

EMPLOYMENT

Is the future really female?

An analysis of sex discrimination case law and the future of employment law

In this article, we examine recent case law surrounding sex discrimination, identify areas of good practice for employers and discuss future employment law developments that appear to be on the horizon.

8 MIN READ

CASE LAW FINDINGS

McCaughley v Footprints Women’s Centre [2022] (Northern Ireland)

Facts

In this recent case from the Industrial Tribunal in Northern Ireland, the Claimant was offered the role of Support Services Manager with the Respondent’s business. During a discussion between the Claimant and Ms Loughran (the Chief Executive Officer of the organisation), the Claimant queried whether there was any flexibility regarding school pick up and drop off times. There was a dispute between the parties as to the interaction that had taken place between them. However, the Claimant believed that she was informed that the organisation would be flexible in relation to childcare. The Claimant further presented evidence that during this discussion, Ms Loughran stated that the organisation’s

maternity leave provisions were ‘not great’. A formal offer was made to the Claimant on 30 October 2019, which she accepted.

Subsequently, in November 2019, the Claimant received an email indicating she did not meet all the necessary requirements and the organisation was no longer in a position to recruit her. The Claimant requested further information however, received no response from the Respondent. The Claimant lodged a claim alleging sex and age discrimination.

Decision

The Tribunal held that the Claimant had discharged the burden of proof in relation to the discriminatory elements to her claim and found that the Respondent had not provided adequate reasons for revoking their offer. The Respondent’s reasons for doing so included that the Claimant allegedly made too many requests prior to commencing work and had little regard as to the needs of the organisation. The Tribunal rejected the Respondent’s explanation citing that it had no evidential basis.

Therefore, the Tribunal inferred discrimination as a result of the absence of satisfactory explanation for the Respondent’s treatment of the Claimant. The Tribunal upheld the claim and awarded the Claimant £8,500 for injury to feelings.

Lessons for employers

This case demonstrates the importance of providing evidenced based reasons for decisions made (in the above instance, the burden shifted to the employer to demonstrate why they revoked the job offer). Further, the decision highlights the importance of having well-drafted family friendly policies in order to support employees who balance their role with childcare responsibilities.

Whilst it is important to note that an employer is under no obligation to go beyond the minimum statutory entitlements for working parents, the introduction of positive family friendly policies should play an important part in both retaining female employees and attracting talent.



CASE LAW FINDINGS

Mackin v BNP Paribas (England and Wales)

Facts

A case that attracted vast media attention last year was that of *Mackin v BNP Paribas* whereby the Claimant was awarded over £2 million in a successful sex discrimination claim via a remedy hearing in the High Court.

The Claimant joined BNP Paribas in 2013 on a salary of £120,000 whereas her male colleague (who performed the same role) received £160,000. Over the following four years, the male colleague received over £167,000 in bonuses, in comparison to £33,000 that the Claimant received. Despite the Claimant raising concerns about pay differential, the Respondent failed to address these complaints and downgraded the Claimant in subsequent performance appraisals, resulting in lower bonus awards.

The Claimant also experienced various sexist incidents during her employment at the bank. On one occasion, a witch’s hat was left on her desk by drunk male colleagues, and her boss frequently responded to her questions with the expression “not now Stacey”, which was consistently repeated to her by other colleagues.

The Claimant brought various claims under the Equality Act 2010, including claims for direct sex discrimination, victimisation and equal pay.

Decision

The Tribunal upheld Ms Mackin’s claims for direct discrimination, victimisation and equal pay in 2019. The Tribunal held that the incident involving the witch’s hat was inherently sexist and the colleague’s persistent use of the phrase “not now Stacey” was held to be a demeaning comment used to belittle the Claimant. While the latter issues were out of time as standalone claims, the Tribunal held that the Respondent was unable to demonstrate that the difference in the Claimant’s pay and

bonus in comparison to her male colleague had not constituted less favourable treatment because of her sex.

Undoubtedly, what generated the most media attention in this case was the large compensatory award. The award included £857,044 in respect of loss of future earnings (which was awarded from the Claimant’s period of sick leave to retirement); £15,000 for aggravated damages; £35,000 for injury to feelings and a 20% uplift in respect of the Respondent’s unreasonable failure to follow the ACAS Code of Practice on Disciplinary and Grievance Procedures.

It is important to note that compensation awards in a tribunal are rarely this high and that the amount of the Claimant’s salary and bonuses involved in this claim led to an inflated award. Similarly, the conduct of the Respondent, including the unwillingness of the Claimant’s manager to issue a genuine apology and the failure of the Respondent to follow the ACAS Code of Practice also led to significant uplifts.

Lessons for employers

The case is a lesson to employers about the importance of fostering an inclusive culture and addressing unequal pay practices as soon as they are identified. This case highlights the need for the regular review of equal opportunities policies, the implementation of regular training and the importance of following LRA / ACAS Codes of Practice.

The two cases discussed above demonstrate the continued willingness of courts and tribunals to rule in favour of female employees that have suffered sex discrimination in the workplace and set a precedent that sexist behaviour and practices will not be tolerated.

The future is female? Unfortunately, we are not quite there yet!

Gender pay gap reporting

The gender pay gap is the difference in the average hourly pay of women compared to men. Gender pay gap reporting is mandatory in both England and Wales and, more recently, in the Republic of Ireland. However, legislation on gender pay gap reporting in Northern Ireland has not yet come into force.

The legislation in relation to gender pay gap reporting is set out in section 19 of the Employment Act (Northern Ireland) 2016. However, as a result of various collapses of the Northern Irish Assembly, legislative progress on this issue has been delayed.

We eagerly await the restoration of the Northern Ireland Assembly and the introduction of gender pay gap

reporting in Northern Ireland. This will assist employers with understanding the basis of any gender pay gap identified, evaluate the success of diversity and inclusion policies and facilitate action to minimise the pay gap.

Menopause – government response to the women and equalities committee report

Last month, the UK government published its long-awaited response to the July 2022 report from the Women and Equalities Committee (WEC), entitled Menopause and the workplace.

While some recommendations were accepted, many of the suggestions made by the WEC were rejected. For example, the following proposals were rejected:

- The enactment of section 14 of the Equality Act 2010, which would allow affected individuals to claim for ‘combined discrimination’
- For menopause to be acknowledged as a stand-alone protected

characteristic in the Equality Act 2010

- The piloting of a ‘menopause leave’ policy.

The government’s rejection of the above proposals has been described by the WEC Chair as a “missed opportunity” to protect working women. However, despite this, the government has agreed to appoint a ‘Menopause Champion’ to work directly with employers on the issue and to initiate campaigns on menopause in the workplace.

Despite the lack of radical change on the horizon, menopause is still a critical issue for employers. If action is not taken to support menopausal women in the workplace, employers risk losing talent, facing decreased employee morale and potential tribunal claims. For now, employers can take positive steps to support affected employees by raising awareness through training, facilitating reasonable adjustments and implementing menopause policies.



Domestic abuse leave

Finally, this year will welcome legislative support for victims of domestic abuse in the workplace. Although not strictly a female issue, according to a recent [report](#) published by Women’s Aid in Northern Ireland, 69% of victims of domestic abuse crimes in Northern Ireland were women and 31% were male.

Employees in Northern Ireland who are victims of domestic abuse will be entitled to 10 days’ paid leave each year to deal with issues relating to the abuse. This will be a ‘day one’ right, which means that no minimum period of service is required in order to qualify. Notably, Northern Ireland will be the first jurisdiction in the United Kingdom to introduce such legislation.



Conclusion

While global awareness days such as IWD play a key role in inspiring women in the workforce and raise awareness of the challenges that women face in employment, it is evident that awareness days must be supported by positive action. With women comprising of a significant (and crucial) section of the workforce and given the negative impact of potential sex discrimination claims, time is of the essence to support and champion females in the workplace.

If you or your organisation require advice on any of the issues raised in this article, please contact [Aisling Byrne](#), [Shirley Blair](#), [Lauren Hudson](#) or any other member of the [A&L Goodbody Belfast Employment Team](#).

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Resources



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