

# How risky is it to work with your partner? Discrimination at work due to marital status

[Mr Ellis v Ms Bacon & Advanced Fire Solutions Limited \(In Administration\) \[2022\] EAT 188](#)

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## **The facts**

Mr Bacon was the MD and majority shareholder of AFS. In 2005, C joined AFS as a bookkeeper. C and Mr Bacon subsequently married; and in 2008 C became a director and shareholder. In 2012 Mr Ellis joined AFS; and in 2013 he became a director and 10% shareholder. In August 2017 Mr Ellis took over as MD from Mr Bacon. Unfortunately, it seems that the relationship between C and Mr Bacon ran into difficulties: in August 2017 C informed Mr Bacon that she wished to separate. There followed an acrimonious divorce between C and Mr Bacon. During that period false allegations were raised against C that she had misused company IT; and she was later dismissed. The dismissal letter was signed by Mr Ellis as MD. C was also subjected to other detriments, such as the non-payment of dividends and being reported to the police.

## **The ET**

C presented claims including unfair dismissal and direct discrimination (relying on the protected characteristics of marriage and sex). The latter claims were pursued against both AFS and Mr Ellis.

Shortly before the final hearing, AFS was put into administration. In the particular circumstances the claims against AFS were stayed. However, the final hearing proceeded in any event so that C's direct discrimination claims against Mr Ellis (insofar as they did not involve AFS) could be heard.

Those claims included a striking set of allegations, such as:

- Mr Ellis taking sides with the husband and agreeing to exclude and ultimately dismiss the claimant;
- Mr Ellis withholding dividend payments;
- Mr Ellis stopping the claimant's share loan repayments and diverting them to Mr Bacon;
- Mr Ellis allowing Mr Bacon to use company funds to pay for his divorce proceedings;
- Mr Ellis disregarding the claimant's grievance; and
- Mr Ellis reporting the claimant to the Police for theft.

The ET upheld the direct discrimination claims in respect of the matters in the list above on the basis of the protected characteristic of marriage (but not that of sex).

There is little doubt that C was subjected to detriment by way of those matters; the key issue was that of causation, i.e., whether the relevant acts were done "because of" the relevant protected characteristic (i.e., "marriage").

In its written reasons the ET referred on a number of occasions to there being a lack of an adequate explanation from Mr Ellis as to why he acted as he did. It also seems to have reached the view that Mr Ellis had decided to side with Mr Bacon in the couple's dispute and to act accordingly. In the circumstances the ET felt able to infer that the true reason for the alleged acts was the relevant protected characteristic (i.e. "marriage").

Unfortunately, it seems that the ET was not referred to *Hawkins v Atex Group Limited*, which, as can be seen below, was later of considerable assistance to the EAT in this matter.

## **The EAT**

Mr Ellis appealed. He argued that the ET had failed properly to address the statutory test as to the cause of the treatment or to consider the appropriate hypothetical comparator.

The EAT was assisted by previous EAT authority, namely *Hawkins v Atex Group Limited* [2012] ICR 1315, which had made clear that in a claim for direct discrimination based on marriage the appropriate comparator would usually be someone in a relationship akin to marriage but who was not actually married. In order for a claim to succeed, the fact of marriage must be the ground for the relevant act (and not just the fact that the relevant individual was in a close relationship).

Leading on from that, the EAT in the instant case pointed out that the appropriate matter to consider was “whether Mr Ellis treated [C] in the unfavourable ways that have been identified because she was married. That is where the sentence ends: the question is not whether she was badly treated because she was married to a particular person.”

Looking at the matter in that light, the EAT had little difficulty allowing the appeal. The EAT was of the view that the ET had not asked itself the correct question/s on the issue of causation.

## **Comment**

Absent any romantic relationship ever having existed between C and Mr Bacon, C would never have been treated as she was by Mr Ellis. C’s relationship with, and marriage to, Mr Bacon, was a fundamental part of the factual context. Furthermore, it seems that the ET took the view that Mr Ellis treated C as he did because, upon the couple were going through an acrimonious divorce, Mr Ellis chose to pick sides and to comply with Mr Bacon in taking action against C.

However, as this authority makes clear, that is not enough for a finding of direct discrimination because of “marriage”. In order for such a claim to be upheld, it is necessary for the reason for the treatment in question to have been the fact of C being married (and not the fact that C was married to a particular individual). The key point is that, if C had been in a close relationship with Mr Bacon which had then fallen apart with an acrimonious split, there is no indication that her treatment would have been any different.

It is not at all uncommon for workplace disputes to arise when marriages between co-workers fall apart (all the more so when one of the couple is more senior in the company than the other). This case serves as a useful reminder for practitioners to consider carefully the appropriate hypothetical comparator when advising on marital status discrimination claims in such cases, namely someone in the same circumstances but in a close relationship rather than married.

It would seem that adopting such a comparator will expose the lack of merit in many such potential claims. Rare is the employer (or co-worker) who would subject an employee to detriment simply because they are married (and not due to some other matter connected to the relationship).

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