Frederick Place Chambers

Robert Spicer, M A(CANTAB)
Diploma in Legal Studies (CANTAB)
Public Access Barrister
Regulated by the Bar Standards Board

9 Frederick Place
Clifton
Bristol
BS8 1AS
Tel : 0117 9467059
E-mail : Robert.spicer@frederickchambers.co.uk
www.frederickchambers.co.uk

EMPLOYMENT TRIBUNAL - SEX DISCRIMINATION CASES

2020 Cases

Territorial jurisdiction

Walker v Wallen Shipmanagement Ltd (2020) Morning Star, March 13, EAT

W Ltd, a Hong Kong based company, provided workers for foreign registered ships sailing outside Britain. In 2016 the company interviewed a number of candidates. W, a qualified deck officer, was told after her interview that the company could not employ her because it only recruited men. W complained of direct sex discrimination, harassment and victimisation. The ET found that the decision was an act of direct sex discrimination but it did not have jurisdiction to hear the claim because the interviews were for jobs on foreign registered ships sailing in foreign waters and fell under the exemptions within the 2011 regulations brought into effect by section 81 of the *Equality Act 2010*. If the jurisdiction point had not applied, the ET would have awarded compensation for injury to feelings of £9000. Her claim for loss of earnings would not have succeeded because she had found new work which had offset any loss. W appealed to the EAT.

Decision

1. The appeal was dismissed.

2. W Ltd's conduct was clearly reprehensible but the ET had no power to right the injustice that had been done to her.

3. The 2011 regulations allowed an offshore employment service provider to discriminate on British soil on the ground of any of the protected characteristics in the 2010 Act when recruiting personnel in this country to serve on its clients' foreign flagged ships sailing outside British waters.

Time limit for claim

Caterham School Ltd v Rose (2020) Morning Star, January 31, EAT

R resigned on August 24, 2017. On December 29, 2017 she lodged complaints of sex and age discrimination, unfair dismissal and harassment. She alleged discriminatory conduct in 2011, 2012 and 2017. She also alleged a cumulative breach of the implied duty of mutual trust and confidence. The ET found that time had started to run on August 24, 2017 and the complaints were out of time. It was just and equitable to extend time in relation to the discrimination claims because they amounted to conduct extending over a period. The employer appealed to the EAT.

Decision

1. The appeal was allowed.

2. The ET had reached its decision at a preliminary hearing before considering the evidence and making findings of fact. It had been wrong to do so.

3. It was for the tribunal at a full hearing to decide whether the employer had discriminated against R before her resignation and whether this amounted to conduct extending over a period.

4. It was also for the ET at the full hearing to decide if it was just and equitable to extend the time limit.

2019 Cases

Burden of proof

Raj v Capita Business Services Ltd UKEAT/0074/19/LA

R's employment with C was terminated during the probation process following a number of meetings where his performance was discussed. He complained of sexual harassment in relation to the actions of his team leader. The ET rejected the complaint despite stating that the actions had been unwise and uncomfortable. R appealed on the basis that the ET had erred in law in that it had failed to apply the shifting burden of proof provisions.

Decision

1. The appeal was dismissed.

2. The ET had correctly identified evidential difficulties in concluding that the threshold had been reached of showing a prima facie case of unwanted conduct related to R's sex.

Evidence

Steele v Uniquely Chic Furniture (2017) Manchester employment tribunal

S, an employee of U, was accused of undermining a manager. S was upset when she was reprimanded. MB, a male director, contacted S to discuss the issue and repeatedly told her how much he wanted to have sex with her. S resigned, alleging sexual harassment by the director.

Decision

1. The ET had to make a decision based on the word of each party. There was no evidence of sexual harassment other than the word of S. The employer alleged that S had fabricated the claim.

2. The ET preferred the evidence of S. She had resigned with no guarantee of getting an alternative job, had texted her sister at the time, spoken to another friend and contacted the CAB and her GP.

3. S was awarded £26,500 for injury to feelings and personal injury plus interest.

Evidence

Partial disclosure of privileged advice

Kasongo v Humanscale UK Ltd UKEAT/0129/19/LA

K was dismissed after she informed her manager that she was or might be pregnant. She was dismissed after she had been employed for 11 months. She claimed that the effective cause of her dismissal had been her pregnancy or the prospect of her maternity leave. The employer argued that the reason for the dismissal had been K's poor performance, work attitude and attendance issues. As part of standard disclosure, the employer disclosed a redacted dismissal letter drafted by the employer's lawyers. K was able to read the redacted words and sought to use them at the hearing. The ET ruled that there had been no "cherry picking" by the lawyers in relation to legal professional privilege and K could not rely on the redacted words. K appealed to the EAT.

Decision

1. The appeal was allowed.

2. The disclosed document was part of one transaction, which was legal advice about K's dismissal.

3. The redactions to the draft dismissal letter would be removed and the full letter would be included in the trial bundle at the full hearing.

Indirect discrimination

Murray v Maclay Murray & Spens LLP [2018] 2 WLUK 575, EAT

M was a solicitor employed by M&S. Her working hours were 9 a.m. to 5 p.m. She was unable to arrive before 9am because childcare responsibilities and was sometimes late. She could not work after 5pm because she had to collect her daughter from childcare. She was dismissed for poor timekeeping and was told that she was not pulling her weight. She alleged indirect sex discrimination on the basis that the employer had applied a provision, criterion or practice (PCP) requiring employees to arrive by 9 and to stay at work after 5. This put women at a disadvantage because they were more likely than men to have childcare responsibilities. M later discovered that M&S was to cease practice. She sought to join the three individual partners of M&S as individual respondents because she was concerned that M&S would have no assets. Her application was refused and she appealed to the EAT.

Decision

1. The appeal was dismissed.

2. There were no reasons why the individual partners should be liable for indirect discrimination.

3. M had alleged that M&S had applied a PCP, rather than alleging that the partners had acted as individuals when they dealt with her.

Parental leave

Female comparator

Hextall v Chief Constable of Leicestershire Police [2018] ICR 1632, EAT

H, a police officer, took shared parental leave under LP's maternity leave and pay policy. He was paid at the statutory rate. He claimed sex discrimination and equal pay on the basis that women had the option of taking maternity leave on full pay, whereas men did not. The ET found that the claim was one of discrimination rather than equal pay. The ET rejected the claims, finding that the provision, criterion or practice of paying the statutory rate did not put men at a particular disadvantage. H appealed to the EAT.

Decision

1. The appeal was allowed.

2. The particular disadvantage relied upon was that fathers, as opposed to mothers, had no other choice than to take shared parental leave. This deterred them from taking leave to care for a child.

3. The ET had not clearly identified the particular disadvantage relied upon, so that no facts were found to enable a decision to be taken in relation to a logically relevant pool.

4. The claim of indirect discrimination would be remitted for rehearing.

Parental leave

Victimisation

Capita Customer Management Ltd v Ali [2018] ICR 1591, EAT

A took two weeks paternity leave with full pay, in accordance with his employer's parental leave policy. His wife was diagnosed with post-natal depression and he asked for leave to enable him to look after the baby. He was told that he was eligible for leave but would only receive the statutory shared parental leave payment. A female colleague on maternity leave would have received full pay for 14 weeks after the birth of the child. A lodged a grievance alleging sex discrimination. This was rejected and he went on sick leave. During the sick leave he was told that he would be demoted, and when he returned to work he was demoted. He complained of sex discrimination and victimisation. The ET upheld both claims. The employer appealed to the EAT.

Decision

1. The appeal was allowed in respect of sex discrimination. The primary purpose of maternity leave and pay was the health and well-being of the mother before and after giving birth. This was different from the purpose of shared parental leave, which was to care for the child. A woman on maternity leave was not a proper comparator for the purposes of a sex discrimination claim.

2. The appeal was dismissed in respect of victimisation. Bringing the grievance and lodging tribunal proceedings were protected acts and A had been subjected to four particular detriments.

Sexual harassment

Abildgaard v IFM Investors (2019) April, Central London Employment Tribunal, unreported

A, an investment associate, alleged that MV, an executive director of the company, repeatedly invited her to his hotel room after a work celebration in Spain. She resigned and complained of sexual harassment, constructive dismissal and victimisation.

The victimisation claim was based on allegations that her former employer made an unjustified and aggressive threat in an approach to her new employer.

After the complaint was made, the company cut MV's bonus and banned him from drinking at work events for 12 months. The case was based on the company's alleged failure to take reasonable steps to stop MV from carrying out acts of harassment and failing to protect A. It was also claimed that MV failed to respond appropriately after A complained. Following an initial hearing, the matter was settled for £270,000.

Significant points of the case:

- A did not sign a non-disclosure agreement.

- A commented on the unfair power balance between employees claiming harassment and their employers. Her case had cost more than £100,000 in legal fees.
- A has set up a charity – Legal Aid Business Diversity – to provide funding for workers who suffer discrimination.
- TUC research has reported that more than half of all women and 2 in 3 women aged 18 to 24 have suffered harassment at work.

Stereotyping assumptions

Commerzbank AG v Rajput (2019) Morning Star, September 20, EAT

R was an employee of C. She applied for a post as head of market compliance with two other internal candidates, one male and one female. Her male colleague, who was her junior, was appointed acting head. This was justified by C on the basis that the toxic atmosphere of the team would have been made worse by the divisive personalities of the women. R notified C that she was pregnant. Two days later an external male candidate was offered the post. He described R as having a controlling personality. R complained of sex discrimination, harassment and maternity leave discrimination. The ET found in her favour on the ground that C had operated on the basis of stereotypical assumptions about women. C appealed to the EAT, arguing that R had not put forward an argument based on stereotypical assumptions and it had not had the opportunity to challenge this.

Decision

1. Experience of stereotypical assumptions does not constitute a general category of knowledge which can be applied without first giving notice to the parties.

2. It is a type of specialist knowledge which must be disclosed to the parties, their advisers and witnesses in advance of the hearing so that they can challenge and test them.

3. These aspects of the case were remitted to a freshly constituted tribunal.

2018 Cases

Evidence

One person's word against another's

Steele v Uniquely Chic Furniture 2401533/2017, Manchester Employment Tribunal

S, a female employee of UCF, was reprimanded by a director for undermining her manager. Another director, a man, discussed the reprimand and repeatedly talked about how much he wanted to have sex with her. S was signed off with stress and resigned. The reason for

her resignation was sexual harassment. She complained of sexual harassment to an employment tribunal. The male director stated that the complaint was fabricated.

Decision

1. The complaint was upheld.

2. The tribunal had to make decision in relation to conflicting evidence.

3. It preferred the evidence of S. She had resigned with no guarantee of another job and had complained to a friend, a relative, her GP and the Citizens Advice Bureau.

4. S had suffered sexual harassment. She was awarded £26,500 compensation for injury to feelings.

Gender segregation in Islamic faith school

HM Chief Inspector of Education, Children's Services and Skills v The Interim Board of Al-Hijrah School (2017) Morning Star, December 1, Court of Appeal

Al-Hijrah School is a voluntary-aided Islamic faith school for boys and girls aged 4 to 16. Boys and girls are segregated from age nine for religious reasons. In 2016 the school was rated as inadequate. HMCI stated that the segregation of boys and girls limited their social development and their ability to interact with the opposite sex when they left school. HMCI took the view that the segregation was contrary to the *Equality Act 2010*. The school applied to the High Court to decide whether the segregation policy was discriminatory. The High Court found that there was no direct discrimination because one sex was not being treated less favourably than the other. HMCI appealed to the Court of Appeal.

Decision

1. The appeal was allowed in part.

2. The differential treatment was detrimental to both girls and boys. As such, there was discrimination contrary to the Equality Act by virtue of the fact that each sex was treated less favourably than the other.

Height of Greek police

Ypourgos Esoterikon and Ypourgos Ethnikis Pedias kai Thriskevmaton v Kalliri (2017) Morning Star, December 8, Court of Justice of the European Union

K applied to join the Greek police academy. She was refused entry on the basis that she was 1.68 metres tall and the minimum height requirement was 1.70 metres for all applicants of whatever gender. The Greek Court of Appeal upheld her claim of indirect sex discrimination. It ruled that the height provision was contrary to the constitutional principle of equality of the sexes. Greek measures administration ministers appealed to the CJEU.

Decision

1. Fixing a minimum requirement which applies to all candidates, whatever their gender, may amount to indirect sex discrimination if it puts more women at a disadvantage than men.

2. Indirect discrimination may be objectively justified by an aim where the means of achieving that aim are appropriate and necessary.

3. It was for the national court to decide if the minimum height requirement was justified.

4. Even if all the duties of a police officer required a particular physical aptitude, there was nothing to suggest that it was connected with being a certain height.

5. Until 2003, Greek law allowed different minimum heights for men and women. Different minimum heights applied to the Greek armed forces, port police and coastguard.

6. The main aim pursued by the Greek government could be achieved by measures which were less disadvantageous to women, for example by preselecting candidates based on specific tests of their physical ability.

Indirect discrimination

Dog handling test

Carter v Chief Constable of Gloucestershire 1400638/2017, Employment Tribunal

C, a police officer, applied for a position as dog handler. The dog handling assessment test involved a long walk and run of 3 hours over difficult terrain and a dog carry for 70 metres. C was physically exhausted after the long walk and was unable to lift and carry the dog. She was withdrawn from the process. She raised a complaint through the Police Federation on the basis that the long walk and dog carry was a physical and not an aptitude test. The complaint was rejected and she complained to the ET of indirect sex discrimination.

Decision

1. The complaint was upheld.

2. The assessment test was a provision, criterion or practice (PCP) and this included an endurance and stamina element.

3. The test was apparently neutral but put women at a disadvantage.

4. The aim of the test was legitimate but was not justified. It did not accurately reflect the demands of dog handlers. Most dog handlers already in position had not taken the test and would not be expected to.

Multiple complaints

Tarn v Hughes and Others UKEAT/0064/18/DM

T, a GP, worked as a partner with H and others. She became pregnant and lodged 30 separate complaints of sex and pregnancy discrimination, harassment and victimisation. At a preliminary hearing the ET ordered T to choose ten events for consideration by the tribunal. T appealed against the order.

Decision

1. The appeal was allowed and the matter remitted to the ET.

2. The order had been perverse and no reasonable tribunal could have made it.

3. The ET had a broad case management discretion but the separation of sample complaints should not be ordered except in cases where it was clear that this would not endanger just determination of the case.

4. In many discrimination cases, the complete picture had to be considered.

Risk assessment

Eida Otero Ramos v Servicio Galego de Saude (2018) Morning Star, January 5, Court of Justice of the European Union

OR, a nurse, returned to work at a hospital after having had a baby. She told her employer that she was breastfeeding and that her work was liable to have an adverse effect on her milk and to expose her to health and safety risks arising from a complex shift system, ionising radiation, healthcare associated infections and stress. The employer issued a report stating that there were no risks and no need to put preventative measures in place. OR requested a medical certificate stating that there was a risk to the breastfeeding of her child. This was refused on the basis that her job was included in a list of risk-free jobs. She appealed against this decision to the local Social Court. Her appeal was dismissed and she appealed further to the High Court on the basis that her employer's failure to carry out an adequate risk assessment was in breach of the relevant EU Directive. The High Court referred the matter to the CJEU.

Decision

1. A general assessment of a worker's role does not meet the requirement to carry out a risk assessment under the Directive to improve the health and safety at work of pregnant and breastfeeding workers.

2. Where an employer breaches the obligation to carry out a risk assessment, this amounts to direct discrimination on the ground that the failure amounts to less favourable treatment of a breastfeeding woman.

3. The burden of proof passed to the employer to prove that the risk assessment had been carried out to the required standard.

State pension

Transgender women

MB v Secretary of State for Work and Pensions (2018) The Times, August 16, European Court of Justice

MB was born a male. She married in 1974 and underwent sex reassignment surgery in 1995. She did not hold a full certificate of recognition of her change in gender because, for religious reasons, she did not wish her marriage to be annulled. In 2008 she reached the age of 60 and applied for a Category A state retirement pension. Her application was rejected because she could not be treated as a woman in the absence of the certificate. Her action against that decision was dismissed by the First-tier tribunal, the Upper Tribunal and the Court of Appeal. She appealed to the Supreme Court which referred the matter to the ECJ for a preliminary ruling.

Decision

1. The effect of section 4 of the *Gender Recognition Act 2004*, which required a subsisting marriage to be annulled prior to the issue of a full gender certificate and thus to a transgender woman being treated as a woman for pension purposes, contravened the principle of equal treatment and was therefore discriminatory.

2. The national legislation accorded less favourable treatment, directly based on sex, to a person who changed gender after marrying, than that accorded to a person who kept his or her gender and was married, even though those persons were in comparable situations.

2017 Cases

Breastfeeding facilities

McFarlane and Ambacher v Easyjet Bristol ET

References: Management of Health and Safety at Work Regulations 1999: regulation 16: new mothers: breastfeeding facilities

The recent Bristol employment tribunal decision in the case of *McFarlane and Ambacher v Easyjet Airline Co Ltd* has given guidance on the application of the *Management of Health and Safety at Work Regulations (MHSWR)* in the context of breastfeeding by employees. The case illustrates the application of health and safety law, and employment law in general, in this context.

B and A were female cabin crew members employed by Easyjet. They wished to continue breastfeeding their children after returning to work at the end of their maternity leave. They were advised by their GPs that they should ask for their shifts to be limited to eight hours. There were no suitable facilities for expressing milk on board aircraft. The GPs advised that working longer shifts would increase the risk of the development of mastitis.

Easyjet refused to agree to the requests. It failed to conduct a risk assessment and showed a strong reluctance to create bespoke shift patterns because of possible operational difficulties, given the need to deal with possible flight delays. The employment tribunal found that the treatment of B and A amounted to indirect sex discrimination. It took into account evidence that the company had been able to create bespoke shifts for another crew member who suffered from deep vein thrombosis, and evidence that flight delays were not as common as the company had suggested.

Regulation 16(1) of MHSWR imposes an obligation on employers to carry out a specific risk assessment where women of childbearing age or new or expectant mothers may be at risk from a work process, working condition or physical, chemical or biological agent. New or expectant mothers are defined as women who are pregnant, who have recently given birth or who are breast feeding.

New or expectant mothers may also be suspended from night work if a doctor or midwife signs a certificate stating that such work should be suspended on grounds of the woman's health and safety.

Regulation 16(2) requires employers to change working conditions or hours if it is reasonable to do so to avoid such risks. If such steps would not be reasonable or would not avoid the risks, regulation 16(3) imposes a requirement to suspend an employee on medical grounds, subject to the employee's right to be offered alternative work.

If no alternative work is available, the employee has a right to be paid while suspended on maternity grounds. This includes suspending a woman because she is breastfeeding a child. The tribunal in the Easyjet case found that the company had in effect suspended B and A by failing to offer them reduced hours, knowing that they had received medical advice not to accept longer shifts. They were therefore entitled to claim for pay during the suspension.

The tribunal referred to the World Health Organisation paper on Mastitis causes and management which identifies full-time work as a factor influencing the risk of mastitis, because of long intervals between feeds and lack of time for adequate milk expression.

The extent of the duty to carry out a risk assessment in compliance with regulation 16 of MHSWR was considered by the Employment Appeal \Tribunal in the case of O'Neill v Buckinghamshire County Council (2010) The EAT made the following points:

<u>The duty to carry out a risk assessment for pregnant workers only arises where:</u>

- The employee has notified the employer in writing that she is pregnant
- The work is of a kind which could involve a risk of harm or danger to the health and safety of the mother or the baby

- The risk arises from processes, working conditions or physical, chemical or biological agents in the workplace.

There is no general obligation to carry out a risk assessment for a pregnant employee. When the duty to carry out a risk assessment arises, the employer does not have to hold a meeting with the employee. The employer is under a duty to inform the employee of the results of the assessment and to provide the employee with relevant and comprehensive information about the risks.

Burden of proof

Commissioner of Police of the Metropolis v Denby [2017] UKEAT 0314/16/2410

D was a police officer who was subjected to a criminal and/or gross misconduct investigation by the DPS (Department for Professional Standards). A female officer who was under investigation for similar misconduct was not the subject of a DPS procedure, and complaints against her were dealt with locally. D's complaint of sex discrimination was upheld by the ET. The respondent appealed to the EAT on the following grounds:

- Failure to properly apply the burden of proof provisions in section 136 of the *Equality Act 2010*
- Allowing an unsuitable comparator whose circumstances differed materially from those of the claimant
- Misapplying the principle in CLFIS (UK) Ltd v Reynolds that an innocent agent acting without discriminatory motivation is not liable for discrimination
- Procedural unfairness by rejecting evidence from witnesses for the respondent on issues that had not been adequately put in cross-examination
- The ET had not properly addressed the issue of discriminatory motivation and its reasoning was inadequate.

Decision

1. The appeal was dismissed.

2. The ET had correctly applied the burden of proof provisions, properly evaluated the evidence and made findings consistent with the CLFIS principle.

3. The CLFIS decision should not be allowed to become a means of escaping liability by deliberately opaque decision making which masks the identity of the true discriminator.

Capability procedure

Gayle v Donaldson Associates Ltd (2016) Eq Opp Rev 273:24, London South ET

G was employed by D Ltd for 14 months. She was put on a Performance Improvement Plan (PIP). She was dismissed for lack of capability and complained of direct sex discrimination on the grounds of breaches of the capability procedure and contravention of the company's equality policy.

Decision

1. The complaint was rejected.

2. It was custom and practice for the employer not to follow its capability procedure in relation to all employees who did not have qualifying service to claim unfair dismissal.

3. The employee was not treated less favourably than her comparators. The failure to follow the procedure was not related to G's gender.

Compensation

Causation

BAE Systems (Operations) Ltd v Konczak [2017] EWCA Civ 1188, Court of Appeal

K complained of sex and disability discrimination and victimisation. Following 4 employment tribunal hearings, an EAT hearing and contentious case management hearings, she was awarded £360,000 compensation for psychiatric injury. The issue for the Court of Appeal was the extent to which the employer was liable for K's mental breakdown. There had been a long history of stress and workplace problems, for which the employer denied responsibility. The employer argued that the tribunal should have discounted K's compensation by a percentage of apportionment.

Decision

1. The appeal was dismissed.

2. It was only after a comment made by a colleague which pushed K over the edge into mental illness. She had not consulted her doctor about her mental health at any point in the two years before this. There was no reason to apportion the harm caused, because her illness had manifested itself after the incidents in question.

Compensation

Psychiatric injury

BAE Systems (Operations) Ltd v Konczak (2017) The Times, September 27, Court of Appeal

K complained of sex discrimination. Her complaint was upheld by the ET which found that the psychiatric illness suffered by her was not divisible between the discrimination which

had occurred and other events. This decision was upheld by the EAT. The employer appealed to the Court of Appeal.

Decision

1. The appeal was dismissed.

2. The tribunal should try to identify a rational basis on which the harm suffered could be apportioned between a part caused by the employer's wrong and a part arising from other causes. If there was no such basis then the injury was indivisible.

3. The exercise was concerned not with the divisibility of the causative contribution but with the divisibility of the harm.

4. The most difficult type of case was where the claimant 'will have cracked up quite suddenly, tipped over from being under stress into being ill'. Whether it was possible to distinguish between part of the illness caused by the employer's wrong and part due to other causes would depend on the facts and the evidence.

Gender segregation for religious reasons

Interim Executive Board of X School v HMCI (2017) Morning Star, January 6, High Court

X school, a voluntary aided Islamic faith school, educates boys and girls separately from the age of nine for religious reasons. The HMCI rated the school as inadequate in 2016. the grounds for this included concerns that the segregation limited pupils' social development and their ability to interact with the opposite sex when they left school. The HMCI took the view that segregating boys and girls was contrary to the *Equality Act 2010*. The school applied to the High Court by way of judicial review to decide whether the segregation policy was discriminatory.

Decision

1. The school had not directly discriminated against its pupils because boys were denied the opportunity to mix with girls, just as girls were denied the opportunity to mix with boys. There was no evidence that one gender was placed at a particular disadvantage.

2. The policy did not perpetuate notions of women as inferior to men. This would be too broad and sweeping a judgment to make in a multicultural society, particularly in circumstances where the separation was not enforced but elected by the parents.

Harassment

Employees

Unite the Union v Nailard [2017] IRLR 906. EAT

N was employed by U as a regional officer at Heathrow. She complained to the union about two elected officials who carried out full-time union duties, alleging that she had been bullied and harassed. The union investigated and decided to transfer N away from Heathrow. She protested and resigned and brought proceedings against U. The employment tribunal decided that N had been subjected to sexual harassment and that U was vicariously liable because the officials were employees or agents of U. It referred to U's rule book which it decided amounted to a contract. U appealed to the EAT.

Decision

1. The appeal was allowed in part.

2. The officials were not employees of U. There was no contract personally to do any work. The officials were voluntarily undertaking their duties and there was no right to remuneration.

3. The officials were agents of U. They had been carrying out work on behalf of U in their dealings with members, officers, other trade unions and employers.

4. The tribunal had erred in how it had considered whether the treatment of N by the officials had amounted to sexual harassment. The tribunal should have asked whether their conduct was associated with a protected characteristic. The matter was remitted.

Indirect discrimination

Requirement for full-time work

Timoshenko v Spy Alarms Ltd (2016) Eq Opp Rev 273:22, Ashford ET

T was employed by SA as an accounts assistant. SA moved its offices to Orpington from Sevenoaks. This meant that her children would have to spend a nine to ten-hour day at their primary school in Sevenoaks. She requested a change in working hours to part-time, which was granted. SA decided that it needed a full-time accounts manager. T was invited to interview for the new post but she declined because of the child care issue. She was dismissed on grounds of redundancy. She complained of indirect sex discrimination based on the requirement that she work full-time.

Decision

1. The complaint was dismissed.

2. The tribunal could not simply make an assumption that a provision requiring full-time work would disadvantage women who would be suitable candidates for such a role.

3. T's assertion that there was such a disadvantage to women was no more than an assertion based on her own circumstances.

Injury to feelings

Compensation

AA Solicitors Ltd and Ali v Majid UKEAT/0217/15/JOJ

The employer appealed against an award of £14,000 for injury to feelings in a sexual harassment case on the basis that it was manifestly excessive.

Decision

1. The appeal was dismissed.

2. Appeals against the amount of an award for injury to feelings will rarely succeed unless the award was placed within the wrong Vento band.

3. It might be thought that this award was on the high side but it was correctly placed in the middle band of Vento.

4. Employment tribunals are entitled to take account of cogent evidence of changes in the value of money over time when considering whether the boundaries of the Vento bands should be altered.

Maternity leave

Interserve FM Ltd v Tuleikyte [2017] IRLR 615, EAT

T started maternity leave in June 2013. Her earnings were too low for her to receive statutory maternity pay. In October 2013 she was recorded as a leaver with a termination date of June 2013 as a result of the employer's blanket policy of treating employees who had been absent without pay for three months as leavers and removing them from employment records. T complained to the ET that she had been treated unfavourably because of pregnancy and maternity. The ET upheld the claim, finding that the application of the blanket policy had the automatic consequence of treating her unfavourably because she was on maternity leave. The employer appealed to the EAT.

Decision

1. The appeal was allowed and the matter remitted to the ET.

2. If T's absence on maternity leave formed any part of the reasons or grounds for her treatment, it could only have been because the employer was, whether consciously or subconsciously, significantly influenced by her maternity leave.

Survivor's pension

Objective justification

Re Brewster's Application [2017] UKSC 8, (2017) Morning Star, April 14, Supreme Court

B had lived with her partner for 10 years. In December 2009 she was engaged to him. He died shortly afterward and she applied for a survivor's pension. The Northern Ireland Local Government Officers' superannuation committee refused her application on the basis that it had not received a form from her partner nominating her. The relevant scheme provided that unmarried cohabiting partners who have lived together for at least two years have to be nominated by their partner to be eligible for a survivor's pension. This did not apply to married or civil partner survivors. B sought judicial review on the basis of unlawful discrimination and interference with her right to property. The High Court granted the application. The Court of Appeal allowed the appeal. B appealed to the Supreme Court.

Decision

1. The nomination requirement in the scheme should be disapplied. B was entitled to receive a survivor's pension under the scheme.

2. The interference with B's right to property could not be objectively justified.

3. There was no rational connection between the objective of the scheme and the imposition of the nomination requirement.

2016 Cases

£800,000 compensation

Marks v Derbyshire Healthcare NHS Trust (2016) Eq Opp Rev 269:31, Nottingham ET

M was the director of workforce and organisational development, employed by D. She successfully complained of direct sex discrimination and victimisation.

Remedies

1. Injury to feelings: £15,000 plus £3000 aggravated damages because her complaint had not been treated seriously, there had been no apology and the perpetrator of the discrimination had been leniently treated.

2. Personal injury: Ongoing stress, anxiety, low mood, traits of trauma, moderate anxiety and depression. £15,500.

3. Actual loss of earnings: £100,000. Future loss: 12 months plus continuing loss: £190,000.

4. Pension loss: £168,000 (calculated with advice from a jointly appointed independent expert.

5. Total award (after grossing up): £832,711.

Childcare arrangements

Burden v Chief Constable of Hampshire Constabulary (2016) Eq Opp Rev 267:35, Southampton ET

B, a police officer, agreed a flexible work arrangement following the birth of her first child. She reduced her hours to 30 a week and arranged her work pattern with her husband, who was also a police officer, so that they worked alternate shifts.

B was promoted to sergeant and was posted to a police station more than 30 miles from her home. This meant an additional two hours travelling time each day. She submitted a grievance alleging that she had been discriminated against as a female primary carer because she was told that she would have to withdraw from promotion if she was unable to work the required hours in the new post. The grievance was not upheld. B complained of indirect sex discrimination.

Decision

1. The complaint was upheld.

2. The combined effect of PCPs pit B at a disadvantage and went further than was reasonably necessary to achieve the respondent's legitimate aim, which could have been achieved by other non-discriminatory means.

Compensation

European law

Arjona Camacho v Securitas Seguridad Espana SA [2016] ICR 389, Court of Justice of European Union

A's complaint of sex discrimination was upheld by a Spanish court. She was awarded 3000 euros compensation. The court referred the matter to the European Court, asking whether punitive damages could be awarded to serve as an example to others.

Decision

1. Directive 2006/54/EC allowed but did not require member states to introduce measures providing for punitive damages for discrimination. In the absence of national law allowing for the payment of punitive damages, article 25 of the Directive did not provide that a national court could require a discriminator to pay such damages.

Discrimination by others than employers

Michalak v General Medical Council [2016] IRLR 458, Court of Appeal

M, a doctor, brought proceedings in the ET against the GMC and its staff for sex, race and disability discrimination in relation to the way in which its qualification body had investigated and heard her case. The ET found that it had jurisdiction to hear the complaint. On appeal to the EAT, that decision was overturned on the basis that an application to the ET was precluded because of the availability of judicial review under section 31, Senior Courts Act. M appealed to the Court of Appeal.

Decision

1. The appeal was allowed.

2. Where a complaint is focussed on unlawful treatment of the nature prohibited by section 53, Equality Act 2010, the employment tribunal rather than the administrative court in its judicial review jurisdiction is the specialist tribunal charged by Parliament to make decisions of that kind.

3. The ET had a sufficient jurisdiction with appropriate remedies.

Employment service provider

Blackwood v Birmingham and Solihull Mental Health NHS Trust (2016) Morning Star, August 12, CA

B started a work placement organised by Birmingham City University and operated by SMH. It became clear that she could not work nights or weekends because of childcare responsibilities. SMH withdrew the placement. B complained of indirect sex discrimination against SMH as an employment service provider. The issue was whether the claim should be brought in the employment tribunal or the county court. The ET accepted that SMH was an employment service provider by providing a work placement for vocational training. The discrimination complaint should be brought under the education provisions of the Equality Act, in the county court. B appealed to the Court of Appeal.

Decision

1. The appeal was allowed.

2. Where a claim was about discrimination by a provider during the course of a tcould be brought in the employment tribunal.

Family friendly policy

Snell v Network Rail Infrastructure Ltd (2016) Eq Opp Rev 272: 23. Glasgow ET

In 2015 S applied for 12 weeks of shared parental leave. The employer's family friendly policy provided for full pay for 26 weeks for mothers on shared parental leave but limited pay for partners on shared parental leave to the statutory rate. He raised a grievance, arguing that he should be paid the same rate as the mother. The employer then changed

the policy to reduce the mother's entitlement to that of statutory pay. S complained of indirect sex discrimination.

Decision

1. The complaint was upheld.

2. S had applied for shared parental leave under the original policy and was therefore entitled to compensation for loss which reflected the amount which he would have been paid if treated the same as the mother.

3. An award of £5000 plus a 20 per cent uplift for the employer's failure to follow ACAS procedures was made for injury to feelings. S had been caused stress and upset. He was distracted by the delays around his grievance and had been unable to give his wife full support when she was ill. He was caused further upset by being unable to plan for the birth of his child.

Harassment

Conduct clearly of sexual nature

Samuda v London Borough of Hackney and Adams (2016) Eq Opp Rev 271:25, East London ET

S was employed by LBH from 2006. In 2013 E joined her team. His behaviour was described as eccentric and weird. He told stories of his sexual exploits, brought women's underwear to work and sat at his desk with his trousers undone. She complained about his behaviour and he was suspended. A disciplinary hearing found that his behaviour was inappropriate. The complaint of sexual harassment was not addressed and he was allowed to return to work. In 2015 S resigned and complained of unfair dismissal and sexual harassment.

Decision

1. The complaint was upheld.

2. E's conduct was clearly unwanted and was for the purpose of creating an intimidating, hostile, degrading, humiliating or offensive environment.

3. The employer had not taken all reasonable steps to prevent the harassment.

4. S was awarded £12,000 compensation for injury to feelings. She had been considerably sensitised and upset, she had contemporaneously diarised and recorded events of harassment and had been off work with stress entirely attributable to her continuing issues.

Indirect discrimination

Balancing act

Dutton v The Governing Body of Woodslee Primary School (2016) Morning Star, September 16, EAT

D was a teacher at a school for children with special educational needs who needed a significant degree of continuity and stability. D requested that she should return to work on a part-time basis, working four days a week instead of five, after maternity leave. The employer refused on the basis that the children required stability. D claimed indirect sex discrimination. She argued that the employer had imposed a provision, criterion or practice (PCP) which placed her at a particular disadvantage because of her gender. The claim was rejected by the ET on the ground that the PCP was a proportionate means of achieving a legitimate aim. D appealed to the EAT.

Decision

1. The appeal was allowed and the matter remitted to a freshly constituted tribunal.

2. The ET had not fully weighed the importance of the legitimate aim against the discriminatory effect of the treatment.

Indirect discrimination

Balancing act

XC Trains Ltd v CD and others (2016) Morning Star, September 9, EAT

CD, a female employee, worked full time for X as a train driver/instructor. She was required to work 35 hours a week over six days with daily working hours determined by the employer. She also had to work on rostered Sundays. CD had three children. She asked to work flexibly and her specific request not to work Saturdays and Sundays was rejected. She complained of indirect sex discrimination. The ET found that the working arrangements put women and CD at a particular disadvantage. The PCP was not a proportionate aim. Other large employers had transformed their working practices. The employer appealed to the EAT.

Decision

1. The appeal was allowed and the matter remitted to the ET to decide whether the PCP was a proportionate means of achieving a legitimate aim.

2. The ET had exceeded the scope of the exercise it should have undertaken when it categorised the employer's bargaining system as 'outdated'.

Personal injury

Compensation

Olayemi v Athena Medical Centre (2016) Morning Star, September 2, EAT

Facts O was employed by AMC as a GP. Following her dismissal in 2008 she was diagnosed with post-traumatic stress disorder (PTSD). She complained of sex discrimination, unfair dismissal and breach of contract on the basis that AMC had subjected her to a campaign of harassment to drive her out of her job. The claims were upheld by the ET. She was awarded £752,333 compensation. The ET deducted 12.5% from the total, based on a medical report which stated that a previous episode of PTSD had contributed 10 to 15% to the current episode. O appealed to the EAT.

Decision

1. The appeal was allowed.

2. O had clearly established that her employer's wrongdoing had been a material cause of her psychiatric condition.

3. It was not open to an employer to argue that the only reason she had suffered from PTSD was because of an earlier susceptibility or vulnerability.

4. The employer could not rely on susceptibility or vulnerability as a defence unless it could show that it was completely divisible from the harm which the employer had caused.

Pregnancy and maternity

Childcare vouchers

Peninsula Business Services v Donaldson (2016) Eq Opp Rev 267:33, EAT

PBS offered childcare vouchers to its employees. A condition of the scheme was that employees who took maternity leave ceased to receive vouchers for the duration of the leave. D was pregnant when she wished to enter the scheme. Entry was only allowed to employees who accepted the scheme. She refused to do so. D claimed that the failure of the scheme to continue to provide childcare vouchers during maternity leave was discriminatory. The ET upheld the claim. PBS appealed to the EAT.

Decision

1. The appeal was allowed.

2. The provision of childcare vouchers as part of a salary-sacrifice scheme amounted to remuneration.

3. There was no requirement for an employer to continue to provide the vouchers while the employee was on maternity leave.

4. An employee who refused to join a scheme which discontinued the vouchers during maternity leave was not discriminated against on the grounds of pregnancy or maternity, nor was there indirect sex discrimination.

Refusal of change in working hours

Little v Commissioner of Police of the Metropolis (2016) Eq Opp Rev 269:30, East London ET

L, a detective constable, worked part-time to be the primary carer for her children. She successfully applied to join the Child Abuse Investigating Team, knowing that there was a minimum working time of 0.7 full time equivalent hours a week. She agreed to work on Wednesdays. She then discovered that her mother would no longer be able to look after her children on Wednesdays. She requested a change in her days of work. This was refused. L resigned and complained of direct and indirect discrimination.

Decision

1. The complaint was dismissed.

2. There was no direct discrimination because a man who had requested a change in hours would have been treated in the same way.

3. In relation to indirect discrimination, the PCP was a requirement for officers to work 0.7 FTE. Any indirectly discriminatory effect against women was justified.

Sexual harassment

Banter and innuendo

Smith v Renrod Ltd (2016) Eq Opp Rev 267:36, Bristol ET

S, an employee of R, lodged a grievance which included allegations of bullying, including inappropriate sexual behaviour. The grievance was rejected on the basis that there was a culture of sexual banter in the workplace of which S was a willing participant. S complained of direct sex discrimination and sexual harassment.

Decision

1. The complaints were upheld.

2. The conduct had gone beyond what was acceptable and created an offensive and intimidating environment.

3. The provision of training, and having an anti-harassment policy, were patently inadequate to ensure that managers were aware of their responsibility to prevent harassment in the workplace.

Stereotypical view of women

Ward v Leeds United Football Club Ltd (2016) Eq Opp Rev 271:24, Leeds ET

W was employed by L's academy. The club's owner commented that football was no place for women, they should be in the bedroom or the beauticians. W was suspended for allegedly having been absent without authority. She was later dismissed for gross misconduct and complained of unfair dismissal and sex discrimination.

Decision

1. The complaint of sex discrimination was upheld.

2. W had been dismissed for a sham reason. The real reason was a sexist and stereotypical assumption that a woman's career was unimportant and that a man in the same circumstances would not have been dismissed.

Successor employer

Butterworth v Police and Crime Commissioner Office for Greater Manchester [2016] IRLR 280, EAT

B was employed by Greater Manchester Police Authority (GMPA) from 1996 until 2011. Her employment then terminated. A year and a half later the GMPA was dissolved. Its functions were transferred to the respondent. B issued proceedings against the respondent, alleging post-termination sex discrimination, victimisation and harassment. The ET struck out the claims because there had been no employment relationship between the parties. B appealed to the EAT.

Decision

1. The appeal was dismissed.

2. There was no duty on a successor employer not to discriminate against an individual whom it had never employed.

3. No employment relationship had ever existed between the parties at any time.

Unconscious or subconscious

Geller and Geller v Yeshurun Hebrew Congregation (2016) Morning Star, August 19, EAT

G was employed by YHC in 2011. A year later his wife started working for YHC on an ad hoc basis. YHC later suggested that the couple should be paid a joint salary. This was accepted.

In 2013 it was decided that Mr G would be made redundant. Before he was informed of this, he told his employer that his wife was pregnant. Mrs G stated that she should also be considered for redundancy. Both were made redundant at the end of 2013. They lodged a number of claims in the employment tribunal including sex discrimination in that YHC had failed to treat Mrs G as an employee and had failed to pay her properly. The claims were dismissed on the basis that YHC had not treated Mrs G less favourably because of her sex

but because it genuinely believed that she worked for them on an ad hoc basis. Mrs G appealed to the EAT.

Decision

1. The matter was referred back to the tribunal for reconsideration.

2. The tribunal had overlooked the important point that discrimination can be conscious or subconscious.

3. The tribunal had failed to go through the two-stage burden of proof test in section 136 of the *Equality Act 2010*. Its treatment of the test had been rudimentary. There were primary facts from which discrimination could be inferred. At that stage the burden of proof would have shifted and it would have been for the employer to demonstrate a non-discriminatory reason for treatment.

2015 Cases

Employment tribunal fees

R (on the application of Unison) v Lord Chancellor (No.2) [2015] IRLR 99, High Court

Statute reference: Employment Tribunals and the Employment Appeal Tribunal Fees Order 2013

In July 2013 fees for bringing employment tribunal claims were introduced. Unison challenged this scheme on the basis that it rendered employment rights illusory and that it operated in an indirectly discriminatory way with respect to women. The union submitted that the number of claims had reduced by 79%.

Decision

1. The imposition of fees was in principle a legitimate aim designed to ensure that users of the service made a contribution towards its cost.

2. The court had no evidence that any individual had been unable to bring a claim because of cost.

3. It was not disputed that the proportion of women who brought discrimination claims was greater than the proportion of men. But it was necessary to test any provision, criterion or practice by focusing on all those who were subject to it. It was not legitimate to take a self-selected group.

4. The scheme taken overall, particularly having regard to the arrangements designed to relieve the poorest from the obligation to pay, had been justified and proportionate to any discriminatory effect. Moreover, costs were recoverable, in general at least, if the claim succeeded.

5. The challenge failed.

Gender reassignment

Pension entitlement

MB v Secretary of State for Work and Pensions [2014] ICR 1129, CA

Statute reference: Gender Recognition Act 2004. s.4; Equality Act 2010, s.29

MB had been born a man, before going through gender reassignment. She had married before her transition. She did not apply for a gender recognition certificate because she did not wish to have her marriage annulled (a condition of the certificate). When she reached 60 – the pensionable age for a woman at that time – she applied for a state retirement pension. Her application was refused on the basis that the pensionable age for a man was 65. She appealed to the First-tier tribunal. Her appeal was dismissed. Her further appeal to the Upper Tribunal was also dismissed and she appealed to the Court of Appeal.

Decision

1. The appeal was dismissed.

2. Gender reassignment would not be recognised until a gender reassignment certificate had been issued.

3. The requirement that any existing marriage had to be annulled was to avoid the anomaly of same sex marriage when it was not permissible.

4. Such a provision was not disproportionate in its effects.

Harassment

Vernon v Azure Support Services and others (2014) Eq Opp Rev 253:27, EAT

V was employed as a sales manager by Port Vale football club. In 2011 her department was contracted out to Azure under a TUPE transfer. There was a rule that employees of Azure should not have a personal relationship with any Port Vale player. V admitted that she had had a relationship with a player. She was dismissed on the basis that her conduct amounted to a breach of mutual trust and confidence. V complained that her dismissal amounted to direct sex discrimination. She brought a complaint of sexual harassment by a manager employed by Port Vale. The ET upheld the claim of direct sex discrimination on the basis that a man in similar circumstances would not have been dismissed. Further, the harassment had been a continuing act, but Azure was not liable because the harassment had been carried out by someone who was not its employee. Both V and Azure appealed.

Decision

1. The tribunal had been entitled to conclude that the dismissal amounted to sex discrimination.

2. An employer's vicarious liability for sexual harassment was passed on to a new employer when the employee was transferred under TUPE.

Harassment

Inappropriate behaviour

Southern v Britannia Hotels Ltd (2015) Eq Opp Rev 258:29, Leeds ET

S, an employee on a zero-hours contract, was subjected to inappropriate sexual conduct by her manager. She delayed making a complaint because she believed that the manager had control over the number of hours' work she would be offered. She complained of sexual harassment against her manager and against the employing company.

Decision

1. The claim succeeded.

2. The employer had the right policies in place but managers simply paid lip service to them.

3. The employer could not rely on the statutory defence of having taken all reasonable steps to prevent the harassment.

4. The investigation of the complaints had been perfunctory.

5. The claimant was a highly vulnerable person and her manager knew of this.

6. Compensation fell within the middle Vento band. Aggravating factors included the perfunctory investigation. Award: £19,500

Pregnancy

Police dog handler

Commissioner of Police of the Metropolis v Keohane [2014] ICR 1073, EAT

Statute reference: Equality Act 2010, ss. 18, 19, 32

K was a police dog handler. When she became pregnant, one of her two dogs was transferred to another officer in accordance with a health and safety policy which stated that pregnant officers would not be permitted to continue as dog handlers. K requested that she should have the dog returned to her when she returned to work. This was refused and she complained of sex discrimination on the basis of unfavourable treatment. The ET upheld the claim. It stated that she had suffered less favourable treatment. The respondent appealed to the EAT.

Decision

1. The appeal was dismissed.

2. It was clear that the cause of the detriment to which K had been directed, namely the risk that she would be penalised for not having a second dog, was her pregnancy.

3. Since K's dog had been reallocated and later not returned, she was disadvantaged. The risk created by the health and safety policy had materialised. Unless the police could establish that the policy could be objectively justified, a claim of indirect discrimination would be made out.

Pregnancy and maternity

Humphryes v Yoo Ltd (2015) Eq Opp Rev 261:34, London Central ET

H was an architect employed by Y. She was excluded from a major development project because she was going on maternity leave. She was described as exhibiting 'maternity paranoia'. She resigned and complained of pregnancy and maternity discrimination and direct sex discrimination.

Decision

1. It was not necessarily unlawful for a woman on maternity leave to not be involved in an activity.

2. Where the matter is one where she has a legitimate expectation that she will be involved, notwithstanding that she is off on maternity leave, failure to do so may amount to unfavourable detrimental treatment.

3. The 'maternity paranoia' comment amounted to discrimination.

4. The employer's conduct was laced with an element of sexism.

Pregnancy and maternity

Scott v Grafton Recruitment Ltd (2015) Eq Opp Rev 261:36, Belfast IT

S went on maternity leave. She told her line manager that she wanted to be kept informed of changes or opportunities which arose during her leave. The employer failed to inform her of a change in structure and the appointment of another senior employee at a higher level. She was also not involved in discussions about a change to a bonus scheme. She complained of discrimination while on maternity leave.

Decision

1. The claim succeeded.

2. Although this conduct had little impact on S and were quickly rectified by the employer, the fact that the employer had ignored and forgotten about the employee because she was on maternity leave amounted to unfavourable treatment.

3. S had been significantly distressed. Injury to feelings of £7500: bottom end of middle Vento band.

Race & Sex discrimination

Fairness at Work procedure

Howard v Commissioner of Police of the Metropolis [2014] Eq Opp Rev 252:30, London Central ET

H was a black female police officer. In 2012 her line manager, K, undermined her and sought to have her investigated for potential misconduct. She raised an internal complaint under the force's Fairness at Work procedure. This was not upheld. H complained of sex and race discrimination.

Decision

1. K had treated H far worse than any other officer.

2. K's negative perception was based on the fact that H was a black woman. His treatment of her amounted to direct sex and race discrimination.

3. Remedies: Injury to feelings: top Vento band: £25,000: six months sickness absence, suffering from stress and depression.

Aggravated damages: £10,000: malicious, vindictive and spiteful behaviour: no regret or apology.

Stereotypical assumptions about part-time workers

Dykes v Premier Risk Service LLP (2014) Eq Opp Rev 253:30, Leeds ET

D was employed as a part-time health and safety expert. Her employing company carried out a restructuring exercise which involved the abolition of D's job. She was given the opportunity to apply for a full-time post but she was unable to apply because of childcare responsibilities. She was made redundant and complained of unfair dismissal and direct and indirect sex discrimination.

Decision

1. There was no direct discrimination. D was made redundant because she did not apply for the full-time post and not because she was a woman.

2. There was a PCP of requiring employees to work full-time. This put women at a disadvantage.

3. The employer's reasons for deleting the part-time post were based on stereotypical and prejudiced assumptions about part-time workers.

4. In the absence of evidence of a need for a restructuring which resulted in the part-time post being deleted, the claim of indirect sex discrimination was upheld.

Victimisation

Deer v University of Oxford [2015] IRLR 481, CA

Statute reference: Sex Discrimination Act 1975, s.4; Equality Act 2010, s.5

D was employed by UO as a research fellow. In 2008 she complained of sex discrimination. The proceedings were settled and constituted a protected act for the purposes of a complaint of victimisation. D brought 5 complaints of victimisation in relation to a professor's refusal to provide her with a reference. This claim was dismissed. D then pursued an alternative claim (2) alleging that the professor had been an innocent conduit of acts of victimisation. This claim was struck out as being an abuse of process. The other claims were struck out because there was no reasonable prospect of success. The EAT dismissed her appeal and D appealed to the Court of Appeal.

Decision

1. The appeal was allowed in part.

2. In principle there would be cases where procedural failings might give rise to a detriment even though it was plain that they had no effect on the substantive outcome of the investigation. Two of the claims could proceed to a full hearing subject, as D had little reasonable prospect of success, to her paying deposit orders for each claim.

2014 Cases

Illegal contract

Wijesundra v Heathrow 3PL Logistics Ltd [2014] ICR 523, EAT

Statute reference: Equality Act 2010, s.40(1) (b)

W, a Sri Lankan national, applied for work with H. She told H that she could not work unless she had a work permit. During the time that she was waiting for the permit, she suffered serious sexual assaults by an employee of H. She started work for H without a permit and was again subjected to serious sexual harassment. When her work permit arrived, she was dismissed. She complained of sexual harassment. The ET rejected the claim on the basis that W was not an employee or was employed under an illegal contract. W appealed to the EAT.

Decision

1. The appeal was allowed.

2. Section 40(1) (b) of the *Equality Act 2010* protected applicants for employment.

3. The claim was not so inextricably bound up with the contract of employment or the illegality as to be defeated by the defence.

2013 Cases

Sexual Harassment

Highest injury to feelings award

Turley v Mild Professional Homes Ltd [2012] EqLR 385, Cardiff ET

T was employed by MPH at a hospital. A co-owner of MPH was Dr Igbokwe (I). T complained of sexual harassment by I. This involved a continuing series of incidents including requests to meet him outside working hours and exposing himself. T told her colleagues about these incidents and was effectively demoted. She later resigned. Following her resignation, she received emails from 'Baba Ayen' which claimed that T was a prostitute and a porn star. T complained of direct sex discrimination, sexual harassment and victimisation. I denied all the allegations and stated that none of the incidents had taken place.

Decision

1. T's evidence was to be preferred.

2. The respondent had failed to show that the treatment was for any other reason than her sex, as it denied that the incidents had taken place at all.

3. T's effective demotion had been a result of her raising the issue of sexual harassment.

4. I had been responsible for the emails.

5. £24,500 was awarded for injury to feelings, plus £5000 aggravated damages, plus £17500 actual loss of earnings. The issue of future loss of earnings was adjourned to a further hearing.