

Discrimination (Jersey) Law 2013

Insights - 31/08/2015

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Under the Discrimination (Jersey) Law 2013 (the Law), "race" has been a protected characteristic since September 2014. As of 1 September 2015 it will also be unlawful to discriminate on the grounds of:

1. Sex
2. Sexual orientation
3. Gender reassignment
4. Pregnancy and maternity.

This means that, as of 1 September 2015 you cannot directly or indirectly discriminate, harass or victimise any person on any of the above grounds.

The risk of discrimination extends to all areas of employment, from the recruitment and selection processes, treatment of employees whilst in employment (i.e. promotion) and the grounds and circumstances in which employees are dismissed (in particular during a redundancy exercise).

The concept of statutory discrimination is relatively new to Jersey, and how the Law will be interpreted and applied is relatively uncertain (with only single figure claims to date since race discrimination was introduced). As the types of protected characteristics expand we expect the number of claims to increase. As similar provisions have been in existence in the UK for many decades, at least during the early stages, the Jersey Employment and Discrimination Tribunal is likely to draw on practice from the UK.

People with experience from other jurisdictions will probably understand the issues that might

arise. For the remainder, as discrimination law is being encountered for the first time, the employment world will now be quite different. The Employment Tribunal will no longer predominantly be the domain of those that have been dismissed; it will also accommodate employees bringing claims against their existing employees with whom they will and want to be employed in the future but, treated fairly and not discriminated against. Therefore whilst issues will certainly arise, it also about reasonableness, understanding boundaries and having zero tolerance to discrimination issues. In other words train employees, train managers follow policy and process and manage effectively.

What is unclear is whether the discrimination law will work in practice as a deterrent, but we anticipate an increase of cases even though the maximum compensation claim of £10,000 is relatively low. In the UK there is no cap and successful discrimination claims can lead to very high compensation awards. However, there is the ability in the future for the States of Jersey to increase the maximum level of compensation, which we think would have a more profound impact on employer's behaviour.

There is also the consideration as to what are the risks for the employee in bringing a claim. The compensation is low, you remain with the same employer and the realities of the work place could make life difficult in the future. The Law seeks to protect this by making victimisation unlawful but a recent case in the UK emphasises how difficult it can be to even raise a complaint with an employer. A black firearms officer in the UK Police Force complained about her supervisors conduct towards her who then went on to racially and sexually discriminate against her as a result of her complaint. The claimant was successful, but after the claim stated that the torment and impact of bringing that claim had been so bad that they would now question whether it was worth bringing the claim. She no longer feels able to work for the police.

We are not suggesting that claims will not be brought simply because of the emotional impact, but it will be interesting to observe whether employees feel confident or brave enough to bring a claim, given the relatively small employment market and the limited rewards for a successful claim. It will also be interesting as to whether employers will take a robust and intolerant approach to discrimination if issues arise, and whether they will adapt their policies and procedures.

Office Banter

We consider the biggest exposure to employers and employees will be claims arising out of what may be considered as harmless workplace "banter". There is a risk that where such comments and acts stray into the territory of the protected characteristics that claims under the Law could be successfully presented.

When asked, most people would argue they know when banter strays into something worse. However difficult issues can arise, as the individual's perception may differ. For example is sending a valentine card unlawful? Are half naked calendars (of a man or woman) unlawful? Is

calling a person 'coloured' or 'gay' or simply swearing unlawful? Because people believe they know the difference between banter and what the law now allows, this is where the problems will arise. In each of the above examples the line could be easily be crossed, deliberately or more realistically inadvertently.

Harassment

Harassment takes place when one person engages in unwanted conduct towards another, that is related to a protected characteristic (sex, race etc) and which has the effect of:

- a. Violating the person's dignity; or
- b. Creating an intimidating, hostile, degrading, humiliating or offensive environment for the person.

As of 1 September 2015, this will include unwanted conduct of a sexual nature that has the above effects.

The Tribunal will look to how the conduct was perceived by the individual, the circumstances of the case and whether a reasonable person could regard the conduct as having that effect.

Legal Consequences of Discrimination

In the majority of cases the Employer could be held liable for the discriminatory acts of its employees. The only defence to such claims under the Law is that an employer took such steps as were reasonably practicable to prevent the employee from doing the act, or acts of that description. It is no defence to for an employer to assert that the employee was acting without the employer's permission or in ignorance of the law.

While the Law offers no guidance as what would be considered reasonably practicable steps, we anticipate that the Tribunal would expect to see clear and up to date policies on discrimination, equal opportunities and dignity at work and providing relevant training and management of situations as they arise.

If the Tribunal upholds a claim of discrimination it may make an award for financial losses up to a maximum of £10,000 and/or an award for hurt and distress, not exceeding £5,000. The total combined award ordered by the Tribunal cannot exceed £10,000.

It is important to note that a claimant is expected to issue proceedings against his/her employer and the individual involved i.e. the manager of work colleague. If this occurs that manager or colleague could be liable personally for up to £5,000 (for the hurt and feelings they are found to have caused (even if not intended) and it may not always follow that the employer will indemnify that employee. It will all depend on the circumstances.

Where there is more than one respondent to a claim, the Tribunal has the power to apportion the award between the employer and employee as it sees fit. For an employer, even if the claim is successfully defended on the grounds they took all reasonable steps and liability falls on the employee in a personal capacity, the adverse publicity and reputational damage will already have occurred.

To help avoid breaching discrimination law, an employer should:

- Amend (if required) employment handbooks, including policies on equal opportunities and harassment, setting out what constitutes acceptable behaviour and what does not.
- Review employment contracts and any relevant policies to ensure they comply with the Law.
- Provide training on equal opportunities and harassment. This may help managers to avoid inappropriate questions at interviews, or to recognise and deal with harassment at an early stage.
- Set up clear procedures for staff to raise concerns and complaints, and for dealing with complaints. Ensure discriminatory behaviour by staff is not tolerated and is dealt with through proper disciplinary measures.

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