

Disability Discrimination Legislation Broadened

CORPORATE

A raft of new provisions relating to disability discrimination came into force on 5 December.

One of the most significant changes will be the amendment of the definition of “disability” under the Disability Discrimination Act. The effect will be to enhance protection for progressive conditions such as HIV, MS, and certain types of cancer from effectively the point the employee is diagnosed. This means that people who have been diagnosed with these conditions will be protected from being discriminated against even when they are not experiencing any adverse effect on their daily activities.

In addition, the requirement that a mental illness be “clinically well recognised” will be removed, thus making it easier for those with a mental impairment to bring Disability Discrimination Act claims. This is one of the most significant amendments for employers. There has never been a requirement that a physical disability be clinically well recognised, and it has long been argued that there is no reason why a mental impairment must arrive from a mental illness which is clinically well recognised. Many people with a mental

health impairment may not therefore think of themselves as disabled and they may now have rights supported by the Disability Discrimination Act.

Whilst in some respects it is going to be easier for an employee to bring a claim, relying on the new definition of a mental impairment, it must be remembered that the Disability Discrimination Act still requires that the mental impairment must have a substantial effect on day-to-day activities. Employers should therefore be aware of the broadening of disability discrimination and, in particular, whether they are under any obligation to make “reasonable adjustments” for employees whom they previously did not consider as “disabled”.

There are further amendments to the Disability Discrimination Act which include making third party publishers (e.g. newspapers) liable for publishing discriminatory adverts. Significantly, for public bodies, a further amendment will come into force in December 2006 imposing a duty to promote equality of opportunity for disabled persons.

lara.crane@rlb-law.com

Religious Belief Regulations

Two years on

In December 2003, the Employment Equality (Religion and Belief) Regulations (“the Regulations”) came into force. Sejal Raja and Rebecca Watson consider what impact these Regulations have had in the workplace.

What do the regulations say?

The regulations define religion or belief as “any religion, religious belief or similar philosophical belief”. It will be for the Employment Tribunal and the Courts to decide what particular circumstances are covered by the Regulations.

The Regulations apply to all employment and vocational training and include recruitment, terms, conditions of employment, promotions, transfers and dismissal. They make it unlawful for an employer on the grounds of religion or beliefs to:

- apply a criterion, provision or practice which disadvantages individuals of a particular religion or religious belief unless it can be objectively justified;
- subject someone to harassment, victimise them because have made or intend to make a complaint or allegation or intend to give evidence in relation to a complaint of discrimination;
- discriminate against someone, in certain circumstances, after the working relationship has ended.

There is also now a statutory definition of harassment, which amounts to unwanted conduct that violates a person’s dignity or creates an intimidating, hostile, degrading, humiliating or offensive environment for them having regard to all the circumstances including the perception of the victim.

In addition there is a genuine occupational requirement defence available to employers. To be able to rely on this position an employer will need to consider the nature of the work and the context in which it is carried out. One example could be certain religious schools which require teachers of that religion.

As is clear from the summary above, many of the concepts in these Regulations are identical to those in the sex discrimination, race discrimination and disability regulations.

It was hoped that there would by now have been number of cases to shed light on how these regulations would impact on employers and employees in the workplace. However, the reported cases have been limited to say the least. There have been two cases in Employment Tribunals.

The pilgrimage to Mecca

This was the first case to be brought under the new regulations. Mr Khan was a bus cleaner employed by the Respondent, G & J Spencer Group Plc. He wished to make a pilgrimage to Mecca. The Muslim faith requires that all Muslims make a pilgrimage to Mecca at least once during their lifetime if they are able to do so. He requested six weeks’ leave made up of five weeks’ annual leave and one week of unpaid leave. He received no answer from his employer and so, on the advice of his union, submitted a further, written request. He still received no reply but his manager told him that he should assume that he could go.

On his return Mr Khan was suspended without pay pending an investigation into unauthorised absence and subsequently was sacked for gross misconduct.

Mr Khan was successful in his claims for unfair dismissal and indirect discrimination on the basis of religion. The Respondent did not defend the claim and no evidence was put forward either that the company had tried to accommodate Mr Khan's request nor that it had any cogent reasons for refusing it.

The Tribunal found that Mr Khan's manager had, at least informally, sanctioned the leave. Mr Khan was awarded £1,590.00 for unfair dismissal and £8,224.00 as compensation for unlawful discrimination.

This case illustrates the care that needs to be taken when religious belief is involved. If Mr Khan had, on the same basis, taken an extra week at the seaside or for a non-religious reason, would he have received such an award? One can only speculate. It is (from our point of view) a pity that the claim was undefended.

Human Rights Act Protection is Limited

Before the introduction of the new regulations it was accepted law that an employee's freedom to manifest his religious beliefs was not infringed by dismissal for refusing to agree to Sunday working. That was recently confirmed in the case of **Copsey v WWB Devon Clays** which went to the Court of Appeal and was decided under the Human Rights Act. The theory is that if you wish to go to church on Sunday, your human rights are not infringed even if you have to resign and look for another job.

Disputes relating to individuals' right to practise their religion are not new (remember Chariots of Fire?). On the basis of Copsey, the Human Rights Act does not protect individuals from the adverse consequences of exercising that right.

Copsey was decided before the religious discrimination regulations came into force. It would now be open to the Claimant to argue indirect discrimination on the grounds that a greater number of Christians than non-Christians are disadvantaged by having to work Sundays.

Attending Church on Sundays

That is what happened in the case of **Williams-Drabble v Pathway Care Solutions Limited**. The Respondent, Pathway Care Solutions Limited, ran a residential care home at which the Claimant, Ms Williams-Drabble, worked. At her interview for the job, the Claimant informed her employer that she could not work on a Sunday because she attended the local Church's Sunday service. This wish was initially accommodated. However the Respondent subsequently imposed a change in the work rota so that she would have to work on Sundays and told her that if the new rota was not acceptable to her then she would have to resign. She did so and claimed constructive dismissal along with direct and indirect discrimination.

The Nottingham Employment Tribunal found that the Claimant had been discriminated against on the grounds of her religious belief and that she had suffered a disadvantage by being prevented from attending her regular church service. The Employment Tribunal found that the Respondent had applied a requirement that put practising Christians at a disadvantage and that the Respondent could not justify the change.

Although the number of reported cases is low, they illustrate that employers should be mindful of the potential impact that the new regulations have on employees' rights to religion and worship.

In particular, employers need to take extreme care in refusing holidays and varying contracts of employment without due consideration of the legislation.

If you would like more information regarding the content of this article, please contact Sejal Raja on sejal.raja@rlb-law.com or Rebecca Watson at rebecca.watson@rlb-law.com.

**Happy Christmas
and
New Year**

from the RLB Employment Team

Michael, Sejal, Robert, Kerry, Lara,
Rebecca, Michelle and Lynn



Ask REG

For those who have not been introduced to REG.

Who is REG? REG (otherwise known as RadcliffesLeBrasseur Employment Group) is a friendly, approachable and yet knowledgeable character and appears as a (fairly) regular feature in our Update to answer those employment law questions you were too afraid to ask.

REG invites you to email your questions to reg@rlb-law.com. You can also telephone or email any of us and we will pass your questions on. Look out for REG's answers to your questions in forthcoming issues of the Employment Update.

Dear REG

Local authorities provide care for some people in their own homes, but they do not always have enough staff to meet the demand. Consequently local authorities very often put some of their domiciliary home care out to tender. The contracts offered are for the provision of a certain number of hours. For example, a local authority may offer one contract for the provision of 2,000 hours of home care and be unspecific as to precisely who should do the work. Domiciliary care agencies then bid for the work.

If one domiciliary care agency lost its local authority home care contract to another agency, would the workers be covered by TUPE and have to transfer to the new agency? Would the carers need to have their criminal record bureau checks done again?

The first thing to ascertain would be whether the people doing the work are the employees of the agency or of the local authority or of neither. In all likelihood, the agency will have drafted the workers' contracts in such a way that they are not its employees. If the local authority allows the agency to provide the hours by using any of the people who work for it, there would be no duty on the local authority to provide work to a particular individual and therefore no mutuality of obligation. The case of **Dacas** made clear that mutuality of obligation must be present before a contract of employment will be found to exist. If the workers are not employees of the agency, then there can be no TUPE transfer.

If, however, the workers are the employees of the agency, the next question to ask is whether or not there was an identifiable business unit which might be transferred.

If the workers were employed by the local authority under Dacas principles, then the risk is that on the award of a new contract, they would be inadvertently dismissed.

If there was a TUPE transfer, the criminal checks would not have to be done again by the new agency. In this instance, however, if the new agency wanted to take on the services of some of the old agency's carers, it ought to err on the side of caution and repeat the checks.

Sorry not to be more precise, but this is a classic case where the result very much depends on the facts.

Workshop/Seminar News

2006 Programme

We have put back the Age Discrimination Workshop/Seminar to April or May to allow us to see the Government's reply to consultation.

February:	Policies, their preparation, effect and how to use them
April/May:	Age Discrimination
September:	Avoiding legal pitfalls in recruitment
November:	Annual update

5 Great College Street
Westminster
London SW1P 3SJ

Tel +44 (0)20 7222 7040
Fax+44 (0)20 7222 6208
LDE 113

6-7 Park Place
Leeds LS1 2RU

Tel +44 (0)113 234 1220
Fax+44 (0)113 234 1573
DX 14086 Leeds Park Square

25 Park Place
Cardiff CF10 3BA

Tel +44 (0)29 2034 3035
Fax+44 (0)29 2034 3045
DX 33063 Cardiff 1

info@rlb-law.com
www.rlb-law.com

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If you require any further information regarding the issues mentioned in this bulletin please contact Robert O'Donovan or Sejal Raja.

robert.o'donovan@rlb-law.com
sejal.raja@rlb-law.com

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