

SEXUAL ORIENTATION

WHAT ARE THE LIMITS OF HOMOPHOBIA?

CHARLES WYNN-EVANS

A case that tested employment equality has ruled that homophobic abuse may not be discrimination if the recipient is known not to be gay

Since the legislation prohibiting discrimination on the grounds of sexual orientation came into force in December 2003, there have been relatively few cases on how it would work in practice.

To date, cases that have been brought have been fairly straightforward, and have dealt with exactly the sort of prejudicial and discriminatory treatment that the legislation was intended to combat.

That said, the recent decision in **English v Thomas Sanderson Blinds** (UKEAT/0556/07/LA), provides further interpretation of the regulations.

The Employment Equality (Sexual Orientation) Regulations 2003 prohibit discrimination based on workers' actual or perceived sexual orientation. The regulations refer to harassment or "unwanted conduct" which violates the recipient's dignity or creates for the person an "intimidating, hostile, degrading, humiliating or offensive environment".

English complained that for many years he had been submitted to "banter of a homophobic nature" by his work colleagues, after a manager became aware that English lived in Brighton and had attended a boarding school.

The aspect of this case that tested the scope of the legislation was that English was not homosexual, his colleagues knew this, and English was fully aware that they did not believe him to be gay.

English argued that his colleagues' treatment of him was a breach of the regulations because it was based on their perception of him as having stereotypical characteristics that they associated with a gay person. He argued the regulations should apply because they extend to discrimination based on perception.

KEY POINTS

- The Employment Equality (Sexual Orientation) Regulations 2003 prohibit discrimination in the workplace against employees or workers based on their real or "perceived" sexual orientation (meaning a mistaken belief that the person has a particular orientation).
- The regulations do not protect the recipients of homophobic banter if the person is not gay, and the perpetrators know that their victim is not gay. This may be too narrow an interpretation of the EU directive on which the regulations are based.

This argument failed. The homophobic banter was a "vehicle for teasing" the claimant – it was not based on a perception or incorrect assumption that he was gay. The EAT upheld the employment tribunal's rejection of the claim.

This may not be the end of the story, however, since permission was granted for an appeal on the grounds that the regulations are drafted too narrowly and do not properly implement the EU framework directive into UK law.

The regulations cover harassment "on grounds of" sexual orientation, so complainants must have, or be believed to have, a particular orientation to be protected. The directive prohibits unwanted conduct "related" to sexual orientation, which could be wide enough to cover the circumstances of this case.

In any event, the **English** case should not be seen as excusing banter, whether homophobic or related to one of the other discriminatory grounds.

Treatment that violates a colleague's dignity or creates an intimidating, hostile, degrading, humiliating or offensive environment may constitute constructive (and unfair) dismissal and an employer that ignores complaints about this behaviour may also face claims under the whistle-blowing legislation.

The case is a useful reminder of the need for employers to adopt dignity at work policies, which establish clear guidelines on what is considered appropriate and inappropriate in the workplace, the potential sanctions for breaches of the policy, together with avenues for formal and informal resolution of complaints.

Charles Wynn-Evans is a partner at Dechert
charles.wynn-evans@dechert.com

Mayr v Bäckerei und Konditorei Gerhard Flöckner OGH**Sick leave during IVF treatment**

The European Court has now clarified the position of women undergoing in vitro fertilization (IVF). The EU pregnancy directive applies only when a woman is pregnant. Mayr had been prepared for the implant, she was off work and the egg had been fertilised *in vitro* and was to be implanted within a few days. At this stage she was not pregnant so the directive did not apply. But the equal treatment directive did. IVF could only happen to women. So, as in pregnancy, any detrimental treatment – in this case dismissal – would breach the directive. It was for the national court to determine the reason for her dismissal. This surely means that sick leave should be available for IVF treatment.

Case ref 2008 C-506/06 ECJ

Royal Bank of Scotland v Bevan**Good reasons for extending time limits**

Bevan had appealed against his dismissal. He knew he had been unsuccessful but the letter confirming his dismissal only arrived five hours before the time limit for an unfair dismissal claim ran out, and his solicitor's office was closed. He asked for an extension.

Under the Employment Rights Act 1996, a tribunal can grant an extension where it is not reasonably practicable to bring the claim in time. It was reasonable for Bevan to wait for the written confirmation and it was not possible to obtain legal advice on a possible claim until the solicitor's office re-opened. So the time limit could be extended.

Case ref 2008 IDS 847 EAT

M&P Steelcraft Ltd v Ellis**Job placement not an employment contract**

Ellis was a prisoner let out on licence to attend a job placement at Steelcraft. He was paid during the scheme, initially by the prison, then by the work experience employer on the same terms as it paid its employees. Steelcraft gave him a job on his release but dismissed him after six months. Ellis claimed unfair dismissal, using his work placement to provide him with continuity of service.

The EAT agreed with the tribunal that there was sufficient evidence to imply a contract, but said that the purpose of the relationship had to be considered. The purpose here was to prepare a prisoner for life after gaol, not to provide him with employment. This was not an employment contract and was not legally enforceable as one.

Case ref UKEAT/0536/07