DISCRIMINATION (I) SEX AND RACE DISCRIMINATION

Preparation:

This seminar covers the sex and racial discrimination regimes in the context of employment. In order to prepare for this seminar you should read from one or two of the textbooks from the general reading listed below. You should then look at and consider the issues that will be discussed. You should read any specific material cited and undertake any specific tasks set.

General Reading:
Davies chapter 7*¹
Selwyn chapter 4*
Deakin & Morris pp. 515-605*²
Honeyball & Bowers pp. 232-264*
Painter and Holmes chapter 5*
Pitt, Chapter 2*
Smith & Wood pp. 274-343*

Journal Reading:
Lizzie Barmes, “Promoting Diversity and the Definition of Direct Discrimination” (2003) 32 ILJ 200*
Collins “Discrimination, equality and social inclusion” 2003 Modern Law Review 16*
Oran Doyle, “Direct Discrimination, Indirect Discrimination and Autonomy” (2007) 27 OJLS 537
Aaron Baker, “Proportionality and Employment Discrimination in the UK” (2008) 37 ILJ 305*
Naomi Cunningham, “Indirect Discrimination: Between the Wheat and the Chaff” (2009) 38 ILJ 209*

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Advanced Reading:
Nicholas Bamforth, Maleikha Malik and Colm O’Cinneide, Discrimination Law: Theory and Context (London, Sweet & Maxwell, 2008) Chapters 4, 5, 6, 7, 8, 10 and 12

Question 1:
What conception or ‘model’ of equality does the European Union and the UK adopt for the purposes of anti-discrimination law?

Specific & Advanced Reading:

Question 2:
What does the Equality Act 2010 prohibit and in what contexts?

Direct discrimination

Question 3:
How is direct discrimination defined – Illustrate with cases. Do you agree with Bowers and Moran? After the decision of the Supreme Court in R v Governing Body of Jews Free School [2010] IRLR 136, is it


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ever possible for an employer’s ‘benign motive’ to be taken into account in assessing whether there has been direct discrimination?

**Specific Reading:**
Selwyn pp. 128-132 and 136-139*
Deakin & Morris pp. 528-542–6
Honeyball & Bowers pp. 232-239*
Painter and Holmes pp. 270-295*
Pitt, pp. 50-66*
Smith & Wood pp. 286-292*

**Specific & Advanced Reading:**

**Journal Reading:**
Oran Doyle, “Direct Discrimination, Indirect Discrimination and Autonomy” (2007) 27 OJLS 537
Naomi Cunningham, “Indirect Discrimination: Between the Wheat and the Chaff” (2009) 38 ILJ 209*

*Noone v NW Thames Regional Health Authority* [1988] IRLR 195
*Etam plc v Rowan* [1989] IRLR 150
*R v Birmingham C. C., ex parte EOC* [1989] IRLR 173*
*James v Eastleigh B. C.* [1990] IRLR 288*
*Nagarajan v London Regional Transport* [1999] IRLR 572 HL*
*Shamoon v RUC* [2003] IRLR 285*
*Moonsar v Fiveways Express Transport Ltd.* [2005] IRLR 9
*Baldwin v Brighton & Hove City Council* [2007] IRLR 232
*Centrum voor Gelijkheid Van Kansen en voor Racismebestrijding v Firma Feryn NV* [2008] IRLR 732
*Amnesty International v Ahmed* [2009] IRLR 884
*R v Governing Body of Jews Free School* [2010] IRLR 136*

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**Question 4:**

In what circumstances can an employer legally insist that a man, rather than a woman, is required for a job? Identify the relevant provisions of the Sex Discrimination Act 1975 and case law in relation to this question.

**Specific Reading:**
Selwyn p. 138*
Deakin & Morris pp. 588-598*
Honeyball & Bowers pp. 255-258*
Painter and Holmes pp. 346-351*
Pitt, pp. 56-62*

**Specific & Advanced Reading:**

*Page v Freight Hire (Tank Haulage) Ltd [1981] IRLR 13*

**Indirect discrimination – the four components:**

**Question 5:**

What is a ‘provision, criterion or practice’ – identify any relevant case law which interprets this phrase. Move on to identify the subsequent three components of the test of indirect discrimination and explain how each might be used by counsel for the employer defending a discrimination claim. In doing so, explain the mechanics of the employer’s ‘proportionality’/’objective justification’\(^7\) defence.

**Specific Reading:**
Selwyn pp. 132-134 *
Deakin & Morris pp. 542-557*\(^8\)
Honeyball & Bowers pp. 239-245*
Pitt, pp. 66-71*
Smith & Wood pp. 293-300*

**Specific & Advanced Reading:**

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\(^7\) These terms are used interchangeably.

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Question 6:

Explore the concepts of harassment and sexual harassment. Is there any requirement for an employee to compare herself with a comparator? Is an employer liable for third party harassment or third party sexual harassment of an employee? Explain the relationship between (i) sections 26 and 40 of the Equality Act 2010 and (ii) sections 1 to 4 of the Protection from Harassment 1997.

Specific Reading:
Selwyn pp. 134-135*
Deakin and Morris pp. 582-584*9
Honeyball & Bowers pp.251-252*
Painter and Holmes pp. 304-313*
Pitt, pp. 74-78*
Smith & Wood pp. 291-292 and 300-303*

Specific & Advanced Reading:
Michael Connolly, Discrimination Law (2nd edition, Sweet & Maxwell, 2011) chapter 5*

Journal Reading:

Burton v De Vere Hotels Ltd. [1996] IRLR 596
EOC v Secretary of State for Trade and Industry [2007] IRLR 327
Majrowski v Guy’s and St. Thomas’ NHS Trust [2006] UKHL 34; [2007] 1 AC 224
Veakins v Kier Islington Ltd [2010] IRLR 132

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Specific Tasks:


2. Refer to the cases of Vento v Chief Constable of West Yorkshire Police (No. 2) [2003] IRLR 102, Da'Bell v National Society for the Prevention of Cruelty to Children [2010] IRLR 19 and Chagger v Abbey National plc [2010] IRLR 47. How is compensation for injury to feelings and stigma damages fixed where an employee’s discrimination claim is successful?
Question 1
What conception or ‘model’ of equality does the European Union and the UK adopt for the purposes of anti-discrimination law?

- Substantive equality based on results, equality of opportunity, substantive equality and a broad value driven approach

- Anti-discrimination laws cannot be reduced to equal treatment. A closer inspection of the legislation reveals three kinds of deviations from a simple equal treatment principle.

**Equality Act 2010**
An Act to make provision to require Ministers of the Crown and others when making strategic decisions about the exercise of their functions to have regard to the desirability of reducing socio-economic inequalities; to reform and harmonise equality law and restate the greater part of the enactments relating to discrimination and harassment related to certain personal characteristics; to enable certain employers to be required to publish information about the differences in pay between male and female employees; to prohibit victimisation in certain circumstances; to require the exercise of certain functions to be with regard to the need to eliminate discrimination and other prohibited conduct; to enable duties to be imposed in relation to the exercise of public procurement functions; to increase equality of opportunity; to amend the law relating to rights and responsibilities in family relationships; and for connected purposes.

- Major piece of legislation.
- Purport to harmonise all the law dealing with the prevention of discrimination and the promotion of equality.
- Repeals or revokes most of the previous law on the subject.
  - Equal Pay Act 1970
  - Sex Discrimination Act 1975
  - Race Relations Act 1976
  - Sex Discrimination Act 1986
  - Employment Act 1989 ss.1-7, 9
  - Disability Discrimination Act 1995
  - Equality Act 2006 (ss.25, 26, 33, 43, 81, Part 2 and Part 4, and part of Sch 3)
  - Employment Equality (Religion or Belief) Regulations 2003
  - Employment Equality (Sexual Orientation) Regulations 2003
  - Employment Equality (Age) Regulations 2005 (except Sch 6, which deals with provision relating to retirement).

**Disability (ss.6 and 13(3))**
6 Disability