DISCRIMINATION LAW CASE UPDATE

A Review of Five Discrimination cases from 2020

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Liverpool

1. Hill v Lloyds Bank PLC (UKEAT/0173/19)
2. Sullivan v Bury Street Capital Ltd UKEAT/0317/19/BA
3. Ms. R Taylor v Jaguar Land Rover Ltd
4. Zakaria Kioua v Lainston House Ltd
5. NH v Associazione Avvocatura per I dirittti LGBTI (Case C-507/18)

Disability discrimination

Hill v Lloyds Bank

An unreasonable extension of the duty to make reasonable adjustments?

1. We know that the duty to make reasonable adjustments requires the disabled person to be treated ***more favourably*** in recognition of their special needs. It goes beyond introducing a 'level playing field' for disabled and non-disabled alike and recognises that that approach ignores the fact that disabled persons will sometimes need special assistance if they are to be able to compete on equal terms with those who are not disabled.

   "The 1995 Act, however, does not regard the differences between disabled people and others as irrelevant. It does not expect each to be treated in the same way. It expects reasonable adjustments to be made to cater for the special needs of disabled people. It necessarily entails an element of more favourable treatment. The question for us is when that obligation arises and how far it goes"
   Baroness Hale at paragraph 47 in *Archibald v Fife Council [2004] UKHL 32*.

2. s.18B Disability Discrimination Act 1995 is not replicated in the Equality Act. However, the matters referred to in it are largely reproduced in Chapter 6, paragraph 6.32 of Code of Practice on Employment 2011.
   In addition, HHJ Richardson in *Carranza v General Dynamics Information Technology Ltd [2015] IRLR 43*, *[2015] ICR 169* at paragraph 36 stated:
   'I have no doubt that the same approach applies to the Equality Act 2010'.

3. Accordingly, a Tribunal will consider the following (non-exhaustive) considerations when deciding whether it is reasonable to have to take a particular step to comply with the duty to make reasonable adjustments:
s.18B(1) "In determining whether it is reasonable for a person to have to take a particular step in order to comply with a duty to make reasonable adjustments, regard shall be had, in particular, to—"

    (a) the extent to which taking the step would prevent the effect in relation to which the duty is imposed;

    (b) the extent to which it is practicable for him to take the step;

    (c) the financial and other costs which would be incurred by him in taking the step and the extent to which taking it would disrupt any of his activities;

    (d) the extent of his financial and other resources;

    (e) the availability to him of financial or other assistance with respect to taking the step;

    (f) the nature of his activities and the size of his undertaking;

4. The adjustment sought **need not entirely remove the disadvantage.**
In accordance with *Noor v Foreign and Commonwealth Office* UKEAT/0470/10, [2011] ICR 695, *[2011] EqLR 448, EAT*, the adjustment should 'prevent' the PCP having the effect of placing the disabled person at a substantial disadvantage. In this case, the EAT held that the ET had erred in holding that for the adjustment to be reasonable it must be shown that taking the step *would* prevent the disadvantage.

5. In *Romec v Rudham [2007] All ER (D) 206 (Jul), EAT*, HHJ Peter Clark said that if the adjustment sought (in that case the extension of a rehabilitation program), would have had **'no prospect'** of removing the substantial disadvantage, then it could not amount to a reasonable adjustment but if there was a 'real prospect' of removing the disadvantage it 'may be reasonable'.

6. In C*umbria Probation Board v Collingwood [2008] All ER (D) 04 (Sep), EAT*: HHJ McMullen said that 'it is not a requirement in a reasonable adjustment case that

the Claimant prove that the suggestion made *will* remove the substantial disadvantage'. The EAT upheld a finding of a failure to make a reasonable adjustment which effectively gave the Claimant '*a chance*' of getting better through a return to work.

7. The authorities of *Romec* and *Cumbria Probation Board* were applied in *Leeds Teaching Hospital NHS Trust v Foster UKEAT/0552/10, [2011] EqLR 1075*.
   The EAT emphasised that when considering whether an adjustment is reasonable it is sufficient for a Tribunal to find that there would be *'a prospect'* of the adjustment removing the disadvantage. The Tribunal is **not** required to find that there has to be a 'good' or 'real' prospect of that occurring.

8. In the case of Hill v Lloyds Bank PLC, the Claimant returned to work after a lengthy period of absence suffering with reactive depression – caused by alleged bullying from two of her managers.

9. It is important to remember that her grievances were dismissed.

10. The Respondent, as a large organisation had no difficulty in accommodating the request that the staff did not have to work together going forward. The three individuals worked in different offices - the Claimant was in Bristol, one in Glasgow and the other in London. They were in different business units and they had not been required to work together since the Claimant returned from being signed off sick.

11. So, the Claimant was not likely to work directly with these individuals again. By the time of the hearing, one of the individuals had also been dismissed by reason of redundancy.
    The Claimants contention was that her reactive depression was exacerbated by the *thought* of having to working with these people in in the future.

12. She sought an undertaking from her employer that she would
    a. not have to work with them

b. not have to work under them
c. if neither a or b could be avoided, to be paid a severance payment equivalent to a redundancy payment (she had been employed for over 30 years)

13. The Respondent was prepared to give words of comfort. It was not prepared to provide the undertaking.

14. The Claimant contended that the employer's provision, criterion or practice (**PCP**) placed her at a substantial disadvantage compared to non-disabled employees.

15. The PCP relied upon was “a practice of not giving these sorts of undertakings” The bank seemed to be saying that they had received requests previously for undertakings that a severance package would be agreed if certain criteria were met. This is why the EAT was able to say that the Respondent had a “practice” of not giving firm undertakings in circumstances like these.

16. The EAT decided that the Bank's unwillingness to give an undertaking was not a one-off decision, but was a "practice" susceptible to adjustments and it could be reasonable to give an undertaking providing a disabled employee with special financial benefits in certain circumstances.

17. The substantial disadvantage was that the fear of working with either colleague again aggravated symptoms such as hair loss, panic attacks, exhaustion and feelings of dread and hopelessness.

18. The employer was then enjoined to consider whether the adjustment would lessen the disadvantage and, if it would, whether it was a reasonable step to take in the all the circumstances.

19. The EAT ruled that the undertaking would have alleviated Ms Hill's fear and so it would have been reasonable for Lloyds to have given a firm undertaking. Words of comfort were not enough.

20. The EAT ruled that it would have been a reasonable adjustment to give an undertaking to a disabled employee that she would not be required to work with the two colleagues that she claimed had bullied and harassed her **and** if this was not possible that she would be offered a severance package.

21. The EAT saw no reason why it would not be reasonable to give an undertaking to provide a disabled employee with certain benefits if, **in future**, certain circumstances arise.

22. The thrust of the Respondents argument was that the purpose of making reasonable adjustments was to keep disabled employees **in work**, rather than to deal with exit terms. However, the EAT set out that the underlying purpose of the proposed undertaking was to allow the Claimant to work without fear and so remain in work.

What can we take away from this case?

23. There is a widening of the scope of potentially imaginative solutions available to Claimants.
    We may now start to see employees who allege that they have been bullied at work, and become seriously ill because of it, asking for an undertaking of the kind sought in this case.
    Employers should be very careful in their response to such requests and not dismiss it out of hand.

24. This case may give employers concerns as to the adjustments which could be considered "reasonable" in giving comfort to employees who are concerned with working with certain colleagues.
    However, an undertaking in the form outlined in this case is likely to only be required rarely - taking some more informal steps to assuage the employees reasonable concerns at an early stage might prevent the request escalating.

25. The reasonable adjustments duty is broad - employers *may* have to go as far as giving formal undertakings to pay severance payments.

The EAT did say that the circumstances that would require such an undertaking would be rare.

26. The fact that it was found that not providing the undertaking requested was a failure to make a reasonable adjustment was likely related to the size and set up of the organisation. This is likely to have factored significantly in the Tribunals determination – the case should not be read as extending the prospect of an undertaking of this nature to all employers. It is likely to be a rare case where such an undertaking would be required as it is so fact specific.

27. Employers should still address their minds to considering concerns "in the round," including whether an undertaking could be appropriate and to keep in mind the breadth of the reasonable adjustment obligation once it is engaged.

28. Employers need to ensure that they sufficient and uptodate medical evidence and advice on an employee's health in order to help reach a decision on reasonable adjustments (and their feasibility)

29. Employers should consider the question of whether a proposed adjustment is reasonable considered based upon the individual's particular circumstances, rather than based on a standard company-wide policy.

30. So, where a policy puts a particular employee at a disadvantage, it may be reasonable to offer flexibility in order to support that employee.

31. The EAT may take a fairly expansive view on what could be considered a reasonable adjustment for a disabled employee and so employers should always carefully consider what can reasonably be done to alleviate genuine concerns expressed by disabled employees.

32. Employers need to fully consider concerns being expressed by disabled employees and consider the impact on them in the present and whether

provisions can be made - whether to take effect now or only if **specific future events arise** - which would alleviate these concerns in the present.

Considering these concerns at an early stage in the process and fully engaging with employees regarding what can be done could serve to prevent matters escalating.

33. Employers are reminded that the duty to identify appropriate reasonable adjustments lies with them and not with the employee - employers must proactively consider whether committing to working arrangements (and to severance terms if such arrangements cannot continue) would amount to a reasonable adjustment in any particular case.

Harsh decision?

There is a wide-ranging duty to make reasonable adjustments.

a. The Claimants grievance had been rejected
b. The Claimant was not working with the alleged perpetrators
c. They were located a significant distance away from the Claimant
d. The alleged perpetrators had no managerial or supervisory control over her
e. They would not be interacting with the Claimant and the Bank had said it would do its best to keep them apart in future.
f. The undertaking was indefinite and open-ended.
g. There was no medical evidence outlining what impact the undertaking would have upon the Claimant.

Disability discrimination

Sullivan v Bury Street Capital

EAT decision dealing with "long-term" and the prospect/likelihood of recurrence

Facts

- **2008** C started employment as a senior sales executive
- **March - May 2013** C had a relationship with a Ukrainian woman
- **May 2013** C had paranoid delusions – he believed that he was under constant surveillance from Russians
- **July 2013** Chief Exec became aware of C's delusions
- **September 2013** C was taken on a business trip to New York by the Chief Exec – C performed well and told the Chief Exec that his condition was "improving"
- **Feb 2014** C saw a Doctor
- **May 2014** C saw a psychologist
- **July 2014 – September 2017** C had regular reviews with Chief Exec
- **September 2014** – new employee joined who work closely (proximity) to C – noticed no change in C's behaviour and C never discussed the Russian gang with him
- **8.9.17** Claimant dismissed

34. s.6 of the Equality Act provides:
"(1) A person (P) has a disability if- (a) P has a physical or mental impairment, and (b) The impairment has substantial long-term adverse effect on P's ability to carry out normal day-to-day activities. …"

35. s.212(2) of the Act provides that an effect is substantial if it is "more than minor or trivial."

36. Paragraph 2 of Schedule 1 to the Act sets out the definition of "long-term." It provides:
"(1) The effect of an impairment is long-term if –
(a) it has lasted for at least 12 months,
(b) it is likely to last for at least 12 months,

(c) it is likely to last for the rest of the life of the person affected.

(2) If an impairment ceases to have a substantial adverse effect on a person's ability to carry out normal day-to-day activities, it is to be treated as continuing to have that effect if that effect is likely to recur…"

37. It is not in dispute that the term "likely" in this context means something that "could well happen", and is not synonymous with an event that is probable - SCA Packaging Ltd v Boyle [2009] ICR 1056 per Lord Hope at [2], Lord Rodger at [35], Baroness Hale at [73] and Lord Brown at [78].

38. The likelihood of recurrence within the meaning of paragraph 2(2) of Schedule 1 to the Act is to be assessed **as at the time of the alleged contravention**: see McDougall v Richmond Adult Community College [2008] ICR 431, per Pill LJ at [24] and Rimer LJ at [33].

39. An impairment is to be treated as having a substantial adverse effect on the ability of an employee to carry out normal day-to-day activities if measures are taken to treat or correct it and, but for such measures, it would be likely to have the prescribed effect - paragraph 5 of Schedule 1 to the Act.

What can we take from this case?

40. There is a crucial distinction to be drawn between the beliefs and the substantial adverse effect.

41. When considering whether a condition is likely to recur, the tribunal must make an assessment on the basis of the information available at the material time and not with the benefit of hindsight.

    Where a substantial adverse effect does recur (e.g., in 2017), the tribunal is not prevented from concluding that at an earlier date (e.g., in 2013) it was not likely to do so.

42. We are reminded that the determination under s.6 is a legal one – medical evidence is not definitive or determinative.

Ms. R Taylor v Jaguar Land Rover Ltd

Broadening the definition of gender reassignment?

43. It is uncontroversial that gender *reassignment* is covered under the Equality Act.

7 Gender reassignment

(1)A person has the protected characteristic of gender reassignment if the person is proposing to undergo, is undergoing or has undergone a process (or part of a process) for the purpose of reassigning the person's sex by changing physiological or other attributes of sex.

(2)A reference to a transsexual person is a reference to a person who has the protected characteristic of gender reassignment.

(3)In relation to the protected characteristic of gender reassignment—

(a)a reference to a person who has a particular protected characteristic is a reference to a transsexual person;

(b)a reference to persons who share a protected characteristic is a reference to transsexual persons.

Facts

44. The Claimant had worked for the Respondent for over 20 years.
    In 2017, she identified herself as being gender fluid/non-binary.
    She suffered "jokes" and abuse from her colleagues as a result.
    She resigned and brought claims for constructive dismissal and discrimination on the grounds of gender reassignment.

45. The issue in this case was the status and protection afforded to people who were gender-fluid or non-binary. Were they subject to the protection of s.7? No, thought JLR.

What was the intention of Parliament?

"For a long time, those in the transgender community have had physically to change gender before qualifying for the same protection as other strands. To date, the transgender spectrum has not really been understood. While we understand the desire for

clear definitions in the Bill, ***many people find themselves on that spectrum but do not necessarily want a sex change. This is about people who face discrimination because of how they express their gender but do not fit into neat boxes.*** *As the Bill progresses, we will test the Government on exact definitions, because we are still concerned about the continued, fairly narrow definition whereby transgender is seen as part of a process on the way to a change of gender. That is only a slight advance on where we are now, and we would wish those anywhere on the spectrum to have the full protection of equality under the law."*

Lynne Featherstone MP, 11th May 2009

"We are not, as he seems perpetually to be stuck on, talking about the medical model of gender reassignment, on which some people may well be too young to be responsible enough to decide. This is not gender reassignment on a medical model. He really needs to come off that tramline and look at this for what it is. ***It concerns a personal journey and moving a gender identity away from birth sex.*** *I am sure that that is as capable of being done by a young person as by an older person, and it is indeed likely to have manifestations. Those manifestations are the things that will indicate that some sort of process is in place.*

If a person makes the proposal—it is a proposal, not a decision where someone says, "I will do it and never turn back"—that they may move along that pathway, at that point, and at that point only, does it become practical to protect someone. Someone who is having internal concerns about themselves is not manifesting it in any way that can be acknowledged and protected by any external person. As soon as there is a manifestation—as I have said already, and we discussed this last week too—the duty not to discriminate comes in."

Vera Baird, Solicitor General, 16th June 2009

46. Lynne Featherstone MP later wrote:

"I lost my argument in the Equality Bill to have this 'strand' termed 'gender ***identity***' *rather than 'gender assignment'. I was arguing on the basis that there are many trans people who never live in the other gender let alone make the actual change hormonally or surgically and therefore the term reassignment did not cover those who made no change or who were indeterminate in gender identity. In the course of discussion however, the*

Solicitor General, who led for the then Government, clarified that it was intended to cover the wider group."

47. A note of caution has to be expressed because it is only a first instance decision but on the face of it, on a practical level we have moved from categorisation of gender reassignment to "gender identity" which would be a more appropriate representation of the extension of protection afforded.

48. People are increasingly rejecting the concept of gender being binary and so this broader interpretation is overdue. Indeed, section 7 had been the subject of proposals for reform since 2015 and ACAS had also been pushing for a widening of the protection afforded.

<u>What steps should be taken?</u>

a. Consideration to drafting of specific gender identity policies
b. Consideration of what data is collected – should forms only reference "male" and "female"
   Likewise, consideration should be given when drafting contracts/addressing letters
c. Ask employees about their preferred pronouns
d. Institute equality and diversity training which incorporates this issue
e. Deal with matters sensitively and confidentially
f. Cascade information only to those in the organisation who need to be made aware and for whom the individual provides consent
g. Consider the introduction of gender-neutral toilets and uniforms

Religious discrimination

Zakaria Kioua v Lainston House Ltd

Punishment for an employer doing the "right thing?"

49. Contrary to the headlines and press coverage, this case is not about an employer being punished for bending over backwards to accommodate different faiths and religions.
    The Claimant advanced multiple claims but the religious discrimination – harassment and direct discrimination - are the focus of this review.

Facts

50. The Claimant was an Algerian Muslim.
    There was a staff party on 7 January 2017 – the Claimant was not present.
    His ticket was drawn and he won a bottle of alcohol – Cognac.
    He was not given Cognac; he was given a box of chocolates instead.

51. On the face of it, this would seem a reasonable and thoughtful step for an employer to take.

52. His employers had provided the substitution knowing that the Claimant did not drink alcohol. A colleague (Ms. Lee) collected the prize for him, agreeing to the substitution and took the gift for the Claimant in his absence.

53. In 2016, the Claimant had been given a bottle of Champagne to celebrate the anniversary of him being in post. His employer was aware of his religion at that time. No issues/concerns were raised. He gave it to Ms Lee. She, likewise, obviously therefore knew that he had no objection to being given alcohol per se.

54. When she agreed the substitution and accepted the chocolates on his behalf, she did not point out that he would accept alcohol even though he did not drink it. When he found out, the Claimant was upset at the substitution – his employer knew that he did not have problems receiving alcohol.

55. The Claimant contended that this was direct discrimination based upon his religion and raised a grievance.
    The Tribunal agreed that swapping the bottle of Cognac was direct discrimination on the grounds of religion.

56. His employers had contended that his faith played had no part in the decision to make the swap but this flew in the face of the evidence.
    In dismissing the grievance, the employer stated:
    "I believe that there was no ill-intention behind the different treatment you received due to your religious beliefs."

57. In the letter dismissing the appeal, the employer stated:
    "It is accepted that a decision was made to change the gift and this was done in good faith on the part of those involved in deference to your religious beliefs."

58. The Claimant was not given the prize that he was entitled to ***because of*** his religion.

59. At the grievance meeting, the substitution of the Cognac for the chocolates was explained by the employer comparing the Claimants religion to a nut allergy.

60. Clearly, the nut allergy reference was a clumsy way to address a complaint of discrimination on the grounds of religious faith.
    There is an obvious connection between the Claimants faith and abstinence from drink.
    There was no such simple comparison between the Muslim faith and a nut allergy.
    Abstinence from alcohol was due to religious faith, and that that was the known context. A nut allergy is an illness and so not an acceptable point of comparison because it served to minimise the importance of the Claimants beliefs and practices.

61. The Tribunal concluded that the decision should not have been made to change the Claimants prize.
    The nut allergy comment was offensive and caused him distress - it was unwanted conduct related to the Claimant 's protected characteristic of religion and had the effect of violating his dignity.

62. So, the issue here was NOT that the employer sensibly considered offering an alternative prize to a Muslim employee. That is what any reasonable employer would do – entirely pragmatic and sensitive to an employees faith. The issue here was that the employer compared his religion to a nut allergy and comparing something intrinsic to one's belief system as akin to a nut allergy is the epitome of violating dignity and/or creating an intimidating, hostile, degrading, humiliating or offensive environment.

63. Whilst the intentions of the employer may have been noble and kind, the execution was regrettably, cack-handed and unacceptable.

Sexual orientation discrimination

Broadcasting Homophobia

NH v Associazione Avvocatura per I Diritti LGBTI

64. The case looked at the issue of how pronouncements on media should be dealt with in the employment context and also considered the hierarchy/conflict of ECHR rights.

65. An illustrative backdrop to this case was an action brought against the notorious Romanian tycoon, George Becali (owner at the time of Steaua Bucharest Football club). In 2010, Becali made public statements that the Club would never employ a gay footballer and was taken to court by a Romanian gay rights organisation (ACCEPT).
    The club had the option of publicly denying that Becali's statements reflected the club's views and proving that the club had a policy of equal opportunities recruitment but instead, the clubs legal team affirmed that Becali's approach was the unwritten club policy.

66. The Romanian anti-discrimination council convicted Becali of harassment but only imposed a written waning.
    ACCEPT appealed and the Bucharest Court of Appeal referred questions of law to the European court of Justice for a preliminary ruling on the interpretation of the European Union law barring anti-gay discrimination in employment (Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation)

67. The court also held that anti-gay direct discrimination can be found without there being any identifiable victim (ACCEPT had launched proceedings in the public interest) and gave legal standing to non-governmental organisations to challenge homophobic harassment and discrimination in the absence of an actual victim.

68. This takes us to the case of NH v Associazione Avvocatura per I Diritti LGBTI

Facts:

69. An Italian lawyer went on a radio show and declared that he would not wish to recruit gay people to his firm nor use the services of gay people in his firm.
    He contended that the comments were made as a private citizen and not in a professional context.
    There were no open or planned recruitment exercises.

70. One important issue arising from the cases is the fact that these organisations (ACCEPT and AA) in bringing these claims have ensured that potentially affected individuals who do not want to come out have their voices heard in relation to this discrimination – particularly important for individuals in member states where homophobia remains rampant and such views are more readily tolerated.

What can we take from this case?

a. There does not need to be an identifiable complainant who is the subject of actual discrimination
b. An employer associated with the person making the statements may be found to be guilty of discrimination
c. A clear message has been sent that potential obstacles on access to the employment market are prohibited (even in the absence of a formal policy)
d. The court gave a wider interpretation to the issue – the key was not whether a specific person had been discriminated against but rather whether there was a "discriminatory climate against a group/segment of the population" which shared a protected characteristic
e. The court said nothing in its judgment about specific protection for *existing* employees (they presumably fear what their employer would do to them if their sexuality was revealed in terms of pay/career progression)

71. The case has drawn criticism because of the failure to explicitly denounce homophobic hate speech. The court engaged in the usual balancing exercise – freedom of expression (Article 10) against the right to equality and protection from discrimination.

In terms, it balanced the right of people to set out their homophobic statements against the rights of LBGTQI people not to be discriminated against.

72. Some consider this exercise unnecessary and that there simply needs to be clear and unequivocal zero tolerance attitude toward homophobic hate speech.
    In this respect, some argue that it can be deemed a missed opportunity for the Court to take a clear and unequivocal stance against homophobic speech in the sphere of employment law.

<u>What is the relevance of this case post-Brexit?</u>

73. Well, the status of the ECJ as the supreme court of the EU will not be changed - it will still uphold the rule of law within the EU, and give final rulings on the validity and interpretation of EU law.
    Up until the end of December 2020, UK courts remain bound by rulings on EU law by the ECJ.
    Admittedly, after this date, existing rulings of the ECJ on EU law could in principle be overridden by a contrary ruling of the Supreme Court.

74. In respect of ECJ rulings given after the end of December 2020, UK courts 'need not [but may where appropriate] have regard to' any ruling of the ECJ on a point of EU law, including rulings relating to the period of UK membership but delivered after that date.

    EU law is being incorporated into UK law to be reviewed at a later stage in the process and so, this is still relevant to litigation in the UK.