

LEGALEYE

Landmark ruling on indirect discrimination

The Supreme Court's landmark judgment in Prospect's case of *Mohammad Naeem v Secretary of State for Justice* has extended the scope of discrimination. This is an extremely important case for all those facing inequality at work.

The Court has confirmed that where a pay system, or any other practice, disproportionately affects a racial or religious group, the employer must be able to objectively justify the practice.

The ruling overturns a very restrictive judgment in the Court of Appeal, that found not only did workers have to show that those sharing their protected characteristic (such as race or religion in this case) were disadvantaged, but also that the reason for the disadvantage related to the characteristic.

The case was brought by Prospect on behalf of our member Mohammad Naeem, who works as a Muslim chaplain for the Prison Service.

As a Muslim chaplain, Mohammad was more likely to be paid at the lower end of the pay scale compared to longer-serving chaplains.

We argued that this amounted to indirect discrimination on the grounds of religion and race.

Despite winning on the principle of indirect discrimination, the Supreme Court was not prepared to overturn the employment tribunal's original finding of fact that the Prison Service was justified in its approach to the pay system. This means Mohammad loses his claim.



Sean Jones, QC; Marion Scovell, Prospect head of legal; Amy Rogers, counsel; Emma Hawksorth, solicitor at Slater & Gordon; Mohammad Naeem at the Supreme Court

Prospect general secretary Mike Clancy, said: "We won the major principle, but not the individual case. This is an important judgment for all workers facing discrimination in the workplace. As a union we are committed to fighting discrimination and ensuring that all of our members get a fair deal."

Prospect head of legal, Marion Scovell said: "If we had not challenged the Appeal Court's judgment it would have been an extremely backward

step for discrimination law."

"The case is another demonstration of the value of unions, enabling individual workers to pursue cases that will benefit thousands of other workers.

"Prospect is committed to challenging discrimination at work and will take cases through the legal system to ensure equality for our members."

For more detail see our employment law update at: bit.ly/2nNyMOh

Blinkered approach to job share was unlawful

Ann Downie, a successful and well respected HR Manager, was dismissed from her job because she could not work full time due to child care responsibilities. An employment tribunal in Glasgow found the

dismissal was unfair and unlawful sex discrimination.

Ann had worked for Coherent Scotland Ltd for over nine years. She had always worked part time. But in March 2016, she was told that the company now needed a full time HR manager and she would need to increase her hours to full time or she would be made redundant.

Ann could not work full time, but made several proposals to meet the employer's need for more HR resource. She offered to reduce her hours so a job share could be appointed, or to increase her hours to provide some extra cover.

Story continues on Page 2



Ann Downie, Ian Perth (Prospect Negotiator) and Nicola Braganza (Counsel)

LEGALEYE

This is the latest edition of the legal team's regular e-newsletter LegalEye, which features success stories from around the union and highlights updates and changes in the law relevant to members.

Previous editions can be downloaded from: bit.ly/AllLegalEyes

Blinkered approach to job share was unlawful -

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The company rejected her suggestions. The managers were adamant that they wanted one full time HR officer and as Ann could not do that they dismissed her.

Prospect presented a claim to the tribunal and the case was heard over three days from 21 February 2017.

Ian Perth, Prospect negotiator, who had represented Ann in the internal hearings, was a witness in the case. Nicola Braganza, Counsel from Garden Court Chambers represented Ann at the hearing.

The tribunal found in Ann's favour and ordered not just compensation, but also that the company should reinstate her as a HR Manager.

The tribunal held that the manager's approach to Ann's proposals was 'incredible' and the reluctance to consider these "was indicative that he had made up his mind, was blinkered and was unwilling to consider".

Ann said: "This has been a really tough and stressful experience, but all through it I felt there was an important principle to uphold. However, I couldn't have done it without the support of Prospect."

"Now I am looking forward to being able to return to my job with a renewed sense of the importance of equality and justice within the workplace," added Ann.

Marion Scovell, head of Prospect Legal, said: "This is a classic case of indirect sex discrimination. A requirement to work full time will be likely to place women at a particular disadvantage. This will be unlawful, unless the employer can show it is justified."

"It is extraordinary that some employers still refuse to accept part time working, despite the wealth of evidence available that it works at all levels," continued Marion.

Ian said: "The tribunal's decision sends a message to employers that indirect sex discrimination needs to be considered right at the outset of any strategic planning, and not simply as an 'add on' to their plans. Countless women face discrimination in the workplace, which must be challenged."

Forecast for equal pay at the Met Office



Some of the claimants at a recent Prospect event

Prospect members at the Met Office have won the first round in their battle for equal pay.

A claim on behalf of 76 members was submitted to the employment tribunal in March 2016. There have now been two hearings on case management and a contested preliminary hearing.

The Judge at the Exeter employment tribunal heard hours of legal argument on the scope of the claim. The employers were seeking to limit the potential comparisons to those doing like work or work rated as equivalent, whereas we were contending that there should be further comparisons on the basis of

work of equal value. The Judge ruled in favour of the women claimants so that the full case can proceed.

It was agreed to stay the claim for three months to see if the claims could be settled. Prospect negotiators are now in discussion with management about a new equality proofed pay structure.

Congratulations, Ben Cooper QC

Prospect Legal is delighted that Ben Cooper has been appointed to Queen's Counsel.

Ben has worked with Prospect on many cases over the past few years, most notably our Court of Appeal case in *Wilson v HSE*. He has also acted in several of the follow on equal pay cases (including the current cases against the Met Office & MOD).

Marion Scovell, head of Prospect Legal said: "Ben is certainly the barrister you want on your side in complex equal pay litigation. Many Prospect members have benefited from his impressive expertise."



Gordon Hutchinson (branch secretary), Ben Cooper (QC), Debbie O'Sullivan (branch rep) at the tribunal following the hearing

Inequality in performance management

Many Prospect members are facing unfair and often discriminatory performance management systems.

In several areas we see that BME, part time and disabled staff are disproportionately receiving low marks.

A Prospect member has successfully challenged her performance marking.

Our member has a disability and had been pressing for adjustments at work for some time. Some, but not all, of these had been provided. In her annual review she received the lowest performance mark.

Prospect presented a claim to the employment tribunal alleging

discrimination on the grounds of disability. There was evidence that disabled workers were given disproportionately lower performance markings than others. Prospect contended this was indirect disability discrimination. We also argued that there had been a failure to make reasonable adjustments.

The case settled with a very good outcome for the member, who can now continue to progress her career.

For more information on challenging performance management schemes see our briefing: bit.ly/1Te8ocf

Health & Safety: Brexit on the horizon

Frances McCarthy, head of personal injury at Pattinson & Brewer, Prospect's solicitors, spoke about Brexit and what it might mean for health and safety law, at Prospect's recent health and safety conference.

Frances explained how the fear of prosecution really helps to focus organisations on keeping workers safe, though of course good employers want to do that because it's the right thing to do.

A "six-pack" of regulations were introduced in 1992 to comply with EU directives, covering Manual Handling, Display Screen Equipment, Personal Protective Equipment etc. These have made a real difference in helping to sue organisations over health and safety failures. It had also contributed to preventing accidents occurring.

But, since the government introduced the Enterprise and Regulatory Reform Act in 2013, it has no longer been possible to make legal claims for breaches of the EU-based regulations.

Frances expressed concern that The Great Repeal Bill could threaten health and safety law further as the government will have more power to change legislation with fewer checks and balances.

Unions can campaign against deregulation by making the case that



Frances McCarthy speaking at the conference

Photo: Stefano Cagnoni

NHS costs and welfare costs could increase.

Frances' presentation, which can be downloaded from: bit.ly/2oLKE6M highlighted the stark realities of the world of work, whilst underlining the value of being a Prospect member. Specifically she stated:

- ✓ Changes to funding - injured now lose up to 25% of damages - **Except Prospect members!**
- ✓ Liability issues - can't find lawyers to take the case - **Except Prospect members!**
- ✓ Employees have no voice to lobby or protest - **Except Prospect members!**

Frances concluded that "Never ever have workers needed a union as much as they do now."

Terms and conditions for legal assistance

You must:

- ✓ Be in membership at the time the problem arises
- ✓ Continue to be in membership for the duration of their case
- ✓ Not take independent legal advice before approaching Prospect
- ✓ Not commence litigation before approaching Prospect



See our legal advice guide for details (bit.ly/ProspectLegalGuide)

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Words To Find:

Appellant	Respondent
Brief	Ruling
Claimant	Supreme Court
Judgment	Tribunals
Legal	Witness
Mediation	Statement
Redact	

Workers' Rights Quiz

All the answers can be found in this edition of LegalEye

1) A refusal to allow a women to work part time is likely to be.....

- a) direct discrimination
- b) indirect sex discrimination
- c) victimisation

2) When were the EU 'six pack' regulations on health and safety introduced?

- a) 1992
- b) 2002
- c) 1982

3) New limits on check off apply from:

- a) 1 March 2017
- b) 1 October 2017
- c) 1 March 2018

4) Mary MacArthur has been in the news lately because:

- a) it is 100 years since her birth
- b) she was made an honorary member of the the TUC general council
- c) She has been honoured by a blue plaque

5) Appeals from the Court of Appeal go to:

- a) The Supreme Court
- b) Court of Session
- c) Employment Appeal Tribunal

6) How long must you be employed in order to bring a claim of unfair dismissal arising in TUPE situation?

- a) No time, the right applies regardless of length of service
- b) 1 year
- c) 2 years

1) b, 2) a, 3) c, 4) c, 5) a, 6) c

Ask LegalEye

Q. We work for an engineering company and have been told they have lost the contract for a major part of the work and that everyone working on this project will be transferred to a new employer. What rights do we have?

A. The Transfer of Undertakings (Protection of Employment) Regulations (TUPE) are likely to apply in this situation. This means that the transferring employer should be formally consulting with the union over the transfer. If there is no union they must consult with workplace representatives. TUPE provides that your current contracts of employment transfer to the new employer. All contractual terms, such as pay, holidays and redundancy rights, will transfer to the new employer. The new employer is not able to make changes to the contract because of the transfer. You also have protection against being dismissed for a reason related to the transfer (unless it's for an economic, technical or organisational reason entailing changes in the workforce) as long as you have two years' service. The law on TUPE can be complicated though, so check with your Prospect rep for more details. And see our members' guide to TUPE (bit.ly/2ooJFc0).

Q. I have been asked to be a witness for my colleague who is bringing a claim of race discrimination against our employer. I would like to help her, but I am worried about how my manager will view this. Is there any legal protection for me?

A. Under the Equality Act, workers are protected from being victimised because they have supported another person bringing a claim under the Act. You must not be treated unfavourably because of supporting your colleague in her discrimination claim. But you, and she, need clear advice on what evidence you can add to her case. Of course this can be a really difficult situation, so do speak with your Prospect full time officer, who will be able to talk this through with you and work out the best way to help your colleague.

Note the answers in this column are only brief responses to the general issues raised, they should not be taken as a definitive outline of the law. In all cases you should seek advice from your Prospect Full Time Officer.

“Anti” Trade Union Act kicks in

Most of the provisions of the TU Act came into force from 1 March 2017 including; new rules on industrial action, the new strike thresholds and more onerous requirements for balloting.

New regulations have also now been introduced which apply to the public sector (except for devolved authorities in Wales) and will:

- ✗ Limit check off (deduction of union subs from salary) from March 2018
- ✗ Require public authorities to report on facility time for union reps.

For more details on the Act see our employment law briefing (bit.ly/2iYMJcq).

Campaign for the living wage

BECTU sector members fighting for the Living Wage at Picturehouse Cinemas are the first Prospect area grappling with the new industrial action and picketing laws under the TU Act.

Their campaign has won the backing of leading creatives at home and abroad. There is also an Early Day Motion raised in the House of Commons to register MPs concern.

For more news see bit.ly/2n6Xr3M.



April tax changes

Two new tax rules which came into effect on April 6th are likely to affect Prospect members who provide their services through personal limited companies, or are registered for VAT.

The union's BECTU sector has been following the changes on behalf of its large proportion of members who describe themselves as "freelance", but other Prospect sectors are affected as well.

Tony Lennon, BECTU sector research officer explains;

The first big change is that liability in the public sector for unpaid tax, where workers with Personal Service Companies (PSCs) are found to be in "disguised employment", is now with the engager, rather than the PSC. This has led to a review in the public sector of all contracts with PSCs, with some workers now being taxed as if they were employees.

In another tax change, workers and small companies registered for the VAT flat-rate scheme will need to show they have at least £1,000 worth of goods purchases a year to avoid a 16.5% payment rate, which means handing over all the VAT they collect from clients. Travel, subsistence, services and capital purchases do not count towards the total.

Blue Plaque for Mary Macarthur

Mary McArthur was an early pioneer for equal pay and fought to improve conditions for women workers. Her valiant contribution to women's rights was celebrated by the unveiling of a blue plaque on the eve of international women's day.

Frances O'Grady, general secretary of the TUC said: "I'm delighted that Mary's contribution to the union movement, and particularly to working women, is being honoured with a blue plaque from English Heritage. Thanks to her and others like her there were more than a million women in unions by 1918."



Information from Prospect Legal

Prospect produces a range of guides to help members better understand their rights at work these include fact cards, members' guides and other specialist publications. To download updates, briefings and guides visit: bit.ly/Emp_Legal

