

Kulikaoskas v MacDuff Shellfish and anor IDS 913

After working for less than a month, Mr Kulikaoskas and his partner, Ms Mihailova, were dismissed by MacDuff Shellfish. Mr Kulikaoskas brought unfair dismissal and discrimination claims, arguing that he was dismissed after telling his supervisor that he had helped Ms Mihailova lift heavy weights in the factory because she was pregnant. His discrimination claim was brought under S.3A of the SDA 1975, which provided that a person discriminated against a woman if, during the protected period (of pregnancy and maternity leave), he treated her less favourably on the ground of her pregnancy. The employment tribunal refused to accept Mr Kulikaoskas's discrimination claim. He appealed, arguing that, because of European law, he should be protected against associative pregnancy discrimination. In his view, S.3A of the SDA 1975 had to be interpreted in the same way as the DDA 1995 had been in the Coleman to ensure such protection was granted.

The EAT rejected the appeal. S.3A of the SDA 1975 did not prohibit an employer from treating a man less favourably on the ground of a woman's pregnancy. If Mr Kulikaoskas's argument as to the interpretation of the section was correct, it would have surprising consequences. For example, the dismissal of a male teacher on the ground of the pregnancy of a pupil with whom he had a sexual relationship would be unlawful discrimination, despite it being likely that his dismissal in such circumstances would be substantively fair.

Furthermore, European law did not require S.3A of the SDA 1975 to be read as covering associative pregnancy discrimination. The decision in the Coleman case could be distinguished. It was decided under the Framework Directive, whereas Mr Kulikaoskas's claim fell under the remit of the Pregnant Workers' Directive and the Equal Treatment Directive. Those directives recognise that special protection is required in respect of the biological condition of pregnancy, and the risk to a woman in her pregnant state and its immediate aftermath.

This case was brought under the SDA 1975. But a question remains: could an associative discrimination claim be brought under the Equality Act, where S.18 replicates the effect of S.3A SDA? The EAT commented that this is not entirely clear. S.18 of the Equality Act requires that the unfavourable treatment must relate to the claimant's own pregnancy, meaning that associative discrimination is not covered by this provision. However, S.13 prohibits direct discrimination because of pregnancy and maternity that falls outside the scope of the protection in S.18 meaning that associative pregnancy discrimination is potentially covered, which is the view taken by the Equality and Human Rights Commission. But conversely, S.25(2) of the Equality Act states that pregnancy and maternity discrimination is [only] discrimination within S.18. It therefore remains to be seen how the courts and tribunals will interpret the relevant provisions.

Keeping You One Step Ahead



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Secretary of State for Work and Pensions v Wakefield IDS 913

Ms Wakefield (W) sustained a workplace injury which resulted in damaged tendons in her right arm. This left her unable to use a computer properly and she could only hold a pen with considerable pain.

Following a workplace assessment conducted by an occupational health specialist, a number of detailed recommendations were made concerning changes to W's workstation, but when the new workstation arrived it was found not to be suitable, and both W and the employer agreed that a new assessment was required.

W was sent home for a further period of special leave with pay, and the employer recommenced the whole process of occupational health referral. When W returned to work the equipment had still not been provided and she brought claims of disability discrimination. The tribunal upheld her claim that the employer was in breach of its duty to make reasonable adjustments, taking the view that the delays went well beyond what was reasonable, given the employer's size, resources, and the expertise available to it.

The EAT held that a tribunal had failed to follow the guidelines set out in *Environment Agency v Rowan* when assessing whether the employer had failed to make reasonable adjustments. These guidelines stated that a tribunal cannot properly determine whether there has been a failure by the employer to comply with a duty to make reasonable adjustments without first identifying: (i) the provision, criterion or practice applied by the employer (and/or the physical feature of the premises occupied by the employer); (ii) the identity of non-disabled comparators (where appropriate); and (iii) the nature and extent of the substantial disadvantage suffered by the claimant.

This assessment had not happened in this case and without making findings of fact on such matters, the tribunal is not in a position to judge if any proposed adjustments are or would have been reasonable. The tribunal needs to explain why the proposed adjustments would alleviate the disadvantage in question and cannot do so unless it has identified the substantial disadvantage at the outset.

Ayodele v Compass Group plc IDS 913

Mr Ayodele made a request to work beyond his 65th birthday, having been notified by his employer that it intended to retire him at age 65. Although the retirement policy referred to the duty to consider procedure, it did not provide any guidance on how this would be carried out.

A meeting to consider his request and an appeal meeting took place as a "mere formality". On both occasions, the HR function made clear that it was Compass's policy to retire people at 65 and there would be no exceptions. Nothing he could say or do would affect the outcome. In evidence, one of the witnesses for Compass expressed it as a "done deal" on the basis that "the policy was the policy". Mr Ayodele was dismissed and brought a claim for unfair dismissal.

The tribunal found that Mr Ayodele had been dismissed by reason of retirement but that the dismissal had been unfair. There was no doubt that Compass had complied with its notification requirements under Schedule 6 (of the Employment Equality (Age) Regulations 2006, which remain in force until October 2011).

But Compass had failed to comply with the duty to consider procedure in paragraphs 6 to 8 of Schedule 6. Acknowledging that the wording in the Regulations suggested that a summary process is permissible, the tribunal stated that a completely sham process or a mere charade did not comply either with the letter or the spirit of the legislation.

The fact that the express words "in good faith" were deleted from an earlier draft of the Regulations did not support the view that a sham process was permissible; it was implicit that any statutory obligation must be performed in good faith. Mr Ayodele was awarded two years' loss of earnings (relating to the period of his requested extension).

This decision comes as somewhat of a surprise since the Regulations are clear that the duty to consider procedure consists of only "procedural requirements". As a tribunal decision, it is not binding, but it serves as a reminder that the procedure should not be just a 'mere formality' and that proper consideration should be given to the request.