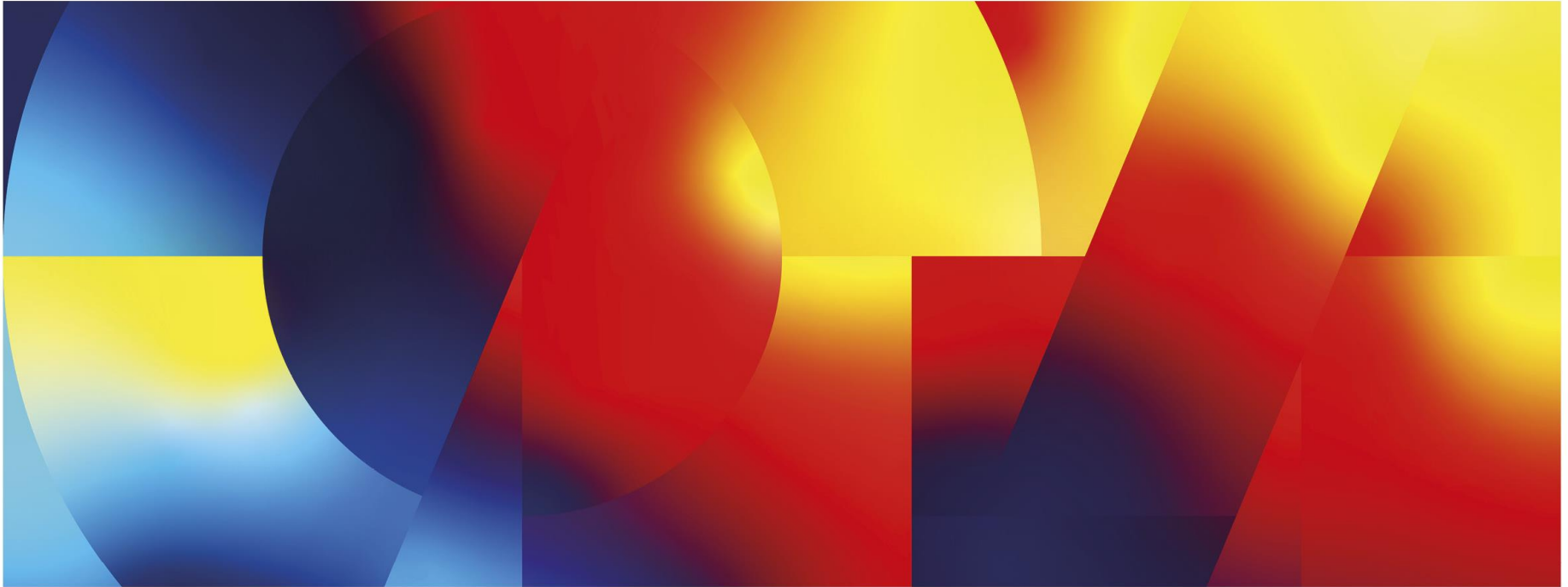


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Graham Vials and Gillian Burns

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hadaway

Discrimination and family friendly rights



Session overview

- **Introduction to Equality, Diversity and Inclusion;**
- **Discrimination and protected characteristics;**
- **Forms of discrimination working in schools;**
- **Prevention of discrimination;**
- **Family friendly rights;**
- **Horizon issues.**

- What is Equality?
- What is Diversity?
- What is Inclusion?
- Why is Equality, Diversity and Inclusion important?
- Recent headline cases:
 - The Yorkshire cricket scandal - where Azeem Rafiq, a former Yorkshire cricket player, made allegations of institutionalised racism at the club
 - Bill Michael of KPMG's resignation triggered by internal and public backlash following a careless (and misjudged) statement that "there is no such thing as unconscious bias" and making other critical comments about the concept generally.

Discrimination and Protected Characteristics (1)

- The legislative background
 - European law
 - The Equality Act 2010
 - Case law

Discrimination and Protected Characteristics (2)

- There are 6 types of discrimination under the Equality Act 2010

	Direct discrimination	Indirect discrimination	Harassment	Victimisation	Reasonable Adjustments	Discrimination arising from disability
Age	✓	✓	✓	✓	X	X
Disability	✓	✓	✓	✓	✓	✓
Gender reassignment	✓	✓	✓	✓	X	X
Marriage and civil partnership	✓	✓	X	✓	X	X
Pregnancy and maternity	✓	X	X	✓	X	X
Race	✓	✓	✓	✓	X	X
Religion or belief	✓	✓	✓	✓	X	X
Sex	✓	✓	✓	✓	X	X
Sexual orientation	✓	✓	✓	✓	X	X

Forms of discrimination (1)

- Direct discrimination
 - where "because of a protected characteristic, A treats B less favourably than A treats or would treat others" (section 13(1), EqA 2010)
 - what is "less favourable treatment"
 - "because of"
 - what was A's conscious or subconscious reason for treating B less favourably, and
 - the relevant protected characteristic needs to be a cause of the less favourable treatment but does not need to be the only or even the main cause
 - the need for a real or hypothetical comparator
 - intent is irrelevant
 - can include discrimination by
 - association; and
 - perception

Forms of discrimination (2)

- Indirect discrimination
 - where a person (A) discriminates against another (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of B's.
 - a provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of B's if—
 - A applies, or would apply, it to persons with whom B does not share the characteristic,
 - it puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it,
 - it puts, or would put, B at that disadvantage, and
 - A cannot show it to be a proportionate means of achieving a legitimate aim.

(section 19, EqA 2010)

Forms of discrimination (3)

- Harassment – three forms (section 26, EqA 2010)
 - Generally
 - A person (A) harasses another (B) if—
 - (a) A engages in unwanted conduct related to a relevant protected characteristic, and
 - (b) the conduct has the purpose or effect of—
 - (i) violating B's dignity, or
 - (ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.
 - In deciding whether conduct has the effect referred to the perception of B, the other circumstances of the case and whether it is reasonable for the conduct to have that effect need to be taken in to account

Forms of discrimination (4)

- Victimisation
 - occurs where a person (A) subjects another person (B) to a detriment because either:
 - B has done a protected act.
 - A believes that B has done, or may do, a protected act.

(Section 27(1), EqA 2010.)
- What is a protected act?
 - Each of the following is a protected act:
 - bringing proceedings under the EqA 2010
 - giving evidence or information in connection with proceedings under the EqA 2010
 - doing any other thing for the purposes of or in connection with the EqA 2010
 - making an allegation (whether or not express) that A or another person has contravened the EqA 2010

Forms of discrimination (5)

- Duty to make reasonable adjustments
- Comprises three requirements. Employers are required to take reasonable steps to:
 - Avoid the substantial disadvantage where a provision, criterion or practice applied by or on behalf of the employer puts a disabled person at a substantial disadvantage compared to those who are not disabled.
 - Remove or alter a physical feature or provide a reasonable means of avoiding such a feature where it puts a disabled person at a substantial disadvantage compared to those who are not disabled.
 - Provide an auxiliary aid (which includes an auxiliary service where a disabled person would, but for the provision of that auxiliary aid, be put at a substantial disadvantage compared to those who are not disabled).

(Sections 20, 21 and 22 and Schedule 8 EqA 2010)

Forms of discrimination (6)

- EHRC Code – examples of adjustments that might be reasonable to make:
 - Adjustments to premises – e.g. widening a doorway / providing a ramp
 - Providing information in accessible formats – e.g. Braille or audio instructions
 - Allocating some of a disabled person's duties to another worker – e.g. removing responsibilities that require working at height from someone who suffers from severe vertigo
 - Adjusting redundancy selection criteria – e.g. where absences are being taken in to account

Forms of discrimination (7)

- Discrimination arising from disability
 - occurs where both:
 - A treats B unfavourably because of something arising in consequence of B's disability.
 - A cannot show that the treatment is a proportionate means of achieving a legitimate aim.

(Section 15(1) EqA)

- EHRC Code example of discrimination arising from a disability

“An employer dismisses a worker because she has had three months' sick leave. The employer is aware that the worker has multiple sclerosis and most of her sick leave is disability-related. The employer's decision to dismiss is not because of the worker's disability itself (so not direct discrimination). However, the worker has been treated unfavourably because of something arising in consequence of her disability (namely, the need to take a period of disability-related sick leave.”

Liability for discrimination at work

- Who is liable for discrimination?
 - the employer where the discriminatory act occurs in the “course of employment” – broad definition
 - the individual discriminator
- Rarely successful “All reasonable steps defence”

Defending discrimination claims

- Exceptions and defences
 - All reasonable steps defence
 - Genuine occupational requirement
 - For direct age discrimination, discrimination arising from a disability and indirect discrimination, objective justification
- Positive actions and positive discrimination
 - what is the difference and what is lawful?

The effect of discriminatory conduct at work

- Consequences include:
 - poor morale
 - staff sickness absence
 - higher rates of attrition
 - grievances / whistleblowing complaints
 - take up of management time
 - disciplinary action
 - Employment Tribunal claims and compensation (uncapped)
 - Alleged discriminators can be named personally in any claim (with the risk of “joint and several liability” for compensation)
 - bad publicity (including the online publication for ET Judgment)

Prevention of discrimination at work

- Steps to take to help prevent discrimination at work include:
 - Carry out a policy and process audit – are your current documents fit for purpose?
 - Prepare bespoke policies that are relevant to your organisation and people
 - Make sure the process for reporting or complaining about potential discrimination or general unwanted conduct is clear, concise and well publicised
 - Ensure that all staff are trained to understand EDI
 - Encourage and empower staff to report for themselves and others
 - Get to know your workforce better – team and individual meetings and conversations
 - Ensure that reported incidents are taken seriously
 - Be consistent

Family friendly rights

- Maternity leave and pay
- Paternity leave and pay
- Adoption leave and pay
- Parental leave
- Shared parental leave and pay
- Time off for dependents
- Flexible working

Pregnancy, Maternity leave and pay

- Key rights:
 - Time off for antenatal appointments
 - Health and safety protection while pregnant
 - Up to 52 weeks' maternity leave regardless of length of service
 - Statutory maternity pay for up to 39 weeks if eligible (but note Burgundy Book / Green Book)
 - Maternity Allowance for up to 39 weeks if not eligible for SMP
 - Right to return to the same job or in certain circumstances, a suitable alternative with no less favourable terms and conditions
 - Right to request flexible working when returning from maternity leave
 - Health and safety protection while breastfeeding
 - Protection from dismissal, detriment or discrimination because of pregnancy, childbirth or taking maternity leave

Pregnancy, Maternity leave and pay

Occupational maternity scheme under the Burgundy Book: Section 5

- Must be employed for at least one year and 11 weeks by the expected week of childbirth
- Initial obligations on teacher
 - 14 weeks' notice of wish to take maternity leave and declare whether she intends to return to work
 - before EWC must give Notify employer at least 21 days before she wishes to start maternity leave, or as soon as reasonably practicable that she is pregnant, EWC and when she wishes to start maternity leave
- Occupational maternity pay –
 - Must return to her job for at least 13 weeks (including holidays) to qualify
 - Weeks 1 - 4: 100% of salary offset against payments made for statutory maternity pay / maternity allowance
 - Weeks 5 – 6: 90% of salary (offset)
 - Weeks 7 – 18: 50% of salary plus SMP (except to the extent to which the combination of occupational maternity pay and statutory maternity pay exceeds full pay)
 - Weeks 19 – 39: statutory maternity pay

Pregnancy, Maternity leave and pay

Occupational maternity scheme under the Green Book: Part 2 Section 11

- Must be employed for at least one year and 11 weeks by the expected week of childbirth
- Enhanced maternity pay
 - Weeks 1 - 6: 90% of salary offset against payments made for statutory maternity pay / maternity allowance
 - Weeks 7 – 18:
 - If employee declares in writing that she intends to return to work, 50% of salary plus SMP (except to the extent to which the combination of occupational maternity pay and statutory maternity pay exceeds full pay)
 - If employee does not declare intention to return to work, statutory maternity pay
 - Weeks 19 – 39: statutory maternity pay

Adoption leave and pay

- Key rights:
 - Up to 52 weeks statutory adoption leave
 - Statutory adoption pay for up to 39 weeks (but check your policies and procedures)
 - Right to return to the same job (or in certain circumstances return to a suitable and appropriate alternative job)
 - Protection from detriment and dismissal
 - Priority to be offered suitable alternative employment if redundancy occurs during the leave

Adoptions and other arrangements covered by the statutory rights:

- Adoption through an agency
- Fostering for adoption
- Surrogacy – parental order parents

Paternity leave and pay

Key rights:

- One or two week period of leave with statutory pay (but check your own policies and procedures)
- To be taken within 56 days of birth or placement of the child in adoption
- Right to return to the same role both in terms of seniority and pension rights and on terms and conditions no less favourable than prior to taking leave;
- Protection from detriment and dismissal

Shared parental leave

Key rights:

- Mother or primary adopter can give notice to end the 52 week maternity/adoption leave period early
- The partner or secondary adopter can share the remainder of that leave
- Two week's compulsory maternity or adoption leave must be taken first
- Right to return to the same role both in terms of seniority and pension rights and on terms and conditions no less favourable than prior to taking leave;
- Protection from detriment and dismissal
- Not unusual for this to be used by teachers around school holiday periods... particularly summer holidays

Time off for dependents and parental leave

Parental leave:

- Unpaid leave available to some working parents in addition to statutory maternity, paternity and adoption leave;
- Up to 18 weeks unpaid leave per child up until their 18th birthday or the 5th anniversary of the date of placement of an adopted child
- Can be taken at different times

Time off for dependents


- Reasonable unpaid time off for emergency time off where it is necessary to care for a dependent (unexpected illness, death, breakdown of care arrangements for a dependent)

- Employees with at least 26 weeks' service have the right to make a written request for flexible working for any reason
- Employer has three months to consider the request, discuss it with the employee and notify them of the outcome
- Must be dealt with reasonably and dealt with within 3 month period. Can only be refused for certain reasons
- Only one request can be made in 12 month period
- Key issue – watch out for discrimination risks – possible indirect discrimination claims
 - Since the decision in *London Underground v Edwards (No 2) [1998] IRLR 364*, it has been open to women whose requests for flexible working are rejected to seek redress by making a sex discrimination claim.
 - Disability discrimination claim – reasonable adjustments to amend working days / hours.
 - Religion or belief discrimination - in order to accommodate their religious beliefs and requirements

- June 2022 – response to the consultation on disability workforce reporting is due
- Mid 2022 – a white paper (recommendation for legislation) is expected on improving the employment outcomes for disabled people and those with health conditions
- Employment Bill – expected to include:
 - extension of the period of protection for redundancy from the point of notification of pregnancy to six months after the end of maternity leave;
 - leave and pay for neonatal care;
 - A week's leave for unpaid carers;
 - making flexible working the default.
- Menopause enquiry into whether further legislation is required to provide protections for anyone going through menopause has closed – we are expecting a report in 2022

Questions and answers

Thank you

 Ward Hadaway  @WardHadaway
wardhadaway.com