



# Recent developments in disability and sex discrimination

## Summary and implications

The law is moving on with the times – we think! At the end of last year, for the first time, the Courts issued an injunction, requiring a bank to make reasonable adjustments to disabled access to its premises, at the cost of £200,000. The EAT gave us some helpful guidance on how employers should treat the rising number of employees undergoing IVF. And, the compensation rates for unfair dismissal came down (yes, down) to reflect the current economic conditions.

What should you make of all this?

- Remember that your duties under the Disability Discrimination Act (DDA) extend beyond your employees, e.g. to customers, clients and others who visit your property. *RBS v Allen* makes it clear that you will have to take all reasonable action to ensure that disabled people can access your premises.
- During certain periods of the IVF process, employees enjoy the same protections as pregnant employees. You owe such employees certain duties, even though you may not know that they are undergoing IVF (*Sahota v Home Office*).
- The compensatory award limit will go down for dismissals that take on or after 1 February 2010; the cap on a week's pay is unchanged this year; other rates, such as SMP and SSP will rise slightly from 6 April 2010.

## Many businesses have twin responsibilities under the DDA – as employers and as service providers. Reasonable adjustments may have to be made in respect of customers as well as employees

*RBS v Allen* serves as a useful reminder that all service providers **must** consider whether each of their individual premises is up to scratch, and make **all reasonable adjustments** to allow disabled access.

This case is very interesting in showing how courts approach the question of what adjustments should be made. And it is well worth noting that

## Ask a question

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RBS and the court did not share the same view on this most crucial point!

The case provides some useful pointers for all businesses:

- **Be prepared to make sacrifices.** The Court ordered RBS to install a platform to allow wheelchair access to its main Sheffield branch, even though this resulted in the loss of a valuable meeting room, which RBS said was in constant use;
- **Seek professional advice.** Find out how you can make adjustments to your premises, and the implications of doing so;
- **Consider the options carefully.** RBS was criticised for not giving sufficient thought to the different ways that it could have made adjustments to its premises. To avoid this, you should carefully consider the professional advice, and ensure that your thinking process is well documented if you decide not to make the adjustments.

If you think that it is not reasonable to make adjustments to your premises, or if you think you can offer an alternative service to disabled customers that does not require access to your premises, we recommend that you seek legal advice about any potential risks. And, bear in mind that what is reasonable in the context of employment may not be reasonable in the realm of service providers.

**During certain stages of the IVF process, women undergoing the procedure benefit from the same protections as pregnant employees.**

IVF-related absences are becoming an issue for employers, as more and more women undergo this procedure. However, as employees are often reluctant to discuss such a sensitive matter, employers may end up dealing with absence or performance issues, without appreciating that they arise from IVF treatment.

- The upshot of two recent EAT and ECJ decisions is that employees undergoing IVF treatment are protected **in the same way as a pregnant woman** under section 3A of the Sex Discrimination Act 1975:
- In limited circumstances, for a very short period leading to implantation;
- In all circumstances, following implantation, either until the end of a maternity leave period or, if the pregnancy fails, for a two-week period following the end of the pregnancy.

The problem remains that employers may not know that an employee is undergoing IVF treatment which entitles her to this extra protection. You may be able to take some small comfort from the EAT's decision in Sahota. The Home Office managed to fend off various allegations of sex discrimination by Mrs Sahota, who was undergoing IVF treatment, even

**"Rights of Access" 2006**

The 2006 Code of Practice "Rights of Access: service to the public, public authority functions, private clubs and premises" provides that:

"The policy of the DDA is not a minimalist policy of simply ensuring that some access is available to disabled people; it is so far as it is reasonably practicable, to approximate the access enjoyed by the rest of the public. Accordingly, the purpose of the duty to make reasonable adjustments is to provide access to a service as close as it is reasonably possible to get to the standard normally offered to the public at large." (paragraph 6.4)

As employees are often reluctant to discuss such a sensitive matter, employers may end up dealing with absence or performance issues, without appreciating that they arise from IVF treatment

**Employers beware**

Employers are advised to tread very carefully when faced with taking disciplinary action against an employee who is undergoing IVF treatment. The employee may enjoy special protection from sex discrimination in what is known as "the protected period". Disciplinary action during this period may lead to a successful claim for direct sex discrimination.

A complete lack of knowledge on the part of the employer that an employee is undergoing IVF, is likely to defeat any subsequent claim, provided the employer "did not shut its eyes to the truth".

though the application of their internal processes had been, to some extent, flawed. At one point, Mrs Sahota's manager held a disciplinary meeting, and issued a written warning in respect of the absence, without Mrs Sahota being present at the meeting. It later transpired that some of Mrs Sahota's absence was IVF-related. Although the tribunal strongly criticised this course of action, the Home Office was still able to defend itself because Mrs Sahota failed to provide proper evidence that her absence was IVF related.

**New rates and limits apply from February and April 2010**

Limit/payment	2009	2010	Effective from
Maximum compensatory award for unfair dismissal taking place on or after 1 February	£66,200	£65,300*	1 February 2010
Cap on a week's pay	£380	£380	1 October 2009
Maximum guarantee payment per day	£21.50	£21.20*	1 February 2010
Standard rate for statutory maternity, adoption and paternity pay	£123.06	£124.08	6 April 2010
Weekly earnings threshold for the above statutory payments	£95	£97	6 April 2010

\* Yes, these figures do go **down!**

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