

DISCRIMINATION LAW UPDATE

The Equality Act 2010 provides that it is unlawful for an employer to discriminate against an employee on the grounds of sex, age, disability, pregnancy or maternity, gender reassignment, marriage or civil partnership, race, religion or belief or sexual orientation.

The recent cases of *Lisboa v Realpubs Limited and others* [2011] UKEAT/0224/10, *O'Reilly v British Broadcasting Corporation and Another* ET/2200423/10 and *Hall and another v Bull and another* [2011] EW Misc 2 (CC) confirm the wide scope of discrimination law. A summary of each of these interesting cases is set out below.

Lisboa v Realpubs Limited and others [2011] UKEAT/0224/10

A homosexual employee (L) brought a claim of direct discrimination against his employer (Realpubs) on the basis that the employer's policy of seeking to make a pub less attractive to gay people was discriminatory.

Realpubs' business was to buy failing pubs and reposition them as gastropubs so that they appealed to all sections of the community. Realpubs acquired The Coleherne Pub, a failing pub with a reputation for being London's first 'gay pub' and also for housing drug dealers and male prostitutes with the intention of repositioning it in the market and making it more attractive to all members of the public.

L was employed to work as an assistant manager at the The Coleherne Pub. As part of the repositioning strategy, Realpubs planned to place a sign outside the pub stating that "this is not a gay pub", asked its staff to seat customers who did not appear to be gay in prominent areas so that they could be seen by members of the public and made the gender balance of the staff members more even.

L resigned from his employment with Realpubs. L brought claims of direct discrimination on the grounds of sexual orientation on the basis that: (a) three comments that had been made to him regarding his sexuality during his employment constituted discrimination; and that (b) Realpubs' policy of making the pub less attractive to homosexual people was, in itself, discriminatory. L brought an additional claim of constructive dismissal on the basis that Realpubs' actions left him with no choice but to resign.

The Employment Tribunal (ET) rejected L's claims that Realpubs' policy of repositioning was discriminatory and that he had been constructively dismissed. The ET held the view that Realpubs' strategy to reposition the pub was lawful and did not constitute direct discrimination against L. Further, the ET held the view that L had resigned as a result of Realpubs' strategy (rather than the remarks made to him about his sexuality) and that L had brought the constructive dismissal claim based on a "mistaken perception" that Realpubs was a homophobic organisation.

On appeal, the Employment Appeal Tribunal (EAT) held that gay customers were treated less favourably on the grounds of their sexual orientation by virtue of the employer's repositioning policy and that accordingly such policy constituted direct discrimination against gay customers and also L. The EAT also held that the policy gave rise to a valid constructive dismissal claim.

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The EAT confirmed that the key consideration should have been whether Realpubs' policy had been implemented in a manner which meant that homosexual people were being treated less favourably than the straight customer base on the grounds of their sexual orientation. The EAT remitted the case to the ET for a determination of quantum.

O'Reilly v British Broadcasting Corporation and Another ET/2200423/10

The employee, Miriam O'Reilly, (R) brought claims of direct sex and age discrimination and victimisation against the British Broadcasting Corporation (BBC). R was employed as a presenter on the BBC's Countryfile television programme and conducted radio work for the BBC. In 2008, the BBC changed the viewing time for Countryfile from daytime television to Sunday evenings with the intention of attracting a larger audience at that time.

R (aged 51) and 2 other female presenters (aged 44 and 43) were told that they were no longer required to work on Countryfile as a result of the move. R claimed that her removal from Countryfile amounted to direct discrimination on the grounds of her age and sex. Further, R claimed that the BBC's failure to offer her any additional radio work or suitable television work and failure to offer her further work as a writer for Countryfile Magazine after she had made complaints about the discrimination was an act of victimisation.

The Employment Tribunal (ET) upheld R's claims of direct age discrimination and victimisation, but rejected her claim of sex discrimination. The ET considered whether R would have been retained on Countryfile if she were a man of the same age and concluded that she would not. For that reason, R had not been discriminated against on the grounds of sex.

The ET held the view that R's age was a significant factor in the BBC's decision not to retain her on the Countryfile programme when it moved to a prime television viewing time. The ET rejected the BBC's claim that any alleged discrimination was justified in order to appeal to a primetime audience. The ET acknowledged that the BBC's desire to appeal to younger viewers was a legitimate aim. However, it did not consider that choosing younger presenters was a justifiable means of achieving that aim, and even if it was, it was not proportionate to remove the older presenters on merely an assumption that younger presenters would attract younger viewers.

Hall and another v Bull and another [2011] EW Misc 2 (CC)

The claimants, homosexual civil partners, brought a claim under the Equality Act (Sexual Orientation) Regulations 2007 ("the Regulations") of direct and indirect discrimination on the grounds of sexual orientation against the owners of the Chymorva hotel. The Regulations provide protection to the public from direct or indirect discrimination in the provision of goods and services on the grounds of sexual orientation.

The defendants were a married couple who held strong Christian beliefs. They operated a policy at the hotel to the effect that double rooms would only be let to heterosexual married couples. The defendants refused to allow the claimants to stay overnight in a double room. The hotel owners argued that their refusal to accommodate the claimants was not specifically based on the sexual orientation of the claimants, but on the defendants' belief that sexual relations outside marriage was a sin.

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The defendants sought to justify their actions on the basis that the policy applied to unmarried heterosexual couples (as well as homosexual couples) and the alleged discrimination was justified on the basis of their right to manifest their religion under the European Convention on Human Rights (ECHR).

Bristol County Court (“the Court”) held that the defendants had directly discriminated against the claimants on the grounds of their sexual orientation and that their policy, which disadvantaged homosexuals as a group, indirectly discriminated against the claimants.

The Court held that the defendants’ right to manifest their religion (under the ECHR) was not absolute and could be limited to protect the rights and freedoms of the claimants. Furthermore, the Court held that it was not a valid defence to the indirect discrimination claim to assert that allowing homosexuals to share a room was inconsistent with their religious beliefs. The defence was only available where the justification for the policy was nothing to do with sexual orientation. The Court granted the defendants permission to appeal against the decision.

If you require any specific advice in connection with the material contained in this bulletin, or on any other Employment Law issues, please contact: Paul Chamberlain in Manchester on 0161 836 8864, Andrew Cross in Liverpool on 0151 600 3062 or Kevin James in Preston on 01772 229847.

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