Albion Chambers, Broad Street, Bristol BS1 1DR
and 29 Park Street, Taunton TA1 4DG

Telephone 0117 927 2144
Fax 0117 926 2569
DX 7822 Bristol

clerks@albionchambers.co.uk
www.albionchambers.co.uk

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Albion Chambers EMPLOYMENT AND PROFESSIONAL DISCIPLINARY TEAM NEWSLETTER

'He' said, 'she' said...

The recently reported (https://www.theargus.co.uk/news/17502815.stop-calling-me-sir-trans-woman-hits-out-at-rail-staff/) incident of transgender woman Katy Yeoman seeking compensation for allegedly being referred to as 'sir' by rail staff raises a potential issue relating to the interaction of s.26(4) of the Equality Act 2010 and the Equality and Human Rights Commission Employers Equality Act 2010 Code of Practice.

What happened?

In this case Ms. Yeoman alleges that Southern Rail staff referred to her by the wrong pronoun on two separate occasions:

- On one occasion she says that after trying to speak with a member of staff she was requested to, *"take a seat sir"*.
- On the second occasion Ms. Yeoman was seeking information relating to the departure of her train and was directed to, *"platform number two sir"*.

Southern Rail have denied any wrongdoing. Ms. Yeoman is seeking £2,500 from the Rail Ombudsman in recognition of the upset caused to her.

Legal framework

A transsexual person is someone who has the protected characteristic of gender reassignment. 'Gender reassignment' is afforded to those people who, by virtue of s.7 of the Equality Act 2010, propose, have started or have completed a process to reassign their sex.

Interestingly (and in a departure from requirements of the Sex Discrimination Act 1975), some form of physiological or medical intervention is no longer required. It is sufficient for a person to propose that they will undergo gender reassignment to the gender they identify with, even if there hasn't been any medical procedure of reassignment.

In order to gain protection under the EQA 2010 a transgender person needs only to demonstrate that they have proposed to undergo a process to change his or her sex. This process does not have to be irrevocable and can include such things as changing the mode of dress or 'socially transitioning'.

For children this can arise even in circumstances where they are too young to understand what reassigning gender means (see the EHRC technical guidance for schools in England).

Equality and Human Rights Commission Employers Equality Act 2010 Code of Practice

The Equality and Human Rights Commission Employers Equality Act 2010 Code of Practice (the "Code") sees the 'process' as being very much open to personal interpretation and is not linked to any medical process (see paras 2.23 and 2.24 of the Code).

The Code provides an example to illustrate this point, and describes a hypothetical situation where a female who decides to spend the rest of her life as a man, but does not undergo any medical procedure to achieve this, would still be protected under the EQA 2010. The fact that this person can *'successfully pass as a man without the need for medical intervention'* will be enough.

Unhelpfully, what constitutes 'passing as a man' is not elaborated on; however, in an age of 'gender fluidity', it is likely open to many personal interpretations. It is worth highlighting that the Code is statutory and provides guidance as to how the EQA 2010 is to be interpreted.

'Proposed' or 'thought about'?

The key component is that the person has 'at least proposed to undergo gender reassignment'. This can take the form of a conversation with friends and counselling from a therapist as to the process.

The necessity of a proposal seeks to establish a form of conviction, it would seem, and establish a clear divide between those people who may wish to cross-dress, as an example, and those who are making a determinative choice over their gender. However, there are no strict guidelines on the method of 'proposal', and, even if this process is not completed, the individual will be protected under the EQA 2010 from, amongst other things, being harassed.

Harassment

S.26(1) of the EQA 2010 provides this protection and arises where someone is subjected to unwanted conduct which has the purpose or effect of violating the person's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the individual.

Unlike its statutory cousin, the Protection from Harassment Act 1997, no course of conduct is required. One incident will suffice (see *Reed v Steadman* [1999] IRLR 299) as long as it is determined to have the effect at 26(1) of the EQA 2010, taking into account:

- the perception of the subject of the harassment;
- the circumstances of the case generally; and
- whether it was reasonable for the conduct to have the effect complained of (section 26(4) of the EQA 2010).

But what about the Southern Rail case?

In the above situation between Ms. Yeoman and Southern Rail staff, would the use of the wrong pronoun constitute

harassment for the purposes of the EQA 2010?

The case of *A De Souza E Souza v Primark Stores Limited* (2017) provides a little illumination on the point. This case saw a transgender claimant awarded the sum of £47,433 for injury to feelings based on allegations of harassment and direct discrimination.

In this case there were a number of allegations regarding harassment. In one allegation (Allegation 2), Ms. de Souza claimed that a colleague referred to her as "Alexander" in front of customers and another colleague, despite Ms. de Souza requesting that she be known as "Alexandra". In another allegation (Allegation 7), a colleague told an electrician that he could enter the ladies' toilets as there were "no ladies in there", despite being aware that Ms. de Souza was present. Both of these allegations were upheld and considered to be harassment contrary to s.26 of the EQA 2010.

In the first case, the colleague who referred to Ms. de Souza by the male version of her name was found to have known that she was transgender and 'could see that the claimant was choosing to present as a woman'. The action of Ms. de Souza's colleague was considered to be unwanted conduct which had the purpose of violating Ms. de Souza's dignity and creating an intimidating, hostile, degrading, humiliating or offensive environment for her. Similar findings were also made in regard to Allegation 7 and which, but for s.212 of the EQA 2010, would have also been considered to have been direct discrimination.

A key feature of the findings of the employment judge in relation to these allegations was the knowledge of Ms. de Souza's gender history by her colleagues. Knowledge, certainly in this case, would appear to be keystone by which 'purpose' was established.

Let's import Ms. Yeoman's situation into an employment situation for a moment and assume that her circumstances mirrored that of a hypothetical new starter where, unlike the de Souza case, her former gender had not been divulged and that they had only recently proposed to reassign their gender.

Would the conduct complained of amount to harassment contrary to s.26 EQA 2010 in that context?

Under section 26(4) of the EQA 2010, the question as to whether the conduct has the necessary effect is to be assessed from the subjective viewpoint of the new starter. This is subject to the following caveat: the conduct will only be considered to have the effect on the new employee as set out at s.26(1)(b) where it was 'reasonable for the conduct to have that effect', (section 26(4)(c)). As long as the offence is unintentional there will be no harassment if our starter is simply being 'hypersensitive' (acknowledging that Tribunals must make such determinations).

Our 'foot-in-mouth'-prone staff members would undoubtedly adopt the position that no offence was meant. But what if this was disputed? How would our hypothetical employee establish some form of intent?

Remember, that to gain protection it is only necessary that a person 'proposes' that they will undertake gender reassignment. Also, the example at para 2.24 of the Code contemplates that someone who 'successfully passes as a man without the need for any medical intervention' will have the protected characteristic of gender reassignment.

A tension

On one hand, our employee would first need to establish that they had the protected characteristic of transgenderism by demonstrating that they had proposed to undergo the process of gender reassignment, and were, if the guidance within the Code is to be considered, 'passing' as their chosen gender. On the other hand, in order to establish intent and avoid a finding of being too sensitive, they would, perhaps, also have to argue the potentially conflicting position that knowledge of their transgenderism could be inferred from how they presented. This argument, on the face of it at least, appears to undermine the example given in the Code and the guidance upon which interpretation of the EQA 2010 is to be based.

Additionally, given the very subjective method by which the process of changing gender can be commenced, the expanding number of gender variants (Facebook added 71 options in 2014) and the concept of gender fluidity, is there not a material risk of a clumsy but innocently made comment being subjectively misconstrued as a personal slight? These will all be matters that a tribunal, and those advising both sides, must grapple with, and the answers aren't easy.

Not an easy decision

In Ms. Yeoman's case, if imported into an employment situation, with the absence of some compelling evidence to the contrary, it is unlikely that the members of staff misusing the pronoun would be found to have harassed her. The fact that the comments had been made by two staff members seemingly independent of one another suggests that it was based upon error rather than intent. But if she remained adamant that it was their intention to use the pronoun in a pejorative sense, and in the absence of actual knowledge of her transgenderism by those staff members, how could she advance her argument without potentially eroding the guidance within the Code? Furthermore, if someone is seeking to establish that they are 'passing' as their chosen gender, by whose standard is this measured, and who is going to be bold enough to actually make that determination?

Darren Stewart

Disability, deadlines and data

Time limits, how strictly must they be adhered to?

The most recent case shedding some light on this question is *J v K and another (Equality and Human Rights Commission intervening)* [2019] EWCA Civ 5.

The facts

The appellant had previously issued a claim in the ET. His claim was struck out. He was ordered to pay the respondent's costs of £20,000. If he wished to appeal he had to do so within 42 days of the ET's reasons being sent. The deadline was 4pm on the final day.

The appellant sent his appeal notice and accompanying documents five minutes before the deadline. The email wasn't received as the file was over 10mb, which is the maximum capacity the server can deal with. The size limit is stated in a document on the gov.uk website called *I want to appeal to the Employment Appeal Tribunal (T440).* The document is not easily accessible and requires appellants to find the relevant page of the website.

The attachments were resent as

smaller files. They were received by the EAT by 5pm but after 4pm. As it was after the 4pm deadline they were treated as having been received on the next working day.

Application to extend and the appeal

The appellant was notified his appeal was out of time. He applied for an extension. The judge who heard the application accepted that the appellant was suffering from a degree of mental ill health, but dismissed the application to extend citing the usual 'strict timescales' rationale.

The appellant was given leave to appeal to the Court of Appeal. The appeal was limited to the following two grounds:

- *whether the statements of principle at [36] of the EAT's judgment needs modification to take account of the duty to make reasonable adjustments under the Equality Act 2010; and if so whether reasonable adjustments should have been made for the Appellant;*
- *whether the combination of (a) the very modest delay of one hour in transmitting the required documents to the EAT and (b) the reason for the delay being the limited size of the EAT's inbox ought to have amounted to exceptional circumstances such as to require an extension of time in order to comply with the overriding objective.*

The law on extensions was set out briefly; where there is no good reason for missing the deadline, an extension will only be granted in exceptional circumstances. This applies even where the deadline is missed by a very short time. The 'exceptional circumstances' hurdle is set high.

What should the claimant have known?

Should the appellant have known of the size limit as a result of it being stated in T440? A covering letter points parties to a document called *The Judgment* and within that document T440 is referred to.

Unfortunately, the appellant never received a covering letter.

In the absence of the letter, Lord Justice Underhill concluded that the ordinary layman, knowing that the EAT accepts service by email, would reasonably expect the server to be able to handle the files sent.

Cutting it fine

The appellant waited until five minutes before the deadline to send his documents. Although this is a very important factor to take into account, the obstacle in this case was the EAT's own antiquated system.

It would be a very different situation if the obstacle was extraneous to the EAT. As service was effected within an hour of the deadline, this was held to be an exceptional case 'where an extension was required as a matter of justice'.

The effect of mental health

The appeal was allowed without considering the appellant's mental health but some general guidance was given.

Mental health or other disability will always be an important factor when considering whether to grant an extension, irrespective of the principles in the Equality Act 2010. To apply the Equality Act to such a situation would deprive those who have been ill for less than 12 months from having their circumstances considered, which is unsatisfactory.

Three specific points were made:

- When an individual alleges that they couldn't comply with a time limit due to mental ill health, the Tribunal must decide on the evidence if they were suffering from mental ill health at the material time. The evidence will preferably be in the form of a medical report.
- If the evidence establishes that an individual is suffering from mental ill health, does the condition explain or excuse the failure to comply with the time limit? The EAT often takes into account an individual's ability to take other action during the relevant period.
- If the Tribunal finds that the failure to comply with a time limit was the result of mental ill health, justice will usually require an extension. While all reasonable accommodations must be made, the Tribunal must also consider the interests of the other parties.

To sum up

Where does this case take us? Well, time limits are still strictly applied. There may be some leniency where a delay is the result of the EAT not an extraneous factor. If T440 had been well publicised, the outcome would likely have been very different.

Regarding mental ill health, if this is a factor we want the Tribunal to consider when an extension is required, we must be armed with evidence to prove there is a condition affecting ability to comply. Failure to prove there is a disability within the meaning of the Equality Act is not a bar to using mental ill health to apply for an extension. Where lawyers are acting for a party, that will likely be a factor going against the grant of an extension. As always, it is a balancing exercise.

Lucy Taylor

Redundancy during maternity leave and beyond

New proposals for greater protection

On 25 January 2019, the Department for Business, Energy and Industrial Strategy (BEIS) issued a Green Paper to consult on proposals to extend the redundancy protection for pregnant women (and new parents) once they have returned to work.

Sceptics could, perhaps, be forgiven for suggesting that the timing of the consultation had far more to do with assuaging the concerns of MPs about the loss of EU employment rights and protections in the run up to critical Brexit votes in the House of Commons, than a real interest in reform. However, the consultation, which is scheduled to close on 5 April 2019, was stated in the Green Paper to be in response to not only the Taylor review of modern working practices, but also research (published by BEIS and the Equality and Human Rights Commission) demonstrating that pregnancy and maternity discrimination, while unlawful, was still prevalent.

The current position

Before considering the proposed changes to the law, it is perhaps pertinent to consider the current position for women who are pregnant and/or on maternity leave and who are at risk of redundancy. This is a complex area of law but, in summary, the current legal protections for pregnancy and maternity are enshrined in two pieces of primary legislation: The Equality Act 2010 ("EqA 2010") and

The Employment Rights Act 1996 ("ERA 1996").

The EqA 2010 deals with unlawful discrimination whereas the ERA (and the regulations made under it) sets out the right not to be unfairly dismissed and the rights of woman on ordinary or additional maternity leave facing redundancy.

Discrimination

Under the EqA 2010, pregnancy and maternity are protected characteristics and during the 'protected period' women who are pregnant or have recently given birth are explicitly protected from discrimination. Section 18(2) – (4) sets out that a woman is discriminated against if she is treated unfavourably as a result of:

- the pregnancy or because of illness suffered by her as a result of it;
- her being on compulsory maternity leave; or
- her exercising or seeking to exercise, or has exercised or sought to exercise, the right to ordinary or additional maternity leave.

Currently, this 'protected period' runs from the start of the pregnancy and ends when the woman returns to work at the end of her ordinary maternity leave, or additional maternity leave (if she is entitled to either form of leave) or, if the woman is not entitled to maternity leave, two weeks after the end of the pregnancy.

It is also unlawful to treat women less favourably because of her pregnancy, maternity or breastfeeding after the end of the protected period where this amounts to sex discrimination or where the less favourable treatment stems from a decision made during the 'protected period', even if the implementation of those decisions does not take effect until after the end of the protected period.

Unfair dismissal

Redundancy is a potentially fair reason for dismissal under the ERA 1996. However, the redundancy must be genuine and be the reason or principal reason for the dismissal. Dismissals where the reason (or principal reason) relates to:

- pregnancy, childbirth or maternity;
- ordinary, compulsory or additional maternity leave;
- parental leave or shared parental leave; or
- ordinary or additional paternity leave

…will be automatically unfair under section 99 ERA 1996, even if the usual qualifying period of continuous employment is not satisfied.

Redundancy Protection under MPL 1999

Regulation 10 of the Maternity and Parental Leave etc. Regulations 1999 (MPL 1999), made under the ERA 1996, specifically deals with the situation where a woman is on ordinary maternity leave ("OML") or additional maternity leave ("AML") and facing redundancy.

In such a situation (and where it is not practicable for the employer to continue to employ a woman under her current contract of employment), Regulation 10 imposes an obligation on the employer to offer the woman (and not just invite them to apply for) a suitable alternative vacancy with the employer or associated employer where one is available. The vacancy must be both suitable for the woman to do in the circumstances and the terms and conditions must not be "substantially less favourable" than her previous role.

The rationale of Regulation 10 is to give women on OML/AML priority over other employees who are also at risk of redundancy. This is intended to challenge the position where a woman on maternity leave is automatically offered redundancy first before other employees, who are often more likely to be male.

The protections afforded by Regulation 10 extend further than the protections otherwise afforded under the EqA 2010 and, as the EAT emphasised in *Wainwright v Sefton Borough Council* [2015] IRLR 90, a breach of Regulation 10 does not necessarily entail discrimination under section 18 of the EqA 2010. Therefore, a woman who has returned to work will not necessarily be able to rely on the EqA if she is then faced with redundancy.

The Government's proposals

Given that breach of Regulation 10 does not necessarily entail breach of the EqA, the protection against redundancy is lessened when the woman actually returns to work as compared to that she enjoyed while on maternity leave. In principle, therefore, an employer could simply wait for OML/AML to end and the woman to return to work before making the new mother redundant, without worrying about the obligations under Regulation 10.

The Government proposals in the Green Paper are aimed at promoting a more uniform position throughout pregnancy, maternity leave and the period of return to work. The Green Paper sets out the belief that consolidation or greater uniformity might make it easier for individuals to understand and then exercise their rights.

The solution proposed to these issues in the Green Paper is to extend the scope of current protection against redundancy provided under MPL 1999 to all pregnant women (in addition to those on OML/AML) and also to new mothers for six months after they returned to work.

Comment

The law as it currently stands is very clear. It is unlawful to make a woman redundant due to pregnancy or maternity. Any dismissal on the alleged grounds of redundancy which is actually by reason (or principle reason) of pregnancy, childbirth or maternity, is automatically unfair.

Where one is considering the redundancy protections for women who have returned to work after maternity leave, things become more difficult. It is one thing to say that women who are at risk of redundancy but are on OML/AML should have protections in place, quite another to say that all those who have returned to work should continue to be protected for a significant period of time at the potential expense of their colleagues who are neither pregnant nor returning for maternity leave, regardless of any other considerations.

When selecting employees for redundancy, there is a clear and fundamental obligation on the part of the employer to apply fair and objective selection criteria. Any selection criteria which is less favourable to a woman because of her pregnancy, maternity or breastfeeding after the end of the protected period is likely to amount to sex discrimination and be unlawful. That is to be desired.

However, legally enshrining positive discrimination in a redundancy situation in favour of pregnant employees or those returning from maternity leave on that basis, and that basis alone, is perhaps much more difficult to justify.

It will be interesting to see the results of the consultation and what, if any, changes result.

Philip Smith

Employment and Professional Disciplinary Team Seminar

‘Putting the horse before the cart’

This year’s Employment and Professional Disciplinary Team seminar will focus on all things ‘preliminary’. The team at Albion Chambers propose to delve into the issues that can make or break your case at the outset, looking at issues such as jurisdiction, status and costs to give you some invaluable tools to present or defend your case.

We will also be joined by one of the Resident Employment Judges of Bristol who will give an update on the work of ET ‘Craft’ and the use of judicial mediation.

Topics and speakers:

- **Subject Access Requests, A Sword and Shield –** Richard Shepherd
- **TUPE –** Alec Small
- **Deal or No Deal, Strike Outs, Deposit Orders and Costs Warnings –** Lucy Taylor
- **Disability Discrimination Claims, Preliminary Considerations for Primary Advantage –** Darren Stewart

Registration is at 9.00am and the seminar will commence at 9.30am. The cost of the day is £75 plus VAT per delegate, and includes tea, coffee and lunch. However, delegates who book and pay for a place before Friday, 17 May will receive a £20 discount.

Places on this annual seminar are in increasingly high demand, so you are encouraged to book early. Please click here to book your place(s) or to enquire about further information.

WE’RE RECRUITING

In recent years we have been enjoying a significant increase in our employment and general civil practices.

As part of our strategy for growth and development, and to meet an ever-increasing workload, we are inviting applications from third-six pupillage and junior tenants to our civil team.

Applications by those wishing to cross-qualify are welcomed.

If you would like any further information or a confidential chat please contact Richard Shepherd (richard.shepherd@albionchambers.co.uk) or Paul Fletcher, Chambers Director (paul.fletcher@albionchambers.co.uk).

Darren Stewart joins Albion Chambers

We are very pleased to welcome Darren to Chambers.

Before joining Albion and cross-qualifying, Darren had been a solicitor for 14 years and is highly experienced in advising large employers and organisations in relation to employment and civil disputes. In the short time he has been with Chambers he has proved to be an invaluable member of the team.

If you wish to discuss Darren’s practice or wish to instruct him, please contact his clerk: stephen.arnold@albionchambers.co.uk

Albion Chambers Employment and Professional Disciplinary Team

Team Clerk
Stephen Arnold

Kate Brunner
Call 1997 QC 2015
Recorder
Upper Tribunal Judge

Nicholas Fridd
Call 1975

Richard Shepherd
Call 2001
Team Leader

Stephen Roberts
Call 2002

Darren Stewart
Call 2002

Simon Emslie
Call 2007

Philip Smith
Call 2012

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