



Discrimination: Hints, Tips and Solution Focused Answers

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- *“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?”*
- Unconscious discrimination?

What is unconscious bias?

- Hidden beliefs
- Attitudes
- Stereotypical views
 - Under the surface
- Human nature
 - Childhood influences
 - Changes in society
 - What is acceptable now and what was in past years

How to spot hidden bias?

- Social events
 - Groupings
 - Who fits in
- Gestures
 - Warm welcome or cold shoulder?
 - Invited or assumed non-attendance?
- Physical appearance
 - Can attraction influence the decision?
 - Weight bias?

- Geller and another v Yeshurun Hebrew Congregation
 - Advert for individual or married couple
 - Mr Geller appointed in post
 - Following marriage Mrs Gellar starts work
 - Mrs Gellar not recognised as employee
 - Payments to Mrs Gellar delayed
 - Mr Gellar made redundant
 - No communication to Mrs Gellar
- Sex discrimination?
 - Management belief engaged for ad hoc work
 - However was her treatment due to stereotypical assumption regarding her position as just Mr Gellar's wife?

The Geller case

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- Alleged discriminator
 - May have had a benign motive
 - Not considered that the reason for his or her treatment of the claimant was the protected characteristic
- Honesty of witness not sufficient to show that no unconscious discrimination

- Nagarajan v London Regional Transport
 - Race discrimination established by subconscious intention to treat an interviewee less favourably
 - No requirement for conscious motivation
 - Requirement to make deductions and inferences to establish motivation
- Staph v Norgren European Logistics Co Ltd
 - Consider each incident individually and collectively
 - 'Step back' to look at overall picture
- Defending claims
 - Paper trail – need for documentation

Raising awareness

- Avoiding claims
 - HR's role
 - Management training
 - Make the unconscious conscious
- The reasonable steps defence
 - Applying policy, training and enforcing equal treatment principle
 - Haringey Council v Al-Azzawi
 - Casperz v MoD
 - Onus on the employer

Good intentions but...

- Treating an employee favourably because of a 'protected characteristic'
- Ensuring they are not disadvantaged
 - Eversheds Legal Services Ltd v De Belin
 - Protecting employee on maternity leave in a redundancy situation
 - Discrimination against other employee who was made redundant
 - Steps taken were not proportionate
- Expressing belief as to what employee should do
 - Risk if connected to a protected characteristic
 - Good intention is not a defence
- Duty to make reasonable adjustments
 - Salford PCT v Smith – move to less skilled role was reasonable
 - G4S Cash Solutions (UK) Ltd v Powell – adjustments to duties have to be agreed

Positive discrimination – unlawful

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- Positive action under the Equality Act
- Limited steps only permitted
 - General positive action
 - Recruitment and promotion
- Proportionate steps only
- Public sector equality duty

Unconscious discrimination

- Raise staff awareness
- Management training courses
- Make unconscious – conscious
- Back up decision making processes with paperwork

Good intentions

- General prohibition on positive discrimination
- Positive action limited options
- Reasonable adjustments – require agreement
- Preventing less favourable treatment requires proportionate action