SIMONS MUIRHEAD & BURTON

All Inclusive **March 2010**

Coming To A tribunal Near You Soon

Makbool Javaid
Partner
Head of Employment Law

Ewan Keen
Partner

The extensive platform of employment rights in the UK provides significant protection for employees and workers against unfair and discriminatory treatment. But unfortunately these rights are seen by some as an opportunity to exploit the system and in recent years we have seen the rise of the 'serial litigant'. A serial litigant lodges multiple claims against organisations which have little merit in the hope that one, or more, might be successful, or, that respondents will decide it's cheaper to settle the claim rather than go to tribunal.

Just last month, the Sunday Times reported the case of a 54 year old man, who has initiated age discrimination claims against at least 60 firms simply because they used the words "school leaver" or "recent graduate" in job advertisements. According to the newspaper report, once the firm becomes aware of the action, the claimant allegedly emails them to warn them they can avoid an employment tribunal only by making him a settlement payment of up to £3,500.

But now, in Keane v Investigo and ors, the EAT has dealt a significant blow to serial litigants by ruling that a job application must be genuine before any detriment under the Employment Equality (Age) Regulations 2006 can be suffered. Therefore, where a claimant did not genuinely want the jobs she applied for, she did not suffer age discrimination when her applications were rejected. The EAT also ordered Ms Keane to pay the employer's costs – see page 4.

While the outcome in the Keane case will no doubt be welcomed by employers, it nevertheless highlights not only the need to be alert to potential claims of this type, but to ensure that robust anti-discrimination policies are in place, that any potentially discriminatory language is avoided within advertisements and that clear and objective reasons are recorded in respect of all selection decisions.

News In This Edition

An amendment to the Equality Bill allows for caste discrimination to be outlawed and the EHRC issues a timeline for the Bill's implementation – Page 2

Companies may be required to report on progress to get more women into the boardroom under Government Equalities Office proposals – Page 2

The EU Commission plans to use a series of measures aimed at significantly reducing the 18% pay gap between men and women in Europe – Page 3

A belief in Marxism/Trotskyism does not constitute a philosophical belief under the Employment Equality (Religion or Belief) Regulations 2003 – Page 3

Whether an adjustment is reasonable is not relevant if the adjustment would not remove the substantial disadvantage to a disabled employee – Page 4

Where a claimant did not genuinely want the jobs she applied for, she did not suffer age discrimination when her applications were rejected – Page 4

Top ranked CHAMBERS UK 2009

RECOMMENDED BY The LEGAL 500 2007/08 www.legal500.com

Lexcel Practice Management Standard Law Society Accredited

Amendment will allow caste discrimination to be outlawed

The Equality Bill has completed the report stage in the House of Lords, resulting in the Government accepting an amendment allowing for the introduction, in the future, of measures to make caste discrimination unlawful. At the same time, the EHRC published a provisional timeline outlining when the different parts of the Equality Bill will have legal effect.

During the Equality Bill's Report Stage in the House of Lords, the Government accepted an amendment to Clause 9, which defines what is meant by 'race', creating a power to add caste discrimination to the list of prohibited grounds. The caste system relates to the social stratification and social restrictions in the Indian subcontinent, in which social classes are defined by thousands of hereditary groups, often termed as jātis or castes.

As the Bill completed its report stage, the Equality and Human Rights Commission (EHRC) published an Equality Bill Timeline for the different parts of the Equality Bill to have legal effect, provided it passes all its Parliamentary stages before the general election. The Bill still needs to complete its third reading, followed by consideration of amendments, before gaining Royal Assent. The main employment and equal pay provisions will come into force in October 2010. Government guidance will be published in July 2010, along with an EHRC Code of Practice. Dates are subject to change where detailed regulations are awaited.

Women on boards: public want quicker pace of change

Companies may be required to report on their progress to get more women into the boardroom, under proposals announced by the Government Equalities Office. It comes as new research shows that 61% of people think there are not enough women directors in big businesses.

A survey, commissioned by the Equalities Office, shows that 61% believe businesses are losing out on talent by having fewer women in senior roles. In response, the Government has asked the Financial Reporting Council to consider including a new principle in its UK Corporate Governance Code to require firms to report on what they're doing to increase the number of women in senior management positions.

This new principle builds on Clause 158 in the Equality Bill allowing employers to take a protected characteristic (sex, race, etc.) into account when deciding who to recruit or promote, where people having the protected characteristic (e.g. being a woman), are at a disadvantage or are under-represented, but only where the candidates are equally qualified and it is proportionate to do so, e.g. if a man and woman are equal in all respects, but the number of women in the role is disproportionately low, the woman can be chosen, subject to proportionality.

Current legislation allows employers to undertake a variety of positive action measures, e.g. offering training and encouragement for certain forms of work. But it does not allow any form of positive action at the actual point of recruitment or promotion. Clause 158 extends what is possible to the extent permitted by European law, and applies in relation to all protected characteristics, not just sex.

European Commission aims to reduce gender pay gap

The European Commission plans to use a series of measures aimed at significantly reducing the pay gap between men and women over the next five years, including providing pay transparency and regular reporting on the pay gap, which currently stands at 18% in the EU.

The EU Commission is concerned that the gender pay gap – the average difference in gross hourly earnings between women and men across the economy as a whole – now stands at 18% for the EU, with considerable differences between countries and sectors. The Commission will use all available instruments, both legislative and non-legislative, to reduce the gender pay gap.

The Commission intend to analyse in detail the economic and social impact of certain options, together with the European social partners, in particular: (i) reporting the gender pay gap and ensuring transparency on pay at company and individual levels or collectively through information and consultation with workers;(ii) reinforcing the obligation to ensure gender neutral job classifications and pay scales; and (iii) improving the provisions on sanctions in case of a breach of the right to equal pay, to ensure that they are dissuasive and proportional (for instance, higher sanctions in a case of a repeated offence).

With new measures in the Equality Bill designed to toughen equal pay legislation, the issue seems destined to become very high profile in the latter part of 2010.

Belief in Marxism/Trotskyism not protected by Regulations

In Kelly and others v Unison, a tribunal, following the guidance set out by the EAT in Grainger plc v Nicholson, found that a belief in Marxism/Trotskyism does not constitute a philosophical belief under the Employment Equality (Religion or Belief) Regulations 2003.

The four claimants are all members of the Socialist Party and hold views of society based on Marxism/Trotskyism. They claimed discrimination on grounds of religion or belief when disciplinary action was taken against them following the publication and distribution of leaflets objecting to Unison's policy, containing images reflecting their beliefs which some members found to be offensive, and who said so publicly at the conference, from the rostrum.

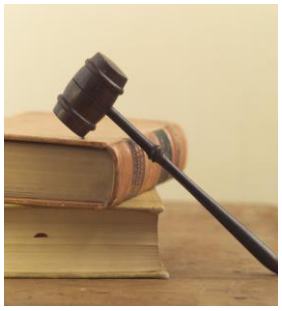
The tribunal referred to the EAT's judgment in Grainger plc v Nicholson which provides guidance on interpreting whether a 'belief' constitutes a 'philosophical belief' within the meaning of the 2003 Regulations. Here the EAT said that a political belief may qualify, but not if the views are repugnant; and that one of the key considerations is whether the beliefs are worthy of respect in a democratic society and are not incompatible with human dignity.

The tribunal decided that the claimants' beliefs included resorting to revolution and a willingness to engage in unlawful strikes. As such, the political beliefs of Marxism/Trotskyism and the Socialist Party conflict with the fundamental rights of others and the dignity of the individual. They are not worthy of respect in a democratic society and did not constitute a belief under the 2003 Regulations.

Adjustment must remove disadvantage in the first place

In Job Centre Plus & Ors v Wilson, the EAT overturned a tribunal's finding that an employer had failed to make reasonable adjustments to accommodate a disabled employee. The only adjustment she would consider would not have removed the substantial disadvantage she was placed at by the working arrangements.

Ms Wilson suffers from a psychological condition that manifests itself in agoraphobia and panic and anxiety attacks in new situations. As a result of her condition she had been given a back office administrative role with minimal public contact in a workplace near to her home. When her workplace was closed she said that working from home was the only way in which she could continue to work for JCP. There were no existing vacancies suited to home working and Ms Wilson rejected six other alternatives offered to her, which included reasonable adjustments in each case. A tribunal decided that JCP had failed to comply with its duty to make reasonable adjustments. In particular, the tribunal were not convinced that home working was not reasonably practicable.



The EAT upheld JCP's appeal. The evidence demonstrated that the work that was available required supervision and contact with the public, neither of which could happen in Ms Wilson's home. Nor could she have face-to-face contact with the public. The adjustments offered to enable working at other locations were reasonable and it was not possible for Ms Wilson to work at home. As working from home would not have removed the disadvantage suffered by Ms Wilson, then the issue of whether it was 'reasonably practicable' was not relevant.

No age discrimination where applicant has no interest in job

In Keane v Investigo and ors, the EAT has held that a job application must be genuine before any detriment under the Employment Equality (Age) Regulations 2006 can be suffered. Therefore, where a claimant did not genuinely want the jobs she applied for, she did not suffer age discrimination when her applications were rejected.

Ms Keane, a 51 year old accountant, applied for 20 jobs for which she was over qualified. She targeted adverts aimed at recruiting newly qualified accountants, with limited experience. She lodged age discrimination claims against the 11 agencies who rejected her applications, six of whom settled. But five proceeded to a full hearing. The tribunal dismissed Ms Keane's claims. None of the agencies concerned had committed an act of age discrimination. Furthermore, none of the applications had been genuine and Ms Keane's representative had conceded that if it was found that Ms Keane had not been genuinely interested in the jobs she had applied for, she could not have suffered a detriment.

The Employment Appeal Tribunal rejected Ms Keane's appeal. The finding that the applications were not genuine was not perverse given the evidence, nor was the finding that Ms Keane had made the applications with an ulterior motive. As Ms Keane had no genuine interest in the jobs she had applied for, she could not have suffered a detriment under the Employment Equality (Age) Regulations by being rejected, even if the advert could be found to be indirectly discriminatory. The tribunal had also been right to order Ms Keane to pay the employer's costs.