POLICE Federation

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Equality Matters

Welcome to the winter issue of RJW's Police Federation Equality Matters

2009 sees the 5th anniversary of the extension of the "whistleblowing" protection to police officers and we focus upon what needs to be established to bring a successful whistleblowing claim and some key case law developments during that period.

Police officers have also been covered by the Disability Discrimination Act for 5 years now and it continues to be a fast developing area of law. In this issue of Equality Matters we feature a recent successful disability discrimination case which focuses upon reasonable adjustments that may be required when assessing a disabled officer's entitlement to CRTP.

We also highlight a recent racial harassment decision which provides some useful guidance in determining whether unlawful harassment has occurred across all the discrimination strands. One of the purposes of the Equality Bill is to further harmonise the different concepts of discrimination which exist in the separate pieces of equality legislation. The Bill continues to make its progress through Parliament. We provide a brief update on the current position.

We feature a recent decision of the Employment Appeal Tribunal to increase the guideline ranges for injury to feeling awards to take account of inflation since 2002. The Employment Tribunal Service has recently published further statistics about average tribunal awards so we also take a brief look at these before our usual round up of current equality cases for Police Federation members.

This update is aimed at Equality Representatives, but please feel free to circulate to any other Federation members who may find it useful.

We would welcome any feedback or suggestions for subjects you would like to see covered in future editions.

Please contact:

Emma Hawksworth e.j.hawksworth@rjw.co.uk
Rachel Harfield r.l.harfield@rjw.co.uk

Please copy any comments to the Secretary of the JCC Equality and Diversity Sub-Committee Mick Pearson mpearson@jcc.polfed.org

Whistleblowing: 5 years on

It has been 5 years now since the protection afforded to "whistleblowers" by the Public Interest Disclosure Act (PIDA) was extended to cover police officers and 10 years since the protection was ever introduced. There has been a steady increase in the number of whistleblowing claims brought in the employment tribunal, rising from 157 claims in 1999/2000 to 1494 in 2007/08.

Whistleblowing claims can be technical and complex claims, not least because to qualify for protection the disclosure must have the right content and be made in the right way, to the right person, for the right reasons. Here we briefly review the legislative requirements as interpreted by the courts in the last decade.

There are 3 main requirements to be met to establish PIDA protection; firstly the claimant made a 'qualifying disclosure', secondly, that he or she followed the correct disclosure procedure and thirdly, that he or she suffered a detriment as a result of making the disclosure.

Qualifying Disclosure

A disclosure will amount to a qualifying disclosure if, in the reasonable belief of the individual making it, it tends to show that:

- A criminal offence has been committed or is likely to be committed
- A person has failed or is likely to fail to comply with any legal obligation to which he is subject
- A miscarriage of justice has occurred or is likely to occur
- The health and safety of any individual has been or is likely to be endangered
- The environment has been or is likely to be damaged
- Information tending to show any matter falling within the above paragraphs has been, or is likely to be, deliberately concealed.

The concept of what amounts to a "legal obligation" has generally been widely interpreted by the tribunals, however, any such disclosure will not be protected if the whistleblower commits an offence by making it or the information is covered by legal professional privilege.

A qualifying disclosure does not have to relate to malpractice by the whistleblower's employer or colleagues, it can cover malpractice committed by a third party. The whistleblower must have a reasonable belief that the disclosure made tends to show that such malpractice has occurred or is likely to occur. Provided that reasonable belief is held it does not matter if it ultimately transpires the legal obligation in question does not actually exist.

Cont...

Whistleblowing: cont

Protected Disclosure

In the second stage a "qualifying disclosure" becomes a fully "protected disclosure" provided that it is made in the correct manner to the correct individual. The general expectation behind the legislation is that whistleblowers should raise such concerns initially with their employers and this is the simplest way in which a disclosure becomes protected. The only additional requirement is that the disclosure must be made to the employer in "good faith." The concept of "good faith" is not defined within the legislation but the courts have emphasised that there should be a "public interest purpose" behind the disclosure and not solely for the individual's own benefit. The courts have, for example, held that where the dominant or predominant purpose for the disclosure is malice towards a colleague it was not made in good faith.

Detriment

The third stage is to establish that the whistleblower has been subject to a detriment as a result of the qualifying disclosure. What constitutes a "detriment" is not defined in the legislation but it would cover things such as a failure to promote, refusal of training or other opportunities, unjustified disciplinary action, reductions in pay, termination of the individual's service as well as general unfavourable treatment. In the recent first instance decision of Okoh v Metronet Rail this included a manager telling the whistleblower's colleagues, in front of the whistleblower, that they would have to move seats in a van (for health and safety reasons) because their colleague had complained. The tribunal concluded that the manner in which the colleagues were told meant that the claimant was more likely to be ostracised by his colleagues and had suffered a detriment. Detrimental treatment will even be covered where it occurs after the individual's service has come to an end, for example, where a negative reference is given.

Often one of the most difficult aspects in a PIDA claim is to establish the causative link between the detriment complained about and the making of the protected disclosure. Case law has established that the tribunal has to consider, as a question of fact, the employer's conscious and unconscious reason for acting in the manner complained about. It is not, however, always straightforward for a worker to establish before a tribunal that the detrimental treatment about which he complains was on the ground that he made the protected disclosure and not for some other reasons. For example, in Bolton Schools v Evans the Court of Appeal rejected a whistleblowing claim brought by a teacher who had raised concerns that the school's IT system was not sufficiently secure. When his concerns were ignored he hacked into the computer system to demonstrate his point.

The Courts agreed that he was disciplined not because of a protected disclosure but because of his conduct in hacking into the system.

There is a time limit for lodging a claim of 3 months less one day from the detriment complained about. Where a claim is successful the tribunal has the power to award compensation both for financial losses and, in detriment claims, also for injury to feelings. In Virgo Fidelis Senior School v Boyle it was made clear that the Vento guidelines apply when assessing compensation for injury to feelings and that detriment suffered by whistleblowers should normally be regarded by tribunals as a very serious breach of discrimination legislation. There is little statistical information available assessing average awards in PIDA cases, however, in the first 3 years of the legislation being in force the highest award made by a tribunal was £805,000, the lowest £1000 and the average £101,117 these figures will include compensation for financial losses suffered as well as injured feelings.

Disability Discrimination: Reasonable adjustments in police cases

We have had recent success in the case of Michelle Jeram v The Chief Constable of Hampshire Constabulary. The case involved a claim for disability discrimination by way of failure to make reasonable adjustments, arising from Hampshire Constabulary's rejection of Ms Jeram's application for a Competency Related Threshold Payment (CRTP).

Ms Jeram had seriously injured her knee playing Force sports. Her injury necessitated several operations culminating in a full knee replacement. She had a number of periods of sickness absence while recovering from her various surgeries. Ms Jeram applied for CRTP having been at the top of her pay scale for a year. This was ultimately rejected on the basis of her levels of sickness absence, which breached the Force's trigger for management action.

The tribunal held that the Force's refusal to award Ms Jeram CRTP amounted to a failure to make a reasonable adjustment. Key points arising from the judgment include:

- The Force's employee relations manager indicated his view that the CRTP policy was "designed to provide motivation and achieve performance" and the tribunal appears to have accepted this characterisation of CRTP as an incentivising payment
- It was common ground between the parties that, but for Ms Jeram's disability-related sickness absence, she would have met the criteria for CRTP
- The tribunal found that the Force had sufficient power and discretion to make adjustments to enable Ms Jeram to qualify for CRTP under its internal policies on CRTP and attendance management
- It was arguable that the Force had failed to follow the statutory provisions relating to entitlement to CRTP in that it made no distinction between commitment to achieving high levels of attendance (one of the criteria for entitlement to CRTP) and actually achieving high levels of attendance (the criterion applied by the force)
- Ms Jeram had clearly demonstrated commitment to achieving high levels of attendance notwithstanding her substantial absences. The tribunal considered that "a reasonable employer" would not have failed to make such an adjustment in this case.

The tribunal does not clearly articulate what adjustment it considers would have been reasonable in Ms Jeram's case, for example whether all of her disability- related absence should have been discounted for CRTP purposes. It simply states that the force had sufficient discretion to make adjustments to allow the CRTP payment to be granted.

The tribunal's decision will not be binding on any other tribunal and its force is therefore purely persuasive. However in appropriate cases it may be worth drawing the Jeram case to the Force's attention as it may assist in resolving similar disputes.

Racial Harassment

In Richmond Pharmacology v Dhaliwal the Employment Appeal Tribunal upheld a tribunal's findings that there had been harassment on grounds of the race of an Indian employee where a remark was made by the employer to the possibility of her being "married off in India." The EAT gave guidance to tribunals when assessing whether there has been unlawful discrimination on grounds of race under the Race Relations Act 1976. It recommended that a tribunal should focus on:

- Whether there was unwanted conduct
- Whether the purpose or effect of that conduct was to violate the person's dignity (or to create an environment which was intimidating, hostile, degrading, humiliating or offensive)
- Whether the conduct was on the grounds of the person's race (or ethnic or national origins)
- Whether, if the person felt their dignity had been violated (or that an intimidating environment had been created), it was reasonable for them to feel this way.

On the facts of the case whilst the employer had not intended to violate the employee's dignity, it was accepted that the comment had that effect upon her and it was reasonable for her to feel this way. She was awarded £1000 for the injury to her feelings. The guidance given will be of assistance in assessing whether discriminatory harassment has occurred in the other protected equality strands.

Equality Bill Update

In the last edition of Equality Matters we provided a summary of the key elements of the Equality Bill which was published on 27th April 2009. Since that time the Bill has completed the committee stage of the House of Commons and is waiting for its report stage when it will proceed through the House of Lords. The Government's intention is for the Bill to receive Royal Assent in April 2010 with the majority of the provisions coming into force in October 2010.

During the committee stage the Government made several amendments to the draft Equality Bill including allowing claimants to bring a discrimination claim on two combined grounds (such as sex and race). The Government has also committed to make further amendments as the Bill progresses hereafter including looking again at the new concept of "disability arising from discrimination" due to concerns about the adequacy of the current drafting. It also committed to regulate the use of pre-employment health questionnaires which are increasingly used by employers to obtain details of health or disability issues from job applicants and which research suggests leads to discrimination against disabled persons. The Government is still also considering whether to allow bodies such as trade unions and staff associations to bring representative actions on the behalf of groups of individuals.

Tribunal Awards

In discrimination cases the tribunal can award compensation for injury to feelings. Back in 2002 the Court of Appeal in the case of Vento v Chief Constable of West Yorkshire Police laid down some guidelines to assist with assessing compensation for injury to feelings, setting out 3 broad bands. In the recent case of Da Bell v NSPCC the Employment Appeal Tribunal increased the guideline figures to take account of inflation since 2002.

The new bands are as follows:

- Upper Band: £18,000 to £30,000 (increased from £15,000 - £25,000) This is appropriate in the most serious cases, such as where there has been a lengthy campaign of discrimination. Only in the most exceptional cases would an award for injury to feelings exceed £30,000
- Middle Band: £6,000 to £18,000 (increased from £5,000 to £15,000) The middle band should be used for serious cases which do not merit an award in the highest band
- Lower Band: up to £6,000 (increased from £500 to £5,000) Less serious cases are described as those where the act of discrimination is an isolated or one off occurrence. In Vento the minimum recommended award for injury to feelings was £500 and it is not currently clear whether the Employment Appeal Tribunal in Da Bell intended to increase that figure.

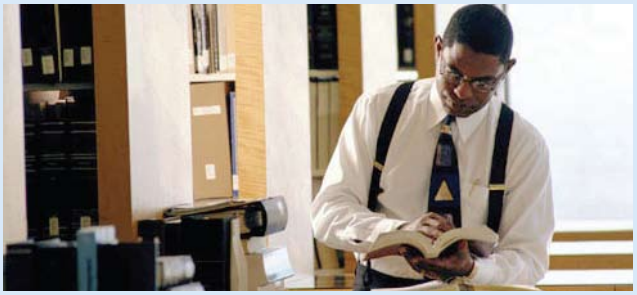
These ranges are still large and tribunals have a wide discretion in determining the seriousness of any discrimination and the appropriate compensation payable. The official Employment Tribunal statistics for the period April 2008 to March 2009 have recently been published and demonstrate that average awards in successful employment tribunal discrimination claims are not high. The median award in race discrimination cases was £5,172, sex discrimination £7,000, disability discrimination £7,226, religious discrimination £4,291, sexual orientation discrimination £15,351 and age discrimination £3,000. These figures include compensation for any financial losses suffered as well as any injury to feelings award.

Default National Retirement Age Remains (for now...)

In the last edition of Equality Matters we reported that Age Concern's challenge to the setting of a national default retirement age of 65 had been before the European Court of Justice.

The ECJ had held that a default retirement age does not breach the European Equal Treatment Directive provided it is set at an age which can be objectively justified. That question of objective justification was remitted back to the High Court.

The High Court recently gave its decision and determined that the national default retirement age was objectively justified at the time it was introduced in 2006. However, a decisive factor for the Court was the fact that the Government has committed to review the default retirement age in 2010. It held that, given the current economic climate, if there had been no commitment to such a review, or if the Government tried to introduce a default retirement age of 65 for the first time now, it would not be a proportionate measure. Further detail is therefore awaited as to whether the Government intends to introduce a higher default retirement age or remove the limitation altogether.



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

We continue to have good successes in cases where officers are ill health retired against their wishes. Tribunals have accepted that reasonable adjustments would have allowed disabled officers to be retained in service whether in a restricted police role or, if no adjusted police role is feasible, a civilian post. In a recent decision in Jelic v Chief Constable of South Yorkshire Police, on the particular facts of that case, the tribunal concluded it would have been a reasonable adjustment to transfer a non-disabled officer into another post so that Mr Jelic could take up that role where his disability could be accommodated and he could have been retained in service. Alternatively, the tribunal concluded Mr Jelic could have been ill health retired and given a civilian role.

The Disability Discrimination Act can also protect those who are subject to detrimental treatment as a result of stereotypical assumptions being made about the nature of their disability. In a recent case the tribunal found that Hampshire Constabulary had discriminated against an officer who suffered from Multiple Sclerosis as they imposed restrictions upon her role which had no legitimate basis and arose out of stereotypical ideas about the nature of her condition. The officer was awarded compensation for her injured feelings.

Sex Discrimination

In the Spring 2009 edition of Equality Matters we looked at the implications of the decision in Stringer which was concerned with the entitlement of workers on sick leave to take paid annual leave under the Working Time Regulations. We commented that this could impact on women on maternity leave who should be entitled to accrue and carry over their annual leave if they have been unable to take such leave. We recently settled two sex discrimination claims brought on this basis. Officers should be permitted to accrue annual leave throughout maternity leave and take annual leave once the maternity leave period has come to an end. Officers need to be particularly careful when their maternity leave coincides with the annual leave year, as carry over provisions are complicated. In any situation where members on maternity leave are being denied their full annual leave entitlement, advice should be sought.

Cases concerned with flexible and part time working continue to arise. We are currently pursuing a claim where a new working structure is being piloted in a Force which means that sergeants will be prohibited from working part time hours on the alleged basis that this would undermine the objective of increased team working.

We are also acting on behalf of a sergeant in a case where she was working full time hours on a flexible basis for childcare reasons until told that she must either work the exact same shifts as her team or move to work part time hours instead.

Race Discrimination

Concerns about race discrimination continue to be raised. These have focused on discriminatory attitudes and problems faced by black and minority ethnic officers who complain of feeling ostracised and excluded by colleagues. Those affected have commented that this can potentially be born of cultural differences (such as socialising in pubs) which emerge early on in the individual's career paths and can lead to long term disadvantage in terms of career opportunities.

Whistleblowing

We continue to act for an officer who complains he was subject to detrimental treatment as a result of making a disclosure that the allocation of response driving courses breached the Race Relations Act. We are currently also representing an officer who alleges that she was subjected to detrimental treatment for exposing alleged malpractice and corruption, and for exposing the "covering up" of crimes. The officer alleges that, amongst other things, she was subjected to spurious discipline charges. The tribunal proceedings were stayed whilst the matter was investigated by the CPS and the IPCC. This investigation has recently concluded, and the case is expected to come before the tribunal some time in 2010.

Religion & Belief

Reflecting the national trend, cases of discrimination on grounds of religion and belief remain a minority but we have in recent times dealt with cases concerning abusive comments about individuals' religious beliefs and requests for time off work to celebrate religious festivals. We are acting for a Muslim officer who faced sceptical questioning from supervisors upon seeking compassionate leave for the death of a family member. The employment tribunal will have to decide whether this approach amounted to indirect discrimination on the grounds of religious belief in that it failed to take proper account of the close relationships between relatives commonly found in Muslim extended families.

Age Discrimination

We currently represent a claimant on the 30 plus scheme who is at risk of his appointment being terminated because his existing role has been restructured and given to a younger officer without the claimant being given an opportunity to apply. He was subject to comments that the new role required "commitment and energy."