 11002/05), that the section infringed the Article 11 rights of trade unions to select their members.



## Employment Practice Group

Members of the Employment Practice Group at 3 Hare Court undertake all kinds of employment work, and at all levels, on behalf of employers, employees, employment agencies and trade unions.

In addition to 'straightforward' employment issues, including unfair dismissal, redundancy, and various contractual claims, we have argued issues of equal opportunities, discrimination and human rights.

We have increasingly become involved in claims by and against senior employees relating to restrictive covenants, confidentiality and breach of fiduciary duty. This does on occasion require immediate action, and we are used to urgent applications for injunctions and search and freezing orders.

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