

# Discrimination update



Chris Middleton and Virginia Allen

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# Overview

- Recent themes
- Focus on disability discrimination
- Multiple grounds of discrimination
- Subjectivity vs Objectivity
- Pushing back the boundaries
- The Equality Bill

# Disability Discrimination: key developments

- The impact of *Lewisham v Malcolm*
- The response of the courts:
  - Assessing the likelihood of recurrence / having impairment if not treated
  - Defining “normal day to day activities”
  - Employer’s knowledge of the disability
- What next? – the Equality Bill

# *Lewisham v Malcolm*

- Reminder -three main categories of disability discrimination
- Dramatically narrowed scope of disability-related discrimination
- Schizophrenic who sub-let flat - comparator?
- Impact for employers

# *SCA Packaging v Boyle*: the definition of “likely”

- Disability = physical / mental impairment which has a substantial and long-term effect on ability to carry-out normal day to day activities.
- If being treated, still counts, provided impairment “likely” to have substantial effect but for the treatment
- If impairment has ceased to have substantial effect still counts if recurrence “likely”
- Likely means “could well happen”

## *Chief Constable of Dumfries v Adams*: normal day to day activities

- Impairment must have a substantial and long-term effect on normal day to day activities
- Walking, climbing stairs, and driving are normal day to day activities, even if performed during a night shift
- In most cases difficult to show that a skill / activity is not a normal day to day activity

# *Secretary of State for DWP v Alam*: employer's knowledge of disability

- Employer's knowledge is key to duty to make reasonable adjustments
- Test =
  - did employer know of disability and that the disability placed the employee at a substantial disadvantage?
  - **IF NOT**, ought the employer to have known that the employee was disabled and that the disability placed the employee at a substantial disadvantage?
- Actual knowledge is not necessary
- Duty to be proactive

# *Ministry of Defence v Hay*: identifying the disability

- Functional, not clinical model
- Relevant to employees with a number of minor ailments

# What's next: the Equality Bill

- New concepts of “discrimination arising from disability” and indirect discrimination
- Intended to take us back to pre-*Malcolm* position
- Drafting currently being reviewed

# Multiple grounds of discrimination

Claims on combined grounds:

- Case concerned female non-British soldier
- Requirement to be available '24/7' put women at a disadvantage
  - but could be justified
- But in combination with restriction on bringing relations from abroad to help with childcare
  - discriminatory

*Ministry of Defence v DeBique*

# Multiple grounds of discrimination

## Conflicting rights:

- Registrar refused to conduct civil partnership ceremonies for same sex relationships
  - said it was contrary to God's law
  - (not part of her job when appointed)
- Council started disciplinary proceedings

*Ladele v London Borough of Islington*

# Objective v subjectivity

Harassment: who decides whether the employee feels harassed

- British citizen of Indian ethnic origin
- Following her resignation a director referred to her being “married off in India”
- EAT stressed there is a two stage test –
  - Did the conduct have the effect of violating the employee’s dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for them?
  - If yes, was it reasonable for the employee to have that perception
- EAT said this was a borderline case
  - but found that the employee had been subject to harassment

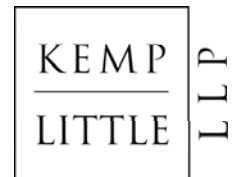
*Richmond Pharmacology Ltd v Dhaliwal*

# Objective v subjectivity

## Requirement of good faith

- Prison officer brought 6 discrimination claims
- Four costs orders made against him
- Dismissed for bringing the claims
  - he alleged this was victimisation
- EAT said employee had brought claims to harass the prison service
  - claims not brought in good faith
  - therefore victimisation claim failed

*HM Prison Service and others v Ibimidun*

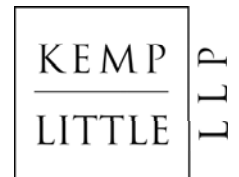


# Pushing back the boundaries

Religious etc discrimination:

- N. employed as Head of Sustainability
- Claimed dismissed because of his belief in climate change
- Was N. protected under the Religion or Belief regulations?
- EAT said (in principle) yes –
  - N's belief equivalent to a religious belief
  - To claim protection, an employee's belief must have similar status/cogency to a religious belief
  - 'One-off' beliefs – eg pacificism, vegetarianism – can be protected
  - Political philosophy could be protected

*Grainger plc and others v Nicholson*

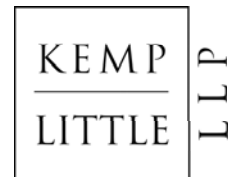


# Pushing back the boundaries

## Associative discrimination:

- S was an adviser at an advice centre
- S's manager Hindu and a member of the Ravidass community
- Complaints made against S's manager, S interviewed as well in a bullying/intimidating manner
- S resigned and claimed religious discrimination/harassment
- EAT said S harassed on grounds of his manager's religion

*Saini v All Saints Haque Centre and others*



# Injury to feelings awards

- The bands have increased –

Lower band: up to £6,000 (previously £5,000)

Middle band: £6,000 - £18,000 (previously £5,000 - £15,000)

Upper band: £18,000 - £30,000 (previously £15,000 - £25,000)

# The Equality Bill

- Harmonisation of discrimination laws
- Various technical changes to ensure continuity between different strands of legislation
- Discrimination by association and perception
- Multiple discrimination
- Equal pay – transparency clauses

(+ changes in relation to disability discrimination)

# Discrimination update – case studies



# Questions

## **Chris Middleton**

Employment Partner

Kemp Little LLP

[chris.middleton@kemplittle.com](mailto:chris.middleton@kemplittle.com)

Tel. +44 (0) 20 7710 1622



## **Virginia Allen**

Employment Solicitor

Kemp Little LLP

[virginia.allen@kemplittle.com](mailto:virginia.allen@kemplittle.com)

Tel. +44 (0) 20 7710 1654

