Discussing Discrimination: Rights, Feelings, and Damages

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The owner of an urban, funky hair salon is sued for religious discrimination after refusing a Muslim teenager a job as a stylist because she wore a headscarf. A law student, who was born without her left arm, sues the clothing retailer Abercrombie and Fitch for disability discrimination after being told that the cardigan she wore to cover her prosthetic limb was breaking the firm's 'look policy'. A Belgian company specialising in the sale and installation of doors is sued by the *Centre for Equal Opportunities and Combating Racism* (a body charged with the promotion of equal treatment in Belgium) after one of its directors states publicly that his company was not going to recruit 'immigrants' because their customers did not want Moroccans in their homes to install the doors.

Intriguingly, these recent cases cover (almost) the entire spectrum of law. For starters, they raise matters of discrimination: was the applicant hairdresser not given the job because she was a Muslim (direct discrimination) or because her hair was covered? The latter would potentially be a case of indirect discrimination if it was shown that Muslims were particularly disadvantaged compared with other persons who for reasons other than religious belief cover their hair when at work. But the hair salon owner insisted it was an 'absolutely basic' job requirement for stylists to have their own hair on show. In other words, the owner was trying to justify the selection process by showing that it pursued a legitimate aim (which is a defence to discrimination).

What do you think? Should the owner be able to select staff based on their qualifications as well as hairstyle? Is an 'urban, edgy, funky' haircut a 'genuine occupational requirement' in this case (given the type of hair salon we are dealing with) that the law should recognise? Was the Muslim applicant unlawfully discriminated against? Or was she treated in the same way as would a fully qualified applicant with a conventional haircut, a bald person, or someone who suffers from Alopecia (a hair loss disease)? Based on the preferences of the hair salon owner none of them would have qualified for the job. Is it fair that only the Muslim applicant can bring an action for discrimination (on grounds of religion) in a court of law? And is it fair that only this particular hair salon owner is being sued after the applicant had been rejected by 25 other hairdressers?

The same sort of questions can be asked in relation to Abercrombie and Fitch. When the student worker was employed by A&F, the company chose to adapt its look policy and gave her special permission to wear a cardigan over her prosthetic arm. However, after a few days she was taken off the shop floor of the London store on Savile Row and told to work in the stock room. Was she discriminated against on grounds of her disability, i.e. had she been

treated differently from non-disabled staff who were also subject to the look policy? Remember to ask whether the employer's policy can be justified: is A&F not entitled to make their dress code a condition of employment, in the same way that some schools and private companies insist on uniforms? Was she therefore appropriately placed in the stock room in accordance with her refusal to wear the appropriate clothing? The student did not have to work for A&F if she was unhappy with their policy; it was her choice to work there.

Would your answer in this case differ if you were told that A&F was sued in the USA in June 2003 by several Hispanic, black and Asian claimants who claimed that they were steered to low-visibility, back-of-the-store jobs, stocking and cleaning up, instead of sales positions out front? (A&F agreed to pay $40 million to several thousand minority and female claimants). Also, in September 2009, A&F was fined $115,264 in the USA for discrimination for refusing to allow a family member to accompany an autistic girl into a fitting room (corporate policy mandated that only one person be allowed in the fitting room at a time). Is this evidence of a wider company policy of discrimination, or of the poor judgment of store managers? Or should each case be evaluated in isolation, based on its own set of facts?

Finally, let's examine the Belgian door company *Feryn* (a case which was heard by the European Court of Justice in 2008). The company director, Mister Feryn, said the following on national TV: 'I must comply with my customers' requirements. If you say "I want that particular product or I want it like this and like that", and I say "I'm not doing it, I'll send those people", then you say "I don't need that door". Then I'm putting myself out of business. We must meet the customers' requirements. This isn't my problem. I didn't create this problem in Belgium. I want the firm to do well and I want us to achieve our turnover at the end of the year, and how do I do that? – I must do it the way the customer wants it done!'

It is well established in law that employers cannot directly discriminate against job applicants because of their race. So the question is whether the public statements constituted *acts* of discrimination, or whether they were merely *evidence* of potential discrimination, insofar as they indicated that future applicants with an ethnic background would not be recruited by Feryn? What makes the case interesting is that there was no evidence that the company had in fact rejected a job applicant on the basis of race or ethnicity; i.e. there was no identifiable victim of discrimination. So should the statements have been interpreted and dismissed as free speech?

The three cases cover a multitude of issues. How important is choice? Should the hairdresser and student simply have chosen another employer rather than pursue their respective grievances in the courts? Also, who should decide whether the display of funky hair is a 'genuine occupational requirement' for stylists? You may think that it is important for customers to see the hair of the person who is about to cut, colour or style their hair. But would you say the same for Feryn? Should their middle-class customers' preference not to have their sectional overhead doors installed by Moroccans factor in to the company's recruitment strategy? No, because arguably it is more important to eradicate discriminatory

recruitment practices. But if that is the case, why not take past practise into account in relation to A&F? Maybe because each case should be decided separately in order to achieve a fair trial (which is a human rights issue). While we are on the subject of human rights, should a company director be sued in the civil courts for *expressing* the unpalatable views of some of his customers (similar to an Orwellian thought-crime which produced no tangible harm)?

My intention has been to take you through the central and surrounding questions of these cases and to show that none of the cases are as straightforward as they look at first sight. The outcomes of these cases are just as intriguing.

The Muslim hairdresser claimed for nearly £34,000 in compensation for lost earnings and injured feelings (enough to put the newly-established hair salon out of business). The employment tribunal awarded her £4000 for 'injury to feelings' and dismissed her claim of indirect religious discrimination. The media reported that she had 'won' her case. Do you agree?

The student worker for A&F claimed for £20,000 but was awarded just over £9,000 in compensation by an employment tribunal (£136 in damages, £7,800 for injury to feelings, and £1,077 for loss of earnings in relation to her claim for wrongful dismissal (as she had subsequently resigned from her job) and harassment. The tribunal again dismissed the claim for disability discrimination, because it stated that the retailer had not treated her differently from their non-disabled staff. However, the tribunal did find that there had been a failure to make reasonable adjustments to the look policy by not allowing her to work on the shop floor. Again, did the student achieve more than a pyrrhic victory?

In *Firma Feryn*, the ECJ accepted the definition of direct discrimination in the Race Directive (2000/43) as a situation in which 'one person is treated less favourably than another … in a comparable situation'. There did not always have to be an identifiable complainant for a claim to come within the scope of the Directive. Such a requirement would dissuade certain candidates from submitting an application and also would be contrary to the objective of the Directive which is 'to foster conditions for a socially inclusive labour market'.

The *Firma Feryn* case raises additional issues about the scope of direct discrimination and the enforcement powers of equal treatment bodies, such as the Equality and Human Rights Commission (EHRC). In the UK, it is already unlawful to publish advertisements which indicate an intention to discriminate, and the EHRC is equipped with various enforcement powers under the Race Relations Act 1976 and Equality Act 2006 in respect of discriminatory advertisements, discriminatory practices and in circumstances where it thinks a person is likely to commit an unlawful act. However, the EHRC does not have the legal standing to bring proceedings where there is no complainant. Do you think it is necessary to have an

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complainant (a victim) before proceedings can be brought in response to an employer's public statements of its discriminatory recruitment policy?

So, in conclusion, we have discussed three cases in employment law that involved direct and indirect discrimination. We touched upon human rights (religion, disability, fair trial, free speech), justification and legitimate aims, and seen the relevance of European Community law, and the potential of equal treatment bodies in commencing litigation. We also noted that damages were primarily awarded for 'injury to feelings' and withheld for discrimination – which suggests that in practice the problem tends to be a lack of tact in rejecting the job applicants (a shortfall in inter-personal skills, rather than a legal matter).

In short, there is a little bit for everyone in these cases – for those interested in law as an intellectual vehicle, for those interested in the scope and limits of human rights, for those interested in daily practice, and even in human psychology. Law may not always be perceived as a cool subject to study, but it is a bit like a funky hairstyle: it sticks out in all directions, it generates strong reactions on all sides, and, if done well, it reflects (and thus contributes to) the diversity and complexity of society.