



# Employment Law Bulletin Issue 24

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# *Blandy's Employment Team News*

## *New appointment to Blandy's Employment team*

Blandy & Blandy has expanded its Employment team with the recruitment of new solicitor Aidan McGuire.

Blandy's Employment team is one of the largest in the Thames Valley and are top rated in independent legal directories for providing strategic Employment advice to some of the largest companies in the Thames Valley.

Aidan qualified in August 2008 with Thales Corporate Services Limited in Surrey before joining Samuel Phillips Law Firm in Newcastle upon Tyne in October 2008. He joined Blandy & Blandy's Employment team in January 2011 and undertakes a mix of contentious and non-contentious employment work for a wide range of clients.

## *Mock Employment Tribunal, 10 March 2011, Reading Civic Centre*

Do you struggle with the following issues, especially with the advent of the Equality Act 2010:

- Are probationary period dismissals without risk?
- What is a "disability"?
- How does disability impact on the employment relationship?
- How should I manage employment tribunal claims alleging disability discrimination?

A company can face complex and costly employment claims in the Employment Tribunal for disability discrimination, if the issues surrounding an employee's medical condition are not handled correctly. Are you confident that you know the answers to the above questions? Do you want to learn more to minimise the risk of expensive employment claims?

Come and join us to hear more about this complicated and fast-moving area of employment law and to experience a mock Employment Tribunal in action.

Please [click here](#) for full details of our Mock Employment Tribunal.

## Recent Cases

### *BBC presenter succeeds in age discrimination claim*

This high profile case against the BBC was heard over 12 days in November 2010. The Tribunal has now given their judgment that the BBC discriminated against Miriam O'Reilly – a presenter of the Countryfile programme – on the grounds of her age (*O'Reilly v British Broadcasting Corporation and another*).

Ms O'Reilly was sacked from the programme when it moved to a primetime slot on Sunday evenings and the BBC chose to replace Ms O'Reilly, 51 (and some other presenters in their 40s), with Matt Baker, 30, and Julia Bradbury, 38. There were also three “second tier” presenters appointed, two in their 30s and one in their 20s. Ms O'Reilly claimed that she had been told to “watch out for her wrinkles when high definition television came in” and that it was “time for botox”.

She brought both an age and sex discrimination claim against the BBC and also argued victimisation on the basis that the BBC failed to offer her any more TV or radio work, apart from a job presenting a Costing the Earth programme on the “environmental cost of ageing”.

The Employment Tribunal found that Ms O'Reilly had suffered direct age discrimination and victimisation, but she lost her sex discrimination claim.

Although John Craven, 68, had been retained on Countryfile, the Tribunal found that he was a well known figure who was in a different position to the other presenters. Overall, the age profile of the presenters had reduced and the Tribunal considered that youth was a particular factor in their appointments (particularly the second tier presenters). The BBC's actions could not be objectively justified as it was not proportionate to remove older presenters to pander to the assumed prejudice of viewers.

However, Ms O'Reilly's sex discrimination claim failed as it was held that a significant factor in recruiting the new presenters was youth, but not gender (i.e. a man of Ms O'Reilly's age would have been treated the same). The victimisation claim succeeded as the Tribunal found that the decisions not to use Ms O'Reilly any more on Countryfile Magazine and to offer her the programme on the cost of ageing were a result of their “annoyance” and that the BBC must have expected the latter to antagonise her in the circumstances.



The Tribunal also offered some commentary on the subject of combined discrimination. Ms O'Reilly had argued that she had been subjected to a combination of sex and age discrimination under the provisions of Section 14 of the Equality Act 2010, even though these have not yet been brought into force. The Tribunal's decision appears to suggest, however, that combined discrimination is already unlawful which calls into question the relevance of the Equality Act provisions going forward.

This decision is a reminder to employers of the pitfalls of making age related decisions, even if they consider they are furthering a perceived business need in the process. It wasn't the comments made to Ms O'Reilly that resulted in the BBC losing the claim (these were made by junior employees), but the fact that the BBC had undoubtedly chosen younger presenters. Although direct age discrimination can be justified, the defence is likely to be construed narrowly as the Tribunal did not, in this case, accept the BBC's argument that removing older presenters in an effort to attract a wider audience was a proportionate means of achieving a legitimate aim.

Defending discrimination claims can often involve complex legal arguments. If you require advice please contact Rebecca Hill on 0118 951 6833 or at [rebecca.hill@blandy.co.uk](mailto:rebecca.hill@blandy.co.uk)

### *Hotel owners discriminate against homosexual couple*

In the case of *Hall and another v Bull and another*, the Bristol County Court decided that the Christian beliefs of hotel owners did not 'outweigh' the rights of a gay couple not to suffer discrimination.

The claimants were in a civil partnership and had booked to stay at a hotel in Cornwall, run by a married couple holding strong Christian beliefs. As they had booked over the telephone rather than online, they failed to see a notice on the hotel website which mentioned that they preferred to let double room accommodation to heterosexual married couples only. When the claimants arrived they were therefore refused a double room and refunded their deposit. They would have been offered a twin room but none were available so they were left to go elsewhere.

Their claim of direct discrimination on the grounds of sexual orientation succeeded and the hotel owners were ordered to pay the couple compensation. Although the hotel owners argued that there has been no discrimination as they would have treated an unmarried heterosexual couple in the same way, the

couple in the same way, the judge held that there was no material distinction between a marriage and a civil partnership. The claimants had therefore suffered direct discrimination. They also won their claim of indirect discrimination as the decision held that the restriction on double rooms put homosexuals at a disadvantage compared with married people. Essentially, it was no defence that the gay couple were in the same position as unmarried heterosexuals.

The case required some careful 'balancing' of two human rights under the European Convention on Human Rights (ECHR), namely freedom of religion under Article 9 and the right not to suffer discrimination under Article 14. It was relevant that by running a business, the hotel owners' right to a private and family life was affected and the decision recognises that freedom of religion is not an absolute right but can be limited where necessary and proportionate.

Leave to appeal has been allowed and the facts of this case are of course outside of an employment relationship. However, given the equal status afforded to marriage and civil partnerships under the Equality Act 2010, it seems likely that differential treatment in an employment context would similarly be judged as discrimination because of sexual orientation and therefore give rise to a potentially significant award of compensation.

### *The right to accompaniment - by your lawyer?*

The right for employees to be accompanied at disciplinary and grievance hearings is well known, as is the status of their companion - a trade union representative or a fellow work colleague. However, in the recent case of *Cuerden v Yorkshire Housing*, an employment tribunal was asked to consider whether an employer had failed to make a reasonable adjustment by refusing an employee the right to be accompanied by a counsellor and a lawyer at a return to work meeting.

Mrs Cuerden had been on sick leave for around seven months and she suffered from depression, to the extent that she was disabled for the purposes of the Disability Discrimination Act 1995 (now the Equality Act 2010). In advance of her return to work meeting, her solicitor requested that she be accompanied at that meeting by her counsellor and lawyer. This request was refused and Mrs Cuerden subsequently resigned, claiming disability discrimination (as well as unfair dismissal and breach of contract).



The employment tribunal upheld her disability discrimination claim and found that Yorkshire Housing had failed in their obligations to make reasonable adjustments when they refused her request to be accompanied by the specific companions. It was held that Mrs Cuerden was at a substantial disadvantage when compared with another employee who had been absent for the same length of time but who did not suffer from a mental impairment. Crucially, the Tribunal was critical of the fact that the company had not even investigated her request properly, for example by seeking medical advice or consulting with the employee and her representatives to discuss the concerns. The key questions according to the judgment were (1) whether the employee was placed at a substantial disadvantage and (2) whether the adjustment would avoid that disadvantage.

Had Yorkshire Housing 'probed' a little more into the reason for the request and assessed whether accompaniment by the counsellor and lawyer would genuinely help the claimant, the decision may have been different. Some further investigation may also have found that accompaniment by the employee's counsellor only would have been appropriate (if indeed the issue was being placed at a 'disadvantage' due to an impairment).

On the face of it, however, this case does suggest some openness to allowing legal representation at what is an internal hearing. Had the claimant's lawyer been permitted to attend, it seems likely that the company would have had a solicitor present too - raising questions as to what purpose the meeting would really serve.

It would not generally be usual for a counsellor and a lawyer to be present at a return to work meeting and there is no right as such for an employee to have such companions present. However, if an employee makes a request, this case highlights that it will be important for an employer to consider that request and be prepared to justify any decision it reaches. It will not necessarily be sufficient to rely on a company policy specifying only certain companions and a Tribunal will be focused on whether an employer has at least genuinely thought about the request and why it may assist.

If you require any practical advice in relation to conducting internal meetings with employees (including disciplinary, grievance and return to work meetings) please contact Laura Binnie on 0118 951 6855 or at [laura.binnie@blandy.co.uk](mailto:laura.binnie@blandy.co.uk)

## *Volunteer not entitled to bring discrimination claim*

In *Xv Mid Sussex CAB* the Court of Appeal has rejected an argument from an unpaid CAB volunteer that she should be protected by disability discrimination laws in the same way as if she were an employee. The decision will apply equally to the other 'protected characteristics' under the Equality Act 2010 which outlaws discrimination due to sex, race, sexual orientation, age etc.

This case follows several other claims against the CAB in recent years from volunteers alleging they are entitled to employment rights. In the latest case, the Court of Appeal has made it clear that where the work is unpaid and cannot be said to be vocational training or an 'occupation', volunteers are unable to bring employment law claims. There is simply no contract of employment giving rise to any obligations on the employer (such as the duty to make reasonable adjustments in disability cases).

While on first sight it may seem harsh that volunteers are worse off, given the absence of any real 'obligations' on the volunteer, there is a logic to them not being covered by employment laws. Certainly this decision will be welcomed by employers, particularly smaller organisations who may well be charities and may find it difficult to cope with the financial and time pressure which would come with employment claims in what is becoming an ever expanding field of anti discrimination laws.

However, it should not be assumed that all 'volunteers' will not be entitled to protection. If the purpose of the volunteering is to lead to permanent employment or there is a specific written arrangement, it is more likely that the volunteer would receive legal protection.



# *Employment Law News*

## *Government confirms plans to phase out the default retirement age of 65 by October 2011*

It has now been confirmed that the default retirement age (currently 65) will be removed as from October 2011 and that transitional provisions will be in place between 6 April and 1 October 2011. Essentially, notices to retire employees can still be given before 6 April 2011, using the compulsory retirement procedures.

For further details and action points please see our advice note here:

Default Retirement Age Note

## *Consultation launched on Employment Tribunal reform*

Last week the Government published fairly radical proposals to reform the Employment Tribunal system with the aim of reducing the number of tribunal claims, encourage speedy resolution of disputes without a hearing and to ease the burden of employment laws on companies. The consultation, Resolving Workplace Disputes: A Consultation (launched by the Department for Business, Innovation and Skills (BIS)) mentions charging claimants a fee to lodge a claim, increasing the limit on costs awards (from £10,000 to £20,000) and, most significantly, raising the qualifying period of service for being able to bring an unfair dismissal claim from one year to two years. The document is generally employer friendly although it also contains a proposal that employers who lose a case could face a penalty between £100 - £5,000 (reduced by half if paid within 21 days).

For further information click here: <http://www.bis.gov.uk/news/topstories/2011/Jan/workplace-dispute-reforms-and-employers-charter>

## *Legislative Developments*

*Further provisions of the Equality Act 2010 are brought in*

On 18 January 2011 the Equality Act 2010 (Commencement No. 5) Order 2011 was published, bringing in powers for the government to issue regulations on public sector equality duties. The Order also brings into force Section 159 of the Equality Act 2010 on 6 April 2011 which deals with positive action in recruitment and promotion. Where an employer reasonably thinks that persons with a particular protected characteristic are disadvantaged or disproportionately under-represented, they would be able to treat a person with the relevant characteristic more favourably than others in recruitment or promotion, so long as the person with the relevant characteristic was “as qualified as” those others. There is however no obligation on employers to take positive action and positive action does not mean positive discrimination in any event.

For further commentary from the Government Equalities Office please click here: <http://www.equalities.gov.uk/pdf/Positive%20Action%20Step%20By%20Step%20Guide.pdf>

*REMINDER: New compensation limits now in force*

The annual increase in compensation limits took effect on 1 February 2011 meaning that the maximum compensatory award for unfair dismissal is now £68,400. The new maximum for a week's pay is £400. Therefore the maximum unfair dismissal award (basic plus compensatory) is £80,400.



*Guest Spot...*

*...from Blandy's Planning and Environmental Team*

*New Government Proposals for the management and funding of flood defences*

The Environment Agency and Department for Environment, Food and Rural Affairs (Defra) are currently consulting on arrangements for the management and funding of flood defences.

A broad strategy is proposed to reduce the likelihood of flooding and also to manage the consequences of flooding which may occur. This may be of interest to businesses operating in the Thames Valley, given the possible costs of disruption to business if a major flooding event did occur.

In terms of funding of flood defences, the proposals state that it should no longer be assumed that all flood risk management costs will be met centrally, and a greater proportion of funding will be encouraged from local areas. This may mean in practice that private sector interests may have to contribute to the costs of community level defences. This could take the form of a levy imposed on businesses operating in an area at risk of flood, such as the Thames Valley.

The consultation documents are open for comment until 16 February 2011. Those who have an interest or operate in an area at risk of flooding can obtain further details from the Environment Agency and Defra websites.

If you require advice on this or any Planning law matters please contact Brigid O'Leary on 0118 951 6878 or at [brigid.o'leary@blandy.co.uk](mailto:brigid.o'leary@blandy.co.uk)

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