

Chapter 11: The protected characteristics

Page xxx

1. If there is a 'boundary dispute' in respect of one of the protected characteristics *x* which eventually gives rise to a new protected characteristic *y* being 'spun out' therefrom, are you of the view that it is justified for a claimant with protected characteristic *y* to be permitted to continue to raise claims of discrimination based on the protected characteristic *x*? Give reasons for your answer.

Author's answer: This is a difficult question, since the fact that a claim may be made in respect of both protected characteristics *x* and *y* would appear to give the claimant 'two bites of the same cherry'. For that reason, there is a case to be made that the claimant should be barred from raising a claim rooted in protected characteristic *x*. On the other hand, the fact that characteristic *y* has had to struggle to be recognised legally may warrant the maintenance of the current legal position whereby claims grounded on both *x* and *y* may be raised, perhaps for a limited period of time at least.

Page 463

1. What are the deficiencies of relying on the individual enforcement of antidiscrimination laws?

Author's answer: The problem with the individual enforcement approach is that any workplace changes to address barriers experienced by disabled workers are always *ex post facto*, i.e. always take place once the employee or worker claimant has won his/her case in an employment tribunal or a court. As such, the whole system is reliant on individual claimants who have allegedly suffered a form of disability discrimination going to the expense, time and trouble of mounting a legal challenge. The end result is that the whole disability discrimination framework propagates a reactive system whereby employers only actively remove barriers to the full participation of the disabled in the workplace once the employer has lost a case raised by a claimant. In this way, there is clearly no incentive for employers to take steps to proactively audit their workplace and anticipate the workplace arrangements and parts of their estate that are causing difficulties for the disabled, and then remove them.