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Relationship Problems: Employer's Liability for Marital Discrimination?

Abstract

This article involves analysis of the law covering discrimination in the workplace against workers who have entered into a formal marriage or a civil partnership and it is referred to here as marital discrimination. It will also involve consideration of the law dealing with discrimination against single workers. The case law in the United Kingdom concerning both these issues will be considered and the protection under law of the European Union and human rights legislation will also be analysed. Also the legal treatment of discrimination in the workplace against people who have entered into a heterosexual or same sex marriage in the United States will also be considered. Thereafter recommendations will be made for changing the law in both the UK and the US in light of the unclear legal rules and inadequate protection in both jurisdictions for victims of marital and singles discrimination.

Catchwords: Marriage, Status, Discrimination, Employment, Rights, UK, US

Introduction

The Universal Declaration of Human Rights in 1948 included the first legal measure to protect married people. It provided a legal right not to be discriminated against on the basis of marital status although this was a general right.¹ Under article 16 ss (3) it stated that 'the family is the natural and fundamental group/ unit of society and is entitled to protection by society and the State.' While clearly an important measure its impact in this context has proven limited. Its general nature has made its enforcement difficult. However, recently it has considerable impact in respect of protecting against sex and more significantly sexual orientation discrimination as the following quote

¹ Article 16 subsection (1) of the Declaration states that Men and women of full age ...have the right to marry and to found a family. They are entitled to equal rights as to marriage, during marriage and at its dissolution.

suggests. “For more than a decade, this non-discrimination principle has been interpreted by UN treaty bodies and numerous inter-governmental human rights bodies as prohibiting discrimination based on gender or sexual orientation. Non-discrimination on grounds of sexual orientation has therefore become an internationally recognized principle and many countries have responded by bringing their domestic laws into line with this principle in a range of spheres including partnership rights.”²

The Equal Treatment Directive (now repealed) dealt with this issue from a European Union perspective but it had limited impact on marital discrimination.³ The Directive defined the principle of equal treatment for women and men as regards access to employment, vocational training and promotion, and working conditions as meaning ‘that there shall be no discrimination whatsoever on grounds of sex either directly or indirectly by reference in particular to marital or family status.’ Until fairly recently, marital discrimination in the UK was covered by the Sex Discrimination Act 1975⁴ Marriage is not actually defined by the legislation although the EHRC Code⁵ suggests any formal union of a man and woman recognised in the UK as a marriage or persons involved in a civil partnership or same sex marriage⁶ will fall under its protection. It is important for an understanding of the law in this area to consider the legal position in the UK and elsewhere.

Historical Position of Married Women and Employment Law

² Amnesty International USA Marriage Equality | Love is a Human Right (2013) www.amnestyusa.org

³ 1976/208

⁴ Now covered by the Equality Act 2010

⁵ EHRC (2011) Statutory Code of Practice on Equality Act 2010 paragraph 36

⁶ In England and Wales a same sex marriage is now included see Marriage (Same Sex Couples) Act 2013 and in Scotland same sex marriages are permitted under the Marriage and Civil Partnership (Scotland) Act 2014.

In employment in the UK the marriage bar was a practice commonly adopted by employers from the late 19th century until, in some professions the 1960s. It simply restricted married women from employment in certain professions, especially teaching and clerical jobs. Marriage bars did not affect employment in lower paid jobs, and therefore lowered incentives for women to acquire skills and education. However, the Sex Disqualification Act of 1919 made it easier for women to go to university and enter the professions. As the following quote suggests the legal status of women in employment was historically uncertain. “Many interesting problems arose, prior to 1920, as to whether a married woman could become, without her husband’s consent, an employee under a contract of service and also, whether in the event of her taking up employment without her husband’s consent, she could be proceeded against under any statute ...”⁷

Middle class women in particular benefited from increased job opportunities. There were more job opportunities for women in the 1920's and 1930's due to better education.⁸ However, the marriage bar prevented many women from staying at work after marriage e.g. the civil service did not allow women to work after marriage. By the 1930s about one third of women in Britain worked outside the home but, only one tenth of married women worked. In the inter-war years the convention of marriage bars was widespread and operated in occupations such as teaching, the civil service and in large private companies such as Sainsbury’s and ICI. For the first ten years of its existence the BBC bucked convention and openly employed married women

⁷ Miller, I P (1970) *Industrial Law*, W Green p 29

⁸ Women were better educated as a result of the Education Acts of 1902 and 1918.

however, in 1932 it took the decision to introduce a marriage bar, albeit not a full bar, which was not abolished until 1944.⁹

The marriage bar was removed for all teachers and workers in the BBC in 1944 and for workers in the Civil Service, most local government and the post office in 1954.

In certain areas including some union offices, the marriage bar survived into the 1960s.¹⁰ but the practice is now unlawful under the sex discrimination legislation.

Law in the United Kingdom

Although discrimination on the grounds of marital status was originally made unlawful under section 3 of the Sex Discrimination Act 1975 it is now covered by section 8 of the Equality Act 2010. This section protects against discrimination on the basis of both marriage and civil partnership.¹¹ It provides that: (1) a person has the protected characteristic of marriage and civil partnership¹² if the person is married or is a civil partner.¹³ The protection extends to people who are discriminated against because of having either status.¹⁴ The Equality Act 2010 provides that an employer can't treat an employee less favourably than others because they are married or have entered into a civil partnership and they will be protected against discrimination on

⁹ Murphy K A Marriage Bar of Convenience? The BBC and Married Women's Work 1923-39 *Twentieth Century British History* (Advance Access) published February 24, 2014

¹⁰ The Foreign Office enforced the marriage bar until 1972.

¹¹ The Civil Partnership Act 2004 (CPA) gave same-sex couples that registered as civil partners, similar rights and responsibilities to married couples.

¹² The Act defines a civil partnership

¹³ S8 (2) In relation to the protected characteristic of marriage and civil partnership (a) a reference to a person who has a particular protected characteristic is a reference to a person who is married or is a civil partner;

(b) A reference to persons who share a protected characteristic is a reference to persons who are married or are civil partners.

¹⁴ Above note 6 Now also extends to those persons in same sex marriages.

this ground but, not normally if they are discriminated against because of being single.

Legal Protection

As will be seen there has not been much case law dealing with marriage discrimination in the employment field in the UK. However, there have been a few important cases which were mainly brought under the Sex Discrimination Act 1975 and which merit consideration. Interestingly in contrast in the US marital status discrimination is not covered by Title VII of the Civil Rights Act of 1964 and the Equal Employment Opportunity Act 1972 (as amended) does not prohibit it.¹⁵ However protection could be provided on other grounds such as sex discrimination e.g. where only women were asked about their married status at an interview or there was discrimination on the basis of nationality. With respect to nationality the following quote explains the nature of the protection. “Federal laws prohibit discrimination based on a person's national origin... This means people cannot be denied equal opportunity because they or their family are from another country, because they have a name or accent associated with a national origin group, because they participate in certain customs associated with a national origin group, or because they are married to or associate with people of a certain national origin.”¹⁶

¹⁵ Confirmed by the EEOC in the *Equal Employment Opportunity Commission Fact Sheet - Discrimination based on sexual orientation status as a parent, marital status and political affiliation*, December 2009

¹⁶ United States Department of Justice Department, Civil Rights Division, *Federal Protections Against Nationality Discrimination* (2000) www.justice.gov

Back to the position in the UK and in *Watkins v Jubilee Club & Institute*¹⁷ the steward of a club and his wife, a barperson, were both dismissed as a result of a stock deficiency. The Claimant had nothing to do with the stock and the Tribunal decided that she was dismissed simply because she was married to the wrongdoer and that a single barmaid would not have been dismissed in similar circumstances.¹⁸ This case illustrates that where the discrimination by the employer is based on a wife's association with her husband in the same employment there will clearly be a breach of the Sex Discrimination Act 1975. Where someone is still single but, is in the process of getting married, then there might be protection available for them under the statute. This is illustrated in *Turner v Stephen Turner*,¹⁹ where a woman was dismissed when her forthcoming marriage to her employer's son was announced. It was held she was discriminated against contrary to the protection of married persons under section 3 of the Sex Discrimination Act. The case was decided by reference to articles 8 and 12 of the European Convention of Human Rights. The Employment Tribunal decided that when section 3 of the Act was considered in the light of these articles the section applied to not only married persons but, also those about to get married.

One of the most important cases of marriage discrimination to date is *Graham v Chief Constable of Derbyshire Police*²⁰ where a senior female police officer claimed she had been discriminated against when her appointment to the post of area inspector was rescinded after the chief constable learned that her husband was a commander in the same division as her and consequently her boss.

¹⁷ ET/5712/82,

¹⁸ Similarly in *Ganhao v ICM Support Services Ltd*¹⁸ the claimant's husband resigned and as a consequence the job of his wife was given to somebody else. She succeeded in a claim of marital discrimination because the respondent had treated her as if she were her husband's appendage.

¹⁹ ET/2401702/04

²⁰ (2002) IRLR 239, EAT

The employer argued that withdrawing the job from her was justified because, in the event there were any criminal proceedings involving both her and her husband, she could not be compelled and was not legally competent to act as a witness against her husband.²¹ Her employer also thought that it would be problematic for her husband to deal with possible complaints made to him by officers under her supervision about her performance. The Employment Appeal Tribunal was not convinced by the employer's arguments and held that Graham had not only been subjected to indirect sex discrimination but also to direct marriage discrimination because she had been treated less favourably than an unmarried female officer would have been treated in a comparable position. Also, because the chief constable had failed to justify the rule that co-habiting officers should not work in the same division the EAT held this policy was also indirect marriage discrimination. This case illustrates that there are a number of bases for pursuing a case in the event that someone is treated unfavourably because of their married status. However, contrasting legal decisions have meant the law in this area is not always clear. The decision in *Graham* emphasised that an employer wishing to prevent spouses or civil partners working together need to come up with strong policy reasons for forbidding it.

In the more recent case of *Dunn v Institute of Cemetery and Crematorium Management*²² the Employment Appeal Tribunal (EAT) held that marital status as a protected characteristic is not limited to being married but, also includes being

²¹ In England and Wales Section 80 of the Police and Criminal Evidence Act 1984 states that the prosecution generally require a spouse to give evidence against their spouse but can only compel a spouse or civil partner to give evidence for the prosecution in cases against their spouse or civil partner which involves; an allegation of violence against the spouse or civil partner, an allegation of violence against a person who was at the material time under the age of sixteen years, an alleged sexual offence against a victim who was at the material time under the age of sixteen years; or attempting, conspiring or aiding and abetting, counselling and procuring to commit the offences in the categories above.

²² EAT/0531/10

married to a certain person. So any action taken against a female employee because of whom she is married to risks being treated as unlawful direct discrimination on grounds of marital status.²³ The facts were that Mrs Dunn became an employee of the respondent in December 2007. Mr Dunn, her husband, was employed by the same employer and was in dispute with them over his other business interests. Mrs Dunn experienced disputes over her sick pay and performance and was then put at risk of redundancy in October 2008. The last straw came in February 2009 when she was paid a lower rate of sick pay than anyone else in comparable circumstances. Mrs Dunn claimed she was constructively dismissed and alleged that the specific reason for this was she was married to her husband. Her employer claimed there was no evidence that the unfavourable treatment was because of her marital status alone, so the claim could only succeed on this ground if discrimination on the grounds of marital status extends to cover the situation of being married to a particular person. The case was brought under section 3 of the Sex Discrimination Act 1975 and the EAT decided that in a situation where the discrimination did not take place simply because the claimant was married but, because she was married to a particular individual there would be a case to answer.²⁴ The EAT ruled that “a person who is married or who is in a civil partnership is protected against discrimination on the ground of that relationship and on the ground of their relationship to the other partner. Any less favourable treatment which is marriage-specific is unlawful.”

The EAT held that the employment tribunal's construction of s.3 of the Sex Discrimination Act 1975 was too narrow. It noted that the relevant provisions of the

²³ The case followed an employment tribunal decision in *Kay v Ripon Cathedral Choir School* Unreported that it was direct marriage discrimination when the offer of a headmistress post was withdrawn following complaints from parents because the teacher's husband ran a legal practice that was under official scrutiny.

²⁴ They followed the precedent of the EAT in *Chief Constable of the Bedfordshire Constabulary v Graham* (2002) IRLR 239

Equal Treatment Directive, which were implemented in the UK by the marital status provisions of the Sex Discrimination Act 1975, included the additional phrase family status, which would clearly cover discrimination against someone because he or she is married to a particular person. This meant that a person who is married or in a civil partnership is protected against discrimination on the basis of being in that relationship and on the ground of his or her relationship to the other person. The provisions in the Sex Discrimination Act 1975 (now the Equality Act 2010) are wide enough to mean that any less favourable treatment that is marriage-specific is unlawful. As stated previously in the US there are no federal laws protecting against this form of discrimination except the Civil Service Reform Act of 1978 which ensures Federal Government employees in the US are protected. . It prohibits marital status discrimination in the federal government. The Civil Service Reform Act of 1978 (CSRA), as amended, prohibits discrimination against an applicant or employee on the basis of conduct which does not adversely affect the performance of the applicant or employee such as marital status or political affiliation. Additionally the Office of Personnel Management (OPM) has interpreted the prohibition of discrimination based on conduct to include discrimination based on sexual orientation.²⁵In the UK in *Hawkins v Ate Group*²⁶ which is a similar case to *Dunn* and also was brought under section 3 of the Sex Discrimination Act 1975 (SDA).²⁷ the EAT came to a different conclusion. The facts were that the Claimant (Mrs H) was married to the Chief Executive (Mr H) of Atex Group Limited (Atex). The company had told Mr H that from the end of 2009 he should not employ any family

²⁵ The CSRA is enforced by both the Office of Special Counsel (OSC) and the Merit Systems Protection Board (MSPB)

²⁶ (2012) IRLR 807

²⁷ Less favourable treatment because of marriage or civil partnership is now prohibited by the Equality Act 2010 sections 8 and 13

members in the business due to concerns about perceived conflicts of interest. Mrs H had worked for Atex as a contractor and became an employee of Atex in 2010. Mr and Mrs H's daughter also became an employee in December 2009. Mrs H was dismissed on the ground that her employment was in breach of the Board's instruction to Mr H and her daughter was dismissed on similar grounds. Mrs H brought a claim of discrimination on the ground that she was married, under the SDA, which was struck out by the Employment Tribunal on the basis that it had no reasonable prospect of success.

Mrs H appealed and her appeal was dismissed by the EAT who held that the Tribunal's decision to strike out the claim was correctly decided. The EAT held that for claims of discrimination because of marriage/civil partnership to succeed, the less favourable treatment must be suffered because the claimant was married rather than married to a particular man. This decision was clearly contrary to the earlier EAT decision on this point in *Dunn v Institute of Cemetery and Crematorium Management*.²⁸ It was decided in the case that although marriage formed part of the relevant background to the dismissal the real reason for it was the closeness of Mrs H's relationship with Mr H. The employment tribunal had found that Mrs H would have been treated in the same way had she had an equally close relationship with Mr H but had not actually been married to him. This was evidenced most clearly by the fact that Mr H's daughter was also dismissed and for the same reason (she was a family member of Mr H). The EAT commented that it is commonly accepted that it will be sometimes legitimate for employers to accord different treatment to employees who are parties to a close personal relationship for reasons (as argued in this case) of conflict of interest, nepotism and perceptions of favouritism. It

²⁸ Above n.22

held that it would be an arbitrary and unacceptable anomaly if married persons in those circumstances were treated unlawfully (by being dismissed) under the SDA/EqA but those in an equally close relationship, but not married, would be treated lawfully. What is not clear from the judgement is the nature or identity of the people referred to as being in a close relationship with the employer or its management. Presumably they could be close friends of a manager, their relatives (but not their spouse) or persons who are having a sexual relationship with the boss.²⁹ It is difficult to envisage others. This means that a claim for marriage discrimination can fall if an employer can show they would have treated someone they were in close relationship with in the same way. This legal argument is fraught with difficulties and cannot be a correct interpretation of the law. It simply doesn't hold up to scrutiny. An unequivocal rejection of this type of argument was made in the following quote. "Any less favourable treatment which is marriage-specific is unlawful. We do not find it necessary to decide whether that extends to persons in any other kind of relationship than current marriage or civil partnership."³⁰

Where the husband is a liability (in terms of his behaviour or reputation) and it has a bearing on the business his wife is working for then she might legitimately face discrimination or dismissal. This was the case in *S v P Nursery Ltd*³¹ where the employment tribunal held that the employer was justified in dismissing an employee whose husband had been charged with child pornography as it was necessary to protect the reputation of her employer (the nursery). So even although she was not at fault and she had been put in a very difficult position by her husband's behaviour. The Employment Tribunal found that the company had conducted an entirely fair and

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²⁹ Middlemiss, S The Law Dealing with Sexual Favouritism in the Workplace, *International Journal of Law and Management*, Vol. 50 No 1 2008 pp 5 - 16

³⁰ Above n. 22 McMullen, J Paragraph 40

³¹ ET/1400081/11

proper procedure and Mrs S had been fairly dismissed. In circumstances that the husband's behaviour has no bearing or impact on the business of his wife's employer then her dismissal because of her husband's criminal charges etc. is likely to be treated as unfair.

The employer is of course entitled to dismiss a married employee where that status is interfering with his ability to do the job for them. In *Bloomberg Financial Markets v Cumandala*,³² Cumandala (C) was an Angolan who applied for a position with Bloomberg based in Madrid. He was not appointed because he intended to commute weekly to spend weekends with his wife in London. He was also considered for a London post but this was offered to another employee Mr Gunn who was white. C claimed that he was treated less favourably because of his marital status and suffered race discrimination when he was rejected for the London post. The tribunal upheld his first complaint but dismissed the second. Both parties appealed. The EAT allowed Bloomberg's appeal and accepted the C was not appointed to the post in Madrid because his intention was to commute and irrespective of the reason for this it meant he could not give the necessary commitment to the job.

Regarding C's appeal, the tribunal had made a specific finding that a white person would fit into the London team, in racial terms, which implied a black person would not fit in. Accordingly the tribunal should have upheld the race discrimination claim and the appeal was allowed.

In the United States state law provides some protection against marital discrimination. However, only 21 states have laws that prohibit employers from discriminating on the basis of marital status.³³ Some states specifically target pay, while others have

³² EAT/672/98

³³ The following states have laws prohibiting marital status discrimination: Alaska, California, Colorado, Connecticut, Delaware, Hawaii, Illinois, Maryland, Massachusetts, Michigan,

created laws regarding hiring and firing.³⁴ Other states (such as Indiana) have limited their labor laws on marital discrimination to certain employment sectors. In Indiana its law on marital discrimination only applies to the employment of teachers.³⁵ Minnesota's labor laws against marital discrimination cover several areas of employment. A person's marital status cannot be used when considering, hiring, salary, promotions, tenure, working conditions or any other employment privileges specific to the job. Montana's labor law prohibits marital discrimination in terms of salary, employment terms and privileges of employment. The state law does allow exceptions.³⁶ It is interesting that in the United States the protection against this kind of discrimination is somewhat piecemeal. The main federal laws dealing with discrimination do not cover it but, as seen some Government employees benefit from federal protection. Other employees are unprotected unless they are fortunate enough to be protected by State Law.³⁷ However, as seen state laws vary considerably in their coverage.

Those employees that are married or in a civil partnership do not have a characteristic that is protected from harassment under section 26 of the Equality Act 2010. However, employees who are harassed on the basis that they are married or in a civil

Minnesota, Montana, Nebraska, New Hampshire, New Jersey, New York, North Dakota, Oregon, Rhode Island, Vermont, Virginia, Washington and Wisconsin.

³⁴ Even in states where marital status discrimination is illegal, several state laws have exceptions for benefits which permit employers to legally discriminate in the benefits provided.

³⁵ The Indiana law states that it is illegal for anyone to make or enforce any rule affecting the employment of a teacher that is based on marital status.

³⁶ *Unmarried America* found that in Montana marital status discrimination in employment is against the law as long as the reasonable demands of the position do not require marital status distinction.

³⁷ This is the case only in 21 States. Additionally in New Jersey there is no specific protection but marital and civil status discrimination is covered by the State discrimination law. Protections under state and local statutes are generally enforced by state or local antidiscrimination agencies, which may be called a fair employment, civil rights, or "human rights commission or agency.

partnership might have the option of pursuing a claim of sexual harassment or bringing an action under the Protection from Harassment Act 1997.

Harassment

Under the Equality Act 2010 an employee is protected from harassment on the grounds of all of the protected characteristics except marriage and civil partnership and pregnancy and maternity. The reason for excluding marriage and civil partnership would appear to be that an employee who had been harassed on the basis of his or her marriage could bring a claim for sex discrimination or if someone who is harassed because they are part of same sex marriage or civil partnership they would have a claim based on sexual orientation.³⁸

Section 26 of the Equality Act 2010 defines harassment as ‘unwanted conduct related to a relevant protected characteristic, which has the purpose or effect of violating an individual’s dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for that individual’. Harassment, in general terms is unwanted conduct affecting the dignity of men or women in the workplace. It must relate to a personal characteristic of an individual that is covered by the Equality Act 2010 namely; age, sex, race, disability, religion or belief or sexual orientation. It may be persistent behaviour, often escalating in seriousness, or an isolated incident.³⁹ The key is that the actions or behaviours are viewed as demeaning and unacceptable to the recipient or witnesses of the behaviour. A comment or act found offensive by one person at work may be perfectly innocuous to another. It usually depends on the

³⁸ Equality Act 2010 Employment Statutory Code of Practice Equality and Human Rights Commission (2011) p 92 Para 7.5.

³⁹ *In situ Cleaning Co. Ltd v Heads* (1995) IRLR 4, EAT

circumstances in which the banter takes place but, ultimately everyone has a right to decide for themselves what behavior they find acceptable or not.⁴⁰ The employer will be held liable where an employee harasses a fellow employee. This liability attaches to the employer even when he knows nothing about it.⁴¹ Although, it can depend on whether the harassment took place during the course of the harasser's employment. This is broadly defined as a result of the decision of the Court of Appeal in *Jones v Tower Boot Ltd.*⁴² The employer may also be held liable for harassment which takes place off the employer's premises.⁴³ Although not normally for third party harassment.⁴⁴

In order to defend a claim for harassment it is often of key importance that the employer is able to argue that even, if the harassment took place during the course of the harasser's employment, the employer took all reasonable steps to prevent the harasser perpetrating it.⁴⁵ Whether liability should be imposed is essentially a question of fact for the employment tribunal. The difficulty for a claimant in this context is showing not only that they experienced marital harassment but also suffered harassment on another ground such as sex or sexual orientation. This onerous burden will undoubtedly dissuade victims of harassment from pursuing a case. It is easily resolved by amending section 26 of the Act to include marriage and civil partnership and pregnancy and maternity although, there are no plans to do this.

⁴⁰ There were various cases that suggested a more subjective definition of sexual harassment was appropriate most notably *British Telecommunications plc v Williams* (1997) IRLR 134 considered below.

⁴¹ Equality Act 2010 s. 109

⁴² (1997) IRLR 168, CA

⁴³ *Chief Constable of Lincolnshire Police v Stubbs* (1999) IRLR 81

⁴⁴ The provisions dealing with 3rd party harassment in the Equality Act 2010 have been repealed from 1 October 2013 by the Enterprise and Regulatory Reform Act 2013.

⁴⁵ S 109

Occupational requirement

An employer may defend certain acts of discrimination by showing there is a general occupational requirement for doing so. Whilst the majority of occupational requirements stipulate a person must have a particular protected characteristic, in the case of marriage and civil partnerships the requirement must be for a person not to be: married or in a civil partnership. The occupational requirements could be either a general occupational requirement (which relates to the nature and context of the work involved) or a more specialist occupational requirement (e.g. that an organised religion can impose a requirement not to be married or in a civil partnership). In addition the Equality Act 2010 provides for various other exceptions which could apply in discrimination claims in respect of marriage and civil partnership. These are; benefit to the public, national security, insurance contracts and positive action. Although it is difficult to envisage when they would apply.

Civil Partnerships

It has been unlawful for employers to discriminate on the grounds of sexual orientation since December 2003 when the Employment Equality (Sexual Orientation) Regulations 2003 came into force.⁴⁶ It is now the Equality Act 2010 that provides the same protection against discrimination because of sexual orientation. This includes orientation towards someone of the same sex (lesbian or gay men), opposite sex (heterosexual) or both sexes (bisexual). The Civil Partnership Act 2004 (CPA) makes it clear that a civil partner has comparable status to a spouse. As a result a civil partner who is treated less favourably than a married person can claim sexual orientation discrimination. It is unlawful for an employer to justify less favourable

⁴⁶ SI 2003/1661

treatment of a civil partner compared with a spouse (unless being heterosexual is a genuine occupational requirement).

The CPA makes it unlawful to discriminate on the grounds of being a civil partner and in respect of their discrimination on the grounds of marital status in employment this has been extended to civil partners by the Equality Act 2010. Same-sex couples who register as civil partners have the right to equal treatment with married couples in a wide range of matters including employment and vocational training. Whatever benefits married employees and their spouses are given must be provided to employees who are civil partners and to their partners. This includes survivor pensions, flexible working, statutory paternity pay, paternity and adoption leave, health insurance or time off before or after marriage/registration. In *Walker v Innospec Ltd*⁴⁷ ~~and others~~ an employment tribunal held that the Equality Act 2010 failed to provide the required protection under EU law for a couple in a civil partnership who were denied accrual of benefits to which married couples were entitled under a pension scheme.

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Sam-sex marriages

This is clearly a very recent development in England and Wales where legislation with the title of the Marriage (Same Sex Couples) Act 2013 was passed in July 2013 and came into force on 13 March 2014. The first same-sex marriage took place on 29th of March 2014.⁴⁸ Legislation in the form of the Marriage and Civil Partnership (Scotland) Act 2014 also allows same-sex marriage in Scotland. This was passed by

⁴⁷ ET/2411316/11

⁴⁸ When Section 9 of the Marriage (Same Sex Couples) Act 2013 came into force, it granted anyone who was registered in a civil partnership the ability to convert that partnership into a marriage.

the Scottish Parliament in February 2014.⁴⁹ The Northern Ireland Executive has stated that it does not intend to introduce legislation allowing for same-sex marriage in Northern Ireland. They do however, recognise civil partnerships. Same-sex couples who are married will have the right to equal treatment with heterosexual married couples in terms of employment law. This will include the right to: flexible working; paternity pay; paternity and adoption leave and survivor pensions. They will also be protected against discrimination and unfair dismissal on this basis.⁵⁰

The situation is a bit more complex in the United States because, civil-partnerships (or civil unions) are only recognised by the law in a small number of US states.⁵¹

Because of this the discussion will concentrate on same sex marriage in the US.

The situation regarding availability of same-sex marriage (and corresponding equality rights) in the US is complicated. There is no federal right to enter into a same-sex marriage.⁵² However, as of January 2014 there are seventeen states that have legalised same-sex marriage namely; California, Connecticut, Delaware, Hawaii, Illinois,⁵³ Iowa, Maine, Maryland, Massachusetts, Minnesota, New Hampshire, New Jersey, New Mexico, New York, Rhode Island, Vermont, and Washington), as well as the District of Columbia. There are indications are that federal judges are unwilling to accept state laws that prohibit same-sex marriage, In December 2013, a federal court declared Utah's ban on

⁴⁹ The first same-sex marriages are expected to occur in Scotland in the Autumn of 2014.

⁵⁰ The Government plan to amend the Equality Act 2010 to reflect the fact that no discrimination claims can be brought against religious organisations or individual ministers for refusing to marry a same-sex couple or allowing their premises to be used for this purpose.

⁵¹ In the U.S. states of Colorado, Hawaii and Illinois, civil partnerships are open to opposite-sex couples.

⁵² A bill to ban employment discrimination on the basis of sexual orientation and gender identity, the Employment Non-Discrimination Act (ENDA), has been introduced repeatedly in the U.S. Congress since 1994.

⁵³ The Illinois law did not become effective until June 1, 2014.

same-sex marriage unconstitutional.⁵⁴ Similarly a federal court on January 14, 2014 declared, that Oklahoma's ban on same-sex marriage was unconstitutional and it immediately stayed the ruling pending appeal.⁵⁵ The Utah and Oklahoma appeals could be heard together, because they're similar and both were heard in the Tenth Circuit. On appeal the Supreme Court could be asked to settle the matter once and for all of whether states can ban same-sex marriage.

Discrimination against same sex marriage refers to discriminatory employment practices such as bias in; assignment of jobs, recruitment and selection, dismissal and promotion. Also victims may experience various kinds of harassment.⁵⁶ In the United States until recently there was very little protection under statute, the common law or case law for those discriminated against because of their sexual orientation. However in 2011 and 2012, the Equal Employment Opportunity Commission (EEOC) decided that job discrimination against Lesbian, Gays, Bisexual and Transgender employees was classified as a form of sex discrimination and thus violated Title VII of the Civil Rights Act of 1964.⁵⁷ In the *Veretto* case the EEOC ruled that a gay employee may be entitled to relief under Title VII's prohibition on sex discrimination for a claim of hostile work environment. Mr Veretto alleged he was subjected to a hostile work environment when Postal Service -management was nonresponsive to his request to remove from the workplace where a male co-worker harassed Veretto due to his

⁵⁴ Same-sex marriage in Utah became legal on December 20, 2013, as the result of a ruling *Romboy, Dennis* (March 26, 2013) U.S. District Court for the District of Utah

⁵⁵ The case was originally *Bishop v. United States* and later became *Bishop v. Oklahoma* January 14, 2014, U.S when the part of the suit that named the federal government as a defendant was dismissed. District Court Judge Kern ruled that Oklahoma's ban on same-sex marriage was unconstitutional.

⁵⁶ Tilsik, A Pride and Prejudice: Employment Discrimination against Openly Gay Men in the United States, *American Journal of Sociology*, Vol. 117, No. 2, September 2011

⁵⁷ The Commission upheld claims by lesbian, gay, and bisexual individuals on the basis that sex-stereotyping was a type of sex discrimination under Title VII. See *Veretto v. U.S. Postal Service*, EEOC Appeal No. 0120110873 (July 1 2011) *Castello v. U.S. Postal Service* 1, 2011); EEOC Request No. 0520110649 (December 20, 2011); 2011 WL 6960810 (E.E.O.C.) <http://www.eeoc.gov/decisions/0520110649.txt>.

planned gay marriage. The EEOC held that the employee's claim could be an example of a hostile work environment based on sexual stereotyping (e.g. that a man should always marry a woman). In a similar decision *Castello v. U.S. Postal Service* the EEOC held that discrimination based on the sex-stereotype that women should only have sexual relationships with men can constitute discrimination against lesbian workers based on sex. The decisions in these cases offer the prospect of a federal right not to be discriminated against on the basis of sexual orientation. This development combined with, the unwillingness of the higher courts in the US to uphold state laws that prohibit same sex marriage, offers some prospect for the future protection of the employment and social rights of the affected group of workers.

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Only twenty of the fifty U.S. states offer full legal protection but, local ordinances offer some protection in 15 of the 30 states without state-wide protection.⁵⁸ Many legislators are shying away from extending legal protection further.

Singles Discrimination

Unmarried workers are not entitled to protection against discrimination in the workplace in the UK. Examples of discrimination they may experience are not getting employed at a family-oriented organisation or, if they are successful in getting a job they could be repeatedly asked to work long and unsociable hours. In contrast colleagues with spouses and/or children will not often be expected to work evenings or long hours. Discrimination against single people often goes beyond the requirement that they work longer hours than married people. Research shows that single people actually earn less money than their married colleagues.⁵⁹ The following comment

⁵⁸ There is a lack of awareness that legal protection under local ordinances can provide legal protections (e.g. Dallas) when the same protection is not available state-wide (e.g. in Texas)

⁵⁹ The Purdue University study found that unmarried men in general make 14.1 per cent less than their married counterparts

from the researchers summarises the position: “We find a marriage premium, that is, married men are rewarded for qualities people think come with marriage i.e. being breadwinners or being responsible and stable.”⁶⁰

The single mother or single woman who works is often looked upon by employers with suspicion as the following quote suggests: “They question whether she can travel when needed or work long hours. Those questions often lead companies to tailor the work assignments that single women with children receive. Those assignments keep the single mom from her rightful place on the promotion, raise, and bonus lists.”⁶¹

In the US singlism as it is sometimes known is a form of inequality of treatment against people because of their single status which is characterised by; stereotyping, stigmatising, and discrimination. The type of behaviour experienced by singles in the US is very similar to that experience in the UK. It often takes the form of; denying employment benefits for single employees that are available to married colleagues e.g. survivors’ benefits, insisting that they travel for work more, work longer hours or work for less pay than married colleagues. Also, denying them promotion because of their status.⁶² This is shown by the following quote. “Common types of discriminatory acts that single workers face include constantly being delegated heavier workloads than colleagues who have families, consistently being chosen for business travel because you’re considered more ‘available’ or even being denied a promotion because your boss views you as a little less stable than her married employees.”⁶³

⁶⁰ Study’s co-author is Michelle Arthur, assistant professor of management at Purdue.

⁶¹ Rapoport, J Zevnik B L P *The Employee Strikes Back* 2nd ed. (1994) Wellington Press

⁶² DePaulo BM Morris WL (2006) The unrecognised stereotyping against singles *Current Direction in Psychological Science* 15 (5) pp 251-254

⁶³ The Nest <http://woman.thenest.com/discrimination-against-single-employees-14324.html>

In the UK the exclusion of a claim for single status was applied in a rather callous fashion in *Bick v Royal West of England Residential School for the Deaf*⁶⁴ where a female employee who announced her intention of getting married was dismissed. The Employment Tribunal acknowledged that it was the intention of the statute to penalise employers who dismissed female employees when they are about to get married. However, they decided that the discrimination against her took place on a day when she was not married but had simply announced her intention to be married. The protection otherwise afforded to married persons did not apply to her. The correctness of this decision was cast in doubt by the Employment Tribunal decision in the case of

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Turner v Turner.⁶⁵ Here the claimant brought an action against her former employer claiming unfair dismissal on the grounds of discrimination on the basis of her marital status. She had dismissed by her employer when he found out about her engagement to his son. It was held that the Sex Discrimination Act 1975 s.3 should be reinterpreted in the light of the Human Rights Act 1998 and in particular Articles 8 and 12 of the ECHR. They decided that s.3 of the 1975 Act must be interpreted as encompassing discrimination not only against married persons but also those who were about to marry.⁶⁶ On this basis they gave judgment for the claimant. Although this only an Employment Tribunal decision it does suggest that persons engaged to be married might benefit from the protection given to married persons in the Equality Act 2010.

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Although anyone that is single is denied rights under the Equality Act 2010 they could possibly bring a case of discrimination under another characteristic in the Act if it

⁶⁴ (1976) IRLR 326

⁶⁵ [2005] C.L.Y. 1304

⁶⁶ It was significant in this case that there had been a very short engagement and the date had been fixed for the marriage.

applied. An example might be if single mothers were discriminated because of their status they could claim sex discrimination. In the case of *DeBique v Ministry of Defence*⁶⁷ the claimant argued she was forced to leave the Army because she was expected to be available for duty around the clock. She was formally disciplined when she failed to appear on parade because she had to look after her daughter. She was told the Army was a 'war-fighting machine' and 'unsuitable for a single mother who couldn't sort out her childcare arrangements'. She brought a successful sex discrimination claim against the Ministry of Defence She also won a claim of race discrimination because Army chiefs did not let her bring her half-sister from the Caribbean to look after the child. Her claim was that British soldiers could rely on their families for childcare but, her relatives were all on her home island of St Vincent, where she was recruited.

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The decision of the employment tribunal was upheld by the EAT.⁶⁸ The Claimant's case was that the disadvantage she was to subjected arose both because she was a female single parent soldier required to be available for deployment 24/7. Also because she was a Vincentian woman who was prevented from having a live-in Vincentian relative to provide child care. This decision has meant that in recruiting single parents with children officers in the army will now need to consider those soldiers' childcare arrangements before giving them orders. Whether this decision has broader implication for single mothers' remains to be seen but it seems unlikely.

With respect to single status discrimination in the US unmarried employees make up 40% of the overall workforce in the US.⁶⁹ However, under US employment law this

⁶⁷ (2007) Unreported

⁶⁸ (2010) IRLR 471

⁶⁹ Sloan Work and Family Research Network *Work-Family Information for State Legislators Policy Briefing Series* 2009 Issue 21 p 1

behaviour goes largely unrecognised and unchallenged. It does not represent a ground for a claim under the Civil Rights Act 1964 or (with one exception) any other federal employment statute. The exception arises under the Civil Service Reform Act of 1978 that provides that where someone works for any branch of the federal government they do have the right to protection from discrimination (based on their marital status or lack of it) by a federal employee with personnel authority. It must result in them experiencing unfavourable employment terms or conditions. Under the Act the affected employee has the opportunity of filing a complaint of marital status discrimination with the Office of Special Counsel (OSC).⁷⁰ The OSC is then responsible for conducting an investigation and if it concludes that the claim of discrimination is valid it has the authority to take corrective action. There are only 21 states and the District of Columbia that have anti-discrimination statutes that prohibit discrimination against single employees.⁷¹ In two of the states Connecticut and Indiana the law only protects teachers from singles discrimination. In the other states they provide broader protection as their statutes cover all workers employed within their respective jurisdictions. Again the law here is patchy (outside of federal employment) and as a result it has little impact on employer's behaviour in the US.

What follows is detailed consideration of the Protection from Harassment Act 1997 in the UK as this Act can offer remedies to victims of serious kinds of marital harassment.

⁷⁰ This is an agency that is separate and independent from all other offices and agencies of the Federal Government.

⁷¹ *Overtime The Norm? How Single Women May Be Discriminated Against At Work* - See more at: <http://madamenoire.com/284586/overtime-the-norm-how-single-women-may-be-discriminated-against-at-work/#sthash.Ns2Uhm0Q.dpuf> also The Nest <http://woman.thenest.com/discrimination-against-single-employees-14324.html>

Protection from Harassment Act 1997

The Protection from Harassment Act 1997 (PHA) was not designed for employment situations however, in the case *Majrowski v Guy's and St Thomas's NHS Trust*⁷² the House of Lords held that an employee may use the PHA to sue his/her employer for workplace harassment. Section 1 of the PHA⁷³ states that: (1) A person must not pursue a course of conduct (a) which amounts to harassment of another, and (b) which he knows or ought to know⁷⁴ amounts to harassment of the other. Significantly conduct can include things said although it is doubtful if verbal comments would be sufficient for a claim.⁷⁵ A course of conduct involves conduct on at least two occasions. The fewer in number and the more distant the occasions are in time from each other, the more difficult it will be to establish a course of conduct. In the *Majrowski* case the claimant felt his manager had bullied and intimidated him, was rude and abusive to him verbally in front of the other staff and was excessively critical of his timekeeping and work. Further, the manager imposed unrealistic performance targets with threats of disciplinary action if he failed to meet them and isolated him by refusing to talk to him. His claim was entirely based on his employer's vicarious liability for their employee's breach of the Protection from Harassment Act 1997. In line with previous cases dealing with vicarious liability,⁷⁶ the House of Lords had to be satisfied that the wrongful act was closely connected

⁷² (2006) IRLR 695

⁷³ Section 8 in Scotland

⁷⁴ A person 'ought to have known' if a reasonable person in possession of the same information would think the course of conduct amounted to or involved the harassment of the other.

⁷⁵ Section 7

⁷⁶ *Lister v Hesley Hall* (2001) UKHL 22, *Fennelly v Connex* (2001) IRLR 390 CA

with the acts the manager was authorised to do, in order to find the employer liable for the acts. As her actions occurred in the performance of her management duties they were able to do that. It was held that these actions did amount to harassment, certainly of the sort of nature from which a claimant may be able to apply for an injunction under the Act. The House of Lords confirmed that an employer can be vicariously liable for harassment by one of its employees under the Protection from Harassment Act 1997. In this case at the Court of Appeal stage, the Court stated that “courts are well able to recognise the boundary between conduct which is unattractive, even unreasonable, and conduct which is oppressive and unacceptable. To cross the boundary from the regrettable to the unacceptable the gravity of the misconduct must be of an order which would sustain criminal liability under section 2.”⁷⁷ This line of reasoning has been adopted by the courts in later cases. When the case went to the House of Lords it was held that the principle of vicarious liability applies where an employee commits a breach of a statutory obligation whilst acting in the course of his/her employment, unless the statute in question expressly or impliedly indicates otherwise. They decided that neither the terms nor the practical effect of the PHA indicated that Parliament intended to exclude the principle of vicarious liability.⁷⁸ The need for the civil action complained of to be serious enough to constitute a criminal act was confirmed in *Conn v Council of City of Sunderland*⁷⁹ The Court of Appeal held that a site foreman's conduct towards one of his team was insufficient to give rise to a claim of harassment under the PHA because, only one of

⁷⁷ *Marjowski v Guy's and St Thomas's NHS Trust* (2005) EWCA Civ 251; CA

⁷⁸, S.10 (1) of the PHA is concerned with the limitation periods for claims of harassment in Scotland. The indication is that vicarious liability is available where damages are claimed for conduct by an employee amounting to harassment within the meaning of the PHA. This provides a clear indication that Parliament envisaged that an employer would be vicariously liable for an employee's harassment of another person. Since it could not have been the intention of Parliament that the scope of the civil remedy for harassment should be different in Scotland from that in England and Wales, must be taken to apply to England and Wales as well

⁷⁹ (2008) IRLR 324

the two incidents was sufficiently serious to cross the threshold into oppressive and unacceptable conduct. This was despite threats of a physical nature to him and to the employee's property. The court emphasised that the touchstone for recognising what is harassment was whether conduct was of such gravity as to justify the sanction of the criminal law.⁸⁰ There is some doubt whether this case was rightly decided but, there is little question that a criminal element to the harassment is needed.

More recently however in the case of *Veakins v Keir Islington Ltd*⁸¹ a female member of staff was singled out for a hard time by her manager. The claimant had an event free and satisfactory two years at work before the new manager arrived. Within two months of his arrival, she was suffering from depression (for which she was prescribed medication), underwent counselling and she never returned to work. Within that two month period, the manager had sought to obtain information about the claimant from her colleagues, (which included details of her private life) with a view to making the claimant's life more difficult at work. When, at the suggestion of a senior manager, the appellant set out her concerns in a letter to her manager and handed it to her, her manager tore it up without reading it and put it in the bin. When she said that the senior manager had suggested she write the letter, her manager replied: "I'm not interested."⁸² The employer did not contest their vicarious liability for the manager's actions if it was shown there was a breach of the Protection from Harassment Act 1997. The Court of Appeal said that it was right that the conduct should be of an order that would sustain criminal liability and the judge had to analyse what conduct did cross the line into potential criminal liability. Earlier in the

⁸⁰ Supra 48

⁸¹ [2009] EWCA Civ 1288

⁸² All this took place in the context of other incidents in which she was victimised or singled out for reprimands on issues about lateness, travel arrangements and unpaid wages in a way in that no one else was reprimanded for similar actions.

Majrowski case Baroness Hale ⁸³ had underlined the discretion of the court in this respect as follows: “a great deal was left to the wisdom of the courts to draw sensible lines between the ordinary banter and badinage of life and genuinely offensive, unacceptable behaviour.” The Court of Appeal in the *Veakins* case found that the straightforward and unchallenged account of victimisation and demoralisation and reduction of a substantially reasonable and usually robust woman to a state of clinical depression was not simply an account of the ordinary banter of life or just “unattractive” and “unreasonable” conduct on the wrong, non-actionable side of the lines drawn above by Baroness Hale. The Court of Appeal stated that the primary focus should be whether the conduct was oppressive or unreasonable although the court should keep in mind that the conduct should be of an order that sustains criminal liability. The Court also found that it may be possible to demonstrate malice by a perpetrator. ⁸⁴Arguably this decision makes it easier for employees to claim the protection of the PHA.

In *Dowson (and others) v Chief Constable of Northumbria Police (No 2)* ⁸⁵ a claim was brought by three police officers who stated that they had suffered harassment after a new detective chief inspector had joined their team. Despite the fact there were 69 separate claims of harassment brought by the officers the judge was not convinced there was a case to answer. The following quote summarises his position: “although there were clearly differences of opinion, some of which were extremely strongly held, and intemperate and barrack-room language used...although this was more than simply a clash of personalities, it was not conduct which was calculated to cause

⁸³ At paragraph 66

⁸⁴ Whilst malice is not a requirement of the Act (since there can be harassment if the perpetrator ought to have known his/her behaviour amounted to harassment) nevertheless, establishing malice would make it easier to satisfy the ‘oppressive and unreasonable’ test.

⁸⁵ (2010) EWCH 2612 (QB)

distress and, although it was unacceptable, it was not oppressive....” It was held that the employers were not vicariously liable under the Protection from Harassment Act 1997.

Recently an employee, Helen Green, sued the Deutsche Bank in the High Court for personal injury and consequential loss and damages and for breach of the civil provisions in the Protection from Harassment Act 1997.⁸⁶ She alleged that the psychiatric injury she had suffered during her employment was the result of harassment and bullying by her fellow employees for whose actions Deutsche Bank were vicariously liable. The main claim of Ms Green was for personal injury however she also claimed that Deutsche Bank was vicariously liable in damages under the Protection from Harassment Act 1997. The High Court cited and followed the House of Lords decision in *Majrowski* and held that an employer can be vicariously liable under the Act for harassment by co-workers of an employee and decided the employer was liable in this case. Ms Green was awarded more than £800,000 for the psychiatric injury caused by bullying at work and the harassment suffered. Given the substantial amount of damages available to successful claimants under the Act⁸⁷ as illustrated in the *Green* case employers will need to try and minimise the possibility of a legal claim. The time limit for commencing a claim under the PHA is six years.⁸⁸ Employment Tribunals have no jurisdiction to hear claims under the PHA however, the claims can be pursued in the County Court and/or the High Court in England and Wales depending on the level of compensation sought.⁸⁹ In marital harassment cases it is questionable that cases involving only verbal harassment will be successful as

⁸⁶ *Green v DB Group Services (UK) Ltd* (2006) All ER (D) 02

⁸⁷ The parties in a harassment case are subject to third party costs whereby the losing party pays (and is personally responsible for) the winning party's costs.

⁸⁸ Five years in Scotland

⁸⁹ Sheriff Court or Court of Session in Scotland

the behaviour is unlikely to be serious enough to meet the legal threshold in these cases. So something else will be needed such as physical touching or threats. However, as the cases have shown where the verbal harassment is part of a systematic pattern of bullying or harassment by the perpetrator then it might be protected against as part of an appropriate legal action under the Act. While none of these cases involve harassment on the basis of marital status they do illustrate the standard of evidence needed to substantiate a claim under the Act and clearly serious acts of marital harassment could be covered. The advantage of a claim under the PHA is there is no requirement to show that a characteristic covered by the Equality Act is also behind the perpetrators actions as needed under the Equality Act at present.-

European Union Law

Marital discrimination is covered by Article 2 of Council Directive of 9 February 1976. The SDA gave effect to, the Equal Treatment Directive,⁹⁰ and Article 2 of the Directive provided as follows... the principle of equal treatment shall mean that there shall be no discrimination whatsoever on grounds of sex, either directly or indirectly by reference in particular to marital or family status. This appears to treat marital status as a specific form of sex discrimination and highlights the particular need for its protection

The Equal Treatment Framework Directive⁹¹ stated that was without prejudice to national laws on marital status but, in the substance of the text it made no reference to marital or family status. Similarly, the Recast Equal Treatment Directive⁹² which repealed the Equal Treatment Directive 1976 with effect from 15 August 2009.⁹³ was

⁹⁰ Council Directive 76/207/EEC

⁹¹ 2000/78/EC

⁹² Directive 2006/54/EC The Recast Directive was made for bringing together in a single text the main provisions existing in the field.

⁹³ Article 34 of the Recast Directive

expressly dealt with equal treatment between men and women but, again made no explicit mention of marital discrimination. In the following quote the ill-advised change in the law is commented upon; “What is surprising is why the protection which existed for 30 years, and was emphasised in particular, is not now an express provision. On its face, there is a substantive change from the earlier Directive.”⁹⁴ A number of Member States such as Belgium, Bulgaria, Cyprus, Hungary, Poland, Romania, Spain, and Sweden chose not to restrict new anti-discrimination laws to the grounds found within the two Directives and have opted for a broader list of prohibited grounds (such as marital status) which is explicitly not included in the scope of the Directives. Of course the United Kingdom had its own pre-existing provisions in their domestic legislation to deal with it.

Human Rights Perspective

In addition, employers need to give consideration to the Human Rights Act 1998, which came into force in England and Wales in October 2000.⁹⁵ The Act introduced, for the first time, a set of legal principles that enshrine basic human rights. The Human Rights Act prohibits discrimination on a wide range of grounds including marital status. Article 12 gives the right to marry.⁹⁶ Article 8 is particularly relevant to marital discrimination as it protects the right to respect for private and family life and Article 10 could be important because, it deals with freedom of expression. These Articles provide employees with the argument that an employer’s restrictions on his

⁹⁴ Above n. 22 Justice McMullen paragraph 14

⁹⁵ The Scotland Act 1998 which established the Scottish Parliament and Scottish Executive also incorporated the ECHR into the law of Scotland

⁹⁶ Article 14 sets out that the prohibition of discrimination in the enjoyment of the rights and freedoms set forth in the European Convention on Human Rights and the Human Rights Act 2000 shall be on any of the following grounds; sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status (E.g. marital status).

or her relationships at work (not to be married to another employee) are unreasonable as they infringe their basic human rights. Arguably, individuals who are forced to disclose any aspect of their personal life, such as information relating to their personal relationships, could also claim this to be a breach of these rights. It is therefore important that employers that need such information create a working environment that encourages employees to disclose it of their own free will. The Human Rights Act does not protect employees from discrimination in all areas of their life. Instead it only protects someone from discrimination in the enjoyment of the human rights protected by the European Convention of Human Rights. The protection against discrimination under Article 14 of the Human Rights Act is not free-standing so a victim of discrimination needs to show that their ability to enjoy one or more of the other rights in the Human Rights Act has been adversely affected by the discriminatory treatment. However, they do not need to prove that the other human right has actually been breached. The European Court of Human Rights decided in 2010 in the case of *Schalk and Kopf v Austria*⁹⁷ that there is no obligation on European states to recognise same sex marriages or civil partnerships.⁹⁸ The Court also said that different European countries often have divergent views on the issue of same sex relationships and that it was up to the individual countries whether, and to what extent, they recognised same sex marriages.

⁹⁷ Application no. 30141/04

⁹⁸ Of the 27 European Union member states only 16 currently allow same sex marriages or civil partnerships.

In the UK the Human Rights Act is only directly enforceable against employers in the public sector.⁹⁹ However, all employers need to be aware of this legislation as tribunals and courts are required to observe and be guided by its principles. In *Lindsay v United Kingdom*¹⁰⁰ a married couple, in which the wife was the sole earner, complained that the UK income tax regime had the effect of taxing comparable couples in a discriminatory way on grounds of sex, marital status and religion. It was held firstly that married couples in which the husband was the sole earner were taxed more heavily than married couples in which the wife was the sole earner. Second, married couples were taxed more heavily than co-habiting couples who were not married. The European Court of Human Rights found that the tax measures which gave extra advantages to a wife who was the earner in the family had an objective and reasonable justification in positively encouraging married women to work. The court did not accept that married couples were in a similar position to co-habiting couples for the purposes of taxation and Article 14 only protects people from discrimination who are less favourably treated compared to others in a similar position and accordingly, there was no violation of Article 14.

¹⁰¹

Conclusion

This article highlights the difficulties in pursuing a claim for marital discrimination in the UK.¹⁰² The categories of person that can bring a claim have dramatically increased with the advent of civil partnerships and same sex marriages north and

⁹⁹ Section 6 of the Human Rights Act 1998 defines two types of public authority to which obligations apply namely, pure public authorities which must act compatibly in all they do and authorities which come under this obligation only when discharging a public function.

¹⁰⁰ 11089/84

¹⁰¹ Confirmed by the EEOC in the *Equal Employment Opportunity Commission Fact Sheet - Discrimination based on sexual orientation status as a parent, marital status and political affiliation*, December 2009

¹⁰² Hand, J The curious case in marriage/civil partnership discrimination in Britain (2012) *International Journal of Discrimination and Law* 12(3) 166-178

south of the border.¹⁰³ There is a basic right for someone ~~who~~ is a victim of discrimination because of his or her married status (heterosexual or same-sex) to bring a claim against their employer. Whether someone can make a claim not, because they are married but, because they are married to a particular person, seems uncertain. Single people are not and have never been protected under UK equality law and can only make a claim when they can establish that discrimination has taken place against them because of some other characteristic (e.g. single mothers claiming sex discrimination as in the *DeBique* case). A less favourable regime applies in the US with regard to marital discrimination with little federal protection being provided. Where a degree of protection does apply to certain victims of marital discrimination in the US is in the fact that there a number of states that have protection against marital discrimination.—¹⁰⁴ Also, in the US it has been provided that federal employees that experience discrimination based on their family status should be protected.¹⁰⁵ It is interesting that the piecemeal development of the protection in the United States has meant that most employees are unprotected against marital discrimination.

Single people (particularly with family responsibilities) in both jurisdictions will no doubt envy the position that married people have under the law.¹⁰⁶

However, given the importance ascribed to marriage as a social institution in both jurisdictions it is surprising that people in this situation are not better protected from

¹⁰³ The Marriage and Civil Partnership (Scotland) Act was passed on 5th of February 2014

¹⁰⁴ In *Taylor v LSI*, 796 N.W.2d 153 (Minn. 2011). The Minnesota Supreme Court held that a woman who was fired after her husband had resigned as president of the company could proceed with her marital status discrimination claim.

¹⁰⁵ Federal Executive Order 13152 prohibits employment discrimination against federal employees because of their "status as a parent."

¹⁰⁶ In *Russ v. City of Troy*, 2001 Mich. App. LEXIS 973 (Mich. Ct. App. 2001), a police officer established a claim for discrimination when he was denied a promotion because he was single. In three states, Hawaii, Minnesota, and Montana, the definition of marital status discrimination includes the identity or situation of a person's spouse which could include discrimination because someone's spouse is single.

workplace discrimination. There is an argument that there is a hierarchy of characteristics applying in employment law in the UK with certain of them at the top of the hierarchy such as sex, race and religion which are better protected than other characteristics such as marital discrimination which are positioned close to the bottom of the hierarchy.¹⁰⁷ There is a need for the law to be reformed as identified in the following quote "...marriage/civil partnership discrimination could have a much wider scope rather than, as some would have it, being relegated to being a quaint relic of the past."¹⁰⁸

Undoubtedly there is a need to amend the Equality Act 2010 to provide additional protection for those that are discriminated because of the characteristic of marriage (heterosexual or same sex) and dare I say it this should now also include single status. The Civil Rights Act 1964¹⁰⁹ in the US for the same reasons should be similarly amended.

¹⁰⁷ Hand, J The curious case of marriage/civil partnership discrimination in Britain, *International Journal of Discrimination and the Law*, September 2012 Vol. 12 no. 3 pp 166-178 at pp 167-68
Howard, Erica (2007) The case for a considered hierarchy of discrimination grounds in EU law. *Maastricht Journal of European and Comparative Law*, 13 (4). pp. 445-470

¹⁰⁸ Ibid Hand p 166

¹⁰⁹ And/or the Employment Equal Opportunity Act 1972