Discrimination protection

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The implications of discrimination protection extending to corporate bodies

As is well known, the *Equality Act* 2010 protects individuals against less favourable treatment because of certain protected characteristics such as gender, race and disability. Individuals are protected at work and in education, and also in relation to goods and services, membership of associations and premises. This means that, for example, a property manager cannot treat an occupant of a premises less favourably by evicting them because of their disability. Nor can a property manager harass an applicant to occupy premises by making rude comments about their disability.

Whilst the protection of individuals under the act is well established, a recent decision of the Employment Appeal Tribunal (EAT) has confirmed that this protection may extend to corporate bodies too, with potentially wide ranging implications for all companies.

In the case in question, *Garry Abrams Limited v EAD Solicitors LLP*, Mr Abrams held a partnership interest in EAD. In common with many partners of professional services firms, he held this interest and provided his services through a corporate entity, Garry Abrams Limited (GAL). Mr Abrams' share of EAD's profits was in turn paid to GAL. When Mr Abrams turned 62, EAD required him to cease working and stopped paying GAL the profit share. GAL brought a claim before the Liverpool employment tribunal, claiming unlawful age discrimination due to its association with Mr Abrams.

The employment tribunal accepted that GAL was able to pursue such a claim under the *Equality Act*, a decision that has recently been upheld by the EAT. The EAT held that both individuals and corporate entities can, in principle, pursue discrimination claims under the act, the latter 'by association' with protected characteristics of the former. The protected characteristics that might be engaged include age, disability, gender reassignment, race, sex, pregnancy and maternity, religion or belief and sexual orientation. The EAT gave a number of examples of treatment that might, in its view, be the subject of a discrimination claim by either an individual or a corporate body. Those examples included a company being shunned commercially because it is seen to employ a Jewish or ethnic workforce; a company that loses a contract or suffers a detriment because of pursing an avowedly Roman Catholic ethic; one that suffered treatment because of its financial support for Islamic education; or one that was deliberately not favoured because it offered employment opportunities to those who had specific disabilities that were unattractive to some would-be contractors.

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Wide-ranging impact

Whilst the EAT's decision concerned discrimination in the context of work, the decision is likely to have wider implications, particularly in the realm of goods, the provision of professional services and the letting of property. Corporate entities that have been treated less favourably because of their association with individuals such as owners, managers, employees or clients, may now benefit from the act's provisions, if the treatment is linked to a protected characteristic of one or more of the individuals concerned.

For example, the act prohibits a service provider from discriminating against an individual who seeks to use its services by charging a higher price than it would charge to someone who did not share the protected characteristic. A developer or property owner must not discriminate against another organisation by refusing to do business with it because of a protected characteristic or offering to do so on

less favourable terms than to someone who does not share the characteristic in question. Following the decision in Abrams, a corporate entity may be able to bring a claim where the refusal, higher price or less favourable terms can be shown to be linked to a protected characteristic of individuals associated with the entity such as its directors, employees or clients. Similarly, an architect or professional consultant which refuses to provide services to a corporate entity on the grounds, for example, that the company intends to build a faith school may well contravene the act.

The EAT's decision also suggests that a corporate entity may, in certain circumstances, be protected under the act if it is shunned commercially or deliberately not favoured. For example, an architectural practice may have a claim against a client who decides not to use its services because of the religion of one of the architects within the firm. This particular aspect of the judgment does, though, sit uncomfortably with the wording of the act and we anticipate that such claims would be keenly contested.

Practical tips

The recent judgment opens the door for disgruntled corporate entities to seek to assert that decisions unfavourable to them were made on discriminatory, rather than commercial, grounds.

The prospect of having to defend a discrimination claim is unattractive for any organisation. Companies which provide goods and services, or premises, to members of the public should consider taking particular steps to minimise the risk of such claims arising.

Whilst it is not clear that procurement or tendering exercises (in the private sector) would be caught by the decision, companies can protect themselves by having a reasonable process in place, with defined criteria for managing negotiations, accepting and rejecting offers, and agreeing commercial terms. To manage the risk further, organisations seeking competitive bids for construction contracts (for example) might include evaluation criteria to assess historic compliance with equality legislation and to establish whether bidders have effective up-to-date internal policies in this context. Firms would then have the option to mark down bids from contractors or consultants who are unable to demonstrate the steps they have taken to ensure compliance.

In particular, such companies should have adequate procedures and safeguards to ensure that where decisions are taken to procure or provide works, service or goods, or to enter into a property transaction, those decisions can be objectively justified on commercial grounds

which are not discriminatory. An adequate paper trail that sets out objective reasons for deciding not to procure or provide such works or services to (or otherwise deal with) a particular organisation will be critical, should there be a need to defend such a decision.

Developers and other organisations procuring works and services can further protect themselves at the contracting stage. Standard form building contracts and professional appointments typically include generic compliance with applicable law clauses and largely do not specifically address compliance with the act (or earlier equivalent legislation). However, it is open to the parties to amend the relevant contract to stipulate that the contractor or consultant shall not unlawfully discriminate for the purposes of the act and shall further procure that any of their subcontractors or subconsultants comply with the obligations imposed by the act. In the event that the service recipient is then exposed to a claim for a breach of the legislation, it can seek to recover damages pursuant to its contract with the relevant contractor or professional. An indemnity provision in respect of costs/losses arising from a breach of the act might also be considered.

Maintenance contracts are sometimes awarded at the completion of a development, particularly where the ongoing success of the project as built involves an element of specialist knowledge, for example, maintenance of clinical or laboratory space, or high performance sports facilities. Similarly, owners of commercial buildings often enter into agreements for services for the better operation of a building. These agreements may be for general cleaning and maintenance services; lift maintenance; security contracts; water hygiene maintenance; landscaping; power generator maintenance; air-conditioning or comfort cooling/heating maintenance and other similar services. It is not easy to see how the *Equality Act* confers protection on such service providers, despite a suggestion in the Abrams judgment that they might be protected. This would not however prevent service providers asserting such claims. To avoid this possibility, and for reputational reasons, developers, landlords and their agents may wish to be careful to ensure that they can demonstrate objective reasons why one service provider was chosen over another. Any related maintenance contract could also include express provisions (including indemnity provisions) to reduce the likelihood of or mitigate the effect of discrimination claims.

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