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Newsletter

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SEX DISCRIMINATION LEGISLATION CHANGES

On 14th March, the government published the Sex Discrimination Act 1975 (Amendment) Regulations 2008, (the "Regulations,") which make significant changes to the provisions on discrimination on the grounds of pregnancy and maternity leave and the definition of harassment in the Sex Discrimination Act 1975, (the "SDA.") The majority of changes came into force on 6th April 2008.

"Harassment" to cover sex based abuse

The legislation in its pre 6th April form provided 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. The new definition replaces the phrase 'on the ground of her sex,' with the phrase 'related to her sex or that of another person.' As a result, a person complaining of harassment under the SDA is no longer required to show that the alleged treatment took place because the complainant was a woman (or a man.) A connection or association with sex will, in the future, be sufficient to mount a successful harassment claim, provided that the rest of the definition of harassment is satisfied.

The new definition will, therefore, cover a wider range of conduct. The Explanatory Notes that accompany the Regulations give two examples. First, when male colleagues dislike a female colleague and decide to put office equipment on a high shelf to make it hard for her to reach, the old definition may not apply because the men are acting out of dislike and not because she is a woman, i.e. not 'on the ground of her sex.' From 6th April, however, such conduct might well be actionable on the basis that it is 'related to sex' because women are, on average, shorter than men. Secondly, the new definition might apply where a male manager follows a woman into the ladies toilets, which could be conduct related to sex, but might not be conduct on the ground of sex, if for example, the reason for his following her into the toilet was to shout at her.

Another consequence of the change in definition is that the unwanted conduct need not be directed at the complainant. It will suffice if the complainant witnesses another person being harassed, providing other elements of the definition are satisfied. Furthermore, the witness does not have to be of the same sex as the recipient of the conduct because the new phrasing 'unwanted conduct related to her sex or that of another person', encompasses abuse directed towards either sex. So, for example, if a manager repeatedly makes denigratory remarks about the abilities of

women in the workplace, a female or male employee may complain that this amounts to harassment under the SDA, even though the remarks were never directed at her or him personally.

Harrassment: third party conduct

In its pre 6th April form, the SDA did not allow a claim to be brought by an employee against an employer on the basis of harassment or a discriminatory act or omission committed by a third party, such as a customer, client, contractor or visitor. The Amendment Regulations state that where an employer fails to take reasonably practical steps to protect employees from third party harassment related to sex, and where that employer knows that such harassment has occurred on at least two other occasions, it will be treated as subjecting the woman to harassment. A one off incident of harassment will not suffice, and employees must complain to their employer as soon as possible after being subjected to unwanted conduct, as liability cannot attach to an employer who is unaware that harassment is taking place.

For the purposes of this new form of liability based on repetitive harassment by a third party that the employer fails to prevent, it is immaterial whether the third party is the same or a different person on each occasion. So, for example, an employee working in a shop might claim to have been subjected to offensive sex related conduct by three different customers on three separate occasions. So long as the employer knew about the first two incidents and did nothing to prevent the third, the claim will succeed provided the rest of the statutory definition of harassment is satisfied.

Pregnancy and Maternity Discrimination

The Regulations eliminate the distinction between Ordinary Maternity Leave (OML), i.e. the first 26 weeks, and Additional Maternity Leave (AML), i.e. weeks 27-52, in respect of the protection of non-pay benefits under the contract of employment. Currently during OML a woman's terms and conditions except those relating to normal remuneration continue to apply. By contrast, during AML the woman is

statutorily entitled to only a few of her normal contractual rights such as maternity related remuneration, notice of termination of employment and compensation in the event of a redundancy.

Putting OML and AML on the same footing is the change likely to attract the most attention from employers and employees alike. As noted, a woman's terms and conditions, bar remuneration, continue to apply during OML. The effect of the Regulations is that employers who remove benefits during AML which are available during OML, such as company cars, gym membership, health insurance etc. are likely to face claims of unlawful discrimination. This is a significant change and likely to have cost implications for employers. In addition, some employers may currently discount AML for the purpose of accruing contractual annual leave or for assessing seniority or financial non contractual benefits based on length of service. Employers are advised to amend such policy sooner, rather than later.

Note that unlike other changes outlined in this newsletter, these amendments in respect of pregnancy and maternity only take effect in respect of women whose expected week of childbirth falls on or after 5th October 2008.

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