CHAPTER 7

Discrimination (2)

CHAPTER OBJECTIVES

The objectives of this chapter are:

- to explore the specific protected characteristics within the Equality Act 2010 – sex, marital status and civil partnership, pregnancy and maternity, race, disability, gender reassignment, sexual orientation, religion and belief, age
- to consider the legislation relating to discrimination on the grounds of trade union membership.

In the last chapter we focused on different types of discrimination. In this chapter we will look in more detail at the different protected characteristics within the Equality Act 2010.

SEX DISCRIMINATION

SEX

Discrimination on the basis of the gender of an individual is unlawful. For there to be sex discrimination, the treatment must relate to the gender of the individual:

- *Shamoon v Chief Constable of the Royal Ulster Constabulary* (2003) IRLR 285
  Shamoon was a chief inspector in the Constabulary. One of her duties was to carry out staff appraisals. There were complaints about the manner in which she conducted some appraisals and hence it was decided that she would no longer carry out that duty. However, the two other (male) chief inspectors continued to carry out appraisals. Shamoon claimed that this was sex discrimination. This claim was rejected because her sex was not the reason that she was no longer carrying out appraisals.

It has been held that requiring women to work shift patterns that make it difficult to meet childcare responsibilities can be indirect sex discrimination. However, this does not mean that the woman is also entitled to any benefits associated with such shifts:

- *Blackburn v Chief Constable of West Midlands Police* (2009) IRLR 135
  Blackburn was a front-line police officer – they were required to work a 24/7 shift, but she was excused from working this because of her childcare responsibilities. Those who worked during night-time (which she did not work) received a bonus. Blackburn claimed that not receiving the bonus made her contract unequal to her male comparators and hence was discriminatory. Her claim failed. The Court of Appeal ruled that paying a bonus for night-time working was a legitimate aim and paying the bonus was a proportionate means of achieving that aim.

MARITAL STATUS AND CIVIL PARTNERSHIP

Discrimination against employees on the grounds of their marital status is covered as part of the Equality Act 2010, but there is no similar protection for people who are living together outside marriage.

- *Chief Constable of Bedfordshire Constabulary v Graham* (2002) IRLR 239
  Graham was an inspector in the Bedfordshire force and married a chief superintendent in the same force. In May 1999 Graham was appointed Area Inspector in the same division that her husband commanded. In June 1999 she was told that her appointment had been rescinded. It was claimed that her appointment was inappropriate in view of the role of her husband in the division. The claims of indirect sex discrimination and direct and indirect discrimination on the grounds of marital status were all upheld. The EAT confirmed that the decision to rescind the job had clearly been on the basis of Graham's marital status.

Those who have entered into a civil partnership are specifically covered by the Equality Act 2010. They are also protected by the Civil Partnership Act 2004. Any benefits that are given to married partners of an employee (eg transport subsidies given to employees and their spouses) must also be applied to an employee and his/her civil partner.

PREGNANCY AND MATERNITY

As we discovered in the last chapter, dismissal on the grounds of pregnancy or any matter relating to pregnancy is automatically unfair. Refer back to the case of *Webb v EMO Air Cargo Ltd* (1994) IRLR 482.

RACE

WHAT IS RACE?

The Equality Act 2010 defines 'race' as being colour, nationality and ethnic or national origins.

A series of cases have helped to define what is and is not a racial group. Sikhs, Jews and Gypsies have all been held to be ethnic groups, but Rastafarians have not. In determining that Sikhs were an ethnic group (*Mandla v Dowell Lee* [1983], IRLR 209, 2 AC 548) it was stated that to be an ethnic group the group must regard itself, and be regarded by others, as a distinct community with long-standing cultural traditions and a shared history. Because Rastafarians have been an identifiable group for only around 60 years, they did not meet this definition. However, Rastafarians are covered by religious discrimination.

- *Serco Ltd t/a West Yorkshire Transport Ltd v Redfearn* (2006) IRLR 623
  Redfearn was a bus driver transporting children and adults with disabilities. He worked in Bradford where 25% of the employees and 70–80% of the passengers were of Asian ethnic origin.

  The employer discovered that he was standing for election as a local councillor, representing the British National Party. The employer was concerned about the health and safety of the passengers, due to the likely reaction to Redfearn's actions and hence dismissed him. Redfearn claimed that this was race discrimination.

  The Court of Appeal rejected the argument. It found that the dismissal was not on racial grounds.

DISABILITY

DEFINITION OF A DISABLED EMPLOYEE

In the Act a disabled person is defined as having a 'physical or mental impairment that has a substantial and long-term adverse effect on a person's ability to carry out normal day-to-day activities'. The definition is extended by the following:

- a mental impairment does not have to be one of a list of clinically recognised illnesses to be classed as a disability, rather the impact of the impairment should be considered
- all people diagnosed with cancers, HIV or multiple sclerosis are classified as disabled from the date of diagnosis.

Physical or mental impairment

In the majority of cases this is a relatively straightforward concept. However, there have been cases brought to the Employment Tribunal for a judgment on less clear illnesses.

- *Millar v Inland Revenue Commissioners* (2006) IRLR 112
  Following a fall at work when Millar hit his head, he developed vision problems primarily including sensitivity to bright lights. This meant that he could not drive at night or on sunny days and could use a VDU only for limited periods of time.

  Despite a number of medical investigations, no cause for his problems could be found, although it was not disputed that the problems existed.

  The Court of Session held that he was disabled in accordance with the definitions set out above. He clearly was restricted in relevant day-to-day activities and reaching the definition of disability does not require reference to cause or to a specific named illness.

Substantial and long-term adverse effect

An illness is deemed to have had a 'long-term effect' if it has lasted, or is likely to last, at least 12 months or (in the case of a terminal illness) is expected to last for the rest of the employee's life. The definition of a 'substantial and adverse effect' is more difficult. Clearly, it is related to the latter part of the definition – the ability to carry out normal day-to-day activities. However, that amounts to a yard-stick, and if the employee is unable to carry out normal duties at work, there is also the possibility that a disability exists.

- *Cruickshank v VAW Motorcast Ltd* (2001) IRLR 24
  Cruickshank developed work-related asthma. He was moved away from his job to working as a fork-lift truck driver and his symptoms went away. However, a reorganisation resulted in his having to use his fork-lift truck near the area of the fumes that had triggered his asthma and the symptoms returned. A medical adviser found that the asthma was triggered at work, but not at home. Because there were no other jobs available it was decided to dismiss Cruickshank. The EAT found that although Cruickshank could carry out most normal day-to-day activities, he was unable to carry out normal duties at work. This could not be ignored and so his illness was to be classified as a disability.

Normal day-to-day activities

These must be normal activities that might occur regularly. The Disability Discrimination Act 1995 contained a list of activities that were considered to be 'normal' and 'day to day'. However, that list is not part of the Equality Act 2010.

If an employee is no longer able to carry out his/her normal work duties this does not necessarily mean that the employee is defined as disabled. The emphasis is on being able to carry out normal *day-to-day* activities, not normal work activities:

- *Quinlan v B&Q plc* (1998) EAT 1386/97
  Quinlan underwent open heart surgery. As a result of the surgery he was unable to lift the heavy loads that was required of him as a general assistant in the garden centre. He

was therefore dismissed. The EAT supported the Employment Tribunal's view that he was not suffering from a disability because he was still able to carry smaller loads that would be typical of day-to-day activities, even though he was not able to carry out the duties required of him at work.

- *Abadeh v British Telecommunications plc* (2000) IRLR 23
  Abadeh worked as a telephone operator. One day, while at work, he received a loud screeching noise in one ear, which left him with tinnitus, hearing loss and post-traumatic stress disorder. In deciding whether Abadeh had a disability as defined by the DDA, the Employment Tribunal accepted the evidence that he was unable to travel by underground or on an aeroplane because of his illness. They classified this as a 'normal day-to-day' activity. The EAT found, however, that they had erred in giving any weight to this part of the argument because Abadeh did not live in London and these forms of transport were not part of his normal daily activities.

It is also important to note that a recurring illness can be treated as a disability, even if it is not evident at the specific time of events:

- *SCA Packaging Ltd v Boyle* (2009) IRLR 746
  Boyle suffered from hoarseness and problems with her vocal nodes. She controlled her condition by regular exercises, drinking water and not raising her voice. The employer removed a wall between her area of work and the warehouse, which resulted in increased noise and the need for her to raise her voice. She asked to move to another area, but this was refused. The House of Lords ruled that this was disability discrimination because it was likely to result in her situation recurring.
- *Richmond Adult Community College v McDougall* (2008) EWCA Civ 4
  McDougall had been offered a job at the college, but this was withdrawn when it became apparent that she had previously suffered from a mental illness, although she had not had an 'episode' for three years. When the offer was withdrawn she had a relapse. The Court of Appeal ruled that this was not disability discrimination because events subsequent to the actions of the college could not be taken into consideration.

A severe disfigurement is treated as a disability. However, there are certain conditions that do not constitute a disability, which are:

- an addiction (eg alcohol, nicotine)
- a tendency to set fires, steal or abuse other people, exhibitionism and voyeurism
- hay fever.

DIRECT DISABILITY DISCRIMINATION

Direct disability discrimination is treating a disabled person less favourably because of the disability. If an individual is disabled the employer is required to make 'reasonable' adjustments to accommodate the needs of a disabled employee. These might include such adjustments as:

- making physical adjustments to the workplace (eg moving a work area to the ground floor of a building)
- allocating some of the duties to another employee (eg in the *Quinlan v B&Q* case, the heavy lifting could have been assigned to another employee – if that was operationally possible)
- moving the disabled person to another job (eg VAW Motorcast moving Cruickshank to fork-lift truck driving duties)
- altering the hours of work (eg allowing the employee to start work at a later hour to enable him/her to take advantage of easier travelling arrangements)
- moving the employee to a different place of work (eg moving to a site/office nearer to home and making travelling easier for the employee)

- allowing time off during working hours for treatment or rehabilitation
- arranging training for the employee (eg to allow him/her to move to a more suitable job)
- acquiring or modifying equipment (eg purchasing a Braille machine to help a partially sighted employee)
- altering instructions or reference materials (eg reprinting them in larger type for a visually impaired employee)
- altering procedures for testing or assessment (eg allowing a longer time to complete the activity)
- providing a reader or an interpreter (eg to help a visually impaired employee)
- providing supervision (eg to help the employee avoid dangerous situations).

TASK

Find out if your organisation, or an organisation with which you are familiar, has had to make any reasonable adjustments due to an individual having a disability. Do you think that these adjustments were reasonable? Why/why not?

All of these possible modifications have a potential impact on the employer. There is clearly a financial impact in most cases and some adjustments (although highly preferable) might be impossible for logistical reasons. In determining whether the employer has acted reasonably, the Employment Tribunal will take all of these issues into consideration.

- *Beart v HM Prison Service* (2003) EWCA Civ 119
  Beart worked as an administrative officer. She had relationship difficulties with her line manager. She discussed the possibility of working part-time and her line manager took this as meaning she wanted to resign and advertised her job. This left Beart facing demotion and a substantial drop in salary. She went on sick leave suffering from clinical depression. During her sick leave the Prison Service believed she was working in a clothes shop that she owned and so dismissed her on grounds of gross misconduct. She claimed unfair dismissal and disability discrimination.

  In considering her claim for disability discrimination the Employment Tribunal held that the employer should have considered making the reasonable adjustment of moving her to a different workplace. In not doing so, disability discrimination had occurred. This finding was supported by the Court of Appeal.

- *Archibald v Fife Council* (2004) IRLR 651, HL
  Archibald worked as a road sweeper but became unable to walk and therefore unable to do her job. She applied for over 100 administrative jobs with the council, but was unsuccessful with all the applications. She was eventually dismissed on grounds of capability.

  She took a claim for disability discrimination, stating that she should have been offered an administrative post without having to go through the process of competitive interviewing. The House of Lords supported her claim – stating that there is an obligation on employers to make reasonable adjustments for disabled employees, and giving her a job without the process of competitive interviewing was a reasonable adjustment that should have been made.

- *O'Hanlon v Commissioners of HM Revenue and Customs* (2007) IRLR 404
  O'Hanlon was absent from work with clinical depression. After a period of time her entitlement to company sick pay ran out, in accordance with the company procedure. She took a claim that failing to pay her full pay during her period of illness was either direct discrimination or disability-related discrimination (not making a reasonable adjustment in light of her disability).

The EAT rejected her claims (this was later upheld by the Court of Appeal). The purpose of a reasonable adjustment is to aid the employee to be part of the workforce. Paying additional monies during a period of sickness absence did not help meet the purpose of reasonable adjustments.

The issue of whether an employer cannot be held responsible for making adjustments has been the subject of case law:

- *O'Neill v Symm & Co Ltd* (1998) ICR 481, IRLR 233
  O'Neill worked as an accounts clerk. Three months after starting work with Symn & Co she was dismissed for sickness absence. At her interview she had told them that she had previously suffered from viral pneumonia, but had since recovered. During her period of employment she was diagnosed as suffering from ME – but she did not tell her employers. When she was dismissed she claimed disability discrimination, but it was found that the employer could not have discriminated if it did not know that there was a disability.

However, that decision was overturned in the case of:

- *H J Heinz Co. Ltd v Kenrick* (2000) ICR 491
  Kenrick had symptoms of chronic fatigue syndrome (CFS), although he was dismissed prior to any firm diagnosis being given. (He was actually dismissed just two weeks before he was due to see a consultant.) The EAT ruled that even though the employer did not know that he was disabled as defined by the DDA, the fact was that he did indeed have a disability. So reasonable adjustments should have been made and the act of dismissal without making these adjustments was discrimination.

The courts will consider what a reasonable employer ought to have known or ought to have reasonably investigated.

INDIRECT DISABILITY DISCRIMINATION

The Equality Act 2010 has introduced indirect disability discrimination. This was a concept that did not exist in the Disability Discrimination Act 1995. The definition of indirect discrimination is as explained in the last chapter.

DISCRIMINATION ARISING FROM DISABILITY

The Equality Act 2010 has also introduced the concept of 'discrimination arising from disability'. This addresses some of the confusion that arose in the following case:

- *London Borough of Lewisham v Malcolm* (2008) UKHL43
  This was a case relating to housing, but the implications read across to all applications of the Disability Discrimination Act 1995 (this case was prior to the Equality Act 2010). Malcolm was schizophrenic. He sub-let his council flat, in breach of the terms of his tenancy. As a result he was to be evicted. He claimed that his schizophrenia meant that he did not always behave rationally and linked the decision to sub-let his flat to his illness. Hence, he claimed, evicting him would be discrimination on the grounds of his disability. The House of Lords ruled that the question was whether a non-disabled person who sub-let his flat would be treated in the same way. There was evidence that tenants who had done the same as Malcolm had previously been evicted and hence the House of Lords found that this was not discrimination on the grounds of discrimination.

This case went against the way that the Disability Discrimination Act 1995 had been applied and made it much more difficult for employees to win a claim of disability discrimination. For example, if a disabled employee had been absent for a significant period of time and was dismissed, on the basis of this case it would not be disability discrimination if it could

be shown that a non-disabled employee who had been absent for a similar length of time would also be dismissed.

The difficulties that arose as a result of this case were addressed by introducing the concept of 'discrimination arising from disability' into the Equality Act 2010.

This is defined as an employer treating an individual unfavourably for a reason arising in consequence of the individual's disability. For example, this could be penalising an employee who makes a lot of spelling mistakes due to having dyslexia. Unlike direct disability discrimination, this will be justifiable if it is a proportionate means of achieving a legitimate aim.

GENDER REASSIGNMENT

It is unlawful to discriminate against an individual who proposes to, starts or has completed a process to change his/her gender. Discrimination is unlawful at any stage of the process of gender reassignment, not just when the process is completed. The Equality Act 2010 extended the protection by stating that there is no requirement for the person to be under medical supervision to be protected. Hence, this would include someone who lives as someone of the opposite gender but does not undergo any medical procedures. Cross-dressers are not protected because they do not intend to live permanently in the opposite gender to their birth gender.

Although this legislation has not been reported on in much detail (probably due to the relatively small number of employees who could potentially be affected), there are two interesting cases to consider:

- *A v Chief Constable of West Yorkshire Police* (2002) EWCA Civ 1584
  A was born male, but underwent gender reassignment surgery in May 1996. Since that time she has dressed and presented herself as a woman. In 1997 she applied to join the West Yorkshire Police Force but was told that that the force had decided not to employ transsexuals because they were unable to perform all the necessary duties. In particular, they would not be able to carry out searches of individuals. A brought a claim of discrimination. The Court of Appeal upheld A's claim, stating that the force could sensibly have avoided the problem by exempting her from the requirement to carry out searches.
- *Croft v Consignia plc* (2002) EAT 1160/00, IRLR 851
  Croft started work with Consignia in March 1987 as a man. In April 1998 Croft started the process of gender reassignment by taking feminising hormones. At this stage she announced that she would adopt a female role. The way of announcing this to the workforce was discussed and, in particular, there was discussion about which toilet Croft should use. It was agreed that she would start by using the gender-neutral disabled toilet, but would eventually move to using the female toilet. Croft was concerned about this because she wanted to live fully as a female and that included using the relevant toilets. However, the female staff (who had known Croft as a man for many years) were not happy with her using their toilets. Her claim of discrimination was unsuccessful because it was found that Consignia were not refusing to allow her to ever use the toilet, but were trying to deal with a difficult employment relations issue as well as waiting for medical advice.

SEXUAL ORIENTATION

Sexual orientation is defined as 'a sexual orientation towards persons of the same sex; persons of the opposite sex, or persons of the same sex and the opposite sex'. The definition thus covers all aspects of sexual orientation. The definition does not include discrimination relating to any particular fetishes (eg sado-masochism) and it cannot be argued that 'orientation' covers orientation towards children (ie paedophilia is not covered by the Act).

The majority of cases that have been heard under this statute have related to harassment on the grounds of sexual orientation:

- *Whitfield v Cleanaway UK Ltd* (2005)
  Whitfield was subjected to a series of taunts about his sexuality, including a manager calling him 'Sebastian' after a homosexual character in the television programme *Little Britain*. Eventually he resigned and successfully claimed constructive dismissal and sexual orientation discrimination.
- *Reaney v Hereford Diocesan Board of Finance* (2007) ET 1602844/2006
  Reaney was a homosexual who applied for a job as youth worker. He was quizzed by the bishop about his sexuality. At the time he was not in a relationship and he assured the bishop that he would not become involved in any sexual relationship if he was appointed to the job. The bishop's concern was not so much the homosexuality, rather that the teachings of the Church see any sexual relationship outside marriage as wrong. The bishop was concerned that Reaney could not make a commitment that he would be celibate in the future and he was rejected for the job.

  Reaney successfully won his case of discrimination. This was because the bishop's refusal to accept that the requirements of the job had been met (ie not engaging in sexual relationships outside marriage) was not reasonable.
- *Thomas Sanderson Blinds v English* (2011) UKEAT/0316/10
  English was heterosexual and was married with children. However, because he had been to boarding school and lived in Brighton, there was general banter and teasing about him being homosexual (based on stereotypical views). The employees involved did not think that he was homosexual, but the banter continued. English's claim of harassment on the grounds of sexual orientation was initially rejected because he was not homosexual. However, it was ruled that the legislation states that discrimination is unlawful on 'the grounds of' sexual orientation. The treatment met with this definition and hence the courts found in English's favour.

The sort of harassment identified in the *Whitfield* and *English* cases can be difficult for the employer to control. As we saw in the last chapter, the employer is vicariously liable for events that occur in the course of employment. A useful outline of what is expected of the employer is set out in the following case:

- *Martin v Parkam Foods Limited* (2007) ET/1800241/2006
  Martin is homosexual. Unacceptable remarks and graffiti appeared in the workplace relating to this. The employer removed his name from the homophobic graffiti, but it was replaced by those involved in the harassment. The employer then posted notices warning employees not to write graffiti and advising that disciplinary action would be taken against anyone who did. It also reminded managers of the equal opportunity policies, monitored the sexual orientation of potential employees and interviewed some employees to try to determine who was responsible for the graffiti.

  However, the Employment Tribunal found that this was not sufficient and Martin's claim succeeded. It ruled that firmer instructions should have been given to employees about the seriousness of homophobic behaviour and that the employer should have apologised to Martin for what had occurred.

RELIGION AND BELIEF

When legislation was initially introduced relating to religion or belief it was defined as 'any religion, religious belief or similar philosophical belief'. However, in April 2007 the Equality Act 2006 amended the legislation, changing the definition to 'any religion, or religious or philosophical belief' (ie omitting the word 'similar'). Prior to this change, political beliefs were excluded from the regulations. In a House of Lords debate on this point it was later

suggested that a philosophical belief should cover a 'world view or life stance' – and it is possible that it could be argued that this would encompass political beliefs.

- *Baggs v Fudge* (2005) ET 1400114/05
  Baggs was a member of the British National Party and was not interviewed for a job in a small medical practice because of this. He brought a claim of discrimination on the grounds of religion/belief. The claim was dismissed because the BNP is not a 'religion, religious belief or similar philosophical belief' (ie the beliefs of the BNP are not similar in some way to religious belief).

However, under the revised definition it might be arguable that the BNP is a group with a 'philosophical belief' – the removal of the word 'similar' meaning that the comparison to a religious belief is no longer required.

It is clear that people who belong to established religions (eg Christians, Jews, Muslims) are covered. What is unclear is whether those who belong to non-conventional 'religions' such as Druidism or who have 'beliefs' such as animal rights activists are covered. It is also not clear to what extent an employee has to follow a religion in order to be covered by the Act or the evidence that they need to give to show that they are a member of a religion.

The difficulties over defining 'religion or belief' continue and some recent cases have been particularly interesting:

- *Grainger plc v Nicholson* (2009) UKEAT/0219/09
  Nicholson had been a senior executive with Grainger and claimed that he had been selected for redundancy due to his strong beliefs relating to the environment. He was able to demonstrate that his environmental concerns affected the way he lived his life, for example he did not use aeroplanes and he had carried out extensive work on his home to make it eco-friendly. The tribunal ruled that this was a belief under the Regulations – and this decision was upheld at a later EAT hearing.

  The EAT specified that to be covered by the Act a philosophical belief must be genuinely held, must be a belief in a weighty and substantial matter, must not be just an opinion or viewpoint based on present facts (it must be deeper than that) and must be cogent, coherent, serious, important and worthy of respect in a democratic society. This case was then remitted to the Employment Tribunal to determine if the belief was the reason for the redundancy, but the matter was settled out of court.

- *Hashman v Orchard Park Garden Centre* (2011) ET/3105555/09
  Hashman worked at the garden centre and was an ardent animal rights activist. He was made redundant and believed that this was due to his beliefs – particularly given that the owners of the garden centre were members of the local hunt and he had been involved in hunt saboteur activities.

  The issue was referred to a Pre-Hearing Review to determine whether his beliefs were protected by the Act. The judge found that the beliefs were strongly held and influenced the way he lived, hence he was protected by the Act.

- *Maistry v BBC plc* (2011) ET/1313142/10
  Maistry was a journalist working for the BBC. He had worked for the BBC for 14 years and had been a journalist for 30 years. He was dismissed and claimed that his dismissal was a result of the BBC discriminating against his values about being 'straight and up front' and promoting cultural interchange, citizenship and social cohesion. However, the BBC argued that he was dismissed after a lengthy internal capability process.

  At a Pre-Hearing Review, the Employment Judge found that his belief in the 'higher purpose of journalism' was protected as a philosophical belief because it met the criteria set out in the case of *Grainger v Nicholson*.

AGE

It is unlawful to discriminate on the grounds of age. This includes discrimination against both younger and older individuals.

An area that is important to note is that of length of service. For example, requiring an employee to have a certain length of experience before applying for a job will make it more difficult for younger workers to be able to apply for the job. However, in line with other indirect discrimination legislation, it is allowed if it can be justified. For example, if it could be shown that the employee would be a danger to the public in a particular job if he/she did not have a certain amount of experience, it is likely that this would make the criteria justifiable.

Care also needs to be taken when requiring qualifications that only younger people are likely to have. For example, requiring a media studies degree is likely to be more difficult for people aged around 40 years or more because such degrees were not available when most of this age group will have attended university. Requiring a media studies degree or similar will be more appropriate.

Particular care must be taken when carrying out graduate recruitment. It is lawful to have specific graduate recruitment and training programmes – but graduates of any age must be allowed to apply, not just those who are recently leaving university.

When recruiting people to training schemes it is not allowed to set age limits that are not justifiable. This applies to both maximum and minimum age limits.

Care needs to be taken that there is no age discrimination in the recruitment process:

- *Cunningham v BMS Sales Ltd* (2007) Equality Tribunal of the Republic of Ireland
  In a case ruled in the Republic of Ireland the applicant for a job was asked questions about his age at an early stage of the interview process. This included questions on the application form such as 'number of children', 'age' and 'date of birth'.

  Cunningham provided incorrect answers to the questions, claiming that they were irrelevant and invasive. Despite being suitable for the job he was not offered it. At the equality tribunal it was ruled that age discrimination had occurred in the recruitment process and he received €5,000 in compensation.
- *Rainbow v Milton Keynes Council* (2008) ET/1200104/07
  An advertisement was placed for a job which would suit a teacher in their 'first five years of their teaching career'. Rainbow claimed indirect discrimination because she was 61 years old and had over 30 years' experience of teaching. The council tried to argue that the requirement was a proportionate means of reaching a legitimate aim – because teachers with less experience cost less to employ and the aim was cost saving. This argument was rejected.

RETIREMENT

When legislation relating to age discrimination was introduced in 2006 a default retirement age of 65 years was introduced. Unless an organisation had an earlier retirement age that was justifiable, it was possible to lawfully retire an employee when he/she reached that age, as long as a statutory procedure was followed.

As soon as the age discrimination legislation became law, Heyday (an organisation for people at or near retirement) lodged a claim against the UK Government, claiming that the interpretation of the Equality Directive was wrong and that there should be no mandatory retirement age. This matter was referred to the Court of Justice for the European Union, which ruled that the justification of the retirement age was a matter for national law. The Supreme Court went on to rule that the retirement age was justifiable, but probably not on an ongoing basis.

The Government committed to review the default retirement age and as a result of that review it was removed. The removal was phased in, starting in April 2011 and concluding with the full removal in October 2011.

Employers are now no longer able to force an employee to retire unless there is an 'employer justified retirement age' (EJRA). An EJRA applies when an employer can show that a retirement age can be objectively justified. This will be in a situation when the employer can demonstrate that there is a sound reason for not employing individuals over a certain age in certain roles. Examples could be air traffic control or the police force.

If there is no EJRA, the decision of retirement rests with the employee. The employer cannot force the employee to retire. As a result of the default retirement age being removed, 'retirement' is no longer one of the potentially fair reasons for dismissal (see Chapter 8).

BENEFITS

It is not unusual for organisations to have benefits that link in some way to length of service. This could include long-service awards or increased sick pay entitlements as service progresses or increased holiday allowance. Clearly, there is an obvious link between service-related benefits and age – because older people have more opportunity to have longer service. There is, therefore, the potential that any such benefits could be seen as indirect age discrimination.

To partly address this issue the law specifically allows for service-related benefits when the length of service in question is five years or less.

Any benefits relating to longer service could be allowable if they are necessary for fulfilling a business need – such as loyalty or motivation of staff. Any benefit that mirrors the calculations for statutory benefits (eg an enhanced redundancy pay scheme that mirrors the statutory scheme) is allowable. This is a little vague – because it could be argued that any benefit is introduced to enhance loyalty and motivation and therefore every benefit is allowable! What is allowable within this part of the statute is likely to be determined through case law.

- *MacCulloch v ICI plc* (2008) ICR 1334
  MacCulloch was made redundant. She was 37 years old and had seven years' service, which meant that she received 55% of her salary on her redundancy. However, someone aged 50–57 years who had 10+ years' service was entitled to 175% of salary when made redundant. MacCulloch claimed that this was age discrimination.

  The EAT found that the scheme rewarded loyalty and hence it could potentially be justified. However, the extent of the difference in redundancy payment between the two ages was not proportionate and hence could not be justified, and this was discrimination.

OTHER ISSUES

As we see in Chapter 8, the process for calculating statutory redundancy pay and the basic award is based on a combination of age and length of service. In the light of that very clear link to potential age discrimination, it was expected that the legislation would introduce a new calculation method for these items – but it did not.

The formula for statutory redundancy and the basic award remains the same. In justifying keeping these bands, the Government explained that this approach is still justified because the job market is different for these three groups. (In other words, the Government sees it as relatively easy for someone aged up to 21 years to find work and relatively difficult for someone aged 41+ years to find work.) There is a commitment that this will be reviewed in the future.

In addition, the age bands that relate to the National Minimum Wage remain. The Government defends this because it does not think that employers would be willing to pay young people more – and also it thinks that the bands, set as they currently are, encourage young people to remain in education.

TRADE UNION MEMBERSHIP

As noted at the start of the last chapter, nine major pieces of discrimination legislation and more than 100 smaller pieces of legislation were replaced by the Equality Act 2010. However, there are still some areas that relate to unfavourable treatment that are covered in other legislation. For example, in Chapter 4 we saw that it is unlawful to treat someone less favourably because they work on a part-time basis or on a fixed-term contract.

In the same way, it is unlawful to treat someone less favourably because they are, or are not, a member of a trade union. Although this is not part of the Equality Act 2010, we will explore that issue here.

REFUSAL OF EMPLOYMENT

It is unlawful (Section 137(1) of the Trade Union and Labour Relations (Consolidation) Act 1992) to refuse employment to people because:

- they are, or are not, members of a trade union
  or
- they refuse to accept a requirement that they either become a member of a trade union or that they cease to be a member of a trade union, or they refuse to make payments to the trade union if they fail to join.

It is important to note that this legislation makes the concept of the 'closed shop' illegal. This used to exist in many organisations where, upon starting employment, it was a requirement to join the relevant trade union.

TASK

Try to find someone who was at work in the 1970s who is willing to discuss their experiences with you. Ask them about the 'closed shop'. How did it work? What were the advantages and disadvantages associated with it?

'Refusing employment' covers all of the following:

- refusing to consider a job application or enquiry
- asking the applicant to withdraw an application
- refusing to offer employment
- making an offer of employment which includes terms that no reasonable employee would agree to, thereby making it difficult for the person to accept the offer
- withdrawing an offer of employment after having made it or causing the applicant to refuse the offer
- including a requirement which goes against that which is listed above (s137(1)).

An example of 'refusing employment' can be found in the following case:

- *Harrison v Kent County Council* (1995) ICR 434
  Harrison was a social worker working for Kent County Council. He was an active trade union member with a reputation for being a 'strong and forthright' negotiator. He resigned from his job for family reasons, but later re-applied to the council. He was refused re-employment on the account of his 'confrontational and anti-management approach' in his previous post. The Employment Tribunal held that this was a fair refusal because it related to previous activities as a trade union member, rather than specifically to trade union membership. The EAT overturned that view, stating that the trade union membership could not be separated from activities carried out because of that membership. The refusal to re-employ Harrison had therefore been unfair.

DETRIMENT

Section 146(1) of the Trade Union and Labour Relations (Consolidation) Act [TULRCA] 1992 provides for employees not to suffer any detriment by an act (or omission of an act) by the employer if this takes place for the purpose of:

- preventing or deterring him/her from becoming a member of an independent trade union or penalising him/her for doing so
- preventing or deterring him/her from taking part in the activities of an independent trade union or penalising him/her for doing so
- compelling him/her to become a member of a trade union.

An example of such a detriment is:

- *British Airways Engine Overhaul Ltd v Francis* (1981) ICR 278
  Francis was a shop steward. She made a statement to the press criticising her trade union for taking so much time to pursue an equal pay complaint by her members. She made this statement during her lunchtime. When the article was published she received a formal warning from British Airways, stating that unauthorised statements to the press were forbidden. Francis challenged the warning in the Employment Tribunal, stating that it was a detriment based on trade union activities. The employer argued that the statement came about after an informal meeting of union members and was too remote from Francis's union duties to be classed as trade union activity. The tribunal found, however, that the statement was linked to trade union activity and the warning was therefore unfair because it was a detriment related to such activity.

DISMISSAL

Section 152(1) of TULRCA 1992 defines a dismissal as being unfair if the principal reason was that the employee:

- was, or proposed to become, a member of an independent trade union
- had taken, or proposed to take, part in the activities of an independent trade union
- was not a member of a trade union and had refused to become a member.

- *Port of London Authority v Payne and others* (1992) IRLR 447
  The Port of London Authority derecognised the TGWU trade union and also carried out a redundancy process. Employees were selected for redundancy based on a number of criteria, including attitude. Seventeen shop stewards were among those selected for redundancy; they claimed they had been selected on the grounds of their trade union activities and that their dismissal was therefore unfair. The tribunal held, and the EAT supported this view, that the shop stewards had been selected by the employer because there was concern that they would become involved in a campaign by the TGWU to restore negotiation rights. Because this campaign was authorised and run by the TGWU, it was held that it must be classified as trade union activity and the dismissal was therefore unfair.

There is no statutory definition of trade union activity and therefore, in supporting this conclusion, the EAT spelled out the process that must be followed to determine if there has been an unfair dismissal relating to trade union activity:

> An industrial tribunal must determine the following: the belief held by the employers which formed the basis of the decision to dismiss; whether that belief was genuinely held; and whether the facts upon which that belief was based, judged objectively, fell within the phrase 'the activities of an independent trade union'.

KEY LEARNING POINTS

- Employees are protected against discrimination on the grounds of trade union membership in recruitment, dismissal and other areas of employment where they might suffer detriments.
- The following protected characteristics are included in the Equality Act 2010: sex, marital status and civil partnership, pregnancy and maternity, race, disability, gender reassignment, sexual orientation, religion and belief, age.

CASE SUMMARIES

Discount Tobacco and Confectionery Ltd v Armitage (1990) IRLR 15 – Armitage consulted her trade union representative about her terms and conditions of employment, and he wrote to the employer on her behalf. As a result of this she was dismissed. This was found to be discrimination on the grounds of her trade union membership.

Department of Work and Pensions v Thompson (2004) IRLR 348 – A dress code requiring men to wear a collar and tie and women to dress professionally was not necessarily discrimination. If the requirement was for the same level of smartness for men and women, this was not discriminatory.

B v A (2007) IRLR 576 – A PA was dismissed by her employer after her romantic relationship with him broke down. She claimed direct sex discrimination, but her claim was rejected because the dismissal was because of the breakdown of the relationship rather than because of her gender.

McClintock v Department of Constitutional Affairs (2008) IRLR 29 – McClintock was a Christian and a magistrate sitting on the Family Panel. He did not want to place children with same-sex couples for adoption. He was not allowed to be relieved of this duty and resigned. He stated that he was resigning because he did not think that the adoptions would work; he did not say that it was because of his religious convictions. Hence, this was not religious discrimination.

Reed and another v Stedman (1999) IRLR 299 – The claimant suffered a series of comments and actions that she said amounted to sexual harassment. The employer argued that none of the events was sufficient to be classed as sexual harassment. The EAT found that sexual harassment does not have to be the result of one event, but can be the cumulative effect of a series of events.

Irving and another v The Post Office (1987) IRLR 289 – An employee of the Post Office, who lived next door to the Irvings, wrote racially offensive comments on a letter addressed to them. He was given a final warning, which remained on his record for 12 months. The Irvings complained that this was not sufficient punishment, but it was found that the Post Office was not vicariously liable for the act of the employee because it was an act of personal malevolence and outside the scope of his work duties.

Horsey v Dyfed County Council (1982) IRLR 395 – Horsey took a role as a social worker and it was a condition of the appointment that she would attend a two-year training course. Her husband was appointed to a job in London and she asked to attend her course in Maidstone. Her employers refused this because they did not believe that she would then return to work in Wales for at least two years (as was agreed

in her contract) given that her husband was in London. She resigned and claimed sex discrimination. The EAT upheld her claim because the refusal was based on an assumption relating to her marital status.

Board of Governors of St Matthias Church of England School v Crizzle (1993) ICR 401 – Crizzle was of Asian ethnic origin and a non-communicant Roman Catholic: she was deputy head teacher at the school. When the head teacher resigned she applied for the job but was rejected. The reason given was that the head teacher had to be Anglican (Church of England) to guide the school in its spiritual worship. The EAT held this was justified because of the religious focus of the school.

British Gas Services Ltd v McCaull (2000) IRLR 60 – McCaull was a service engineer. Unknown to his employers he suffered from epilepsy – they found out when he had a fit. As a result of this his employers were told he was unable to drive, work at heights or work with electrical equipment. He would also need supervision. The employer was unable to adjust his work to fit with this and so offered him a clerical job at a lower salary. He claimed this was not a reasonable adjustment – but the EAT rejected his claim.

Hutchison 3G UK Ltd v Mason (2003) EAT 0369/03 – Mason was depressed and suffering from drug addiction. He was absent for rehabilitation, assessment and treatment, but initially did not tell his employer the true reason for his absence. After he did tell them he was allowed an extended period of absence, but was eventually dismissed. Because his dismissal was due to his illness, and the depression was a disability, this amounted to discrimination.

EXAMPLES TO WORK THROUGH

1 Your organisation works a shift system. One of your employees has informed you that he does not want to work on Fridays because it is the holy day in his religion. Other employees have protested at this request, explaining that they have to work every day of the week on a rota basis and this interferes with their plans. (One employee explains he has to miss football matches every third Saturday – and he is a member of the team.) As a result, 13 employees write to you requesting not to work on certain days because of commitments that they have. How do you proceed?

2 A local church is advertising for a youth worker. One applicant for the job is homosexual and has been refused on the basis that this does not fit with the Christian ethos. He decides to claim discrimination on the grounds of sexual orientation. Do you think he is likely to be successful? Justify your answer.

3 Following an accident one of your workers is no longer able to stand for long periods of time. The employee works as a sales assistant in a busy retail store – and has to be available on the shop floor to advise customers. The job involves standing for most of the day. How do you proceed?

4 Your organisation has experienced a lot of conflict with the trade unions over the years. As a result, the managing director has an unwritten rule that it is inappropriate for managers to be trade union members. Is this lawful?

CASE STUDY

A new managing director was recently appointed in your organisation, which is a call centre handling insurance queries and claims. The organisation has been struggling for some time and the new managing director was appointed with the specific brief of turning around the fortunes of the organisation. She certainly seems to have a track record of introducing change at a great speed and with success. However, after the first month you, the HR manager, have a number of employees coming to you with complaints.

First there is Mary. She has two children aged 4 and 2 years. The children are looked after by Mary's mother when Mary is working. However, Mary's mother suffers from diabetes and is unable to look after the children for more than five hours at a time because she tires very quickly. Mary, who lives near the call centre and hence does not have much travelling time, works from 10am–2pm each day. The managing director has told her that she must extend those hours to 9am–3pm with immediate effect.

Next, there is Raj. Raj suffers from a visual impairment, which means that he needs regular breaks from looking at a VDU screen. As all the call handlers are working at a VDU screen, his needs have been accommodated by allowing him to work for two hours in the call centre, then one hour in the post room, and so on, throughout his shift. The managing director has said that there is no need for him to spend so long in the post room each day and is proposing that he works for two hours in the call centre, followed by a 30-minute unpaid break, and so on, throughout his shift.

Muhammad is a recent recruit to the organisation. He is a Muslim and has asked for permission to attend the local mosque on Friday lunchtimes. Due to the travelling time to the mosque, as well as the time that he will want to spend there, he will be absent for three hours. So, he has asked for permission to take an extended break. The managing director has refused his request.

Valerie is a rather quiet employee. She is a vegetarian and is passionate about animal welfare. Last evening her section of the call centre went out for a meal because one of the team was leaving. During the evening one of the team constantly teased her about being vegetarian, calling her 'my little animal terrorist' throughout the meal. This morning she has brought a complaint that this was harassment, but the managing director has told her to 'grow up and stop being silly'.

Using your knowledge of discrimination legislation, advise the managing director about any problems that might arise from these four situations.