Discrimination and employment law

Employment law race religion

Ben, Catriona, Amrit and Jenna all work for Styles For All Ltd

Ben is an Orthodox Jew who currently works Mondays to Fridays. The company intends to introduce a shift system, and as a result he will have to work alternative Saturdays, which he does not feel able to do for religious reasons. His boss is not sympathetic. It is pointed out to Ben that everyone else has agreed to the changes, and if he does not like it he should leave.

Catriona is a single parent and she has applied for a job as a machinist. She has been turned down for the job because there are concerns that she will be unreliable because of her childcare commitments.

Amrit has made a rather surprising job application to the company. He has applied for a job as a model to show the latest range of female swimwear. The company does not even bother to respond to the application and it was put straight in the bin.

Jenna has been employed by the company as a secretary for three years. She has been diagnosed as being deaf but she is reluctant to tell anyone in case she is not treated equally. Her long hair conceals her deaf aids. Unfortunately her deafness has made her rather poor at taking dictation under pressure, as she finds it difficult to lip read and write at the same time. This can mean that the work is full of mistakes. As result of her poor work, the company has decided that this year Jenna will not be entitled to a performance related bonus.

Advise Ben, Catriona, Amrit and Jenna of any claim for discrimination that they may have against Styles For All Ltd.

Employment Law Essay

i) Ben's Case

In accordance with the ruling in Seide v Gillette Industries [1980] IRLR 427, Ben, as a person of Jewish faith, is classed as a member of an ethnic group. This affords the protections offered under the pertinent legislation.

Race Relations Act 1976 (RRA 1976).

Firstly, s 1 of the RRA 1976 prohibits discrimination on grounds of race. Under s. 3 of the Act, the definition of ‘ race' is given as follows: ‘ colour, race, nationality or ethnic or national origins.' It is accordingly apparent that Ben can rely on the provisions of the aforementioned Act for protection. It is an offence under s. 1(b)(1) of the Act to impose a requirement:

‘(i) which is such that the proportion of persons of the same racial group as that other who can comply with it is considerably smaller than the proportion of persons not of that racial group who can comply with it;

It is also required that the employer is unable to justify such a requirement.

In respect of the meaning of the words: “ can comply”, it was laid down by Lord Fraser in Mandla v Dowell Lee [1983] ICR 385 that the words ought to be read as meaning ” can in practice” comply, or “ can consistently with the customs and cultural conditions of that racial group.” Ben is therefore clearly able to satisfy this requirement due to his religious beliefs/customs.

Further, by virtue of s. 1(A) of the Act an employer discriminates if he applies ‘ a provision, criterion or practice' which either places persons of the same race or ethnic origin ‘ at a particular disadvantage when compared with other persons' not of such a category of persons (see s. 1(A)(a) of the Act), ‘ which puts that other at that disadvantage'(s. 1(A)(b)), and ‘ he cannot show to be a proportionate means of achieving a legitimate aim'(s. 1(A)(c)).

Ben clearly has an arguable point under the above provisions due to the employer's introduction of a shift system which includes Saturdays. It is understandable that as a member of the Jewish faith, Ben, will find this objectionable. Therefore, irrespective of whether or not everyone else has agreed to the changes, it does not detract from the discriminatory impact on Ben and other members of the Jewish faith.

Accordingly, based on the above reasoning, Styles For All Ltd decision to introduce a shift pattern compelling employees to work alternate Saturdays could effectively be indirectly discriminatory against members of the Jewish faith, given that Saturday is their holy day.

In order to establish this point, however, Ben would be required to illustrate that the proportion of persons of Jewish heritage, who are unable to comply with the imposed requirement, is considerably smaller than the proportion of those not of the same faith who can comply.

Anyone complaining that their rights under the Act have been violated ought to bring a claim within 3 months of the occurrence of the discrimination (see s. 68(1)). If Ben can establish his case, he may recover compensation (s.

65(1)(b)) and / or the tribunal could make a recommendation under s. 56(1)(c) of the Act to remove the adverse effect of the discrimination.

Employment Equality (Religion or Belief) Regulations 2003 (SI 2003/1660)

The above provisions are also pertinent to somebody in Ben's situation. They provide protection for those in employment, as defined by regulation 2(3). Regulation 2(1) defines ‘ religion' as; inter alia, ‘ any religion'. Under the Regulations, ‘ Direct' and ‘ Indirect' discrimination are set out at regulations 3(1) (a) and (b), respectively. Whilst there is no defence of justification under the provisions for direct discrimination, the employer can justify indirect discrimination.

An indication of how the Regulations ought to apply in practice can be found in the Government explanatory notes which state that if an employer refuses a break to a Muslim to pray at a particular time, this would not amount to direct discrimination if all employees are refused breaks at those times. Peculiar to Ben's case, however, under Regulation 3(1)(b) indirect discrimination occurs if:

‘(1) A applies to B a provision, criterion or practice which A applies equally to other persons not of the same religion or belief as B, but

(2) which puts persons of the same religion or belief as B at a particular disadvantage when compared with others, and
(3) which also puts B at a disadvantage, and
(4) A cannot show to be a proportionate means of achieving his or her legitimate aim.'

ECHR

Ben can also raise a point under Article 9 of the European Convention on Human Rights, which provides, inter alia: ‘ Everyone has the right to freedom of thought, conscience and religion'. Under s. 3 of theHuman Rights Act 1998, the courts are obliged to read ‘ primary and subordinate' legislation in a manner which is compatible with one's Convention rights. Under s. 7(1)(b) the Convention right issue can be raised in any court/tribunal.

The above points can therefore be raised in the employment tribunal (or county court) on grounds of discrimination. It ought to be borne in mind by Ben that a discrimination case has to be made within 3 months of the alleged discrimination occurring (see s. 68(1) of the RRA 1976).

ii) Catriona's Case

The ambit of the Sex Discrimination Act 1975 (‘ DDA 1975') applies not only to employment, but also to the recruitment process. Part I, s. 1 of the Act sets out circumstances in which Direct and / or Indirect discrimination can occur. Under s. 1 a person discriminates against another if on the grounds of sex the person treats the other ‘ less favourably' than they would treat others of a different sex. In this instance, it is apparent that the imposition of a precondition that the successful candidate for a job ought to not have children is going to disproportionately discriminate against women per se. The test applied by the courts is the ‘ but for' test (see James v Eastleigh Borough Council [1990] 1990 IRLR 288.)

In support of Catriona's case, in Thorndyke v Bell Fruit Ltd [1979] IRLR 1, it was found that a rule providing that the successful candidate for a job should

not have young children was ruled to be discriminatory. This would present prima facie evidence that Catriona has been discriminated against.

Procedurally, in order to establish her case, Catriona would be required to identify a pool of comparators in order to highlight that the proportion of females who are unable to comply with the requirement of having no children will be considerably smaller than the proportion of males who can comply. Further, pursuant to the Sex Discrimination (Indirect Discrimination and Burden of Proof) Regulations 2001 (SI 2001/2660), Catriona need only establish the facts of her case and the burden will then shift to Styles For All Ltd to rebut the presumption of discrimination. If they are unable to do so, Catriona will have made out her case and proved that she was a victim of discrimination.

Based on the information available, Catriona has an arguable case for discrimination that she can either initiate in the county court or employment tribunal. In the event that the case is upheld, the potential remedies, pertinent to Catriona's case include the following: an order that the discrimination ceases; a recommendation; declaration and / or award of compensation.

Should Catriona be minded to bring an action, she is required under s. 76(1) of the SDA 1975 to make a complaint within 3 months of the occurrence of the discrimination.

iii) Amrit's Case

S. 2 states that the provisions of the SDA 1975 apply equally to men as it does to women. Also, the provisions of the Act apply not only to people in employment, but to those applying for jobs.

Evidently, on the facts available, Amrit has been treated ‘ less favourably', by not being considered for the position of model to display female swimwear. Given that the company failed to respond to his application and placed it in the bin, this would indicate that he was clearly the victim of discrimination in this regard. However, s. 7 of the SDA 1975 provides a complete defence to an allegation of sex discrimination where there is a “ genuine occupational qualification”. The tribunal is likely to find that modelling female swimwear qualifies as such an example. However, the provisions of the Sex Discrimination (Indirect Discrimination and Burden of Proof) Regulations 2001 (SI 2001/2000) do still apply. Therefore, once Amrit has established the facts of his case, the burden of proof will shift to Styles For All Ltd to rebut the presumption of discrimination.

That said, whilst the courts have a tradition of interpreting a “ genuine occupational qualification” strictly (see Wylie v Dee & Co. (Menswear) Ltd [1978] IRLR 103), it would appear entirely valid, in these circumstances, that Styles For All Ltd required a female to model their female swimwear. Therefore, it would appear, Amrit has no merits to establish a case on the basis of discrimination in this instance.

Amrit ought to bear in mind, however, that an action in cases of discrimination ought to be brought within 3 months of the alleged occurrence of discrimination having first arisen.(see s. 76(1) SDA 1975)

iv) Jenna's Case

Pursuant to Part I, s. 1(1) of the Disability Discrimination Act (‘ DDA 1995') 1995, a ‘ disability' is defined as being:

‘ ..... a physical or mental impairment which has a substantial and long-term adverse effect on his ability to carry out normal day-to-day activities.'

Further, Part II, s. 4 (2) (b) states that it is:

‘ ...unlawful for an employer to discriminate against a disabled person whom he employs—

(b) in the opportunities which he affords him for promotion, a transfer, training or receiving any other benefit;'

Based on the above information, it would appear that Jenna has a prima facie case for discrimination against her employer, as a result of them not deciding not to award her a performance related bonus. This is due to the fact that her work is evidently impeded by her disability. However, according to s. 7(1) of the DDA 1995, companies with less than 20 employees are exempt from the provisions under Part II of the Act. Therefore, it needs to be ascertained whether or not Styles For All Ltd fall into this category. In addition, according to s. 5(1), discrimination only occurs if:

‘(a) for a reason which relates to the disabled person's disability, he treats him less favourably than he treats or would treat others to whom that reason

does not or would not apply; and

(b) he cannot show that the treatment in question is justified.'

Implicit from wording at s.(5)(a) above is that for an employer to be placed in a position in which he can commit a breach of the Act, he must have advanced knowledge of the ‘ disability' in question. In fact, this very point was established in the case of O'Neill v Symm & Co. Ltd [1998] IRLR 23, in which the court found that there must a requirement that the employer knew or could reasonably have known. Therefore, the law stipulates that if it had been the case that Jenna notified her employer of her deafness, then Styles For All Ltd would have had a duty under s. 6(1) to make necessary adjustments to cater for her disability. However, in the circumstances, Jenna's concealment of her deafness means that the employer has no duty to take ‘ reasonable steps' (see s. 6(4)) to provide for a disability that they have no knowledge of.

Jenna is accordingly advised to bring her condition to the employer's attention forthwith. The employer would then be obliged under s. 6 of the Act to take ‘ such steps as it is reasonable' to ensure her disability does not place her at a ‘ substantial disadvantage' to those persons without such a disability.

Given that Jenna has been employed with the company for 3 years, she ought not be concerned about the company's response, as she has served the requisite 1 year under s. 108 of theEmployment Rights Act 1996in order to bring an action in the employment tribunal for unfair dismissal if she is threatened with termination, or relieved of her position due to the employer

discovering her disability. Further, under s. 76(1) of the SDA 1975 Jenna should issue proceedings within 3 months of any alleged discrimination occurring if she wishes the case to be considered by the employment tribunal.

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