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Insights

DEFINITION OF 'WOMAN" IN THE EQUALITY ACT, GUIDANCE ON CONDUCT DISMISSALS, AND A NEWS ROUNDUP

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SUMMARY

Our employment law update for April covers the Supreme Court decision on the correct definition of "sex" and "woman" in the Equality Act and a Court of Appeal decision providing guidelines on gross misconduct dismissals. We also have a general news round-up, including mandatory ethnicity and disability pay gap reporting, increases of compensation limits at the employment tribunal and new ACAS guidelines on statutory neonatal leave and pay.

EQUALITY ACT DEFINITIONS OF "WOMAN", "MAN" AND "SEX" ARE BIOLOGICAL ONLY

Earlier this month the Supreme Court (SC) held that, in terms of the EqA, the terms referred to in the title mean a biological man or woman, and biological sex. It is the sex of the individual at birth, which cannot be changed. It follows that the legal definitions of "man" and "woman" in particular, do not include transgender men and transgender women, even if they have a Gender Recognition Certificate (GRC).

The SC also held that the provisions excluding sex/transgender discrimination liability for service providers of single sex spaces in schedule 3 of the EqA, only make sense if "single sex" refers to biological sex.

The SC was very clear that the judgment should not be seen as a triumph of one group over another, reiterating the protection transgender people receive through the protected characteristic of gender reassignment under the EqA, which, according to the SC, remains unchanged.

The Equality and Human Rights Commission (EHRC) published an interim guidance on Friday 25 April, but has stated it will provide a full guidance to cover the judgment by June. The decision may

even require legislation, although this seems unlikely.

FACTS

The case arose as the result of the Scottish government trying to increase female representation on public boards. That initiative gave rise to legislation and statutory guidance, both of which stated that transgender women with a GRC would be treated as women for legal purposes. This was in accordance with the Gender Recognition Act 2004 and, very importantly, the EqA. Transgender women with a GRC would be included in the figures for female representation on Scottish public boards and would have the right to use female single sex services and spaces.

An organisation called "For Women Scotland" (FWS), which campaigns for the strengthening of women's rights in Scotland, appealed to the Court of Session, Scotland's Court of Appeal through a judicial review process. FWS argued that the definition of "woman" in the EqA is a reference to a biological woman, not a transgender "GRC certified" woman. The Court of Session dismissed the appeal and FWS appealed to the SC. A number of other organisations, including "Sex Matters" and Amnesty International UK, intervened.

DECISION

The SC, disagreeing with the Court of Session, held that the terms "man", "woman", "sex", "male" and "female" in the EqA refer to **biological sex only**, and should not be interpreted as including "GRC certificated" women, or indeed transgender individuals generally.

The reasoning was pragmatic and included the following:

- If GRC certified women were included in the definition, it would create a lack of consistency and clarity across the whole of the EqA, particularly in relation to areas like pregnancy, maternity and sex-based protections, which require a biological definition. These protections become unworkable unless "man", "woman" and "sex" are given a strict biological meaning;
- It said more or less the same about the exclusion of discrimination liability for service providers under schedule 3 of the EqA, where one sex and/or transgender individuals can be excluded from single sex spaces. Single sex means single biological sex. This is possibly the most contentious and difficult part of the decision. This includes separate spaces and single sex services such as changing rooms, hostels and medical services, communal accommodation, and single sex higher education institutions, single sex associations/charities, women's sports, the operation of the public sector equality duty, and the armed forces;
- The SC noted the inconsistency in giving greater rights to transgender individuals with GRCs compared to those without GRCs. This is particularly the case as it is unlawful to ask an individual if they have a GRC. The former would have the advantage of an EqA legal definition

treating their acquired gender as their sex, but the latter would not. This might lead to confusion for both employers and service providers. For example, individuals with GRCs could bring sex discrimination claims but, subject to our comments below, those without GRCs could not; and

- The SC raised the issue of sexual orientation discrimination under s27 of the EqA, and how this requires sex to have a biological definition to make sense. If "GRC" transgender women are included in the definition of sex, then the concept of same-sex relationships and same-sex attraction becomes confused. For example, if a GRC transgender woman (who is biologically male) is attracted to a biological woman (who is biologically female), then that is not orientation/attraction towards the same sex and is not consistent with the wording of s27.

Overall, the SC held that the EqA must be clear and consistent for groups which share a protected characteristic to be identifiable by employers and service providers. The SC also insisted that existing transgender protections under the EqA remained.

Two interesting points, which were noted by the SC, arise from this decision, using transgender women as an example:

- There are circumstances where a transgender woman might be able to use the sex discrimination provisions in the EqA. A transgender woman may present as a biological woman and might not disclose their transgender status. An employer then might discriminate against that transgender woman based not on transgender status (of which the employer would be unaware) but based on a perception that the transgender women is a biological woman. Under the EqA, a claim can be brought where the protected characteristic is **perceived** to exist, even if it does not. An example would be a straight man being subjected to detrimental treatment because he is wrongly believed to be gay. He could still bring a claim for sexual orientation discrimination even though he does not possess the relevant protected characteristic. What matters is that the employer thought he did. The same applies to an employer discriminating against a transgender woman whom the employer believes to be a biological woman. What matters is the employer's perception of the individual and the individual does not actually have to possess the protected characteristic wrongly perceived by the employer, which in this case is biological sex. A transgender women (or man) could therefore bring a sex discrimination claim based on perceived sex; and

- Because transgender individuals may present as members of their acquired gender as opposed to members of their biological sex, this places a burden on employers and service providers. If transgender individuals do not identify themselves as such or do not present as members of their biological sex, this places the burden on employers/service providers to identify who is transgender and who is not. This might be straightforward in terms of written policies but might be more difficult in terms of day-to-day practice. Employers and service

providers might provide a “third space” for transgender individuals, but many might not have the resources.

WHY THIS MATTERS

This is a landmark judgment and puts the relevant definitions in the EqA beyond doubt. However, in terms of day-to-day implementation, it requires clarification and a full guidance from the EHRC (and possibly legislation).

For Women Scotland Limited -v- The Scottish Ministers

COURT OF APPEAL GIVES GUIDANCE ON CONDUCT DISMISSALS

The claimant was an OFSTED inspector dismissed for gross misconduct. In the course of a visit to a school for an inspection, the claimant briefly touched a pupil’s head to wipe away rain that was dripping down the pupil’s face.

The respondent accepted that the claimant had not acted improperly and also accepted that the case did not involve any safeguarding risks. The claimant was nonetheless summarily dismissed, and the tribunal found the dismissal was fair. The respondent operated an informal zero tolerance “no touching” policy, which the claimant was not made aware of before or during the visit. The disciplinary sanction was increased to a summary dismissal because the claimant did not show remorse and did not understand why he was being dismissed for what he perceived was a harmless act of kindness

The claimant appealed to the EAT who overturned the decision and substituted a finding of unfair dismissal.

The respondent subsequently appealed to the Court of Appeal.

The Court of Appeal upheld the EAT’s decision. It held that the claimant did not know, and could not reasonably be expected to know, that a single act of physical contact, which did not raise any safeguarding issues, constituted gross misconduct and could result in summary dismissal. There was no written policy or rule about physical contact and the claimant had never received any guidance or training regarding what was and was not appropriate.

The Court of Appeal also agreed with the EAT that it was not reasonable, in a case where the misconduct itself did not justify dismissal, for the employer to 'bump up' the seriousness of the conduct simply because the employee had failed to show proper remorse or insight for their actions.

In the course of the judgment the Court of Appeal made three key points regarding conduct dismissals:

CLEAR DISCIPLINARY POLICIES

Employers should be clear in their disciplinary policies about what acts or types of misconduct they consider to amount to gross misconduct. This is particularly important in respect of acts or misconduct where the employee would not have a reasonable expectation that the act in question constituted gross misconduct, and/or that they could be summarily dismissed for that act of misconduct. If in doubt, the employer should list the relevant acts of misconduct. If an act of misconduct is not listed as constituting gross misconduct, it does not inevitably follow that a dismissal for that act will be unfair, it will be a question of facts and circumstances. However, the employee must have a reasonable expectation that the act of misconduct in question could lead to dismissal.

FAILURE TO ADMIT WRONGDOING

If the act of misconduct does not justify dismissal, a failure on the employee's part to admit wrongdoing or show remorse will not increase the seriousness of the misconduct so that the employer can treat it as a breach of trust and confidence justifying summary dismissal. However, if an employee's persistent lack of insight or remorse means there is a genuine risk they may commit repeated or more serious misconduct in the future, dismissal may be justified.

THE IMPORTANCE OF PROCESS

The case is a reminder of the importance for employers to follow their own disciplinary procedures and the ACAS Code of Practice on disciplinary and grievance procedures. Employees should be provided with copies of all documents relevant to anything in dispute in the disciplinary process prior to any decision being reached. Any failure to do so could render the dismissal procedurally unfair.

WHY THIS MATTERS

This Court of Appeal decision gives helpful guidance to employers on the clarity and communication required in gross misconduct dismissals, as well as the dangers of "bumping up" disciplinary sanctions where an employee who genuinely believes they are innocent of misconduct fails to show remorse.

Hewston v OFSTED

NEWS

THE NEW EQUALITY (RACE AND DISABILITY) BILL – MANDATORY ETHNICITY AND DISABILITY PAY GAP REPORTING

In late March the government published a consultation on how to introduce mandatory ethnicity and disability pay gap reporting for employers with 250 or more employees.

The government proposes using a similar framework to that already in place for gender pay gap reporting and the same employers would fall within scope. The same six measures of pay would be reported and the same snapshot and reporting dates would be used.

However, employers would also be required to report the overall breakdown of their workforce by ethnicity and disability, and the percentage of employees not disclosing their data.

In contrast to gender pay gap reporting, employees would be asked to self-report their ethnicity and disability status, with an option to opt out. The government proposes using standardised ethnicity groupings.

Similarly, with disability reporting, a minimum of ten employees must fall in each group being compared.

To avoid the risk of individual identification and the complexities of multiple impairments, the government proposes that disability reporting should take a binary approach of only reporting differences between disabled and non-disabled employees, rather than by type of impairment.

Although these proposals are still at a preliminary stage, the government is keen to press ahead. There seem to be issues with self-reporting on both disability and ethnicity, and employers may face genuine difficulties enforcing these measures (the EHRC is the enforcement body).

However, in order to obtain the statistics, employers must have a breakdown of their workforce by disability and ethnicity, and this cannot be forced. One of the measures suggested is to have a very “broad brush” breakdown where, for example, the workforce is divided into “white and “non-white” and “disabled” and “non-disabled”. This feels very uncomfortable for all kinds of reasons.

We will see how the consultation, which ends on 10 June, progresses and concludes.

ACAS PUBLISHES NEW GUIDANCE ON STATUTORY NEONATAL LEAVE AND PAY

On 2 April, ACAS published new guidance on statutory neonatal leave and pay. As well as setting out the new law, the guidance contains practical advice for employers. Some of the steps recommended by ACAS are as follows:

- Employers should ensure the process for requesting neonatal leave and pay is clear to employees, either in contracts of employment or policies. During the first seven days of neonatal care, when there is no statutory entitlement to leave , an employer should ideally be flexible. They may allow paid time off as special leave or grant unpaid leave. This would also apply where there is no statutory entitlement to neonatal leave/pay for any reason;

- Employers should try and be flexible where employees give notice to take statutory leave, for example, by allowing someone other than the employee to give notice or by allowing notice to be given verbally;
- During a period of neonatal leave, managers should ideally keep in touch and provide support. With permission from the employee, the employer may find communicating with a close friend or family member easier where appropriate. Employers might find it helpful to share information with the employee to support their mental health, including details of an organisation's employee assistance programme or information from a charity such as “Bliss” or “Mind”;
- It will be helpful to discuss confidentiality with the employee and whether they wish any information to be shared with colleagues, clients or customers.

ANNUAL INCREASES TO TRIBUNAL AWARDS

The annual increases to employment tribunal awards have been made along with increases to “Vento” bands for awards for injury to feelings in discrimination cases.

For unfair dismissal awards the increases apply to cases where the termination date is on or after 6 April 2025 - for the increased “Vento” bands, the increases apply where proceedings were commenced on or after 6 April 2025.

The main changes are as follows:

- Unfair dismissal compensatory award – increases from £115,115 to £118,223
- Basic award/a “week’s pay” for redundancy – increases from £700 to £719
- “Vento” bands – these have increased as follows:
- A lower band of £1,200 to £12,100 (increasing from £1,200 to £11,700) for less serious cases
- A middle band of £12,100 to £36,400 (increasing from £11,700 to £35,200) for cases which do not merit an award in the upper band
- An upper band of £36,400 to £60,700 (increasing from £35,200 to £58,700) for the most serious cases.
- Amounts in excess of £60,700 can be awarded in the most exceptional cases.

Although the increases all round are relatively modest, the size of injury to feelings awards, which can be paid free of tax in certain circumstances, is substantial. The upper band is now at £60,700, and that is awarded on top of any separate discrimination award based on income or as a standalone award for a claim brought during employment.

RELATED CAPABILITIES

- Employment & Labor

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