



The newsletter from Tobins Solicitors LLP

▶ employmentbriefing

IN THIS ISSUE



Changes to discrimination laws

▶ CLARE HOCKNEY DISCUSSES NEW LAWS ON SEX DISCRIMINATION



Tupe reform

▶ GARY TOBIN LOOKS AT THE RECENT HISTORY, page 3



Changing terms and conditions

▶ PAUL GRENDON DISCUSSES AN IMPORTANT RECENT CASE, page 4

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Changes to discrimination law and what they mean for employers

New laws on sex discrimination came into force on 1 October 2005. Clare Hockney explains the changes.

On 1st October 2005 the Employment Equality (Sex Discrimination) Regulations 2005 came into force. These amend the Sex Discrimination Act 1975 (SDA), changing the definition of indirect sex discrimination and establishing a definition of sexual harassment. In this article we consider the change to the definition of indirect discrimination; what this means to employers; and what changes are required in light of the new definition of harassment.

Indirect Discrimination

Indirect sex discrimination is often inadvertent. For example, the following could be indirectly discriminatory:

- Imposing a change in working hours or location;
- a requirement for employees to be mobile in their workplace;
- a provision that employees should be

available to work their normal contractual hours without variation;

- a requirement to work overtime;
- a contractual obligation or a practice of undertaking long hours;
- a refusal to allow employees to work from home.

The new definition provides that a person discriminates against a woman where he applies to her a provision, criterion or practice which he applies or would apply equally to a man, but -

- (i) which puts or would put women at a particular disadvantage when compared with men,
- (ii) which puts her at that disadvantage, and
- (iii) which he cannot show to be a proportionate means of achieving a legitimate aim.



▶ cover story / continued

A case study

The following case study should help to illustrate what the change means:

A company has a policy of not allowing any part time working. Mrs Smith wants to return to work part time after the birth of her baby. The company refuses. Both men and women work at the company. Mrs Smith leaves and claims indirect sex discrimination. Everyone else in the company can work full time.

Prior to the change to the definition Mrs Smith would need to establish that more women than men were affected by the refusal to allow part time work. To show this she would need workplace statistics. It is likely that workplace statistics would not help her; they would show that only she was affected. She would therefore be likely to lose her claim, before the employer had to justify why they require full time work.

Under the new definition, she only has to show disadvantage. It would probably be enough for her to state that more women than men are the primary childcarers, therefore more women want to work part time than men. The company would then have to justify why

they insist on full time work. Under the new test the policy can only be justified if it meets a legitimate business aim. In determining whether a business aim is legitimate a tribunal has to balance the discriminatory effects of the policy with the legitimate business aim. This is a harder hurdle to overcome. A blanket ban on part time working is unlikely to be justifiable.

The new definition means that a greater onus will be on employers to establish business reasons why they need a particular policy that affects more women than men.

Harassment

Changes to the SDA have also seen the introduction of a new definition of harassment. Case law had already established that sexual harassment was a form of direct sex discrimination.

The new provisions apply to the areas of employment and vocational training only.

The SDA now says that a person subjects a woman to harassment if -

On the ground of her sex, he engages in unwanted conduct that has the purpose or effect-

of violating her dignity,

or

of creating an intimidating, hostile, degrading, humiliating or offensive environment for her,

or

he engages in any form of unwanted verbal, non-verbal or physical conduct of a sexual nature

that has the purpose or effect of violating her dignity,

or

of creating an intimidating, hostile, degrading, humiliating or offensive environment for her

or

on the ground of her rejection of or submission to unwanted conduct [of this kind], he treats her less favourably than he would treat her had she not rejected, or submitted to, the conduct.

What does this mean in practice?

Employers should already be seeking to prevent inappropriate behaviour among the workforce. However, the new definition does represent a change. Before the introduction of the new definition, comments needed to be gender specific and directed at a particular person for an individual to succeed with a claim. It was difficult to establish that, for example, having nude pin ups of women in the office was discriminatory. Now it should be easier for women to establish that girly calendars and material in the office is harassment and sex discrimination.

Employers should ensure that their workplaces are free from offensive material and ensure that staff are made aware of the new definition of harassment for sex discrimination. The new definition will make it easier for discrimination claims to be formulated and won. ■

Clare Hockney is a partner in Tobins Solicitors LLP and a solicitor for the Equal Opportunities Commission. Clare is a leading authority on discrimination issues.



TUPE reform: the story goes on...

Gary Tobin explains the latest developments in a long running saga.

The Government has long been committed to the reform the Transfer of Undertakings (Protection of Employment) Regulations 1981, more commonly known as the TUPE Regulations. These Regulations safeguard employees' rights when the business in which they work changes hands between employers.

Background

Changes have been in the pipeline for a number of years. The Department of Trade and Industry engaged in a process of consultation and specific policy proposals were put forward for public consultation in September 2001. In the light of that exercise, and of further informal consultations, the Secretary of State for Trade and Industry announced the policy decisions the Government had taken in February 2003.

These policy decisions were carried forward in a further round of consultation in March 2005. This later consultation exercise sought views as to whether or not the draft revised regulations would correctly and effectively implement those policy decisions. It was directed mainly at lawyers and other experts and specialists with a detailed knowledge of the operation of the Regulations.

The intention was that, following this consultation exercise, the revised Regulations would come into force in October 2005. However as a result of the large volume of responses to the consultation document and the many issues that have been raised, the date for implementing the new Regulations has been further delayed.

The current position

The new regulations will now come into effect on 6 April 2006.

The main areas of change are:

- There will be a broader definition of a transfer with the main aim of ensuring that changes in a service provision (such as office cleaning, workplace catering, security guarding and refuse collection) will be covered. This effects the situation where the outgoing contractor has in place an identifiable team of employees to carry out the service provision, which is essentially dedicated to meeting the needs of one particular client. However, there is an exclusion for "professional business services".
- There is an obligation to consult in advance of the transfer with "employee representatives" defined as either representatives elected by employees, or representatives of a recognised trade union.
- The transferor (old employer) and the transferee (new employer) are to be jointly and severally liable for any award of compensation made by an employment tribunal for failure by the transferor to comply with information and consultation requirements.
- There is clarification of the effect of the Regulations in relation to the key issues of transfer-related dismissals and changes to terms and conditions.
- There will be the introduction of a requirement on the transferor to notify

the transferee of the identities of the employees, and of all associated rights, liabilities etc, that will pass across in the transfer.

- There will be greater flexibility in the Regulations' application in certain cases where the transferor is insolvent, in line with the Government's policy to promote the "rescue culture".

A final note: TUPE and pensions

The Transfer of Employment (Pension Protection) Regulations 2005 have now come into force. They implement the Pension Act 2004 which requires a transferee to offer a transferred employee who was a member of an occupational pension scheme with employer contributions, access to a scheme which provides equivalent benefits, or make contributions to a money purchase or stakeholder pension.

Gary Tobin is a partner in Tobins Solicitors LLP

He regularly advises on all aspects of TUPE.



Changing terms and conditions: a warning

Paul Grendon discusses an important recent case.

The recent case of Leicestershire County Council (LCC) v. Unison arose from a situation familiar to many people.

The Council was implementing the results of a job evaluation scheme. The process adopted was a common one. All employees whose terms and conditions of employment were to be changed to their disadvantage were to be dismissed and simultaneously offered re-engagement on a new, less favourable, contract.

The termination of the contracts constituted “redundancy” for the purposes of the collective consultation obligations contained in the Trade Union and Labour Relations (Consolidation) Act 1992.

Unison was the recognised union for the employees. It brought a claim in the employment tribunal that the Council was in breach of its obligations to consult with them.

When should consultation begin?

An interesting issue in the case concerned when the time for consultation began. The tribunal concluded that the practical decision, that is, when the dismissals were “proposed”, began with the decision that had been taken

by the Council's staff, despite the fact that it still required a formal political decision by councillors to ratify it.

Tribunal decision

The tribunal concluded that the timing of the formal announcement to the union that dismissals were to take place, coming as it did at least a month after the practical decision had been taken by Council staff, was in breach of the 1992 Act. This decision was upheld on appeal to the Employment Appeal Tribunal (EAT).

The failure was an expensive one for the Council. Approximately 1,100 employees received a protective award of 90 days pay, and 1,150 received a protective award of 10 days pay.

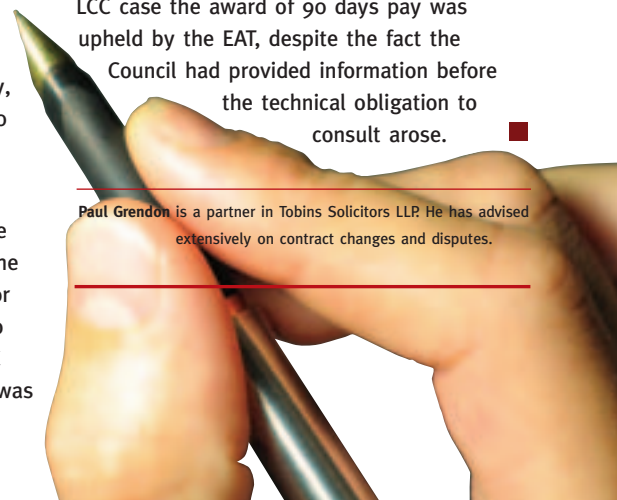
The warnings

Firstly, employers need to be clear that the provisions to consult will be triggered at the moment of “proposal”. There is no need for the person or body making the proposal to have the power to carry it out. In the LCC case it was argued that the final decision was that of councillors and it was only at that point that the obligation to consult was

triggered. This argument was rejected by the EAT. The EAT cited with approval a case which made clear that the purpose of consultation can only be served by permitting representations to be made before a third party, such as the shareholders or parent company, consent to the proposal.

Secondly the case also highlights the serious financial penalties that are likely to be imposed by a tribunal where an employer's obligations to consult are not met. The purpose of an award in such cases is to provide a sanction for breach by the employer of its obligations. It is not to compensate employees for a loss which they have suffered as a result of the employer's breach. In cases where there has been no consultation, tribunals have been told to start with the maximum period, that is 90 days, and reduce it only if there are mitigating circumstances justifying a reduction. In the LCC case the award of 90 days pay was upheld by the EAT, despite the fact the Council had provided information before the technical obligation to consult arose. ■

Paul Grendon is a partner in Tobins Solicitors LLP. He has advised extensively on contract changes and disputes.



Clare Hockney, Paul Grendon and Gary Tobin

About us

Tobins Solicitors LLP is a new law firm specialising exclusively in employment law.

Our experienced team provide clear, concise and cost effective advice across the full range of issues dealt with by human resource professionals. We also act on behalf of

senior employees. Our aim is to provide a high quality service whilst still being friendly and approachable.

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