

## Discrimination judgment means £10,000 compensation cap applies per complaint, not per overall claim

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A case has been published by the Jersey Employment and Discrimination Tribunal this week which provides helpful guidance on the Discrimination (Jersey) Law 2013. For the first time the key principles have been considered. There are some important points for businesses to remember and a number of areas of the law have been clarified. Of particular interest are the following:

- 1) Managers and possibly staff should be properly trained;
- 2) Correct and fair processes must be followed;
- 3) The burden is on the employee to prove their claim, not the employer; and
- 4) The £10,000 limit per complaint, applies to each type of complaint, ie direct discrimination, indirect discrimination, harassment.

In brief, the Applicant, an employee, was gay but had not come out to his colleagues. His claim arose out of comments by two other employees about the Jersey Pride march in September 2015. The comments advocated and condoned violence towards the LGBT community. The comments were repeated to the Applicant, who was upset by them and left work. He brought a complaint about the other employees, was subsequently made redundant and during his last months had some of his shifts reduced.

The Tribunal held that the Applicant had been subject to direct discrimination and victimisation in the way he was made redundant and because his shifts had changed. His employer and the other employees involved were also held responsible for harassment due to the comments. He received

£1,800 for the victimisation, £1,450 for the harassment (split between the employer and the two co-workers), and £1,072.80 for unfair dismissal.

In relation to the claim of harassment, an interesting point arose about the use of information obtained from social media. In order to establish a claim for harassment, an employee has to show that they are actually offended by a remark or insult. In this regard, evidence about the employees own conduct may potentially be relevant. In this case, the Tribunal heard evidence that the Applicant had previously been involved in workplace exchanges with the other employees, commonly referred to by them as "banter". This referred to race, sex and sexual practices. It also occasionally referred to sexual orientation.

The Tribunal also had printouts from the Applicant's Facebook pages that were potentially relevant. However, it refused to consider this evidence, citing uncertainty over the privacy settings on these pages. This is surprising, because in bringing a claim employees are under an obligation to provide all evidence that both supports and harms their case. This would in principle include social media, regardless of the privacy settings (which should not of themselves obviate the disclosure obligation).

The following points stand out for businesses to remember:

1) **Training is fundamental.** The company had not undertaken any form of discrimination training for themselves. Nor had they established any policies for their staff. As a result the business could not avoid liability for their employees' comments. The company was made to pay £435 of the £1,450 for the harassment. Had they trained their staff they could have argued that they were not liable for any of this award.

2) **Processes must be followed.** The company had a genuine redundancy situation as they were closing down one store. However, they failed to follow a proper redundancy process at all. The Tribunal therefore took the view that the reason for redundancy was because the employee had brought a complaint of sexual orientation discrimination. Island Greetings could not rebut this because of the lack of process. This allowed the employee to receive £1,800 for the victimisation, but also to claim for unfair dismissal even though he had worked for the business for less than a year. He received £1,072.80 for the latter claim.

3) **It is for the employee to prove their claim.** In relation to the direct discrimination claim, the Tribunal held that there was no equivalent in Jersey of the "reverse burden of proof" provisions found in the equivalent English statute (where there is a presumption of discrimination and it then is for the employer to produce positive evidence to the contrary). In Jersey the employee has to establish on a balance of probabilities that they have been treated less favourably than someone without their protected characteristic.

4) **The limit of £10,000 applies to each complaint.** The employee brought three complaints: direct discrimination, harassment and victimisation. The Tribunal has confirmed that he would

have been able to claim up to £10,000 for each of these claims, making a maximum possible claim of £30,000. Had there been a claim of indirect discrimination this could have increased to £40,000. This was a point that needed to be determined. An employer should therefore not be under a misapprehension that a claim is limited to £10,000 when in reality it can be rather a lot more.

This decision is a helpful guide on dealing with discrimination claims. It is a reminder that with proper policies, procedures, and training, discrimination claims can be avoided.

If you are interested in attending Ogier's seminar '*Discrimination- What can really happen*', on **Thursday 17 November 2016 at 8.30 am** please email [Kara Mulderrig](mailto:Kara.Mulderrig@ogier.com). The one hour seminar focuses on cases we have been involved with and which highlight practical and important issues; the law in practice across all areas of the discrimination characteristics, race, sex, gender reassignment, family rights. This is a seminar for all managers of people in employment and also the provision of goods and services.

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