

Employment Law

July 2010

The Equality Act

Following a few weeks of uncertainty, the Government has now confirmed that the first wave of the Equality Act 2010 will be introduced in October 2010.

The Equality Act will affect all employers. Many of the provisions of the Act will provide fodder for employment lawyers to burn the midnight oil over, but there are practical implications which employers need to take on board now. In May we looked at pre-employment health questionnaires. In this Alert we look at the other provisions we think will have the biggest impact on employers.

Protected characteristics

The first point to note is that all the same characteristics are protected. These include the long standing protection against sex, race and disability discrimination up to the more recent additions of age discrimination and discrimination based on religion or belief and sexual orientation.

Associative discrimination

Associative discrimination is best illustrated by a recent case. A secretary at a law firm felt she was harassed by other staff because she had to take time off to look after her

disabled son. She had no disability herself but wanted to claim that she was harassed at work because of her son's disability. The case went to Europe and she was successful.

The Equality Act now extends this protection to those who associate with someone who has any of the protected characteristics. Employees are protected against discrimination 'because of' a protected characteristic whether they or another person has that characteristic. So, it will be unlawful to discriminate against someone because they care for an elderly relative, equally an employee with a gay brother may feel harassed if other employees make inappropriate jokes about gays.

The practical implication of this is that employers are going to have to be increasingly sensitive towards their staff and will need to take a much more holistic approach to employee relations.

Perception is key

The current law on perceived characteristics is inconsistent. Under the Equality Act, employees are protected if they are discriminated against because they are perceived to have a protected characteristic (even if they do not). An employer could

discriminate against a woman he perceives to be pregnant and so does not promote even if she is not. Equally, if an employee is harassed at work because he is believed to be Muslim, he will have a discrimination claim, regardless of his actual religious beliefs.

Clearly, again, this widens the scope of discrimination law.

Harassment by third parties

Harassment in the workplace is an increasingly difficult area to manage and over the last few years has resulted in an increasing number of claims. Employers are already vicariously liable for the behaviour of their employees whilst they are at work. The Equality Act will make employers liable in certain circumstances for the behaviour of third parties towards their employees.

This is the so-called three strikes rule. Liability will arise if a third party such as a contractor or customer harasses an employee based on, for example, their race. If the employer knows that the employee has been harassed in the course of their employment on at least two other occasions and has not taken reasonably practicable steps to prevent the harassment occurring

again, they will be liable. This is the case even if the person harassing the employee is different on each occasion.

Practical implications

Employers should now be looking at what provisions they have in place to train employees on diversity in the workplace, what training they provide to managers and, not least, what their equal opportunities and harassment policies cover. All of this will need to be reviewed and updated in the next few weeks. If you would like one of our solicitors to advise you on the changes needed in your organisation, please contact one of the employment team.

Redundancy Payments

The Employment Equality (Age) Regulations 2006 (the Age

Regulations) provide that where a contractual redundancy scheme mirrors the provisions of the statutory redundancy pay scheme it will not discriminate by reason of age. So, if, for example, a contractual redundancy scheme offers to pay full pay instead of statutory redundancy pay of £380 per week, it would not fall foul of the Age Regulations. Where however, a contractual scheme sets out different qualifying criteria, the employer must be able to show that the scheme is objectively justified.

If a contractual scheme had different age bands or different multipliers, the

employer would need to objectively justify it or face falling foul of the Age Regulations. As many contractual redundancy schemes pre-date the Age Regulations, many employers find themselves having to justify the provisions of their schemes.

In the case of Kraft Foods UK Ltd v Hastie, the EAT found that a cap

applied to payments under a contractual voluntary redundancy scheme to ensure that employees did not receive more than they could have earned had they remained employed until retirement age was justified.

Under the terms of the Kraft scheme, employees received 3.5 actual weeks' pay for each year of service. However, the scheme included a cap to ensure that an employee would not receive more under the scheme than they would have received had they been employed up to retirement age (65). Mr Hastie was two years from retirement and had his redundancy payment reduced by £13,600 on application of the cap.

The EAT found that the scheme did not fall foul of the Age Regulations. They found that the scheme was designed to prevent employees receiving excess compensation and the cap used was a proportionate means to achieving that aim.

As always, each case will depend very much on its facts, but this case is

useful for employers who have in place a redundancy scheme which includes a cap on payments or tapering provisions. The EAT have now confirmed that, where the purpose of the cap or tapering is to prevent an employee receiving a windfall, it will be a proportionate means of achieving a legitimate aim and therefore justified.

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