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Welcome to the latest issue of our free employment law update. In this month's issue we look at:

**SEXUAL ORIENTATION DISCRIMINATION**

We provide an overview of some of the more important cases that have been decided since the Employment Equality (Sexual Orientation) Regulations 2003 came into force. [\[more...\]](#)

**UNILATERAL CHANGES** Under contract law, employers cannot usually change the terms of a contract unilaterally, but we look at a case in which the court accepted that employers can reserve the right in certain circumstances. [\[more...\]](#)

**COMPANY LIABILITY** Although the law says that employers are liable for the acts of their employees (or agents) in carrying out an unlawful act, we look at a case in which the court said that an employer cannot be held liable for "aiding" someone to do something after the incident had taken place. [\[more...\]](#)

**IN BRIEF** We provide a brief overview of the main points of the Equality Act which received Royal Assent recently. [\[more...\]](#)

**Heptonstalls LLP's Employment Partner Shaun Pinchbeck has seen a significant increase in employers seeking advice on redundancy situations in the past 2 years:**

"My aim is to explore with clients whether there is a way to avoid having to make employees redundant by considering whether there is an alternative such as reduced hours. In the event that there is no realistic alternative, my aim is then to guide clients through the process to try to minimise the consequences to the client and to minimise the risk of claims being brought. If you are in a situation where you are even contemplating the possibility of having to make redundancies, then seeking advice from the outset is something that I would urge employers to do as mistakes made at any stage of the process can prove costly".

Do not hesitate to contact Shaun if you have any queries on 01405 765661 or email [shaun.pinchbeck@heptonstalls.co.uk](mailto:shaun.pinchbeck@heptonstalls.co.uk)

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## SEXUAL ORIENTATION DISCRIMINATION

The Employment Equality (Sexual Orientation) Regulations 2003 outlawed discrimination on the ground of sexual orientation in employment, vocational training, goods, facilities and services.

There are potentially four ways in which employers can discriminate - direct, indirect, harassment and victimisation. We provide an overview of some of the more important cases that have been decided since the regulations came into force.

### Religion and belief vs sexual orientation

Some of the best known cases actually involve claimants who alleged that they had been discriminated against on the grounds of their religion or belief, when they refused to provide certain services to gay and lesbian clients.

So, for instance, the Court of Appeal has just decided in the case of **McFarlane v Relate Avon Ltd** that a counsellor could not claim discrimination on the ground of his religion or belief when he was dismissed for refusing to provide counselling to same-sex couples. It also refused Mr McFarlane the right to appeal this decision.

Likewise, the Court of Appeal said in **Ladele v London Borough of Islington** that a registrar was not discriminated against because of her religious beliefs when she was threatened with dismissal for refusing to carry out civil partnership ceremonies.

These decisions have prompted the observation from some quarters that sexual orientation rights have "trumped" those of religion and belief.

The Court made the position plain in **Ladele**. It said that "however much sympathy one may have with someone such as Ms Ladele, who is faced with choosing between giving up a post she plainly appreciates or officiating at events which she considers to be contrary to her religious beliefs, the legislature has decided that the requirements of a modern liberal democracy, such as the United Kingdom, include outlawing discrimination in the provision of goods, facilities and services on grounds of sexual orientation, subject only to very limited exceptions."

And in **McFarlane**, the Court actively refuted the allegation by a senior representative of the church that Christians were being likened to bigots because their approach was described as "discriminatory". Instead the Court said that it was not concerned with the motivation of the person in cases of indirect discrimination, but simply with whether the act or omission in question had had a discriminatory effect.

### Harassment

The other major - and well known - development in sexual orientation case law has been the case of **English v Thomas Sanderson Blinds Ltd**. This established that heterosexuals can rely on the regulations for protection if they are the subject of

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homophobic banter.

In this case, Mr English alleged that he had been subject to endless "homophobic banter" which eventually drove him to leave his job. He argued that this amounted to harassment and was contrary to the sexual orientation regulations although he himself was not homosexual, nor did any of his colleagues actually think he was. Mr English himself was aware that his colleagues did not think he was gay.

The Court of Appeal said that it was irrelevant whether Mr English was gay or not: "The calculated insult to his dignity, which depended not at all on his actual sexuality, and the consequently intolerable working environment were sufficient to bring his case ...". The fact that Mr English's colleagues knew he was not gay "has just as much to do with sexual orientation – his own, as it happens – as if he were gay".

And if it was unlawful harassment to torment a man whom others believed to be gay, "the distance from there to tormenting a man who is being treated as if he were gay when he is not is barely perceptible". In both cases the man's (imaginary) sexual orientation formed the basis of the harassment.

The Court said it was also important for policy reasons why the Court should not make a distinction between a scenario in which someone was believed to be gay and someone who was being treated as though they were gay.

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## UNILATERAL CHANGES

Under contract law, employers cannot usually change the terms of a contract unilaterally. In **Bateman and ors v Asda Stores Ltd**, however, the Employment Appeal Tribunal (EAT) accepted that employers can reserve the right to vary employees' contracts unilaterally as long as the term is clear and they do not exercise the power in such an unreasonable way that they breach the term of mutual trust and confidence.

### What happened?

Asda wanted to move some members of staff onto a new, up to date pay structure. After an extensive consultation process, about 9,300 staff agreed to move onto the new structure voluntarily but about 8,700 refused.

Relying on an express term in the staff handbook, Asda imposed the new regime on these employees. This stated that the company reserved the right to "review, revise, amend or replace" what was in the handbook "to reflect the changing needs of the business".

About 700 employees lodged claims for unlawful deduction of wages under section 13 of the Employment Rights Act 1996.

Relying on the 1998 case of **Wandsworth London Borough Council v D'Silva**, the employment tribunal said that although employers normally need consent to vary their

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employees' contracts, they could reserve the right to unilaterally vary them as long as the language of the term was clear.

However, such a term did not give employers an unqualified right to introduce changes. And the term would be unenforceable if the employer had acted so unreasonably or arbitrarily that they ended up in breach of the implied term of mutual trust and confidence. For instance, if they introduced the change without any notice or warning.

In this case, the tribunal said Asda was able to vary the contracts unilaterally as it had given several months notice of the change, and its aim of having one pay structure fell within "the changing needs of the business".

The EAT agreed with the tribunal. It said there was no argument that Asda had acted so unreasonably or arbitrarily as to breach the duty of mutual trust and confidence.

Furthermore, the provision in the handbook was clear and unambiguous, giving Asda the right to amend the handbook unilaterally. It rejected the argument that the employees, most of whom were "not well-educated or even literate or numerate" would not have understood that it meant the company could change their pay rates unilaterally. The claimants had not put any evidence to the tribunal in support of this argument and did not appeal on the ground that the tribunal should have made such a finding.

It also rejected the argument that, under the duty of mutual trust and confidence, Asda should have spelt out to the employees what the provisions in the handbook really meant, as "there was no issue in relation to the trust and confidence duty".

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## COMPANY LIABILITY

Under section 32 of the 1976 Race Relations Act (RRA), employers are liable for the acts of their employees (or agents) and are also liable under section 33 if they knowingly "aid" an employee in carrying out an unlawful act. In **May & Baker Ltd t/a Sanofi-Aventis Pharma v Okerago**, the Employment Appeal Tribunal (EAT) said that an employer cannot be held liable for "aiding" someone to do something after the incident has taken place.

### What happened?

Mrs Okerago worked for Aventis as a pharmacy inspector. In June 2006, a white agency worker (Terri Dower) swore at her and told her to go back to her "own fucking country", when she said that she would not be supporting England in the World Cup.

Although she did not complain about this at the time, Mrs Okerago raised the matter as part of a general grievance that she lodged in December 2006. The company did not investigate this claim and made no specific findings about it in its overall investigation.

When she was dismissed in March 2007, Mrs Okerago claimed direct race discrimination

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and harassment, among other things. The company argued that it could not be liable for Ms Dower's actions as she was not an employee.

The tribunal decided that the World Cup incident had happened as Mrs Okerago had described it and that the company had failed to promptly and adequately investigate her complaint. Instead it had been complicit in allowing an environment to continue where such conduct could take place.

It said the company was liable for Ms Dower's actions as the company had treated her as though she was an employee and were therefore caught by section 32 of the RRA. As it had failed to investigate Mrs Okerago's complaint properly, it had by its subsequent conduct condoned Ms Dower's acts and were therefore liable under 33 RRA as well.

The EAT upheld the company's appeal. It said:

- There were no findings of fact from which the tribunal could conclude that Ms Dower was either an employee or an agent of the company
- Under section 33, a person cannot "aid" someone else to do something they have already done. Given that everything the company did took place after the alleged discrimination, it could not have "aided" an incident after it had happened.
- "Allowing an environment where particular conduct could take place" did not amount to "knowingly aiding the conduct" as required under section 33
- Even if the company had "aided" Ms Dower to do the alleged act, the EAT said that the act would not have been unlawful in itself as she was not an employee. If the act was not unlawful in itself then the company could not be liable for knowingly aiding an unlawful act

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## IN BRIEF

The House of Commons recently approved the amendments made by the House of Lords to the Equality Bill and it subsequently received Royal Assent. The Act will come into force in stages, starting in October this year with other provisions coming into force next year.

The Act will impose the following obligations on employers:

- Introduce a new public sector duty to consider reducing socioeconomic inequalities
- Impose a new integrated Equality Duty on public bodies to cover race, gender, disability, age, sexual orientation, religion or belief, pregnancy and maternity, gender reassignment
- Use public procurement to improve equality with the result that private sector firms bidding for government contracts publish details of their diversity policies
- Ban age discrimination outside the workplace
- Encourage employers with 250 or more employees to publish pay statistics. This will become obligatory from 2013 if insufficient progress has been made in the interim
- Ban secrecy clauses in employment contracts
- Extend the scope to use positive action so that employers can favour under-represented groups during their recruitment process
- Strengthen the powers of employment tribunals so that they can order organisations found guilty of discrimination to change their recruitment and pay policies
- Protect carers from discrimination
- Clarify the protection for breastfeeding mothers
- Ban discrimination in private members' clubs
- Strengthen protection from discrimination for disabled people
- Protect people from dual discrimination - direct discrimination because of a combination of two protected characteristics.

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