

White Paper Conference on Discrimination

Unconscious Discrimination

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Unconscious Discrimination

When do well-intentioned managers with an instinct to make life easier for employees with protected characteristics inadvertently take away power and so become discriminatory?

Or ...

Unconscious Discrimination

The road to the Employment Tribunal ...

... is paved with good intentions.

Key principles

Discrimination can be inherent or subjective

- Inherent discrimination
 - No dispute about factual criterion
 - *James v Eastleigh Borough Council* [1990] ICR 554
- Subjective discrimination
 - Act not inherently discriminatory
 - Need to explore mental processes, conscious or subconscious, of employer
 - *Nagarajan v London Regional Transport* [1990] ICR 877
- Motive is irrelevant
 - EHRC Employment Code
 - *Amnesty International v Ahmed* [2009] ICR 450

Inherent or subjective discrimination

Interserve FM Ltd v Tuleikyte

Facts

- Interserve policy to treat as leaver anyone who had received no pay in previous 3 months
- T received no pay during maternity leave because she did not meet earnings threshold
- New manager applied policy and treated T as leaver from June 2013 when she started maternity leave
- Six other employees also “cleansed” for different reasons
- HR advised T to complete backdated new joiner form
- T did not return and leave date never amended from June 2013 to May 2014
- T lost benefits and accommodation for her and children

Inherent or subjective discrimination

Interserve FM Ltd v Tuleikyte

Decision

- ET upheld claim for pregnancy/maternity discrimination as automatic consequence of policy was to treat T unfavourably because of absence on maternity leave
- EAT allowed Interserve's appeal:
 - policy was not inherently discriminatory
 - ET therefore had to consider mental processes of manager
 - case remitted to ET
- T did not claim that policy was indirectly discriminatory
 - EAT acknowledged that policy arguably had disparate adverse impact on women

Case Study

Diversity Asset Management: Sarah and Yusuf

Sarah and Yusuf have just joined Diversity Asset Management as client relationship managers. Sarah is Jewish. Yusuf is Muslim. Both are of British nationality.

DAM has a number of key clients in the Middle East and their line manager, Colin, assigns Sarah to work on the clients based in Israel and Yusuf to work on the clients based in the UAE.

Questions:

1. Has Colin done anything wrong?
2. How should Colin have handled this situation?

Diversity Asset Management: Sarah and Yusuf

Sarah and Yusuf have been at DAM for just over a year. Sarah is now seven months' pregnant.

Colin receives an RFP from a major prospective client. He gives this to Yusuf to work on and states in the tender response that Yusuf will be the client relationship manager if DAM's tender is successful. He makes no mention of Sarah in the tender response.

Questions:

1. Has Colin done anything wrong?
2. How would you have advised Colin to handle this situation?

Diversity Asset Management: Sarah and Adam

Sarah is about to return from maternity leave. Whilst she has been away, Adam, a junior client relationship manager, has been looking after most of her clients.

Over the last few months Adam has done a brilliant job with one particular client which has invested substantial sums with DAM. Colin therefore decides that Adam should continue to look after this client on Sarah's return.

Questions:

1. Has Colin done anything wrong?
2. How would you have advised Colin to handle this situation?

Diversity Asset Management: Jeremy

Jeremy is another client relationship manager in Colin's team. Jeremy is 58 and has been with DAM for 25 years. Jeremy looks after UK pension fund clients, but over the last few years he has lost most of his major accounts.

Colin and Jeremy have known each other for many years and get on well. However, Colin wants to replace Jeremy with someone with more energy and drive. As Jeremy would qualify for a very generous payment under DAM's enhanced redundancy policy and "good leaver" status under DAM's deferred remuneration plans, Colin decides to put Jeremy at risk of redundancy.

Questions:

1. Has Colin done anything wrong?
2. How would you have advised Colin to handle this situation?

Diversity Asset Management: Diane

Colin is asked to carry out a disciplinary hearing relating to Diane. Diane works in the finance team. A month ago she was given a final written warning for making persistent errors in the management accounts. Her manager, John, presents evidence that she has made a number of further errors in the last three weeks. This is true, but John also knows that Diane has just been diagnosed with a depressive illness. He wants her out. Colin is unaware of Diane's illness and decides she should be dismissed on performance grounds.

Questions:

1. Has Colin done anything wrong?
2. Is DAM liable for discrimination in relation to the dismissal?
3. Does Diane have any claim?

Key lessons

- Motivation is irrelevant
- Consider the reason for the employee's treatment
- Make sure that it is not related to a protected characteristic
- Be honest with the employee (assuming you have a non-discriminatory reason for the treatment!)
- If there is a risk, speak to the employee before you take the decision

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