

Disability discrimination and employers' knowledge

The Court of Appeal has set out what an employer does and does not need to know in order to be found to have discriminated against a disabled employee.

Why employers can be liable for discrimination via their agents

The Court of Appeal has considered the circumstances in which an employer will be held liable for acts of discrimination committed by their agents.

Are some job adverts discouraging women from applying?

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It is now well known that advertising a vacancy for a “barmaid” or a “handyman” would discriminate against applicants of the opposite sex. When Human Rights Watch called out a number of Chinese tech companies for advertising for “men-only” and “men preferred” roles, the discrimination was obvious to all.

Gender-biased phrasing in adverts

However, discrimination is rarely this blatant. We all use language that is subtly ‘gender-coded’, and reinforced by societal expectations and behavioural norms associated with what men and women are like. ‘Bossy’, for example, is a word rarely ever used to describe men. Adverts may also be “gender-coded”, i.e. hinting towards a male or female applicant. Totaljobs has published its [analysis](#) of 75,000 job advertisements, and it shows that gender-biased phrasing is fairly common.

Male and female-oriented phrasing

In terms of male-oriented phrasing, Totaljobs found that the three most frequently-used words are: **lead** (mentioned 70,539 times); **analyse** (35,339 mentions); and **competitive** (23,079 mentions). The three most commonly used female-related words were found to be: **support** (used 83,095 times); **responsible** (with 64,909 mentions); and **understanding** (29,638 uses). Totaljobs also reported that male-oriented language was more frequently used in advertisements for senior positions, such as 'head' roles, directors, and partners; on the other hand, the language in advertisements for "assistant" roles leaned heavily toward female-associated language.

The recent publication of large companies' gender pay gap data revealed significant differences between male and female pay in many instances. Employers with large gender pay gaps have often explained it on the basis that their more senior positions are occupied by men, bringing up the average for male pay.

Under-representation of women in senior roles

Could the way that companies are advertising for senior roles help to explain why women are under-represented at executive level? Totaljobs believes so, concluding that women are hesitant to apply for roles which are worded in a way which appeals to male applicants (albeit unintentionally).

Employers are under increased scrutiny in respect of equality and diversity – for example, the Investment Association recently wrote to a selection of FTSE 350 firms to inform them that shareholders are getting "restless" at the lack of female representation on company boards.

That being the case, a prudent employer may want to take a step back and think about whether the way they advertise job vacancies contains any inadvertent stereotyping or bias. In order to help employers with that process, Totaljobs has

created a tool it calls the “[Gender Bias Decoder](#)” which will flag any gendered words in a text. Anything the tool flags up can be re-worded to sound more gender-neutral.

ACAS guidance on job advertisements

ACAS also recommends that employers or recruiters include in any job advertisements a statement that applications are welcome from all sections of the community, as well as reinforcing the employer’s commitment to equal opportunities.

Small steps can lead to big changes. If employers begin to gender bias de-code their job advertisements to encourage female applicants to put themselves forward for more senior, better paid positions, they may find that their gender pay gap figures start to improve in coming years as women begin to fill the ranks of those senior, better paid jobs.

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Employer discriminated against employee because of perceived disability

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An employer was found to have directly discriminated against an employee on the basis of a hearing disability it perceived that employee to have.

The Employment Appeal Tribunal stated that the evidence clearly showed that the Acting Chief Constable was concerned that Mrs Coffey had a hearing condition which could progress to the extent that she would have to be placed on restricted duties. Therefore, the perception was that Mrs Coffey had a progressive disability.

Mrs Coffey was a police constable in the Wiltshire area. She suffered with some hearing loss which, whilst it did not amount to a disability, put her just outside of the national standards for hearing loss for the police. When Mrs Coffey joined the Wiltshire Constabulary, her hearing loss had been flagged during an initial test, but she passed a practical functionality test showing that she was able to work as a

constable without the need for any adjustments.

She later applied to transfer to the Norfolk Constabulary. As before, her hearing was tested and the same level of hearing loss was identified. The Acting Chief Inspector of Norfolk rejected Mrs Coffey's application on the basis of that hearing test, and did not arrange a practical functionality test.

Mrs Coffey brought a claim for direct disability discrimination on the basis that her application was rejected because of a perception that she had a hearing-based disability.

The Acting Chief Constable denied discrimination; instead, she said her decision to reject Mrs Coffey was influenced by the significant resourcing and cost pressures her Constabulary was facing, in that she could not justify appointing someone who may not be fully operational.

Chief Constable of Norfolk v Coffey UKEAT/0260/16

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How does an employer know whether an employee is

disabled?

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The Court of Appeal has decided that the test was not whether the employer did all it could to determine whether an employee was disabled and exhaust every option open to them; rather, it was whether the employer could be reasonably expected to know the employee was disabled.

The facts of this case are not unusual.

Ms Donelien was a court officer employed by Liberata for almost 11 years. Her employment featured numerous of short-term sickness absences for which various explanations were

given (including, on one occasion, no explanation) and often no advance notice of her absence was given. Liberata referred Ms Donelien to Occupational Health in May 2009, posing a number of questions as it did so.

In July 2009, OH reported that Ms Donelien was not disabled; however, the report failed to engage with a number of the questions posed. Liberata followed up by requesting a second OH report. Whilst the second report was more detailed (and again stated that Ms Donelien was not disabled), it still failed to answer some questions.. Liberata did not go back to OH a third time, but instead held 'return-to-work' interviews with Ms Donelien and reviewed correspondence from her GP.

Liberata dismissed Ms Donelien in October 2009 on the basis of unsatisfactory attendance, a failure to comply with absence notification procedures and a failure to work contractual hours. In response, Ms Donelien brought a number of claims in the Employment Tribunal including a failure to make reasonable adjustments.

The Employment Tribunal found that Ms Donelien was disabled from August 2009. The question was whether Liberata had constructive knowledge of that disability.

This case confirms that employers are allowed to place weight on the reports provided by OH, so long as they exercise their own independent judgment and avoid blindly relying on them.

Donelien v Liberata UK Ltd [2018] EWCA Civ 129

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Greek police's minimum height requirement is indirectly discriminatory

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The Greek police force's requirement for new applicants to

meet a certain minimum height threshold was indirectly discriminatory against women and could not be objectively justified.

Greek national law requires that applicants to police school who wish to train as police officers must be at least 1.7 metres tall without shoes, whether male or female. Ms Kalliri's application to join the police school was rejected on the basis that she was only 1.68 metres tall. She brought a complaint in the Greek courts, and a referral was made to the European Court of Justice to ask whether the minimum height requirement was compatible with EU equal treatment law.

The European Court of Justice held that the height requirement was indirectly discriminatory on grounds of sex, in that far more women are likely to be disadvantaged by the minimum threshold than men. Whilst the Greek government did have a legitimate aim in the effective accomplishment of police functions, the height requirement was not a proportionate means of achieving it. This was because not all police roles require physical aptitude and, even if they did, physical aptitude is not necessarily correlated to height.

Other reasons pointed to by the ECJ were that the law had previously required female police applicants to meet the lower threshold of 1.65 metres, and that the minimum height requirement for female applicants to the Greek armed forces, port police and coast guard was only 1.6 metres. Ultimately, if the Greek government wished to ensure the physical aptitude of its police recruits, it should conduct pre-selection aptitude tests rather than applying rigid requirements across the board. For those reasons, the disadvantage caused to women by the height requirement was not objectively justified and amounted to indirect sex discrimination.

Minimum height requirements are probably one of the clearest examples of work-related criteria or policies which have the potential to be indirectly discriminatory. Employers should

avoid having any kind of blanket restrictions or requirements unless they are clearly able to show that they are a proportionate means of achieving a legitimate aim.

Esoterikon v Kalliri (C-409/16)

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Ruth Gamble comments on the implications of the BBC's gender pay gap in the Evening Standard, Huffington Post, CNBC and the Guardian

As the BBC reveals its pay data for the first time, BDBF Partner Ruth Gamble's comments on the implications of the disparities make the news.

The Court of Appeal clarifies the "public interest test"

for whistleblowing claims.

The Court of Appeal has, this morning, clarified that a disclosure does not need to be in the interest of the public at large in order to attract whistleblower protection. Despite the inclusion of a “public interest test” in whistleblowing legislation, a disclosure can concern only a small group of people, although that the character of the disclosure is relevant.

Age discrimination: silver quotas

Could the ‘silver quota’ be the answer to improving employment rates in the over 50s? Polly Rodway considers in the light of UK discrimination law.

Are employers’ bans on headscarves at work discriminatory?

An employer’s ban on wearing religious symbols at work may or may not be directly discriminatory depending on the reason for the ban.

No need to prove reason for disadvantage in indirect discrimination

In order to successfully establish indirect discrimination, claimants do not have to prove the reason why a practice puts their group at a particular disadvantage.

Government responds to pregnancy and maternity discrimination report

The Government has responded to the Women and Equalities Committee's report on pregnancy and maternity discrimination in the workplace.