

Sex Discrimination Decisions:

"The Case of Hurley v. Mustoe"

The British Equal Opportunities Commission was set up by Parliament in 1975 to eliminate sex discrimination in employment, education and training opportunities, and generally to encourage equal opportunities for men and women in many other areas of activity. - EOC Information Leaflet No. 8: Women and Family Responsibilities (Recruitment: Woman with Children), (Equal Opportunities Commission, EOC 182h/5K/04/85).

Mrs Hurley successfully brought a complaint of direct sex discrimination and indirect marriage discrimination following the employer's refusal to engage her because of domestic commitments.

Mrs Hurley applied for a job as a waitress at "Edward's bistro". She was interviewed by the manager who arranged for her to work a trial evening on the following Saturday. Her work on that evening was entirely satisfactory. However, during the evening the owner, Mr Mustoe arrived. Mr Mustoe had a policy of not employing women with children because he believed them to be unreliable, and he instructed the manager not to employ Mrs Hurley as he knew she had children.

In fact, Mrs Hurley had four children, the eldest of whom was eleven. She had worked for ten years as a waitress, four nights a week and sometimes until as late as 2.45 am. It was not contested that she had a good record at this place of employment. While she was working her husband looked after the children.

Mr Mustoe did not make any enquiry into Mrs Hurley's past work or attendance record, before deciding against employing her.

Complainant's Case

Mrs Hurley claimed that Mr Mustoe, in refusing her the job, had discriminated against her contrary to section 6(1) of the Act (which deals with discrimination in recruitment) either:

- Directly on the grounds of her sex, or
 - Indirectly on the grounds that she was married.
- Indirect marriage discrimination occurs when a condition (for example, not to have dependent children) is applied equally to married and single people but has the effect, in practice, of disadvantaging married people. Such a condition is unlawful unless it can be justified on grounds other than marital status.

Respondent's Case

Mr Mustoe denied that he had discriminated against Mrs Hurley on either count. His defence was:

- Direct sex discrimination - Mr Mustoe claimed that he would have treated a man with small children the same way.
- Indirect marriage discrimination - Mr Mustoe claimed that his policy of not employing people with small children was because they were unreliable in their attendance at work. He

was running a small restaurant where, on occasion, if one waitress were to be absent, half his service staff would be missing and, if this happened without warning, he would be unable to find a substitute. Therefore, he said his policy of not employing women with small children was justifiable as being for the conduct of his business.

The Industrial Tribunal Decision

The Industrial Tribunal found against Mrs Hurley.

- Direct sex discrimination - they accepted that Mr Mustoe would have treated a man with children in the same way.
- Indirect marriage discrimination - they found that married people would be disproportionately affected but that given the small size of Mr Mustoe's business, his policy of not employing women with children was justified as a matter of 'business necessity'.

Mrs Hurley appealed to the Employment Appeal Tribunal.

The Employment Appeal Tribunal Decision

On reversing the IT's decision the EAT found:

- Direct sex discrimination - that the evidence did not support the finding that Mr Mustoe's policy not to employ staff with children was directed at both sexes. In his own evidence Mr Mustoe had spoken only of his policy not to employ women with children. His policy was therefore one which directly discriminated against women on grounds of sex.
- Indirect marriage discrimination - that there was a disproportionate effect on married persons which could not be justified for two reasons:

Reason 1

The IT had applied 'double standards'. The IT had found that Mr Mustoe's policy was against employing persons of either sex who had children. When considering the effect on married persons they should, to be consistent, have looked at the effect on married persons of either sex. However, they looked only at whether a policy which discriminated against married women could be justified. The EAT said of the IT: "... all the evidence before them on the point was directed to the unreliability of women with small children.

There was no evidence that men with small children are unreliable and not even popular prejudice suggested that they are. Therefore, in our view there was no evidence on which the industrial tribunal could find the relevant condition was justifiable".

Reason 2

For a policy to be justified it must be shown to be necessary, and not merely convenient. The IT had found, erroneously, that because it was necessary for Mr Mustoe to have a reliable staff it was justifiable to exclude all women with children on the ground that some would be unreliable. The EAT said that "a condition excluding all members of a class cannot be justified on the ground that some members of that class are undesirable employees". Moreover the reliability of individual applicants could be assessed, for example, by references, enquiries etc.

Implications for Employers

The EAT concluded: "Parliament has legislated that

it is up to each mother to decide whether or not she goes out to work, and employers may not discriminate against them because they are mothers... they are not to be treated as a class but as individuals. No employer is bound to employ unreliable employees, whether men or women. But he must investigate each case, and not simply apply what some would call a rule of convenience and others a prejudice to exclude a whole class of women or married persons because some members of that class are not suitable employees". In their decision the EAT confirmed the principle which underlies the anti-discrimination legislation. i.e. individuals have the right to be treated on merit, and not according to assumptions about the group to which they belong. Any treatment of individual employees or job applicants which is based on generalised assumptions about the characteristics of women, men, or married people, rather than on the characteristics of that individual, is therefore likely to be unlawful.