

## Corporate Manslaughter

The Corporate Manslaughter and Corporate Homicide Act 2007 ("the Act") comes into force on 6 April 2008.

### What is the offence?

The offence is "corporate manslaughter". An organisation will be guilty of the offence if the way in which its activities are managed or organised;

- cause a person's death; and
- amounts to a gross breach of the duty of care owed to the deceased.

However, the organisation will only be guilty if a substantial element of the breach is the way in which activities are managed or organised by its senior management.

### Who are "senior management"?

Senior management play a significant role in the;

- actual management of the organisation; or
- decision-making process in relation to management.

In reality, the identity of senior management will depend on the size and structure of the organisation.

### Penalties

*Fine:* Unlimited! Recent health and safety fines have run into millions of pounds (Transco were fined £15 million for health and safety breaches in August 2005) and it is expected that corporate manslaughter fines will be higher.

*Remedial action:* organisations can be ordered to take steps to remedy a breach within a time limit.

*Publicity Orders:* courts will be able to



order organisations to publicise details of their conviction, amount of the fine and terms of the order.

### What about individuals' liability?

There is no liability for individuals; so no fines and no imprisonment.

However, remember that police investigations will focus on senior management. This could increase pressure for parallel health and safety charges against individuals under which they could still be found liable.

### What should employers be doing?

- conduct a review of the application, effectiveness and enforcement of health and safety management systems;
- carry out risk assessments and eliminate risks;
- consider the culture of the organisation, attitude to health and safety and make any necessary changes;

- review liability insurance – check that covers legal costs incurred under the Act;
- train staff and clarify responsibilities;
- update organisational charts – ensure job profiles reflect roles carried out;
- check/amend whistleblowing policy – encourage reports of health and safety breaches and/or concerns;
- ensure company cars/vehicles are safe (the police have said they will investigate whether companies have carried out basic checks, for example, ensuring staff have MOT certificates, a valid driving licence and insurance).



If your details have changed or if you know anyone who'd like to receive The Works, please contact Katie Davis-Lyons: Tel: 01908 247265 or email [katie.davis-lyons@howespercival.com](mailto:katie.davis-lyons@howespercival.com) This newsletter is designed to provide a summary of the subject matters covered, it should not be relied upon as comprehensive legal advice.

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## Where equal rights collide

**Equality and diversity make headline news. In particular the press has recently courted controversy over religious and belief discrimination.**

Here, we look at some of the more high profile cases over the last year and consider how courts, employers and other institutions are approaching this issue. We ask "are they succeeding in protecting equal opportunities or are we facing an unequal equality?"

### British Airways: cross-ban

Similar to other airlines, BA's uniform policy banned wearing jewellery unless worn under the uniform. Heathrow check-in worker, Nadia Eweida, wished to wear her cross on the outside of her uniform, so that she could express her faith. BA said this was against its uniform policy. Ms Eweida brought a grievance on the basis that the policy discriminated against her Christian faith. In particular, Ms Eweida thought it discriminatory as male Sikh staff could wear turbans and female Muslim staff Hijabs (because they could not be worn under the uniform).

On the face of it, it does appear BA was not even-handed in its approach and the press and church leaders alike were quick to condemn BA's policy. However, many businesses have dress codes; firstly to create a uniform-look to the staff presentation and secondly to comply with Health & Safety legislation. The difficulty for BA and other employers is balancing the competing interests of the individual against the wider interests of the company.

There was, as is often the case, a third way. BA said that it would look into allowing the wearing of all religious symbols as small lapel badges. Perhaps a more equal equality after all?

### Lydia Playfoot v Millais School

Another uniform policy dilemma. This time a school, rather than employer, had a policy banning the wearing of jewellery. Lydia Playfoot, a 16 year old girl, was told to remove her ring, which symbolises chastity, or face expulsion. Miss Playfoot brought a claim against the school for breach of her human right to freedom of thought, conscience and religion. In particular, Miss Playfoot said that she should be allowed to wear the ring because Sikh and Muslim pupils could wear bangles and headscarves in class.

This was generally viewed by the press as anti-Christian. However, the High Court disagreed and found that the school was entitled to require Miss Playfoot to remove her ring. It found the uniform policy served a number of important functions, including reducing the risk of bullying at school; as social pressures develop around clothes and jewellery through peer expectations. Further, there was no evidence that Miss Playfoot's religious beliefs in fact required her to wear a chastity ring, and she at no point suggested that it did.

Again, the school needed to balance the competing interests of the individual, Miss Playfoot, with the wider interests of the pupil body as a whole. Further, a fact that was not widely reported by the press was

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that in fact the school had previously permitted a Christian girl to wear a headscarf. This was because that form of dress was required as part of her faith as a member of the "Plymouth Brethren". Therefore it was misplaced to accuse the school of anti-Christian bias.

## Azmi v Kirklees Metropolitan Borough Council

This high profile case involved the wish of a devout Muslim support teacher to wear her veil in class. The Council refused Mrs Azmi's request on the basis that the veil obstructed her face and mouth and therefore effective communication with pupils was impeded.

Mrs Azmi brought a claim in the Tribunal of religious discrimination. The Tribunal and EAT dismissed her claim. Again, the interests of the individual needed to be balanced against the good of the pupils. Although the school had applied a practice that put people of Mrs Azmi's religion or belief at a disadvantage, the adoption of that practice was justified.

Overall, this decision would seem to illustrate that the courts, at least on this occasion, do fulfil their role in protecting equal opportunities. This must include taking into account the opportunity for children of all ethnic and social backgrounds to have access to effective tuition.

## Foster carers asked to 'promote' homosexuality

The above is similar to recent news headlines in a matter involving a couple's refusal to sign Somerset County Council's foster contract. Mr and Mrs Matherick, devout Christians, wanted to bring up an 11 year old boy in their care as their own. The Council asked them to enter into its foster contract which the couple said specifically required them to 'promote' homosexuality. The couple said that they could not condone that as practising Christians and church ministers and they resigned as foster parents.

The press generally portrayed this as political correctness gone mad, particularly given the shortage of foster parents in the UK. It was the couple who were viewed as being the victims of discrimination because

of their religious beliefs. However, it seems to be the press here who are guilty of not balancing the often competing interests of a good story against the facts.

It has now been clarified that it was never the case that the couple were being asked to 'promote' homosexuality. Rather they were required 'not to discriminate unfairly for reasons of sex, marital status, caring responsibilities or sexual orientation': in line with similar equality promises made by every UK local authority.

The law simply required that, for example, if the couple were asked about it, they would discuss homosexuality as equally as they would discuss heterosexuality. This would seem a sensible balance between the interests of their child, who might otherwise feel unable to

communicate about his sexuality with his parents, and the couple's interests to not have to expressly promote a sexuality which is against their religious beliefs.

## On balance

Equal opportunities will continue to grab the headlines and our interest. Courts and organisations will have to grapple with these difficult and emotive issues for some time to come. Overall, it appears that they are not doing such a bad job as the media would at times have us believe. Maybe the new Equality and Human Rights Commission (in place since 1 October 2007) will be able to provide equality with a better press, as well as working towards a system which tolerates all views and where the collision of rights can be resolved without winners and losers?



# Case notes Age Discrimination

It's over a year since the Employment Equality (Age) Regulations were introduced and it's time for an update on some of the most recent case law.

## Johns v Solent SD Limited (2007): cases to be stayed

In the above case the EAT stayed a claim of age discrimination and unfair dismissal pending the ECJ's decision on the legality of the UK default retirement age of 65 (due in 2009). The case is being appealed to the Court of Appeal.

Following this decision the President of the Employment Tribunals announced that all similar cases should be stayed pending the ECJ's decision. (Although the stay is to be reviewed following the Court of Appeal's judgement in the above case).

**Facts:** Mrs Johns was required by her employer, Solent SD Limited (Solent), to retire at 71. She accepted that her dismissal was due to compulsory retirement and that Solent had followed the correct procedure. However, Mrs Johns brought claims for unfair dismissal and age discrimination.

At a pre-hearing review, the Tribunal rejected her claims on the basis that employers are entitled to rely on the

default retirement age of 65. The Tribunal also refused Mrs Johns' request to stay proceedings pending the outcome of the ECJ decision in the Heyday case (in which the default retirement age is being challenged as unlawful).

The Tribunal took into account that Heyday's challenge, and therefore Mrs Johns' claim had only a remote chance of success. In particular the Tribunal based its findings on the Advocate General's decision in the Spanish case of *Palacios*, which held that compulsory retirement clauses contained in collective agreements are lawful.

Mrs Johns appealed against the Tribunal's decision. The EAT upheld her appeal and allowed her claim to be stayed pending the ECJ's decision in the Heyday case. In particular, the EAT said that the Tribunal should not have prejudged the ECJ's decision.

Unfortunately this may well encourage

employees who are dismissed as a result of reaching the retirement age to bring claims against their employers for unfair dismissal and age discrimination. It also leaves unwelcome uncertainty about whether employers can safely rely on the default retirement age of 65.

Overall, the outcome of the ECJ's decision in 2009 depends if the Government can show that the default retirement age is justified. In the meantime by continuing to rely on the default retirement age employers should be aware that there is a risk of employees bringing claims against them, which could be successful.



## Court v Dennis Publishing Ltd (2007): selection for redundancy

This case highlights the factors that a tribunal will consider when deciding whether to draw an inference of age discrimination.

**Facts:** Mr Court was employed as Promotions Director by Dennis Publishing Limited (DP Limited). He was responsible for creative solutions, a form of advertising within the Motoring Division. Five other staff also provided creative solutions although they worked in another department. A decision was taken to consolidate the creative solutions team and Mr Court was subsequently selected for redundancy. He was 55 years old at the time.

Mr Court brought a claim of age discrimination and unfair dismissal.

The Tribunal upheld Mr Court's claims. In particular, it found that the employer did

not have any good explanation as to why Mr Court was selected for redundancy. Further, there were a number of factors from which an inference of age discrimination could be drawn:

1. The owner of DP Limited, Mr Dennis, had written a book entitled *How To Get Rich*. In this book he promotes the idea that young people are good for business because their talent is not as expensive as that of senior employees. The Tribunal found that his philosophy had infected the culture within the company.
2. The failure to consider for redundancy any other employees, who all happened to be at least 20 years younger than Mr Court.
3. The employee who was recruited to head the new team was 22 years younger than Mr Court.

4. Notes made by a manager prior to the appeal hearing referred to correcting the assumption that age was the only factor for Mr Court's dismissal. In the Tribunal's opinion this implied that age had at least been a factor.

As usual, evidence of direct discrimination is rare. Therefore the ability of the Tribunal to draw an inference is often decisive. This case reinforces the importance for employers to have a clear explanation as to how it arrives at its decisions.

Although having a predominantly young workforce will not in itself lead to a finding of age discrimination, employers should be wary of promoting a "young" culture and be careful to have a transparent basis for redundancy selection, not linked to age.