# Equality Matters

Newsletter for the Police Federation | Spring 2013

Slater & Gordon Lawyers

FORMERLY

Russell Jones & Walker

## Welcome to the Spring 2013 edition of Equality Matters.

It's been a long hard winter in terms of the Government's continued focus on employment law. There are however a few green shoots of good news and in this edition we look at some positive changes to whistleblowing protection, the European Court of Human Rights' recent decision regarding religious belief and increases to the rates of statutory maternity pay, adoption pay and paternity pay. Sadly the ill wind still partly lingers and we look also at the downside to the whistleblowing reforms, and the Government's continued plans to introduce Employment Tribunal fees.

We feature a recent Slater & Gordon poll which looked at the levels of discrimination faced by women returning from maternity leave. We also 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 suggestions/ feedback to:

**Emma Hawksworth: ehawksworth@slatergordon.co.uk**
**Rachel Harfield: rharfield@slatergordon.co.uk**

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

# Whistleblowing Alert

The Enterprise and Regulatory Reform Bill is still working its way through Parliament. It contains a "mixed bag" of improvements but also added difficulties for those wishing to obtain protection when blowing the whistle in the workplace. The Government intends to implement the changes in the Summer of 2013.

The amended legislation will make an employer vicariously liable where a co-worker victimises a colleague because they have "blown the whistle." A 2012 decision of the Court of Appeal identified a loophole in the whistleblowing law meaning that it is currently very difficult for a whistleblower who has been victimised by a colleague to claim redress, even where line managers have done little to stop the behaviour. The amendments to the law will bring whistleblowing in line with the other discrimination legislation. A worker may be personally liable if they subject a colleague to a detriment on the ground that the worker has made a protected disclosure. In turn the employer will be vicariously liable for the actions of its workers unless it can show it took all reasonable steps to prevent the victimisation.

There are however some other changes which aren't as good news. The legislation is also being amended to introduce a new requirement that a disclosure must, in the reasonable belief of the worker making the disclosure, be "in the public interest." The categories of wrongdoing that can form a protected disclosure are drafted widely. They include complaints about a breach of a legal obligation, which can include complaints about an individual's personal entitlement (for example the pay an individual may be entitled to). The Government considers that workers who blow the whistle about essentially private matters, such as their own employment entitlements, should not be protected by the legislation.

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They are therefore introducing this public interest test. The legislation does not, however, define what is meant by the "public interest."

Fears have been expressed that the change introduces another hurdle that will stand in the way of workers who want to speak up and that there will be extensive satellite litigation over what is meant by "in the public interest." It is not unusual for there to be mixed reasons behind why someone has "blown the whistle." There is also no clear dividing line between what is a matter of private interest and what is a matter of public interest.

With the introduction of the public interest test, the Government is removing the requirement for a disclosure to be made in "good faith." Again, however, there is a sting in the tail. If it appears to a tribunal that a protected disclosure was not made in good faith, the tribunal will be given the power, if it considers it just and equitable, to reduce any award of compensation by up to 25%.

The introduction of vicarious liability is clearly good news, but on balance whistleblowers still have a careful path to tread to ensure they are properly protected by the law.

# Religious Discrimination Case report – Eweida and others v UK

The European Court of Human Rights in Strasbourg has given an important judgment in four UK cases concerning religious discrimination.

**Background**

Ms Eweida worked for British Airways, and Ms Chaplin as a geriatric nurse. Both had worn crosses at work, in breach of their employers' respective uniform policies.

Ms Ladele was a registrar, whose employer insisted that she perform civil partnership ceremonies. Mr McFarlane provided counselling services for Relate. He was dismissed for refusing to provide counselling for same sex couples.

All four had brought claims of religious discrimination in the employment tribunal which were unsuccessful, either at tribunal or on appeal. They then brought claims in the European Court of Human Rights against the UK, arguing that their Article 9 rights had been breached.

Article 9 of the European Convention on Human Rights provides that there is a right to freedom of thought, conscience and religion. The right includes a qualified right to manifest religion or belief.

**The Court's decision**

The only one of the four claimants to be successful was Ms Eweida, who won her case by a majority of five judges to two. Ms Ladele lost her claim by a majority of five to two. Ms Chaplain and Mr McFarlane's claims were unanimously rejected.

In Ms Eweida's case, the Court held that British Airways' desire to protect its corporate image did not justify the interference with her right to manifest her religious belief. Ms Eweida's cross was discreet, and there was no evidence that the wearing of religious items such as turbans and hijabs by other employees had any negative impact on British Airways' brand.

On the other hand, the Court rejected the claim by Ms Chaplin. Her employer, an NHS trust, relied on health and safety reasons to justify the refusal to permit her to wear her cross. The Court accepted that the trust's reasons were sufficient to justify the interference with her Article 9 rights.

The Court reached the same decision in respect of Ms Ladele and Mr McFarlane. Whilst they had suffered interference with their rights under Article 9, the interference was justified. Their employers' policies aimed to secure the rights of others, which are also protected under the Convention, and the Court allows wide scope when balancing competing Convention rights.

**Implications**

In upholding Ms Eweida's complaint, the Court departed from its previous case law, which suggested that an individual employers' requirements cannot interfere with religious freedom, since employees are always entitled to resign and seek work elsewhere. The new approach here is to weigh that possibility in the balance when considering whether an employer's workplace restriction was proportionate.

Another interesting feature of the decision in this case is the court's focus on religion as a matter of individual thought and conscience. This contrasts with the emphasis which has been put in the domestic law on religious discrimination on the need to show disadvantage to a group.

These shifts are likely to have a significant effect on future claims for indirect religious discrimination cases in the employment tribunal.

# Maternity Discrimination. Don't suffer in silence

Having a baby is supposed to be a happy time but our experiences suggest that not all women who are pregnant or on maternity leave have an easy time in work. Slater & Gordon therefore recently commissioned a poll to survey the experience of new mothers returning to work.

The poll included experiences of women across all job sectors. 7.6% of the women polled worked in public services.

Findings that are relevant to the police service include:

- 40% of maternity returners said that when they returned to work after maternity leave they returned to a changed position. Of those 40% almost half (45.53%) felt that the job they returned to was somehow worse than the job they departed from
- Of the 40% who saw changes to their job, more than a quarter had their request for flexible working arrangements refused (26%), whilst almost 2 in 5 of all women polled were refused the right to part time hours (17.5%)
- More than 1 in 10 new mothers suffered either physical (12%) or mental (11%) ill health as a result of the changes, with almost 1 in 5 (18%) saying their finances suffered as a result
- A small number (4%) said their relationship with their baby's father broke down as a result of the changes to their job
- Incredibly, of the 45% of women who saw changes to their position, more than half of these women suffered in silence because they were either unsure of their rights (25.8%), they didn't know where to turn for help (14.55%), or they thought seeking help would damage their future career prospects (11.92%). Almost 1 in 5 (18.18%) took no action because they deemed the demands of new motherhood to be a greater priority
- Only 1 in 10 (10.71%) of those who saw changes to their position sought advice from their HR department, with a mere (3.64%) seeking legal advice
- Upon returning to their jobs, almost a third of new mothers (30.51%) felt like they didn't fit in at work anymore and 1 in 3 (36.97%) missed their babies terribly. Almost 2 in 5 (17.37%) felt they lacked the support they needed, with 18.18% feeling like no one understood how it is to juggle the demands of new motherhood alongside the demands of working life. Almost a third (29.49%) said they started resenting coming into work and nearly 1 in 10 (9.09%) said the stress of juggling the duties of new motherhood with work affected their relationship with their partner.

These statistics show the real cost of discrimination to new mothers both in human as well as financial terms. They also show that too many women suffer in silence. New mothers are especially vulnerable since it is often the first time they are wholly responsible for another life.

The Equality Act protects pregnant women and women on maternity leave from being subject to unfavourable treatment because of their pregnancy/maternity. A refusal of a flexible working application may also give rise to an indirect sex discrimination claim. The legal protections are there. If you feel you are being discriminated against please do speak to your JBB Equality Representative.

# Legal Update

### Maternity, Paternity and Adoption Pay

The weekly rate of statutory maternity, paternity and adoption pay rose to £136.78 a week from 7 April 2013. Statutory sick pay rose to £86.70 from 6 April 2013.

### Employment Tribunal Fees

In our last edition we reported on the Government's plan to introduce Employment Tribunal fees both when a claim is issued and when a hearing date is set. The Government indicates that it still intends to press ahead with the introduction of fees in the Summer of 2013 but the final details are still unknown. We will report further in our Autumn 2013 edition.

### Acas Early Conciliation

The Government still intends to introduce compulsory pre-claim conciliation with ACAS before most employment tribunal claims are issued. The final details are awaited but the current framework suggests that before lodging their employment tribunal claim a prospective claimant will need to provide ACAS with certain prescribed information. This will trigger a month long conciliation process. If a settlement is not reached then the ACAS officer will issue a certificate which the claimant will need in order to start his or her tribunal claim. The Government and ACAS state that Early Conciliation will be introduced in April 2014.

**Please note:**
On 11th February 2013 Russell Jones & Walker became Slater & Gordon Lawyers however our commitment to the Police Federation remains unrivalled.


# 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

The Cardiff Employment Tribunal recently found in favour of an officer with a knee condition who was ill health retired against his wishes. We argued that with reasonable adjustments he could be retained. The Tribunal's written reasons are awaited.

We continue to see a steady stream of cases concerning officers with dyslexia, including applications for reasonable adjustments to internal promotion processes.

Another key trend is an increase in the use of UAP/ UPP, particularly involving officers on sick leave, which gives rise to disability discrimination concerns.

We are also acting in a case concerning an officer dismissed for misconduct despite clear medical evidence that she was unwell at the time of the incident, arguing that reasonable adjustments should have been made.

## Discrimination by association / perception

We act for a carer of a disabled child in an associative discrimination claim. He has been refused term time working needed for the care of his son. The hearing is due to be held in late April 2013.

We are acting for an officer who is alleging that she has been discriminated against on grounds of perceived disability. The officer says that contrary to medical evidence the Force has concluded she is suffering from certain medical conditions and has prevented her return to work on this ground.

We recently succeeded in an employment tribunal claim for an officer with a serious on-going medical condition where the Force refused to follow the recommendation of the FMA in relation to the number of days the officer would be allowed for sickness absence. The tribunal agreed that the 13 days allowed was not a reasonable adjustment.

We also had success before the employment tribunal in a homeworking case. The officer's department was centralised and he could not, due to his disability, travel to the new location. The officer had suggested that he work remotely and that he could attend the new location 2 days a week. The Force refused and ill health retired him. The employment tribunal accepted that remote working would be an inconvenience to the Force but that the disruption would not be to such an extent that the adjustment was unreasonable. The claim therefore succeeded.

## Sex Discrimination

We continue to see an increase in sex discrimination flexible working cases arising out of Force reorganisations. We have also seen linked maternity discrimination claims where skills audits seemingly disadvantage officers who have been absent on maternity leave.

## Race Discrimination

We are representing the claimant in a race discrimination claim in which it is alleged that he was discriminated against in a disproportionate disciplinary investigation.

## Age Discrimination

We are pursuing an appeal to the EAT in an age discrimination claim where it is argued that the claimant was selected for redeployment out of his specialist department based on a misplaced assumption that he was intending to retire.

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

W: slatergordon/policelaw

Our offices:
Birmingham, Bristol, Cardiff, London, Manchester, Milton Keynes, Newcastle, Sheffield, Wakefield & Edinburgh - Associated office.