

UPDATE

Guernsey's Royal Court rejects sex discrimination appeal

In *Immuno Biotech Ltd v Lucia Pagliarone*, an employer unsuccessfully appealed against a finding by the Employment and Discrimination Tribunal of direct sex discrimination. The judgment sheds light on the Guernsey Court's approach to the Sex Discrimination (Employment) (Guernsey) Ordinance, 2005 (the Ordinance).

The first ground of appeal was that the Guernsey Tribunal had misapplied the legal test for discrimination under Guernsey law. Under the Ordinance, to establish sex discrimination based on allegations of sexual harassment, the complainant needs to show both that they suffered a detriment and that they were treated less favourably than a person of the opposite gender in the same circumstances.

Immuno Biotech argued that because Ms Pagliarone failed to present a comparator, she should not have succeeded at the Guernsey Tribunal. The Court disagreed and felt that 'the litany of insulting comments uttered on multiple occasions to Ms Pagliarone by Managing Director David Noakes was so gender-specific that the Tribunal could have come to no other conclusion but that she was treated less favourably than a man'. There was therefore no need to identify a specific comparator.

The second ground of appeal was that the behaviour complained of was either not directed at Ms Pagliarone, or did not affect her dignity, or was trivial in nature or was merely offensive rather than conduct amounting to sex discrimination.

Although appellate courts tend to be reluctant to interfere with factual conclusions raised by Tribunals since they do not have the benefit of seeing and hearing the witnesses, in this case Ms Pagliarone had kept a log of events which the judge was able to review. The log referred to incidents of insulting behaviour that were obviously directed at Ms Pagliarone or obviously connected to her gender. There were too many examples for them collectively to be considered trivial and despite Mr Noakes denials that the incidents occurred, he could produce no evidence to support his denials and the Guernsey Tribunal was therefore entitled to base its findings on the evidence it heard.

At the centre of the appeal was a difference between the sex discrimination law of Guernsey, and the laws of Jersey and the UK. In Jersey and the UK, sexual harassment is actually defined as sex discrimination per se. In Guernsey, the law is structured in such a way that discrimination still needs to be proved by reference to a comparator. In this case, the Court acknowledged that although it would have been helpful for the Guernsey Tribunal to have explained how it undertook the comparison exercise, there was sufficient evidence before it to reach its conclusion enabling the parties (and others) to understand its decision. The Court therefore held that the need to reference a comparator is not a loophole that can be exploited by employers and that the Court will call a spade a spade.

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