

Equal, but separate, treatment can be discrimination

In the know

A sex discrimination claim involving segregation of pupils according to their gender at school, although not from an employee-employer perspective, provides useful principles for employers to consider when making choices about treatment of those with protected characteristics. Here, we explain what those principles are.

Islamic faith school segregated children by gender

- Al-Hijrah School is a co-educational faith school which, although it admits children of both sexes, operates single sex classes for children in Year 5 and older;
- Ofsted carried out an inspection in June 2016 because it was concerned, amongst other things, about the segregation policy;
- Ofsted concluded that the school was inadequate and part of the reasoning centred on the segregation issue. Ofsted said keeping children apart based on their gender was unlawful discrimination. Some schools are subject to a public sector equality duty and Ofsted said the segregation showed a failure to comply;
- The school sought judicial review of the report;
- As a result, the High Court declared that Ofsted had been wrong to say that segregation of the children according to their gender was discriminatory. This was because both male and female pupils were treated in the same way – neither gender could mix with the other – so neither was being treated less favourably than the other gender.

Court of Appeal overturns ruling

- The Court of Appeal said the High Court was wrong to consider whether the less favourable treatment was felt by the group. Discrimination should be viewed from an individual perspective, it said;
- Although both groups – males and females – were treated the same way, it does not mean that discrimination cannot occur. Effectively, two wrongs do not make a right;

- Both groups were treated equally, but they were treated separately;
- An individual from each group could still claim that they were being treated less favourably – in this case, for example, a female pupil could claim she was unable to mix with male pupils whereas if she were male, she would be able to.

What should employers take from this?

- Treating men and women in the same way will not prevent a claim of discrimination if that treatment means that both groups are being subject to less favourable treatment;
- It is not enough for an employer to use the “but they are both being treated the same” argument;
- People from within those groups may be able to claim they are being discriminated against on an individual basis when compared to someone from the other group;
- It is the individual basis that counts, not the collective basis.

Croner Tips

- **Employers will not usually segregate employees so there is not likely to be a direct application of this case in the workplace;**
- **However, the general principle can still be applied – treating two groups in the same way will not always provide a defence to a claim of less favourable treatment;**
- **It is the individual perspective that is important.**

The content of this briefing is correct at the time of publishing.

Please contact the 24 Hour Advice Service for advice on your specific situation before acting on the information in this article