

Equality Matters

Newsletter for the Police Federation | Autumn 2013

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Welcome to the Autumn 2013 edition of Equality Matters

2013 has continued to be a year of change in employment law rights and procedures. In this edition we catch up with some of those recent changes including the introduction of Employment Tribunal fees and the repeal of the specific provisions that protected employees from third party harassment. We also take a look at the impact of Employment Tribunal fees on new case numbers in the Employment Tribunal system as well as the latest statistics about Employment Tribunal awards in discrimination cases.

We cast a spot light on disability discrimination claims that can arise in the misconduct arena and feature a recent Employment Tribunal success on this point.

We also look at some recent developments in relation to surrogacy and the right to maternity leave.

Finally we provide our usual round up of current Employment Tribunal cases.

This update is aimed at Equality Representatives, but please feel free to circulate to any other Federation members. We would welcome any feedback or suggestions for subjects you would like to see covered in future editions. Please send any feedback to:

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Please copy any comments to the Secretary of the JCC Equality and Diversity Sub-Committee **Ian Trueman:** ian.trueman@polfed.org

Misconduct and the duty to make reasonable adjustments

We often deal with cases where unsatisfactory attendance and unsatisfactory performance procedures impact on officers with disabilities. However, misconduct proceedings can overlap with disability issues too.

We recently conducted a successful Employment Tribunal claim for a disabled officer where the Employment Tribunal accepted that, in light of the officer's mental health condition, gross misconduct proceedings should have been discontinued and not pursued to a full hearing.

The officer in question was working restricted duties due to long term mental health issues. During a difficult meeting with her line manager she experienced a panic attack which caused her to try to flee the office. Her manager sought to block the door to prevent her leaving and the officer took hold of his arm, causing a minor injury. The officer was investigated and provided a clear account of her panic attack, together with supporting evidence from her GP. Despite this gross misconduct proceedings were brought and only discontinued at the final hearing itself, a year later. By this time medical evidence had been obtained from occupational health supporting the link between the officer's panic attack and her actions. The Employment Tribunal

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held that this psychiatric evidence should have been obtained much earlier in the proceedings. The proper response to that psychiatric evidence should have then been to discontinue the gross misconduct proceedings. The officer was awarded compensation for her injury to feelings. The Employment Tribunal also made recommendations that:

- ▶ All PSD personnel were to receive training in disability issues; and
- ▶ The Force's misconduct policies and procedures were to be fully impact assessed in respect of disability issues.

Disability discrimination claims ultimately turn upon their own particular facts, but the case serves as a reminder that where an officer with a disability is facing misconduct proceedings, that any questions of disability are fully raised and addressed at an early stage of the investigation. This is particularly important where there is a link between the alleged misconduct and the disability and also where reasonable adjustments are required to assist the officer to participate effectively in the misconduct process.

Tribunal statistics and the impact of Employment Tribunal fees

Statistics for compensation in discrimination cases for 2012/13 have been published. Numbers of cases and median awards (to the nearest £100) by tribunals in discrimination cases were as follows:

Protected characteristic	Number of cases going to a hearing on remedy	Median award	Notes
Race	51	£4,800	Award exceeded £20k in only 4 cases
Sex	113	£5,900	
Disability	82	£7,900	
Religion/belief	10	£4,700	
Sexual orientation	6	£6,300	
Age	24	£4,400	

The vast majority of cases settle earlier in the proceedings and do not make it to a remedy hearing. However the statistics again show that average Employment Tribunal awards are for relatively modest sums of money.

Another set of recently released statistics that make interesting reading are an ad hoc statistical release by the Ministry of Justice on the number of Employment Tribunal claims issued between July 2013 and September 2013 following the introduction of Employment Tribunal fees on 29 July 2013.

In most cases now an issue fee of £250 must be paid and a subsequent hearing fee of £950. So has this had the anticipated impact on the number of claims being brought?

The initial impression is that it has. The release states that an average of 17,000 claims were lodged every month between January and May 2013. In June 2013 this jumped to 25,000, potentially because of a rush to get claims lodged before fees were introduced. In July there were 17,000. In August 2013, the first month after the introduction of fees this plummeted to 7,000. In September 2013 there were 14,000.

The statistics must be viewed with some caution as they can be skewed by multiple claims. The Ministry of Justice have also explained that the figures may increase as claims are only recorded in the statistics once the fee has been paid or fee remission granted. As the remission process can take some time the figures could be revised upwards. However, on the face of it the predicted impact has been proved true.





Surrogacy Rights

Where cases go to the European Court of Justice, an Advocate General gives a preliminary view on a case before it goes before the full court. There have been two recent Advocate General opinions on surrogacy rights.

In a case known as C-D v S-T, Advocate General Kokott gave her opinion that an intended mother who receives a baby via a surrogacy arrangement has the right to maternity leave under the Pregnant Workers Directive. This is regardless of whether she intends to breastfeed the child. Her maternity leave cannot be less than the compulsory leave period of two weeks but, aside from that two-week period, a surrogacy arrangement cannot result in a doubling of the maternity leave entitlement arising from a child's birth. Therefore, the leave taken by the surrogate mother must be deducted from that of the intended mother, and vice versa.

On the same day, Advocate General Wahl gave his opinion in another surrogacy case, Z v A Government Department and the Board of Management of a Community School. He gave a contrary view. He suggested that the health and safety protection provided by the Pregnant Workers Directive is intended only for women who give birth to a child, and should not be read as providing maternity leave to a mother who has had her genetic child via a surrogacy arrangement. He said that otherwise that would be inconsistent with the treatment afforded to adopters and fathers/partners.

The European Court of Justice will have to resolve this issue in due course. The domestic law is due to be changed in 2015 to allow those who become parents through surrogacy the same rights as adopters.

What's in a name?

Since July 2013 compromise agreements have been renamed "settlement agreements" in all relevant pieces of employment legislation. Other than their name the purpose, content and effect of settlement agreements have not changed!



Springing ahead

There are more changes to come in April 2014. In particular:

- ▶ The introduction of Acas early conciliation
- ▶ The repeal of discrimination questionnaires.

We will cover these in more detail in the next edition of Equality Matters.

Third Party Harassment Law repealed

The Equality Act 2010 used to contain a provision making an employer vicariously liable for harassment by a third party (such as a member of the public) (a) that third party had harassed an employee on at least two previous occasions; and (b) the employer had failed to take reasonably practicable steps to stop the harassment.

The provision was repealed from 1 October 2013. Where an officer has been the victim of harassment related to a protected characteristic by a third party, and inadequate steps have been taken to stop it happening, it is however still worth considering obtaining some advice. In some circumstances, for example, a failure to take action by an employer to address the behaviour could amount to harassment in its own right.





Equality Case Watch

Disability discrimination

We act for several officers with dyslexia who allege that they have been disadvantaged in promotions processes, and in particular that there have been failures to make reasonable adjustments.

We are acting for groups of disabled officers affected by workplace reorganisations who argue that their moves and the process adopted amounted to disability discrimination.

We have received written reasons in a successful case heard by the Cardiff Tribunal where a disabled officer was ill health retired against his wishes. Despite the austerity arguments put forward by the Force the tribunal accepted all the Claimant's argument that there was scope to retain him in a police officer post, either by allowing him to stay within his own post before it was transformed to a civilian role, moving him to a police officer vacancy, or moving an able bodied officer to create a suitable role.

We continue to see a number of cases where disability issues overlap with unsatisfactory performance and unsatisfactory attendance procedures.

Sex Discrimination

We are continuing to see cases concerning vicarious liability for seconded officers who are subjected to harassment whilst on secondment. In a recent case at a preliminary hearing it was determined on the facts of that case that liability lay both with the Home Office and with the officer's home Force. Settlement of the claim was then negotiated.

Another ongoing trend are flexible working disputes following workplace reorganisations and resulting restrictions on shift patterns (such as requirements to match hours and rest days with the individual's team and increased numbers of late shifts and night shifts). These are giving rise to differing types of claims including indirect sex discrimination claims, maternity discrimination claims (where there are skills audit processes which disadvantage officers absent on maternity leave) and disability discrimination claims.

We are currently running a sex discrimination claim and an associative pregnancy discrimination claim for a male officer who was incorrectly told he was not entitled to additional maternity support leave.

Sexual Orientation

We are acting for an officer in a sexual orientation discrimination claim in which he alleges he was subjected to homophobic remarks, and was overlooked for courses, subjected to overly intrusive supervision and heavy handed disciplinary allegations because of his sexual orientation.

Race Discrimination

We are continuing to act for several officers in race discrimination claims where it is alleged that they were subject to a disproportionate disciplinary investigation for discriminatory reasons.

If you need further assistance, in the first instance please contact your local Joint Branch Board.

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