Discrimination

Although the volume of discrimination claims being brought to employment tribunals has fallen dramatically, the appellate courts still provided a large number of discrimination judgments for us to report last year. Many of these related to disability: the topic of whether obesity can amount to a disability was addressed in a key judgment from the European Court of Justice; and our understanding of 'discrimination arising from disability' under S.15 of the Equality Act 2010 has moved on substantially following various decisions of the EAT. Some cases stretched the boundaries of existing law: the EAT's ruling that 'race' was capable of covering caste is one example; another is the ECJ's surprising finding that there can be 'associative' indirect discrimination. Following reforms to compensation in civil cases, the EAT has been in a state of disagreement over whether a 10% uplift should apply to awards for injury to feelings in employment tribunals, and we also covered cases dealing with the right to bring claims under the Equality Act 2010; direct discrimination; religious discrimination; pregnancy and maternity discrimination; harassment; and victimisation.

Who can claim?

Section 39 of the Equality Act 2010 places an obligation on employers not to discriminate against employees and job applicants; S.39(5) stipulates that this includes a duty to make reasonable adjustments. Para 5 of Schedule 8 to the Act explains that, in the context of recruitment, the duty will apply in respect of a disabled person who is, or has informed an employer that he or she may be, an applicant for employment. In **NHS Direct NHS Trust (now known as South Central Ambulance Service NHS Foundation Trust) v Gunn** (Brief 1023) 2015 IRLR 799 the EAT held that an employee who had objected to her transfer of employment under the Transfer of Undertakings (Protection of Employment) Regulations 2006 SI 2006/246 could bring a claim of disability discrimination against the transferee. An e-mail sent by the transferee, informing the employee of plans to close her workplace after the transfer, that she was in a potential redundancy situation, and stipulating that she work a minimum of 15 hours per week in a different location amounted to an offer of suitable alternative employment on fresh terms, thus bringing her within the scope of the provisions in the EqA covering discrimination in recruitment.

The definition of 'employment' in S.83(2) EqA is likely to exclude the majority of trainees (other than apprentices, who are expressly included). Trainees may be able to claim protection under S.55, which makes it unlawful for a provider of an 'employment service' to discriminate in the provision of its services, such as vocational training. However, S.55 does not apply to training or guidance for students of a university or other higher or further education institution to which the governing body of the institution has 'power to afford access' – S.56(5). Instead, such cases are dealt with under S.91 EqA, and must be lodged in the county court, as employment tribunals have no jurisdiction over claims under that part of the Act.

In **Blackwood v Birmingham and Solihull Mental Health NHS Foundation Trust** (Brief 1014) 2015 ICR 308 the EAT upheld an employment tribunal's decision that it lacked jurisdiction to hear the indirect sex discrimination claim of a university student who had her vocational work placement with an NHS Trust withdrawn because, as a single mother of a young child, she could not comply with the required shift patterns. The tribunal had correctly interpreted the exclusion in S.56(5). The university clearly had power to provide students with placements and it did not matter that the training was provided by the Trust, nor that the Trust apparently had the ability to terminate a placement. The Court of Appeal is due to hear the claimant's appeal in May.

The protections in S.39 do not, it seems, extend to corporate bodies. However, as the EAT in **EAD Solicitors LLP and ors v Abrams** (Brief 1032) 2015 IRLR 978 made clear, the protection of the EqA as a whole is not so limited. The Act prevents discrimination by a person against another person, and the Interpretation Act 1978 establishes that 'person' in this context includes a limited company. The EAT thus upheld the decision of an employment tribunal that a limited company, which was in turn a member of a limited liability partnership (LLP), could bring a claim alleging direct discrimination against the LLP under S.45 EqA. This provides that an LLP must not discriminate against a member (B) by expelling B or subjecting B to any other detriment.

'Associative' discrimination

In the case of Coleman v Attridge Law and anor (Brief 860) 2008 ICR 1128 the European Court of Justice held that under the EU Equal Treatment Framework Directive (No.2000/78) ('the Framework Directive') claims for direct discrimination or harassment on the ground of disability could be brought by individuals who were not themselves disabled but who had been

treated less favourably or harassed because of another person's disability. This was subsequently reflected in the drafting of the definitions of direct discrimination and harassment in Ss.13 and 26 EqA, neither of which require the claimant to possess the protected characteristic which forms the basis of the claim. On this basis, the Liverpool employment tribunal held in **Truman v Bibby Distribution Ltd** (Brief 1027) ET Case No.2404176/14 that an employee who was dismissed after informing his employer that he would in future need to play a greater role in caring for his disabled daughter was directly discriminated against on the ground of her disability.

Various decisions last year extended this principle to other grounds of claim. In **Thompson v London Central Bus Company Ltd** (Brief 1032) EAT 0108/15 the EAT held that a tribunal was wrong to strike out a claim of victimisation 'by association'. The tribunal, having accepted that an individual may claim victimisation based on the protected act of a third party, had erred in finding that a particular form or degree of association between the claimant and the third party was necessary in order for the claim to succeed. The appropriate test was whether the employer subjected the claimant to a detriment by reason of the protected acts of others. And in **CHEZ Razpredelenie Bulgaria AD v Komisia za Zashtita ot Diskriminatsia** (Brief 1026) 2015 IRLR 746 the ECJ held that the concepts of direct and indirect discrimination under the EU Race Equality Directive (No.2000/43) extend to persons who, although they do not themselves belong to a specific race or ethnic group, nevertheless suffer less favourable treatment or a particular disadvantage on the ground of that race or ethnic origin. Accordingly, a policy of the Bulgarian state energy supplier to place electricity meters at an inaccessible height in a district largely populated by Roma was capable of amounting to both direct and indirect race discrimination against a business owner in the district, even though she was not herself of Roma ethnic origin. The ECJ's ruling seems out of kilter with the definition of indirect discrimination in S.19 EqA, which specifically requires that a victim of indirect discrimination share the same protected characteristic as the disadvantaged group.

In **EAD Solicitors LLP and ors v Abrams** (above) the EAT confirmed that there was no reason why a company could not complain of discriminatory treatment based on the protected characteristic of another person. The EAT upheld the decision of an employment tribunal that a limited company, which was in turn a member of a limited liability partnership (LLP), could bring a claim alleging direct discrimination against the LLP based on the age of the limited company's principal shareholder and director.

However, in **Hainsworth v Ministry of Defence (Equality and Human Rights Commission intervening)** (Brief 1015) 2014 IRLR 728 the Court of Appeal ruled that the principle does not extend to the duty to make reasonable adjustments. According to the Court, Article 5 of the Framework Directive is limited to adjustments aimed at assisting disabled employees, prospective employees or trainees. Accordingly, an employer had no duty to make a reasonable adjustment under Ss.39(5) and 20(2) EqA in respect of the working arrangements of a non-disabled employee so that she could better provide for the needs of her disabled daughter.

Direct discrimination

Under S.13(1) EqA, direct discrimination occurs where, 'because of a protected characteristic, A treats B less favourably than A treats or would treat others'. In determining whether a claimant has been treated less favourably than a comparator there must be 'no material difference between the circumstances relating to each case' – S.23(1). In **CP Regents Park Two Ltd v Ilyas** (Brief 1026) EAT 0366/14 the EAT upheld an employment tribunal's finding that an employee suffered direct race discrimination during the course of a disciplinary investigation. The manager conducting the investigatory meeting had prejudged the claimant from the outset, which led him to conduct the meeting in an aggressive and inappropriate manner. Unlike the comparators identified by the tribunal, the claimant gave inconsistent explanations for his conduct and was implicated in fraud, but these differences were not material at the point when the investigation began. However, the EAT overturned the tribunal's separate finding of discrimination in respect of the decision to institute disciplinary proceedings. By the time the investigation was complete, the differences between the claimant and his colleagues had become material, and the appropriate comparator would have been an employee who, like the claimant, had failed to provide adequate responses during the investigation.

In **CLFIS (UK) Ltd v Reynolds** (Brief 1023) 2015 ICR 1010 the Court of Appeal considered whether a tribunal was entitled (or indeed required) to focus only on the mental process of the alleged decision-maker and no one else when considering whether a decision was directly discriminatory. In the Court's view, it was fundamental to the legislative scheme of what is now the EqA that liability can only attach to an employer where an individual employee or agent for whose act it is responsible has personally been motivated by the protected characteristic. Thus, an employment tribunal which had dismissed a claim of direct age discrimination had not erred by focusing solely on the reasoning of the manager who had taken the relevant decision. While he had been influenced by

for junior doctors – which indirectly discriminated against non-UK medical graduates – were justified by the Department of Health as 'a proportionate means of achieving a legitimate aim' under S.19(2)(d) EqA. The EAT concluded that an employment tribunal had been entitled to hold that they were justified. It rejected the argument that European law restricts the grounds for justification under the EqA, and held that the existence of alternative, less discriminatory means of achieving the aims pursued by the rules did not mean that the rules were not proportionate. The EAT also confirmed that an agent of the state can rely on costs, among other considerations, to justify indirect discrimination.

Religion and belief

Employees are protected against direct discrimination because of religion or belief. In **Mbuyi v Newpark Childcare (Shepherds Bush) Ltd** (Brief 1023) ET Case No.3300656/14 an employment tribunal held that a Christian nursery assistant, who was dismissed following a conversation with a lesbian colleague in the course of which she expressed her belief that God does not approve of homosexuality, was subjected to direct discrimination because of her beliefs. The employer had characterised the exchange as harassment even though it had been instigated by the colleague and the claimant was giving an honest answer to a question. This, and other examples of unfairness in the dismissal process, led the tribunal to conclude that the employer's decision came about because of a stereotypical view of evangelical Christians.

More common, however, are claims of indirect discrimination under S.19 EqA – particularly claims that a policy or practice applied by an employer has a disproportionately adverse effect upon the claimant's ability to manifest his or her religion or belief. **Begum v Pedagogy Auras UK Ltd (t/a Barley Lane Montessori Day Nursery)** (Brief 1024) EAT 0309/13 concerned the effect of an employer's uniform policy upon a Muslim claimant. The EAT upheld the decision of an employment tribunal that a nursery which told a Muslim job applicant who was wearing a jilbab (a garment which covered her body from neck to ankle) that its uniform policy meant that any garment worn should not present a tripping hazard to children or staff did not indirectly discriminate on the ground of religion. Although the uniform policy was a PCP, it did not place Muslim women who wore jilbabs at a particular disadvantage. All of the other Muslim women at the nursery (who formed a quarter of the overall workforce) were able to comply with this requirement, including one who wore a jilbab.

Race

The EqA outlaws discrimination on the ground of race, defined as including colour, nationality and ethnic or national origins – S.9(1). When first in force the EqA included a new power for the Government to provide specifically that 'caste' is an aspect of 'race' – S.9(5). Following an amendment introduced by the Enterprise and Regulatory Reform Act 2013, that power was converted into an obligation. As a result, S.9(5) provides that the Government 'must' amend the definition of 'race' to include 'caste', although the Government has taken no action in this regard. Its inaction is partly a result of the EAT's decision in **Chandhok and anor v Tirkey** (Brief 1016) 2015 ICR 527. There the Appeal Tribunal held that many of the facts that may be relevant to caste can fall within the existing definition of race in S.9(1), and thereby found a discrimination claim. Accordingly, an employment tribunal was right to refuse to strike out part of a race discrimination claim that alleged that the claimant was treated less favourably because of a perception, tainted by 'caste considerations', that she was of low status. Facts which concerned the claimant's 'caste' might fall within the meaning of 'ethnic origins' for the purposes of the EqA, as the scope of this term was wide and flexible and included characteristics determined by descent. Note that the tribunal subsequently upheld T's complaint of discrimination – Tirkey v Chandok and anor ET Case No.3400174/13. It held that T's Indian nationality, her inability to speak English, and her inherited position in Indian society – i.e. her caste – were all central to the respondents' decision to treat T less favourably.

Disability

Under S.6(1) EqA a person has a disability if (a) he or she has a physical or mental impairment, and (b) the impairment has a substantial and long-term adverse effect on his or her ability to carry out normal day-to-day activities. Para 5(1) of Schedule 1 to the EqA provides that an impairment is to be treated as having a substantial adverse effect if, but for measures taken to treat or correct it, it would be likely to have that effect. In **Metroline Travel Ltd v Stoute** (Brief 1023) 2015 IRLR 465 the EAT held that an employment tribunal had erred in concluding that a bus driver's type 2 diabetes amounted to a disability under the EqA. In the EAT's view, the condition did not have a substantial adverse effect on the employee's ability to carry out day-to-day activities. It did not consider that abstaining from sugary drinks amounted to a treatment or correction that should be ignored in determining the effect of the diabetes, but rather that such a diet amounted to a reasonable coping strategy that minimised the effect of the impairment such that it was no longer substantial.

The ECJ ruled last year in **Kaltoft v Municipality of Billund** (Brief 1013) 2015 ICR 322 that obesity may amount to a disability for the purpose of the Framework Directive. While there is no freestanding

prohibition in EU law against discrimination on the ground of obesity per se, the Court held that obesity can amount to a disability where it 'entails a limitation resulting in particular from long-term physical, mental or psychological impairments which in interaction with various barriers may hinder the full and effective participation of the person concerned in professional life'. This would be the case, in particular, where the obesity results in reduced mobility or the onset of related medical conditions. The Belfast Industrial Tribunal followed the ECJ's decision in **Bickerstaff v Butcher** (Brief 1023) Belfast Industrial Tribunal Case No.92/14 in finding that a morbidly obese employee who was the victim of derogatory comments about his weight had suffered disability-related harassment. The tribunal found that while obesity was not in itself a disability, its effects on the employee's mobility, ability to sleep, concentration and fitness were such that it passed the disability threshold in the instant case.

Section 15 EqA provides that a person (A) discriminates against a disabled person (B) if A treats B unfavourably because of something arising in consequence of B's disability, and A cannot show that the treatment is a proportionate means of achieving a legitimate aim. In **Trustees of Swansea University Pension and Assurance Scheme and anor v Williams** (Brief 1031) 2015 ICR 1197 the EAT overturned a tribunal's decision that an employee had suffered discrimination arising from his disability contrary to S.15. The tribunal had found that the employee was treated unfavourably in that his ill-health pension was based on the salary he had received while working part time in the period leading up to his retirement, after his employer had reduced his hours to accommodate his disability, rather than on the full-time salary he had received before switching to part-time hours. However, the EAT observed that given that the ill-health retirement scheme only applied to disabled people, it was manifestly perverse for the tribunal to conclude that it discriminated against disabled people when in fact it treated them favourably when compared to non-disabled people. Treatment that was advantageous could not be said to be 'unfavourable' merely because it could have been even more advantageous. The Court of Appeal is due to hear an appeal later this year. By contrast, in **Land Registry v Houghton** (Brief 1017) EAT 0149/14 the EAT upheld a tribunal's decision that the terms of a bonus scheme that excluded employees who had received a formal warning in respect of sickness absence during the relevant financial year occasioned discrimination arising from disability under S.15. The tribunal was entitled to hold that – since exclusion was automatic even for disability-related absences – the rule clearly gave rise to unfavourable treatment in consequence of disability, and that it could not be objectively justified because, among other things, managers had no discretion under the scheme.

In **Hall v Chief Constable of West Yorkshire Police** (Brief 1034) 2015 IRLR 893 the EAT considered what is meant by treatment being because of something arising in consequence of the disability. It overturned an employment tribunal's decision that the dismissal of a disabled employee for gross misconduct following disability-related sickness absence was not discrimination arising from disability under S.15. In reaching its decision, the tribunal had wrongly focused on the employer's motive for dismissing the employee – namely, its genuine but mistaken belief that she was falsely claiming to be sick – and the remoteness of the connection between the employee's disability and the unfavourable treatment. However, the EAT confirmed that to establish a claim for discrimination arising from disability there need only be a 'loose' causal link between the disability and any unfavourable treatment.

We managed to cover one more case on S.15 before the end of the year – **Basildon and Thurrock NHS Foundation Trust v Weerasinghe** (Brief 1035) EAT 0397/14. There, Mr Justice Langstaff, President of the EAT, upheld an appeal against a tribunal's finding that a doctor with a serious lung condition, who had been dismissed for refusing to meet with his clinical director while on sick leave, had suffered discrimination contrary to S.15. The tribunal had approached the matter as if all that needed to be shown was a link between the disability and the unfavourable treatment. However, Langstaff P explained that there is a need to identify two separate causative steps for a claim under S.15 to be established. The first is that the disability had the consequence of 'something'; the second that the claimant was treated unfavourably because of that 'something'.

Where an employer applies a PCP that puts a disabled person at a substantial disadvantage compared with employees who are not disabled, the employer has a duty to make reasonable adjustments to avoid that disadvantage – Ss.20 and 39(5). However, an employer will not breach this duty if it does not know, and could not reasonably be expected to know (commonly referred to as having 'constructive knowledge'), that the employee is disabled – para 20(1), Sch 8. In **Donelien v Liberata UK Ltd** (Brief 1021) EAT 0297/14 the EAT upheld an employment tribunal's decision that an employer did not have constructive knowledge of an employee's disability. While it had not taken every step possible, the employer had taken reasonable steps to ascertain the nature of the employee's illness and could not have been expected to do more. It had not relied solely on an occupational health report stating

that the employee was not disabled; moreover, it had held meetings with her and reviewed letters written by her GP. In the circumstances, the employer could not reasonably have been expected to know that she was disabled and so the duty to make reasonable adjustments did not arise.

The duty to make reasonable adjustments arises at the point at which the disabled employee is placed at a 'substantial disadvantage' by the PCP, but what this means in practice has been the subject of some debate. In **Doran v Department for Work and Pensions** (Brief 1015) EATS 0017/14 the EAT in Scotland upheld a tribunal's decision that an employer's duty to make reasonable adjustments was not triggered where an employee on long-term sick leave remained unfit for any work and had given no indication of when she might be able to return. The tribunal had been entitled to find that the onus was on the employee to discuss possible arrangements for a phased return when she became fit for work. By failing to hold a case conference with an occupational health adviser, the employer had breached its own attendance procedure. However, there was no evidence that such a meeting would have revealed that the employee was fit to return.

Pregnancy and maternity

An employee who is on maternity leave is afforded special protection against redundancy by Reg 10 of the Maternity and Parental Leave etc Regulations 1999 SI 1999/3312 ('the MPL Regulations'). This provides that where her position becomes redundant during her maternity leave period and there is a 'suitable available vacancy' on terms and conditions that are not substantially less favourable to her, she is entitled to be offered alternative employment. If the employer fails to offer a suitable vacancy and subsequently dismisses her by reason of redundancy, Reg 20(1)(b) provides that the dismissal is automatically unfair under S.99 of the Employment Rights Act 1996. However, it is not inevitably the case that such a dismissal will be discriminatory under the EqA. In **Sefton Borough Council v Wainwright** (Brief 1016) 2015 ICR 652 the EAT upheld an employment tribunal's decision that a Council was in breach of the MPL Regulations by failing to offer a newly created post to a woman on maternity leave who was made redundant. Redundancy for these purposes has the same definition as in the ERA and the obligation to offer a suitable available vacancy arose once the Council had decided to merge the woman's role with that of a male colleague and not after it had decided who would get the new position. However, the tribunal had erred in holding that the failure necessarily amounted to discrimination contrary to S.18 EqA. This provides that discrimination occurs where an employer treats a woman 'unfavourably' because of her pregnancy or maternity leave – S.18(2)(a) and 18(3) and (4). The tribunal had not considered whether the employer's reason for not offering her the new role was 'because of' her pregnancy or maternity leave and so the EAT remitted the case for it to determine that issue.

Harassment

Harassment is a specific ground of claim under the EqA which occurs where a person engages in unwanted conduct related to a relevant protected characteristic, which has the purpose or effect of violating another's dignity, or creating an intimidating, hostile, degrading, humiliating or offensive environment for him or her – S.26(1). It might be thought that a constructive dismissal could amount to an act of harassment, but the EAT in **Timothy James Consulting Ltd v Wilton** (Brief 1022) 2015 ICR 764 confirmed that it cannot, as a matter of law. This is because while S.39 provides that an employer must not discriminate against an employee – by, for example, dismissing him or her – harassment in an employment context is dealt with separately in S.40. This simply provides that an employer must not harass employees and job applicants; it makes no reference to dismissal. The fact that acts of harassment give rise to a constructive dismissal does not mean that the constructive dismissal itself becomes an act of harassment. It was therefore not open to the employment tribunal to find that W's constructive dismissal was an unlawful act of harassment, though the EAT upheld its decision that the claimant had been subjected to other acts of harassment related to sex.

In **Habinteg Housing Association Ltd v Holleron** (Brief 1027) EAT 0274/14 the EAT held that an employment tribunal had erred in finding that an employee had been subjected to harassment based on an allegedly discriminatory conversation between her employer and a third party, reported to her by the third party. This hearsay evidence was insufficient by itself to establish, on the balance of probabilities, the truth of what was said and the tribunal was wrong to draw inferences from surrounding facts that had no 'logical relevance' to the matter. The tribunal had further erred by excluding the employer's own hearsay evidence of the same conversation. In determining the truth, the tribunal should have taken into account all available evidence.

The Protection from Harassment Act 1997 provides an alternative means by which employees may seek redress for harassment. S.1 of this Act provides that a person must not knowingly pursue a course of conduct that amounts to harassment. Breach of this provision can amount to a criminal offence under S.2, and also give rise to a claim for damages under S.3. Although harassment is not exhaustively defined by the 1997 Act, S.7(2) provides that it includes 'alarming the person or causing the person distress'. In **Levi and anor v Bates**