Parker & Co

Employment Update

June 2010

Welcome to the latest edition of Parker & Co's Employment Update. This quarter we focus in detail on the new Equality Act, review an EAT case which considers when an employer can be found to have aided another to discriminate and consider two Court of Appeal decisions on unfair dismissal.

Equality Act

The EA represents a major overhaul of the UK's discrimination legislation and seeks to harmonise the law in this area.

The Equality Act 2010 will replace and consolidate equal pay and discrimination legislation. It was given Royal Assent by Parliament whilst the Labour Government was still in power. However, numerous provisions including positive action, dual discrimination and equal pay reporting were opposed by the Conservatives and it remains to be seen whether they will be put into force. Indeed the Equalities Office has just removed the Act's proposed implementation dates from its website. We will update you once the implementation dates are confirmed.

We look briefly at the aspects that would have most impact on employers, before summarising the main areas which might not be introduced:

Protected Characteristics: the Act will harmonise existing discrimination laws to apply to the following "Protected Characteristics": age; disability; gender reassignment; marriage and civil partnership; maternity and pregnancy; race; religion or belief; sex; and sexual orientation.

Perception: discrimination based on a perception will extend to all of the Protected Characteristics. For example, it will be unlawful to discriminate based on a perception about an employee's race.

Associative discrimination: recent case law has allowed carers of disabled persons to claim protection from disability discrimination by association. The Act reinforces and extends protection from discrimination by association to all of the Protected Characteristics.

Equality Act.....continued

It will be harder for employers to justify discrimination. The EA also extends protection from harassment.

Direct / indirect discrimination and discrimination arising from disability: the Act will harmonise the tests of direct and indirect discrimination, and new provisions on discrimination arising from disability will address recent developments in case law which restricted employees from claiming indirect disability discrimination.

Justification: a harmonised test will now apply to justifying discrimination where it is "a proportionate means of achieving a legitimate aim". In practice it will be harder for employers to justify discrimination.

Harassment: an anomaly in the current law means that harassment on the grounds of colour and nationality is not outlawed. The Act extends protection from harassment to all aspects of race as well as to other Protected Characteristics (excluding maternity, pregnancy, marriage and civil partnership).

Third-party harassment: a further onus is placed on employers under the Act in relation to harassment committed by third parties, such as clients. If the employer knows that an employee has been harassed at least twice by a third party, and has not taken reasonably practicable steps to prevent it, they will have vicarious liability for any further third party harassment. An obvious example would be a client who makes repeated unwelcome advances towards an employee; if the employer knows of this and fails to take reasonable steps to prevent it happening, it could be exposed to a potential harassment claim from the employee.

Public sector equality duty: a single equality duty will apply to public bodies and other organisations which exercise public functions. Private sector organisations that carry out public sector work will be covered.

Equality Act.....continued

Restrictions will be introduced regarding the questions employers can ask candidates about their health.

Pre-employment health questionnaires: employers will be restricted in when they can ask candidates about their health prior to offering employment and are well-advised to refrain in general from asking questions about candidates' health prior to making an offer. Such questions will be permitted if they are directly relevant to: whether the candidate is able to carry out intrinsic functions of the role; diversity monitoring; or assessing whether a candidate can undergo an assessment (such as an interview) and whether any reasonable adjustments will be needed. Offers of employment can still be made subject to health checks, although as now employers will need to have an objective and non-discriminatory reason to rescind an offer of employment based on the results of a health check.

As indicated, the current Government were opposed to certain aspects of the legislation. These included:

Dual discrimination: new combined discrimination claims where the alleged treatment may be the result of a combination of Protected Characteristics.

Positive action: which would permit employers to choose between two equally-qualified candidates by preferring one who is from an under-represented group or minority.

Equal pay and reporting: which would require employers with more than 250 employees to publish reports on differences in pay between the sexes and outlaw secrecy clauses which restrict employees from discussing pay differentials.

Parker & Co

Employment Update | June 2010

Discrimination by Agency Workers

The EAT has considered the meaning and application of sections 32 and 33 of the Race Relations Act 1976 in overturning a finding that an employer was liable for the discriminatory acts of an agency worker.

In *May & Baker Ltd v Okerago* an agency worker told the Claimant to "go back to her own country" during the 2006 World Cup. The ET found the Respondent's failure to investigate this incident adequately, and its reaction to the Claimant's subsequent grievance, meant it had "aided" the agency worker within the meaning of RRA. The Respondent had "been complicit in allowing an environment to continue where such conduct could take place".

In deciding that the allegation of direct discrimination should be dismissed, the EAT made the following findings:

- The employer's conduct complained of by Ms Okerago occurred after the offensive comment was made to her. As a person cannot aid another to do something they have already done, liability could not be based on that conduct.
- Allowing an environment where particular conduct could take place does not amount to aiding or "knowingly" aiding that conduct.
- The ET did not properly address the issue of whether the act in question was itself unlawful.
- The ET had failed to adequately address employment status. In particular, it was not possible to find liability simply because the agency worker behaved and was treated like an employee. There were no factual findings to support a conclusion that an employment or agency relationship existed between the agency worker and the employer.

The case highlights the difficulty of harassment or discrimination by agency workers since in order to hold the employer liable, the agency worker must be either its employee or as an agent authorised by the employer to commit the discriminatory act.

Parker & Co

Employment Update | June 2010

Unfair Dismissal

The Court of Appeal rules on two unfair dismissal cases concerning procedure and an employee's breach of trust and confidence.

In *Sakar v West London Mental Health Trust*, the Trust received several complaints from staff about Dr Sakar's "harassing and distressing" behaviour. It initially dealt with the allegations under an informal procedure designed for conduct which did not amount to a serious or gross offence. However, after Dr Sakar refused to allow the Trust's Medical Director to send a report about his behaviour to the GMC, the matter was then transferred to a formal disciplinary procedure. Dr Sakar was summarily dismissed for gross misconduct.

The CA agreed with the ET's decision that the employer had chosen to deal with the matter through the informal procedure, implying that the misconduct alleged was of a relatively minor nature. The same offences could not then be regarded as serious enough to constitute gross misconduct warranting summary dismissal.

In *Dunn & another v AAH Ltd* the CA upheld a ruling that failing to report a significant loss to a parent company so undermined the trust and confidence between the parties that the employer was entitled to treat the employment contract as repudiated.

Both claimants were directors of UK companies with a German parent company. The parent company required subsidiary companies to comply with German law requirements, including a duty to report any losses from transactions.

It was argued that the failure to inform the parent company was an error of judgment which did not amount to repudiatory conduct. However, this argument was dismissed by the CA.

It is established law that conduct which undermines the trust and confidence between an employer and an employee amounts to a repudiatory breach. There was no distinction between gross conduct and repudiatory conduct.

Parker & Co

Employment Update | **June 2010**

News in brief & what's coming up

April changes: A reminder that in April 2010 the following changes took place:-

→ Weekly rates for statutory adoption, maternity and paternity pay and maternity allowance were increased to £124.88. Statutory sick pay remained at £79.15 but fit notes replaced sick notes.

→ The additional paternity leave and pay scheme was introduced.

→ Businesses with 250+ employees now have to consider requests to take time off for training. The right will be extended to all organisations on 6 April 2011.

Injury to feelings: The EAT has held that in a discrimination claim, a claimant does not have to prove that an "injury" resulted from his or her knowledge of the discrimination in order to recover an injury to feelings award and/or an award for personal injury. In *Taylor v XLN Telecom*, the ET found the Claimant's dismissal was unfair and constituted racially-motivated victimisation. While the dismissal was partly based on perceived poor performance, it was also significantly influenced by the Claimant's grievance which included an allegation of race discrimination. However, the ET did not make an award for injury to feelings or psychiatric injury because his distress arose from the manner of his dismissal, rather than any knowledge of the discrimination that he had suffered.

The EAT, however, held there was no requirement to prove knowledge of the discriminatory act whether the claim was for injury to feelings or to health. The Claimant could therefore recover damages for any proven psychiatric injury (or injury to feelings) irrespective of what he knew about the motivation of his employer's decision to dismiss at the time. This is a departure from previous authority which suggested that to receive an award, any actual injury to feelings must have resulted from knowledge of a discriminatory act.

Whistleblowing: In *BLP plc v Elstone* the Claimant made protected disclosures while he worked for P Ltd to managers regarding some BP contracts with which he was involved. P Ltd ultimately dismissed him for gross misconduct. Subsequently the Claimant was engaged by BP as a consultant. While negotiating further consultancy work he was told BP would not engage him having become aware that P Ltd had dismissed him for gross misconduct. The EAT held that a worker who brings a claim against their current employer alleging detriment for whistleblowing did not need to have been employed by that employer when he or she made the protected disclosure.

Religious discrimination: In *Eweida v BA*, the CA has found in favour of British Airways in its dispute with an employee who was required to remove or conceal her cross. The CA confirmed that such a policy did not amount to indirect religious discrimination and noted that where an employer is faced with conflicted interests, a blanket ban may sometimes be the only fair solution.

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Employment Update | **June 2010**

Contact us

If you have any questions arising from the articles or on other areas of employment law, please call or email us and we will be happy to discuss them with you.

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