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# Higher Education Bulletin

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# Contents

# Gender segregation - no discrimination if equally disadvantaged?

The issue of segregation on gender grounds was very topical a number of years ago, but since then appears to have been subsumed into the Prevent duty. The debate may be re-animated by a recent High Court case (*The Interim Executive Board of X School v HM Chief Inspector of Education, Children's Services and Skills* ([2016] EWHC 2813 (Admin)) whose judgment was delivered on 8 November 2016.

**Background**

This is the first case relating to gender-based segregation in the context of education, though it relates to a mixed-sex Islamic faith school for pupils aged 9 to 16. The school judicially reviewed an Ofsted inspection report which had concluded that the school unlawfully discriminated against both its female and male pupils by providing education "for boys and girls in parallel gender streams". It was accepted by the judge that the school's policy was clear and reflected the parents' preferences.

**Ofsted's argument that gender segregation amounts to discrimination**

Ofsted's view was that the segregation amounted to direct discrimination under the Equality Act s13, which occurs when person A treats another person B less favourably because of a protected characteristic e.g. sex.

It is interesting to note that the Equality Act makes express provision for segregation on racial grounds to be inherently discriminatory. No such provision applies to sex or to the other protected characteristics. In order to amount to direct discrimination because of sex, the segregation must amount to less favourable treatment. Not all treatment which is based on a protected characteristic is necessarily less favourable treatment of the possessors of that characteristic and therefore discriminatory.

When choosing an appropriate comparator for the purposes of deciding whether the treatment is less favourable, there must be no material difference between the circumstances relating to each case.

Ofsted sought to justify its conclusion on the following grounds:

Although girls and boys in the school were ostensibly treated equally, less favourable treatment occurred in one or more of four ways:

(i) Both boys and girls lost the opportunity to choose with whom to socialise: girls in the school were denied the opportunity to choose to socialise with boys (which boys in the same school enjoy); and vice versa. That loss of a choice of companions constituted less favourable treatment for the purposes of direct discrimination under the Equality Act.

(ii) Both boys and girls lost the opportunity to socialise confidently with the opposite sex and/or to learn to socialise confidently in preparation for interaction in personal, educational and work-related contexts on leaving school.

(iii) That loss or those losses of opportunity imposed a particular detriment on girls, because the female sex was the group with the minority of power in society.

(iv) The very fact of segregation constituted less favourable treatment of girls because it could not be separated from deep-seated cultural and historical perspectives as to the inferiority of the female sex and therefore served to perpetuate a clear message of that status.

**The Court's decision**

The key question for the judge was whether the denial of the opportunity to both sexes amounted to less favourable treatment. In

relation to points (i) and (ii) above, the judge concluded that both sexes were being denied the opportunity to interact with, socialise with or learn from the opposite sex. It was artificial to say that the denial to the boys of the opportunity to mix with the girls was different from the opportunity being denied to the girls. It would only be different if there were some qualitative distinction for those purposes between male and female interaction, which in his judgment there was not. In short, there was no material difference between the circumstances of the boys and the girls - the treatment was the same for both groups. The segregation was non-discriminatory.

Points (iii) and (iv) as advanced by Ofsted were based on the implicit understanding that the girls were being segregated from the boys because they were regarded as inferior. Such segregation promoted social and cultural stereotypes of the role of women in society. The judge described Ofsted's argument as "sedulously tethered to society". No evidence was advanced to enable him to conclude that segregation in that particular Islamic school generated a feeling of inferiority as to the status of girls in the community generally and consequently he could not rule on it. Points (iii) and (iv) were not taken any further.

**Lessons learnt**

What therefore are the lessons from this case? They are:

- A reminder that segregation on the basis of race is inherently discriminatory;
- Segregation on the basis of sex/gender is not inherently discriminatory;
- Segregation on the basis of sex/gender or other protected characteristic is inherently discriminatory if there is evidence of less favourable treatment.

Segregation is not a practice engaged in by UK universities, though concerns are raised periodically by segregation on gender grounds practised by some student societies and clubs.

This case suggests that in order to justify intervention, universities must be satisfied that the segregation constitutes less favourable treatment of one gender, usually women. The guidance on gender segregation issued by the EHRC and the ECU takes a subtly different approach, stating that apart from the statutory exceptions, genuinely voluntary segregation is permissible. It also exhorts caution, stating that it is unlikely that universities could obtain evidence to satisfy a court that segregation was "wholly and demonstrably voluntary". Segregation is not voluntary where one individual feels that their choice is constrained. But this case suggests that if all those attending, male and female, feel equally constrained, then no discrimination occurs.

Permission to appeal has been granted, given the importance of the issues contested. Universities should continue to apply the EHRC/ECU guidance as before and we will provide an update when the appeal is heard.

**Geraldine Swanton**
Legal Director, Education Team
T: 0121 214 0455
E: geraldine.swanton@shma.co.uk

# Baking and discrimination

The Court of Appeal (CA) in Northern Ireland has recently ruled in *Gareth Lee v Colin McArthur, Karen McArthur and Ashers Baking Company Limited* ([2016] NICA 39), that a bakery owned by Christians who refused to make a cake with the message "Support Gay Marriage" on it directly discriminated against a customer by association on the grounds of sexual orientation.

**Background**

The customer who made the order was a gay man and an active member of the LGBT organisation, QueerSpace. Unlike Great Britain, Northern Ireland does not currently have a provision for same sex marriage and campaigns continue in order to push the Northern Ireland government to introduce such provisions. The owners of the bakery who opposed same sex marriage cancelled the customer's order and refunded him his money, explaining that they believed same sex marriage was against God's law, and therefore were not prepared to make the cake requested.

**The Court of Appeal's decision**

In upholding the original decision, the Court of Appeal rejected the bakery owners' argument that their rights to freedom of thought, conscience and religion and freedom of expression should be taken into account and that the equality legislation should be read so as to accommodate those rights. The Court held that to prohibit a sign supporting gay marriage on the basis of religious belief would be to condone direct discrimination. The Court went on to say that if businesses were permitted to choose what services to provide to gay people based on their religious beliefs, this would leave open the possibility of arbitrary abuse. The owners of the bakery could manifest their religious beliefs whilst they continued to provide cakes.

This case received a great deal of press exposure. However, the decision is not extraordinary. The case reiterates the well-established principle that service providers' religious beliefs do not exempt them from the confines of discrimination legislation.

**Abigail Halcarz**
Solicitor, Employment
T: 0121 214 0388
E: abigail.halcarz@shma.co.uk

# Letters of Intent - commencing works before a contract is concluded

We have recently been advising a client on an IT implementation, where we have been asked to advise on progress under a "letter of intent". A letter of intent is used as a device to provide for a service provider or supplier to progress a project and to receive payment for it. This is a typical device which is used to progress a project while simultaneously hammering out the fine details of a contract. This is especially typical in the education sector as there is invariably only a limited window to undertake construction work or install IT infrastructure during the summer breaks, in preparation for the next academic year.

The recent case of *Arcadis Consulting (UK) Ltd –v- AMEC (BSC) Ltd* ([2016] EWHC 2509 (TCC)) examined the use of letters of intent in commercial contracts. According to the court, the case "starkly demonstrates the commercial truism that it is usually better for a party to reach a full agreement... through a process of negotiation and give-and-take, rather than to delay and then fail to reach any detailed agreement at all."

None of this is new law, however it is interesting to note that even where all of the negotiated documents which were flying back and forth had a limitation of liability, the court concluded that there was no such limit in the agreed terms, and that the court would not "re-write history" by imposing contract terms on a project where there were none at the time.

**Udi Datta**
Legal Director, Commercial
T: 0121 214 0598
E: uddalak.datta@shma.co.uk

# Data Protection Update

- **The impact of Brexit on Data Protection regulation - the fog begins to clear**

The last few weeks have seen some certainty start to emerge around the implementation of the General Data Protection Regulation (GDPR) in the UK. First, the Information Commissioner, Elizabeth Denham, announced on BBC Radio 4's PM programme that "I don't think Brexit should mean Brexit when it comes to standards of data protection". And now Secretary of State for Culture, Media and Sport, Karen Bradley, has said that "We will be members of the EU in 2018 and therefore it would be expected and quite normal for us to opt into the GDPR" and that we will only later look at whether to make any changes to the system.

This was not entirely unexpected. It still leaves open the issues around how the UK's version of the GDPR would, after Brexit, interface with the European version, but at least universities and other businesses can now start to properly plan for implementation of the GDPR.

- **EU-US Privacy Shield**

The European Commission has also now approved the EU-US 'Privacy Shield' as providing an adequate level of protection for transfers of personal data outside the EEA. The EU-US Privacy Shield replaces the Safe Harbor protocol that was undone by the Max Schrems case.

Until now, the guidance from the Information Commissioner's Office (ICO) has been that organisations did not need to undo any transfers to the US that had been made under Safe Harbor. This has now changed. The ICO's guidance is that organisations that had previously relied on Safe Harbor now need to review their position. "Doing nothing", says the guidance, "is not an option".

Universities which have data with organisations in the US therefore need to review the basis on which they are satisfying the requirements of the 8th Data Protection Principle (the general prohibition on transfers outside the EEA).

Given that the implementation of the GDPR will require universities to review their approach to data protection generally, bundling a review of overseas data transfers into this review would be a sensible place to start.

- **STOP PRESS**

The Data Protection world moves surprisingly fast – it has not been two months since the approval of the Privacy Shield and already the Irish privacy advocacy group, Digital Rights Ireland, has challenged the validity of the Privacy Shield, effectively on the basis that the US has not really changed the basis on which it accesses data held by US companies.

Whilst we clearly can't foresee the result of this challenge (and given the results of the last two major votes, I won't even be hazarding a guess), universities still need to ensure that their US data transfers are compliant with the new regime rather than continuing to rely on any leniency around Safe Harbor.

Andrew Hartshorn
Partner, Commercial & IP
T: 0121 237 3023
E: andrew.hartshorn@shma.co.uk

# The JCT Design and Build 2016: What's new?

Last month saw the release of the JCT Design and Build Contract 2016; the second of the 2016 updates, with the remainder of the updated suite to be released over the coming months. The JCT, or Joint Contracts Tribunal, produces standard form construction contracts. A number of the amendments made to the Design and Build Contract mirror the changes made to the other JCT contracts already published; some of the key changes include:

**Payment provisions**

The payment provisions have been revised and simplified, including the introduction of a definition of Interim Valuation Date (IVD). The purpose of the IVD is to improve cash flow down the supply chain by having one IVD each month that applies to every party in the supply chain.

**Insurance**

Amendments have been made to the insurance provisions which now allow for bespoke arrangements to be incorporated in relation to the insurance of existing structures. This is a particular issue for employers who are tenants undertaking fit out works who are unable to insure an existing structure in joint names with the contractor.

**Performance bonds and parent company guarantees**

There is now an express provision requiring the contractor to provide a performance bond and/or parent company guarantee. However, it is worth noting that the form of bond is not prescribed.

**Regulatory and industry changes**

The changes required for the Construction (Design and Management) Regulations 2015 published in a stand-alone supplement last year are now directly incorporated into the contract, as are the provisions of the JCT Public Sector Supplement 2011 which relate to Fair Payment, Transparency and Building Information Modelling. There are also changes to reflect the Public Contracts Regulations 2015 which will apply to most contracts where the employer is a local or public authority by allowing them to terminate the contract in specified circumstances.

**Third party rights**

There is now provision for third party rights to be given by a sub-contractor, whereas previously only collateral warranties were provided for.

**Implications of the changes**

All changes made to the JCT Design and Build Contract 2016 seem positive and show that there has been a clear attempt to simplify certain aspects of the contract. However, as the changes will only apply to contracts entered into going forward (where the 2016 edition has been used), it could be some time before the changes take effect and in particular for any contentious provisions to come to light and be presented to the courts.

Ruth Phillips
Partner, Real Estate Disputes
T: 0121 214 0341
E: ruth.phillips@shma.co.uk

# Reasonable Adjustments

In the recent case of Perratt –v- The City of Cardiff Council ([2016] UKEAT 0079/16/RN), the Employment Appeal Tribunal has stated that the duty to make an adjustment can apply to any provision, criterion or practice that an employer has which "bites harder" on the disabled employee than others.

**Facts**

Mrs Perratt was employed by Cardiff City Council in 2003 as a Recruitment Adviser. Mrs Perratt had a number of disabilities (including Aspergers Syndrome and a back and hip condition). After a significant period of absence, and occupational health referrals, she was dismissed on capability grounds. The dismissing officer could not foresee that Mrs Perratt would be fit to return to her role in the future.

Mrs Perratt appealed against her dismissal. The Council dismissed her appeal and she subsequently presented claims to the Employment Tribunal for discrimination because of something arising in consequence of a disability, failure to comply with the duty to make reasonable adjustments and unfair dismissal.

Mrs Perratt argued that there were a number of adjustments that could have been made. The Tribunal held that her reasonable adjustment claims could not succeed because in their view a non-disabled person would have been treated in the same way. The Tribunal dismissed her claim that she had been treated less favourably saying that the dismissal was proportionate because the employee was unfit for her role and likely to remain so for the foreseeable future. The Tribunal also dismissed the unfair dismissal claim. In doing so it said that as the discrimination claim had failed, the unfair dismissal claim must also fail.

Mrs Perratt appealed to the Employment Appeal Tribunal. The EAT held that the Tribunal's approach was incorrect. The tests applicable to discrimination claims are entirely different to those for unfair dismissal claims. It further stated that where anything required by an employer (a provision, criterion or practice) "bites harder" on a disabled employee, the duty to make reasonable adjustments arises.

The case was remitted back to the Tribunal for a decision in relation to the unfair dismissal claim and part of the discrimination claim for failure to make reasonable adjustments. The Tribunal will now have to consider whether two of the suggested adjustments were reasonable adjustments or not.

**What this means for your organisation**

The wording used by the EAT, "bites harder", seems to imply a duty to make reasonable adjustments over and above where the disabled employee is at a "substantial disadvantage", as is required by the Equality Act 2010.

In the event that you are made aware of an employee's disability and recommendations are made regarding reasonable adjustments, you will need to consider the practicalities of those adjustments.

Rather than having a 'blanket' approach to what you consider reasonable or not, you will need to look at the particular circumstances of the case and your organisation and make a decision on whether you can accommodate those suggested adjustments. In the event that you cannot make the adjustments you should be prepared to explain why it is not reasonable for you to do so.

What is considered reasonable for one organisation might not be for another, but what is important is that you have genuinely looked to see whether you can accommodate the adjustments that are recommended.

**Emma Oliver**
Solicitor, Employment
T: 0121 237 3096
E: emma.oliver@shma.co.uk