SIMONS MUIRHEAD & BURTON

All Inclusive May 2010

Prevention is better than cure

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All the strands of UK anti-discrimination legislation state that employers will not be held liable for discrimination and harassment if they can prove that they took such steps as were reasonably practicable to prevent their employees from committing an unlawful act.

The tribunal case, Ali v Sitel, reported on Page 3 provides an example of how the employer successfully mounted such a defence by showing that although an unwanted and highly offensive remark had been made to a Muslim employee, the company had put in place detailed policies to combat discrimination and harassment which were part of a dynamic regime involving training, awareness and monitoring.

The case provides a useful reminder, not only that this defence is available, but that simply having a policy is not enough to avoid liability. Employers also have to demonstrate that the policy has been properly communicated, all staff have been trained in its application, written guidance has been provided on how to raise and deal with discrimination issues, complaints are dealt with quickly, and treated seriously, and the policy is regularly monitored.

It is surprising that this defence is not mounted more often by employers. It is regrettable when any act of discrimination or harassment occurs. But the law in many instances tries to strike a balance between employee rights and employer liability. And this is one of those instances. It cannot be fair that an employer who has done everything it reasonably can to prevent discrimination, can be held liable for the irresponsible behaviour of its employees, particularly as discrimination law holds employers vicariously liable for both authorised and unauthorised acts committed by employees during the course of their employment.

News in this Edition

Grandparents risk financial hardship to provide free childcare

Grandparents who are filling the 'care gap' in some of Britain's most vulnerable families are risking hardship themselves, a new report from Grandparents Plus and the Equality and Human Rights Commission reveals.

The report "Protect, Support, Provide" highlights that grandparents in families most at risk of poverty are under increasing pressure to take on a caring role. It shows that working age, working class grandmothers on low incomes are most likely to be providing childcare and to have given up work or tried to reduce their hours to care for grandchildren. This has an impact on household income and may have an effect on a grandparent's pension rights as well as their health.

The report warns that two social policy aims are working in conflict with each other – increasing the numbers of lone parents in work and increasing the employment rate of older people as they approach retirement – as grandparents are providing free childcare instead of being at work themselves. This in turn could be undermining attempts to reduce child poverty and to reduce older people's poverty.

"Social policy aims are working in conflict with one another as grandparents are providing free childcare instead of being at work themselves enhancing their income"

Currently, 'working' grandparents in the circumstances described would be excluded from making a request for flexible working arrangements as to qualify in relation to a child under 17 years old (or 18 years old if the child is disabled) the person applying must be either: (i) the child's mother, father, adoptive parent, guardian or foster parent; or (ii) the spouse, civil partner or partner of the child's mother, father, adopter, guardian or foster parent, and have or expect to have responsibility for the child's upbringing.

New homophobic anti-incitement offence comes into force

A new criminal offence has come into force which outlaws threatening behaviour or materials intended to stir up hatred against people on grounds of their sexual orientation. Stonewall successfully lobbied for the new law after it uncovered a range of extreme websites and material inciting anti-gay hatred.

The new offence was included in the Criminal Justice and Immigration Act 2008, which amends the Public Order Act 1986. It creates offences of use of words or behaviour or display of written material, publishing or distributing written material, public performance of a play, distributing, showing or playing a recording, or broadcasting, if the act is intended to stir up sexual orientation hatred, or allow possession of sexual orientation inflammatory material. It covers England and Wales. The maximum penalty on indictment is seven years imprisonment, or a fine, or both.

Stonewall sought a specific incitement offence having uncovered extreme homophobic materials that the law was previously powerless to address. Stonewall emphasise that the law is there to prevent and tackle acts of serious hatred, not impede genuine freedom of speech or the telling of jokes by comedians, as some have suggested.

Active implementation of policy relieves employer of liability

In Ali v Sitel an employment tribunal found that an employer could not be held liable for harassment on because it had a clear policy prohibiting discrimination and harassment, had trained all staff in its application and had continually monitored the policy.

Mr Ali is a Muslim. When he decided to grow a beard, as part of his own expression of his religious belief, he took part in good natured comments about his youthful appearance and well meaning observations about his beard's rate of growth and shape. However, he alleged that he was also subjected to adverse comments, such as being called "Chemical Ali", that he cut his beard off and being likened to Bin Laden.

The tribunal found that the general banter did not amount to religious harassment, particularly as comments about Mr Ali's beard were readily welcomed and received by him and on other occasions he not only participated in discussions but also gave no indication that the comments were unwelcome. However, the Bin Laden comment did amount to harassment.

But Sitel argued that the defence in Regulation 22(3) of the Religion or Belief Regulations applied and that it was not liable, i.e. it had taken steps that were reasonably practicable to prevent the act of discrimination. The tribunal agreed.

The company had put in place "detailed policies" to combat discrimination, employees were aware that discriminatory conduct would not be tolerated and the policy was not a static document but part of a dynamic regime involving training, awareness and monitoring. Therefore, Sitel was not liable.

> "Employers will not be liable for discrimination where employees are aware that discriminatory conduct will not be tolerated and policy is part of a dynamic regime involving training and continual monitoring"

100,000 older workers forced to retire last year

A poll conducted for Age Concern and Help the Aged earlier this year shows the use of mandatory retirement ages soared during the recession, with over 100,000 people forced to retire on or after turning 65.

The new survey reveals for the first time the full scale of the impact forced retirement has had on the older workforce since the Default Retirement Age (DRA) was introduced in 2006.

The findings show that the number of people aged 65-plus forced to retire increased massively last year to more than 100,000. The figure is four times higher than the number the charity feared would be hit when the law was introduced.

The charity fears that the figures suggest that employers have used forced retirement as a cheap and easy alternative to redundancy during the recession. It points out that many more people in their 60s face the prospect of forced retirement in the near future as half a million 60-plus older workers (530,000) work for employers who use the DRA.

Diversity will help with economic recovery

New research by the Chartered Institute of Personnel and Development (CIPD) concludes that embedding diversity into a talent management strategy is one of the factors that will give organisations the edge when building for recovery.

The results of the research are set out in the CIPD Hot Topics report Opening up talent for business success: integrating talent management and diversity . The research involved more than 100 people from a range of sectors, industries and sizes of organisation and provides key learning points drawn from the interviews, including: (i) get the buy-in and commitment of the leadership team from the start; (ii) have a well-thought-out plan; (iii) involve a range of stakeholders from the start; (iv) communicate the whole picture; (v) challenge behaviour that does not respect diversity, and be seen to do this; and (vi) monitor progress.

"Employers who go far beyond just compliance with discrimination law will create an inclusive and open workplace that will help deliver enhanced business performance"

The report includes examples of good practice from Credit Suisse, BT, NHS Tower Hamlets, the London Organising Committee for the Olympic Games and the Guardian Media Group, all of whom go far beyond compliance with discrimination law to create an inclusive and open workplace that helps deliver enhanced business performance.

Allowing a discriminatory environment does not 'aid' it

In May and Baker v Okerago, the EAT held that an employer cannot be liable for aiding an employee's discriminatory act if the employer has done no more than allow an environment to continue to exist in which such conduct could take place simply by default. 'Aiding' discrimination means showing that the employer knowingly collaborated in the unlawful act.

Ms Okerago claimed that a comment made to her involving the World Cup by a colleague was racially abusive. She alleged that the colleague asked her who she would support in a World Cup match, England or her own country? When Ms Okerago replied "my country" the colleague asked her what she was doing in the UK and told her to go back to her own f*****g country.

A tribunal found that the comment amounted to direct race discrimination., The tribunal also subsequently found that even though the employer had no knowledge of the racially abusive remark, it was nevertheless liable since it had aided discrimination in contravention of S.33 of the Race Relations Act in that it had been complicit in allowing an environment to continue where such conduct could take place.

The EAT disagreed. S.33 requires that a person 'aids' another person to do an unlawful act. A person cannot help or assist another to do something which has already done. There were no findings by the tribunal that the employer had deliberately condoned a working environment which permitted racially abusive remarks to be made, to exist prior to, or at the same time as, the incident. In any event, allowing an environment where such conduct could take place does not amount to 'aiding' that conduct, since there has to be evidence that the employer knowingly collaborated in the unlawful act.