

Discrimination – The Act of Discrimination versus Intent and Liability (George Kemish LLM)

We are still seeing a large number of discrimination cases being referred to employment tribunals and law courts and, in many cases, there may not have been an intent to act discriminately. However, it is the actual act of discrimination that will be judged.

In the case of *Nagarajan v London Regional Transport [1999] IRLR 572*, where there had been an act of racial discrimination, the House of Lords had to determine whether an act of discrimination had to be consciously motivated. They held that it did not. Lord Nicholls said:

“All human beings have preconceptions, beliefs, attitudes and prejudices on many subjects. It is part of our make-up. Moreover, we do not always recognise our own prejudices. Many people are unable, or unwilling, to admit even to themselves that actions of theirs may be [racially] motivated. An employer may genuinely believe that the reason why he rejected an applicant had nothing to do with the applicant’s [race]. After careful and thorough investigation of a claim members of an employment tribunal may decide that the proper inference to be drawn from the evidence is that, whether the employer realised it at the time or not, [race] was the reason why he acted as he did.” But what happens when an act is consciously taken but where there was no intent to discriminate?

In determining the case of *Martin v SS Photay & Associates [2007] ET/1100242/07*, a case of age discrimination, the Employment Judge made it clear that, in cases of direct discrimination, it is the actual act of discrimination that will be judged and that the ‘intent’ behind the act plays no part in determining the outcome in law. In short, if an act of discrimination is proven, the fact that the act was not intended to cause discrimination cannot be put forward as a defence. Where an employer discriminates against an employee with a protected characteristic, then it is obvious that it will be the employer who will be found guilty of the offence but what happens where it is an employee that has committed an act of discrimination against another employee who is protected under the Equality Act?

According to Section 109 of the Equality Act 2010 the employer can be found liable for the actions of the employee in the course of their employment, even where the act of discrimination has taken place without the employer’s knowledge or approval; unless the employer can show that they have taken all reasonable steps to prevent the employee from undertaking the act or from doing anything of that description. It is also worthy of note that, in accordance with Section 110 of the Act, the employee(s) who carried out the act of discrimination can also be found liable, even if the employer has a defence. This means that where both an employer and employee(s) have been found liable, then damages can be awarded jointly or severally against the respondents. Where the employer has defended the case, then the employee(s) that have been found guilty of discrimination are likely to find themselves solely liable for the payment of damages (and possibly costs as well).

I hope that this will reinforce the need for employers to have a robust equality and diversity policy; provide regular equality and diversity training for their employees; and back this up with a ‘no-nonsense’ approach to disciplinary action in the event that acts of discrimination take place in an employment setting.