

## Wedded to The Law – striking marital discrimination failure explained (UK)

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As the next in our occasional series of posts about The Law, here is a new Employment Appeal Tribunal decision so morally unjust that even the Judge himself didn't want to make it.

Mrs Bacon was married to the majority shareholder of their joint employer, Advanced Fire Solutions Limited. She was also employee, director and shareholder of AFS. When she told her husband that she wanted to separate (but from him, not it), he promptly demonstrated beyond reasonable argument that hell having no fury is in no sense limited by gender. Both directly and via AFS's managing director, a Mr Ellis, Bacon subjected his wife to a series of retaliatory detriments including denying her dividend payments, fitting a tracking device to her car, falsely alleging IT abuse, dismissing her and making what the Employment Tribunal found to be a wholly spurious complaint to the police about her.

Perhaps unwisely in retrospect, both Mr Bacon and Mr Ellis gave evidence to the Employment Tribunal. Their day started badly and fell away – both, said the ET, “*found the truth an alien concept*” and consequently collected a thorough pasting from the ET in relation to the credibility of their testimony.

So there you have it – employee treated horribly due to being married to senior employee, surely the clearest case of marital discrimination you could wish for.

However, to find direct discrimination under Section 13 Equality Act, the ET has to find less favourable treatment. “Less” is a comparative term, and so it needs to find someone who was not treated so poorly, whether that is an actual person or a hypothetical comparator. The Employment Appeal Tribunal did not see any evidence of this – it was clear that Mrs Bacon had been unfavourably treated, but relative to whom? On the basis that valid comparators for discrimination purposes must be in materially similar circumstances apart from the protected characteristic relied upon, the EAT concluded that the appropriate person here would be someone who had been in a similarly close relationship to Mr Bacon (but was not actually married to him) and who had also told him that she had had enough. There was no evidence that Mr Bacon would have treated such a person any differently.

In the circumstances the marital discrimination claim could not be upheld – the less favourable

treatment had been based on Mrs Bacon's ending of the previously close relationship with her husband, not on her being or having been married to him. Marital discrimination has to revolve around that legal status, not the close personal relationship involved. Marriage points to such a relationship, but is not the only way you can have one.

The EAT reached this conclusion, it said, "with a heavy heart" for Mrs Bacon, compounded by its acknowledgement of delays in the judicial system such that she had had to wait nearly three years from her success at the original Tribunal hearing to be told that The Law offered her no remedy after all. In different circumstances Mrs Bacon could readily have secured compensation for her dismissal by AFS, but since that went into administration a week before the original ET hearing, she would still have seen nothing from it. A good day for The Law, perhaps, but not necessarily for justice.

The distinction between marriage and relationship is a useful one for employers, not necessarily because they would have in mind conduct as vindictive and deplorable as this, but in relation to steps which they might wish to take to avoid some of the potential risks created by employing couples, whether that might be leakage of confidential information, retaliation by an estranged partner, undue influence, bias, favouritism or illicit collaboration, etc. Those measures might easily include actions which arguably constitute detriments, such as altering reporting lines or the conduct of evaluations or pay reviews, or denying a married couple the effective authority to sign off each other's expenses or authorise each other's conduct. If the employer can establish that the risk to the business arises not from the fact of their being married but from the closeness of the relationship, whether married or not, that will be a proper basis for action. However, that escape route comes with some risks of its own. If it is the closeness of the relationship which creates the risk being addressed, that imposes an obligation on the employer to keep an eye on who is in that sort of relationship with whom. If you only take those risk-avoidance steps in relation to married couples but show no obvious interest in whether those same risks arise from less formal relationships, your ability to run that argument will be significantly reduced. That takes the employer on into a world of awkwardness and embarrassment in seeking to work out when in a non-married relationship that level of risk actually arises, but that is perhaps a topic for another day.

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