SIMONS MUIRHEAD & BURTON

All Inclusive **July 2010**

Under Starter's Orders

Makbool Javaid
Partner
Head of Employment Law

Ewan Keen
Partner

First it was fairly certain. Then nothing was certain. But now it's really certain. What are we talking about? The implementation date for the employment provisions in the Equality Act 2010.

Prior to the general election, the Labour Government confirmed that the employment provisions in the Act would come into force in October 2010. After the election, the timetable was removed from the Government Equalities Office (GEO) website fuelling speculation that implementation would be delayed, or that some aspects of the Act were being revisited. But On 3 July, the GEO ended the uncertainty when, as reported on Page 2, it confirmed that the employment aspects would be introduced from 1 October 2010.

The Act is designed to consolidate and strengthen equality legislation. In doing so it makes some significant changes and additions to existing anti-discrimination and equal pay law. This will require a fundamental review of employment policies to reflect new terminology, the widened scope of protection, for example, in respect of direct discrimination and harassment, and new forms of unlawful conduct such as discrimination arising from disability and the prohibition on asking health questions during recruitment. Of course once policies and procedures have been updated, managers will need to be trained in their application and staff will need to be made aware of the new rules.

The Employment Law team are running a one day conference in September to explain the changes and the practical implications. Full details will be circulated to all newsletter subscribers. We do hope you will join us.

News in this Edition

All Inclusive **July 2010**

Equality Act employment provisions in force from October

The Government Equalities Office (GEO) has ended recent speculation about the implementation of the Equality Act 2010, by announcing that the employment provisions will come into force in October 2010. A commencement order will be published this month confirming the full details. No indication has been given as to when the other measures in the Act will be introduced.

The Government Equalities Office have confirmed that the core employment provisions in the Equality Act 2010 will come into force on 1 October 2010.The first commencement order setting out which provisions will come into force at that time will be published in Parliament during week commencing 12 July 2010. The GEO has not, however, confirmed when the other provisions will come into force such as the extended public sector equality duty, gender pay reporting and the new public sector duty regarding socio-economic inequalities.

"The core employment provisions in the Equality Act 2010 will come into force on 1 October 2010. A commencement order is to be published confirming full details."

The GEO, in conjunction with the British Chamber of Commerce, the Equality and Diversity Forum and Citizens Advice, have published summary guides to support implementation of the Act. These publications will be followed by a series of 'Quick Start' guides to key changes in the law. This guidance is designed to set out clearly what the new legislation means for business, the public sector and the voluntary sector, to help prepare for, and minimise the effects of, transition.

36% increase in age discrimination claims

The Tribunals Service has published its Annual Statistics Report for 2009/2010 which shows a substantial increase in employment tribunal claims, rising from 151,000 in the previous year to 236,100 this year, an increase of 56%. Age discrimination complaints increased by 36%.

The Tribunals Service Annual statistics report covering the period for 1 April 2009 to 31 March 2010 shows that 236,100 jurisdictional claims were received, representing a 56% increase on the previous year's figure. The figures show noticeable increases in three particular discrimination jurisdictions: (i) age + 36%; (ii) religion or belief + 20%; and (iii) sexual orientation + 18%.

The full picture for discrimination and equal pay claims is as follows:

Claim	2008/9	2009/10
Sex	18,600	18,200
Disability	6,600	7,500
Race	5,000	5,700
Religion	830	1,000
Sexual Orientation	600	710
Age	3,800	5,200
Equal pay	45,700	37,400

All Inclusive **July 2010**

Consultation commences on equality forms

The Government Equalities Office (GEO) has started a consultation exercise on the new streamlined equality forms and guidance which are to replace questionnaires in discrimination and equal pay claims, when the employment provisions of the Equality Act 2010 come into force later this year.

Discrimination law currently provides a process for a person who thinks that he or she may have been unlawfully discriminated against, or who is not receiving equal pay, to obtain information from the person they think has acted unlawfully against them. The process allows an employee to request information before deciding whether to present a claim to an employment tribunal.

One of the ways in which the Equality Act 2010 streamlines discrimination law is by replacing a series of nine individual questionnaires about possible discrimination, with a single set of paperwork (guidance and forms) for all types of discrimination. There will also be new guidance and forms for equality of terms (equal pay) issues.

The GEO is currently consulting on the draft paperwork for obtaining information about potential discrimination and equality of term cases under the new provision of the Act. The new paperwork will come into use when the Act's employment provisions come into force in October.

"The GEO is currently consulting on the draft paperwork for obtaining information about potential discrimination and equality of term cases under the new provision of the Equality Act."

Putting up with offensive conduct does not make it welcome

In Munchkins Restaurant Ltd v Karmazyn and ors, the EAT held that although four women did not complain about conduct of a sexual nature which had been directed towards them over a long period of time, this did not mean that they considered the conduct to be acceptable.

The four claimants were migrant workers employed as waitresses, with between one and five years' service. They complained that Mr Moss, the controlling shareholder: (i) made them wear skirts which were too short; (ii) often showed them and asked questions about sex books and sexually explicit photographs; (iii) constantly made comments of a sexual nature to them; and (iv) engaged them in discussions about sexual matters. Having decided that "enough was enough", the claimants resigned. The tribunal found that the claimants were subjected to harassment of a sexual nature. The employer appealed on the basis that any alleged offensive conduct has to be unwanted. If the claimants found the behaviour so intolerable, why had they put up with it for so long?

The EAT rejected the appeal. It was not extraordinary that the claimants "soldiered on as they did for the years that they did, in the circumstances they did." They were migrant workers with no certainty of employment elsewhere. There are many situations in life where people put up with unwanted conduct they find offensive because they are constrained by the circumstances they find themselves in. Putting up with such conduct does not make it welcome.

Cap on contractual redundancy pay was justifiable

In Kraft Foods UK Ltd v Hastie, the EAT ruled that placing a cap on a contractual redundancy scheme which prevented employees recovering more as a redundancy payment than they would have earned if they had remained in employment until their retirement age was not unlawful indirect age discrimination because it was justified.

Mr Hastie opted for voluntary redundancy under Kraft's redundancy scheme, which entitled employees to receive 3.5 weeks' (uncapped) pay for each year of service. With nearly 40 years' service, this amounted to £90,100.98 in Mr Hastie's case. But the maximum amount payable was capped, i.e. the total could not exceed what an employee would have earned if remaining in employment until retirement age. Being 2.25 years away from 65, Mr Hastie's pay was capped at £76,560. It was accepted that the cap provision placed employees who were 2 or 3 years away from 65 at a particular disadvantage and amounted to indirect age discrimination. The tribunal rejected Kraft's argument that the cap was justified in order to prevent employees receiving a windfall.

"A capped redundancy scheme preventing people being paid more than if they had stayed on until retirement did not constitute indirect age discrimination"

The EAT upheld Kraft's appeal. The purpose of a redundancy payment is to compensate for loss of expectation of continued employment. If the cap was not in place the compensation payable could exceed what an employee close to retirement could have earned had they remained employed. The cap was therefore a proportionate means of achieving a legitimate aim and the tribunal's rejection of the "windfall justification" was unsustainable.

On call payments not applicable during pregnancy suspension

In Gassmayr v Bundesministerin für Wissenschaft und Forschung, the ECJ held that Member States can legitimately withhold allowances which are dependent upon performance of a specific task from women on maternity suspension, but not regular allowances which are not dependent on performance.

Article 11 of the Pregnant Workers Directive requires Member States to ensure that women placed on maternity suspension because of a health and safety risk must receive an "adequate allowance", i.e. it guarantees income equivalent to that the worker would receive if on sick leave, subject to national eligibility rules.

Dr Gassmayr was placed on medical suspension while pregnant as her health and safety was at risk. Her employer refused to pay her allowances for on-call duties on the basis that if she couldn't work, she couldn't be on call. Dr Gassmayr argued this contravened the Pregnant Worker's directive. The ECJ did not agree. Article 11 does not preclude withholding allowances which are dependent upon performance of a specific task, such as being on call, provided that income does not fall below national sick pay levels. However, regular allowances which are not dependent on performance cannot be withheld.

Sections 66 to 70 of the Employment Rights Act 1996 deal with this issue in Great Britain, requiring that a woman must receive remuneration calculated on the basis of a week's pay. However, a week's pay is not defined. Therefore whether allowances should be paid will turn on the contractual terms.