POLICE Federation

# Equality Matters

## Equality Act Special Issue

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*Welcome to the Spring 2011 edition of Equality Matters where change is in the air.*

In this edition we catch up with further developments to the Equality Act 2011. We also consider the recent disability case of Hinsley which confirms that a reasonable adjustment for a disabled officer can be made to allow the officer to retract their resignation when made in haste. We also review the latest employment tribunal statistics which demonstrate how the strains on the system continue and we look briefly at the government's controversial proposals to reform it even further. The employment tribunal statistics also record an increase in sex/maternity, sexual orientation and age discrimination claims and we take a look at some recent high profile case law developments where employers have been found to have discriminated against employees on grounds of age and sexual orientation. As ever we conclude with our usual round up of current equality cases for Police Federation members.

This update is aimed at Equality Representatives, but please feel free to circulate to any other Federation members who may find it useful.

We would welcome any feedback or suggestions for subjects you would like to see covered in future editions.

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## Equality Act Update

The Equality Act 2010 ("the Act") came into Force in October 2010 but, as we reported at the time, not all of the provisions were immediately brought into force. Additional provisions took effect in April 2011 and the Government has abandoned the introduction of one of them entirely. So what are the changes?

It has for some time been lawful for an employer to take position action such as establishing mentoring schemes or development programmes for ethnic minority staff or women where there has been an under representation of these groups. In April 2011 the much talked about extension to positive action in recruitment and promotion came into effect. This means that it is not unlawful for an employer to recruit or promote a candidate who is of equal merit to another candidate if:

- the employer reasonably believes the candidate has a protected characteristic that is under represented in the workforce, or
- that people with that characteristic suffer a disadvantage connected to that characteristic, and
- provided the candidate's recruitment or promotion is a proportional way of addressing the under-representation or disadvantage.

This is a voluntary provision and an employer does not have to use positive action in this way to address under-representation. Only time will tell whether employers will have the confidence to make use of the provision.

### *Equality Duty*

On 5th April 2011 the new Equality Duty for the public sector came into force and has extended the Equality Duty from race, sex and disability to also cover age, sexual orientation, religion or belief, pregnancy and maternity, and gender reassignment. The Public Sector Equality Duty requires public sector organisations to have "due regard" in developing policy, delivering its services and its day to day workings to the need to eliminate unlawful discrimination, advance equality of opportunity and foster good relations across all of the protected characteristics under the Act. More specific Equality Duties for certain public sector bodies are still being drafted.

### *Codes of Practice*

On 6th April 2011 three new Codes of Practice came into force and replace previous Equality Commission Codes. The three new Equality and Human Rights Commission's (EHRC) Codes of Practice address:

- Employment
- Services Public Functions and Associations, and
- Equal Pay.

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The terms of the Codes of Practice are important as they are admissible in proceedings and a court or a tribunal must take into account a failure to comply with a Code of Practice where relevant.

New statutory guidance came into force on 1st May 2011 relating to the definition of "disability" within the Act. This replaces the previous guidance published for the Disability Discrimination Act 1995.

### *Abandoned Provisions*

In the budget delivered on 23rd March 2011 the Government announced that the Act's dual discrimination provisions would not be brought into force. Those provisions were to enable claims to be brought on the basis that the less favourable treatment had been because of a combination of two protected characteristics, e.g. because of the Claimant's race and disability. The Government explained its abandonment of this provision on the basis of the financial burden it would impose on employers in a struggling economy.


# *Retracting resignations A reasonable adjustment?*

In Hinsley v The Chief Constable of West Mercia Police, the Employment Appeal Tribunal has held that the duty to make reasonable adjustments can, depending on the particular facts of a case, include a duty to re-appoint a police officer who has resigned.

## The Facts of the Case

Mrs Hinsley was a probationer police constable with West Mercia Police. She had performed well throughout her probation, and had achieved independent patrol status. Shortly after there was a dip in her performance at work and the Force decided to address this by placing her on a series of action plans. As a result, Mrs Hinsley expressed an intention to resign. She was given some time to think about her decision but confirmed her wish and her resignation took effect in January 2007.

Some nine days later she visited her General Practitioner and was diagnosed as suffering from severe depression. Shortly after, she contacted the Force requesting that she be permitted to retract her resignation based on her understanding she had made a hasty decision whilst in a distressed state of mind caused by her depression. As she now understood her condition and was being treated for it, she asked the Force to reconsider that decision. She produced medical evidence supporting her condition and its effect upon her decision to resign. Her request was rejected by the Force who said there was no provision under Police Regulations permitting them to allow her to retract her resignation after it had taken effect.

## The Employment Tribunal Decision

The Employment Tribunal found that the Force had applied a provision, criterion or practice, specifically that police officers who had retired and whose retirement had taken effect could not be reinstated or re-engaged. They also found that this was likely to place a disabled officer (suffering from depression) at a substantial disadvantage because the decision to retire is more likely to have been made on irrational grounds. However, the Employment Tribunal found against Mrs Hinsley on the basis that it was not a reasonable adjustment to require the Force to re-engage her as they agreed that there was no provision in Police Regulations which allowed this.

## The Appeal

On appeal, the Employment Appeal Tribunal held that the duty to make reasonable adjustments continued to apply after the termination of employment. The Employment Appeal Tribunal also overturned the Employment Tribunal and held that that re-appointment by way of a reasonable adjustment was not outside the powers of the Chief Constable under the Police Act and the Police Regulations. Mrs Hinsley's case therefore succeeded and a separate hearing on remedy is awaited.

## Conclusion

Instrumental in Mrs Hinsley's case was the fact that she had very clear medical evidence setting out the nature of her condition and the fact it was likely to impact on her ability to make clear and rational decisions. Furthermore, it was also of relevance that Mrs Hinsley was not diagnosed until after she had taken the (irrational) decision to resign. This case demonstrates that depending upon the particular facts it can be a reasonable adjustment to allow an officer to retract a resignation which may have been hastily or irrationally given because of the effects of a disability. Whilst the case was brought under the Disability Discrimination Act similar principles are likely to apply under the Equality Act 2010.

POLICE Federation
Russell Jones & Walker Solicitors

## Tribunal Statistics

The Tribunals Service has published its statistics for the period October 2010 to end of December 2010. The picture is one of a decrease in the number of claims by 51% in comparison with the same period in the year before, partly due to the fact 2009/10 saw an abnormally large number of airline claims being issued. The total number of receipt of claims however continued to outweigh the number of claims disposed of meaning overall that the tribunal system's caseload has continued to rise. Discrimination claims, particularly age discrimination and pregnancy and sex discrimination claims experienced a marked increase reflecting our experience that economic pressures tend to lead to more equality concerns.

The statistics also continue to reflect how only a small number of discrimination claims are successful at a tribunal hearing. For example, during the quarter referenced 44% of disability discrimination claims were settled by way of Acas conciliation, 3% were successful at a tribunal hearing, 9% were unsuccessful at a hearing, 32% were withdrawn, 7% struck out, 4% dismissed at a preliminary hearing and 1% disposed of by a default judgment.


## MAXIMISING MATERNITY PAY ENTITLEMENT

In Wade and North Yorkshire Police v HMRC the Upper Tier Tax Tribunal has confirmed that the period of Statutory Maternity Pay does not have to start at the same time as police maternity pay. The Claimant had started her paid police maternity leave quite some time before the expected due date of her baby. She was able to start her Statutory Maternity Pay at a later date meaning there was a shorter period of overlap between her Statutory Maternity Pay and her police maternity pay before the birth of her baby. This meant that more of her Statutory Maternity Pay was received after the birth of her baby resulting in a longer period of time over which she was paid maternity pay. This can have an obvious cash flow advantage for mothers on maternity leave.

On a related note the lower rate of Statutory Maternity Pay increased in April 2011 to £128.73 a week.

## Tribunal reform

The latest employment statistics demonstrate the continued pressures upon the tribunal system which many would anticipate is inevitable in a time of recession and cuts. Recently the Employment Tribunal Service merged with the civil court system to form "Her Majesty's Courts and Tribunal Service", a branch of the Ministry of Justice. One reason for this was cost savings. The Government has recently commenced consultation concerning far more drastic employment tribunal reform with the expressed aim of reducing costs, speeding up the tribunal process, encouraging employers to employ more staff (without fear of tribunal claims), discouraging a perceived overabundance of unmeritorious claims and encouraging early resolution of disputes. The proposals include:

- compulsory pre-claim conciliation with Acas before a tribunal claim can proceed
- the introduction of a fee to be paid on issuing a claim
- an obligation on a claimant to provide a schedule of loss when issuing the claim
- greater powers to tribunals to strike out perceived weak or vexatious claims without a hearing or to order claimants to pay a deposit
- an increase or decrease to compensation (or an award of costs) where a party has failed to beat a "without prejudice" offer in settlement made by the other party
- witness expenses will no longer be met by the tribunal service
- increasing the qualifying period for an unfair dismissal claim from one year to two years service (which will not affect police officers who do not have unfair dismissal rights)
- fining employers up to £5,000 (on top of damages) if they lose a case (payable to the Exchequer not the claimant).

The proposals are largely backed by business groups. Both employer and employee representatives generally seem to welcome the extension of conciliation provided it is properly resourced. Concerns have, however, been expressed about the potential impact upon minority groups and access to justice.

The consultation closed on 20th April 2011 and the Government's response is awaited. We will report further developments in our Autumn 2011 edition.

# Broadening Diversity or Discriminatory targeting?

An intention by an organisation to broaden and diversify its customer base can amount to unlawful discrimination where in practice the steps taken amount to less favourable treatment on grounds of a protected characteristic such as sexual orientation or age. There have been two recent case law examples of this.

### Case Law Example: Sexual Orientation

In Lisboa v Realpubs Ltd [2011] the Employment Appeal Tribunal upheld a sexual orientation claim brought by the assistant manager of a pub. Realpubs had taken over the pub where he worked and wished to rebrand it as a "gastropub" that would appeal to all members of the public rather than its existing client base which came primarily from the gay community. The manner in which they approached this diversification led to a successful claim by Mr Lisboa. Actions undertaken included: suggesting to Mr Lisboa that he place a board outside saying "this is not a gay pub"; encouraging staff to seat customers who did not appear to be gay in prominent places so they could be seen by passing members of the public; and recruiting new staff to give the pub a more diverse workforce base. The EAT concluded that whilst a business aim of re-positioning the brand and diversifying its customer base was lawful, the manner in which that policy had been implemented was unlawful. Gay clientele were treated less favourably on grounds of their sexual orientation and in doing so the employer also discriminated against Mr Lisboa.

### Case Law Example: Age

The much publicised recent age discrimination claim brought against Countryfile and the BBC reflects a similar point. The tribunal concluded that the presenter Miriam O'Reilly, who was in her early 50s, had been discriminated against on grounds of age when she was removed from the show following its move from a daytime to a primetime slot as her age was a significant factor in the BBC's decision not to retain her. Whilst the tribunal accepted that the BBC's wish to appeal to a primetime audience, including younger viewers, was a legitimate aim, the removal of older presenters to pander to assumed viewer's prejudices about who they would want to see on their screens was not a proportionate means of achieving that aim.

### Conclusion

There may be good reasons why an organisation wishes to appeal to a particular section of the community and doing so will not necessarily always been at the expense of another section or give rise to a discrimination claim. Indeed in some contexts positive action is lawful under the Equality Act. However, the two cases are a stark reminder as to the care that employers need to exercise in assessing how such an intention can be carried out in a non discriminatory manner and how the posssible impact on staff tasked with carrying out the policy out must be taken into account. If public sector bodies properly comply with their public sector equality duties and impact assess their policy decisions in advance then such discriminatory effects may also be avoided.

# EQUALITY CASE WATCH

In our regular case watch column, we outline some cases of interest on equality issues in which we are acting for Police Federation members.

### Disability Discrimination

We recently succeeded in a disability discrimination claim against a force which, as part of a restructuring exercise, moved an Inspector with a back condition from a Neighbourhood post to an operational post. The tribunal accepted there had been a failure to make reasonable adjustments in refusing to allow the claimant to remain in her Neighbourhood post and in requiring the claimant to undertake operational duty cover which meant she was working without her specialist workstation. The tribunal accepted the failures aggravated the claimant's back condition causing her physical injury. A remedy hearing is awaited.

We are continuing to handle cases concerning unsatisfactory attendance and unsatisfactory performance procedures including dismissals which are the subject of appeal to the PAT. In one case we are currently challenging a failure by a force to adjust their Bradford scoring system (a key component in their UAP process) to take account of disability related sickness absence.

We also continue to successfully represent members in cases where it is argued it would be a reasonable adjustment to allow the individual to transfer to another place of work to combat difficulties with travelling.

### Sex Discrimination

We continue to see a rise in flexible working cases particularly where Forces are introducing new shift patterns and changing shift lengths which can give rise to indirect sex discrimination claims. We recently successfully resolved a claim for a custody sergeant who had been told if she wished to work flexibly then it was up to her to find her own job without assistance.

### Sexual Orientation Discrimination

We continue to represent an officer who alleges that there is a general culture of homophobic profiling and comments within a specialist unit.

### Religion /Belief and Race Discrimination

We are also acting for an officer in the same specialist unit who was subject to an ongoing campaign of harassment and discrimination on the grounds of her religion and race. We are challenging the failure by the Force to discipline the offender or to act upon the recommendations of the diversity department following their investigation.

### Whistleblowing

We recently succeeded in a whistleblowing claim for a Detective Constable who had made protected disclosures relating to alleged sex trafficking of women. The tribunal accepted that she had been subject to detrimental disciplinary action when she declined to follow a direction she had been given to delay in passing the information to avoid overtime expenses being incurred. A remedies hearing is awaited.

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