



February 2020

What's New

Solicitor wins age discrimination case after he was denied job for being "expensive"

In *Levy v McHale Legal* an Employment Tribunal (ET) ruled that Mr Levy was discriminated against by reason of his age after he was denied a job at McHale because he was "expensive".

The ET agreed with Mr Levy that McHale's decision not to offer him the position was "synonymous with his being an experienced and [therefore] older solicitor". After deeming Mr Levy unsuitable, McHale's initial intention to recruit a 3-5 PQE solicitor was replaced by a decision to cover the work with junior members of staff. The ET noted that Mr Levy met all the required qualifications for the role and, had the application gone further, he would have likely been offered the job. McHale made no effort to negotiate pay with Mr Levy, despite him being the only interviewee.

The ET mitigated Mr Levy's compensation award on the basis that, had he been appointed, a likely "clash of personalities" would have meant that McHale would have terminated Mr Levy's contract within a month. In addition, the ET noted that McHale had ceased to carry out work in Mr Levy's area of law in the months following the interview. In total, Mr Levy was awarded £13,188 for loss of earnings, injury to feelings and aggravated damages.

Disability must have 'long-term effect' at the time the alleged discriminatory acts take place

In *Tesco Stores Ltd v Tennant*, the Employment Appeal Tribunal (EAT) held that in order to bring a successful disability discrimination claim, the claimant must show that their condition had a 'long-term' effect at the time the alleged acts of discrimination took place.

Ms Tennant was employed by Tesco as a check out manager. She was absent from work as a result of depression from September 2016. In September 2017 Ms Tennant brought a claim for disability discrimination in relation to discriminatory acts she allegedly suffered between September 2016 and September 2017.

In order to demonstrate that she met the definition of "disability" under the Equality Act 2010 (the "Act"), Ms Tennant had to show that her impairment was long-term. Ms Tennant argued that her depression had lasted for more than 12 months, which is one of the statutory indicators of a disability being deemed 'long-term' under the Act. An ET agreed

that Ms Tennant's depression was an impairment that was long-term as it had had a substantial effect on her from September 2016. Tesco appealed on the basis that Ms Tennant was not disabled at the time of the alleged discriminatory acts.

The EAT upheld Tesco's appeal. It held the definition of disability must be satisfied at the time of the alleged discriminatory acts, not when the claim is submitted. Ms Tennant could not show that her impairment and its effect were 'long-term' as they had not lasted for at least 12 months prior to 2017.

University's compulsory retirement age was not justified

In *Ewart v Chancellor, Master and Scholars of the University of Oxford* (the "University") an ET decided that the University's Employer Justified Retirement Age policy (EJRA) was discriminatory and upheld Professor Ewart's claims for age discrimination and unfair dismissal following his compulsory retirement by the University at age 69.

The University argued that there were legitimate aims for their EJRA, including career progression for junior academics. However, the ET found that the EJRA only created 2-4% more vacancies than would otherwise have arisen, and there was no system of career progression, with many senior posts being filled externally.

Accordingly, the ET held that the discriminatory effect of the EJRA outweighed what the University claimed to be a benefit for its younger employees. Furthermore, as Professor Ewart's dismissal was unlawfully discriminatory, the ET also held that it was unfair.

WHAT TO LOOK OUT FOR

Acas produces new guidance for employers and workers on use of NDAs

On 10 February 2020, Acas published new [guidance](#) on the use of non-disclosure agreements (NDAs). This is intended to help employers and workers understand exactly what an NDA is and when it may be appropriate to use one. It is relevant to any type of case, and not limited to those involving discrimination or harassment.

NDAs are sometimes used to restrict workers from disclosing sensitive commercial information or trade secrets to people outside their place of work. Employers should always consider whether one is needed in the first place as their misuse can be very damaging to their organisation.

The guidance gives some information about situations in which it may be appropriate to use an NDA. These include:

- To keep some details of an agreement confidential (for example, the settlement figure in a settlement agreement), or to keep the entire existence of an agreement confidential.
- To protect information belonging to an organisation, including where an organisation needs special protection for intellectual property or client information, and to keep facts known by a worker about an organisation confidential.
- To prevent derogatory statements being made about an employer or worker, or to help protect someone if the details of a dispute became known.

Social Mobility Commission releases guide to help employers boost diversity in workplace

The government's Social Mobility Commission has released a [guide](#) to give employers practical tips for recruiting talented workers from disadvantaged backgrounds. Labelled the "Socio-economic diversity and inclusion employers' toolkit", it makes a range of suggestions based on research. These include asking job candidates to volunteer anonymised details about their school and their parents' occupations. This data could be used to help HR build more diverse recruitment tools and help employers set more effective diversity policies.

The toolkit has been designed to combat the so-called "old boys" network that currently exists in the recruitment world, whereby recruiters favour candidates they know or those with a more privileged social status. The commission hopes to highlight the gains made by employers when they employ diverse groups of people, for example, the growth in proactive problem-solving in teams made up of wide talent pools.

The commission will also launch a "Social Mobility Works" microsite. This will act as a platform for inclusive content and as a directory of organisations to support employers to improve diversity in their workforces.

For more information on any of the items raised in this update please contact our employment law team by [clicking here](#).

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