

Conclusion

Each of the categories considered here, with the possible exception of the extended loans service, shows quite wide differences in the level of provision offered. There were, of course, limitations in this study, which relied largely on information provided on the web sites. It was not possible, within the time available, to contact every college and to

verify every detail presented on the web sites observed. It was, however, extremely useful to the Reader Services team members at IALS, who would like to provide a level of service and support reasonably consistent with that available in the other local academic libraries used by our students and teaching/research staff. A programme of further development of our current services is in progress.

References

- Jones, Sandra (2000) Recommendations to improve access for disabled users in academic libraries. Bristol: CLAUD (Consortium of librarians in higher education networking to improve access for users with disabilities in South and South West England). p. 6

Legal Information Management, 4 (2004), pp. 56–59

© BIALL Printed in the United Kingdom DOI: 10.1017/S1472669603001130

New Anti-Discrimination Legislation

Clare Gilroy-Scott, a solicitor in the Employment Department at Goodman Derrick and James Dalglish, a trainee at the same firm, have written an explanation of the new rules published recently by the government relating to discriminatory behaviour of various types, both within the workplace and against those who are job-seeking

Introduction

From December 2003, for the first time, people looking for work and those in jobs or training will have a right to complain about discriminatory behaviour based on their sexual orientation and religion or religious belief. Similar protection against discrimination based on age should also come into force in 2006. It seems clear that these regulations represent a significant step forward in addressing unfair discrimination in the UK and in achieving a certain level of uniformity and coherence across discrimination legislation.

Employment Equality (Sexual Orientation) Regulations 2003

These regulations came into force on 1 December 2003. It is apparent that they are consistent, to some extent, with the provisions of the Sex Discrimination Act 1975 and the Race Relations Act 1976. Many employers will therefore

be familiar with the general theory and framework of the legislation.

Protection under the regulations is given both to job applicants and to those in employment. “Employment” is defined as work under a contract of service or apprenticeship, or a contract personally to execute any work or labour. By the nature of this definition it is evident that it includes not only employees, but also the wider category of “workers”, self-employed individuals and contract workers. There are also special provisions covering certain types of worker, including those working for or seeking services from an employment agency (see below).

The regulations apply from the moment an application for employment is received, throughout the employment, including dismissal, and even after the working relationship has ended (e.g. when writing references).

I. Types of discrimination

“Sexual orientation” is defined as sexual orientation towards persons of the same sex, opposite sex or both sexes. The regulations therefore protect heterosexuals, homosexuals and bi-sexuals. They do not protect against



Clare Gilroy-Scott

discrimination relating to sexual fetishes such as sado-masochism or paedophilia.

Direct discrimination on the grounds of sexual orientation will occur if an individual is treated less favourably than others as a result of his or her sexual orientation or the sexual orientation of someone else (e.g. a friend), or as a result of the *perception* of his or her sexual orientation, whether the perception is correct or not. It is interesting that the complainant will not have to prove his or her sexual orientation, nor disclose it at tribunal.

Indirect discrimination will occur where a provision, criterion or practice is applied to all, but in fact puts individuals of a particular sexual orientation at a disadvantage. It is notable that the definition differs from that in the Sex Discrimination Act 1976, where the measure must be to the detriment of a considerably larger proportion of one group than the other. The scope of indirect discrimination in the Sexual Orientation Regulations is as a result wider and more flexible. If the employer cannot show that it is a proportionate means of achieving a legitimate aim, the measure will be unlawful.

Harassment is classified as a separate cause of action, whereas in previous anti-discrimination legislation it is considered to be a form of less favourable treatment under direct discrimination. Harassment occurs if conduct has the purpose or effect of either violating an individual's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for him/her. It should be noted that the regulations address the issue of the hypersensitive employee claiming against an unintentional harasser, in that an individual's conduct will be regarded as harassment only if, having regard to all the circumstances, including in particular the perception of the complainant, it should reasonably be considered to have that effect.

The victimisation provisions ensure that individuals are not discouraged from bringing claims under the regulations. Victimisation will occur if an individual is treated

less favourably than others in the same circumstances by reason that that person has done certain protected acts, or intends to do them, or even where it is suspected that he or she intends to do them. Protected acts include bringing proceedings, or giving evidence in connection with a case brought under the regulations, any action in reference to the regulations or alleging that an act has been done which is unlawful under the regulations.

Employers will be vicariously liable for the discriminatory acts of their employees, whether or not the employer knew or approved of them. However, it is a defence if the employer took such steps as were reasonably practicable to prevent the employee from doing that act, or from doing in the course of his employment acts of that description. It is therefore essential for employers to have an equal opportunities policy which is supported by management. The provision of appropriate training and the use of disciplinary sanctions will support an argument that reasonable steps were taken. Employers may also be liable for acts done by any other person on behalf of them, such as agents.

2. Defences for the employer

Discrimination will not be unlawful if an employer can show that:

- Possessing a particular sexual orientation is a genuine and determining occupation requirement ("GOR") and it is proportionate to apply that requirement in the particular case. It is hard to imagine how a particular sexual orientation may be a GOR but it is arguable that counselling in relation to sexual matters may fall within the scope of this exception.
- In the case of organised religion, the discrimination is necessary in order to comply with the doctrines of the religion or to avoid conflict with the followers' convictions.

Interestingly it appears that the granting of benefits by reference to criteria based on marital status will not be unlawful despite the fact that homosexual couples



James Dalglisch

cannot marry. This exception applies to such benefits as survivor schemes in occupational pensions which are only available to the widow(er) of a deceased employee and not to an unmarried partner. It should be noted that the exception relates to *marital status* and therefore any benefit applicable to opposite sex partners only will be unlawful.

As under the Race Relations Act, employers can discriminate in order to afford better access or encourage people of a particular sexual orientation. It is not necessary to show that people of a particular sexual orientation are under-represented, but such 'positive action' should "prevent or compensate for disadvantages linked to sexual orientation" among the relevant section of people.

Employment Equality (Religion or Belief) Regulations 2003

These Regulations came into force on 2 December 2003. The construction of the provisions is largely similar to those set out in the Employment Equality (Sexual Orientation) Regulations 2003.

1. Types of discrimination

"Religion or belief" is defined as any religion, religious belief or similar philosophical belief. It does not include any philosophical or political belief that is not similar to a religious belief. It is expected that in interpreting what amounts to a protected religion or belief, tribunals are likely to look for collective worship, a doctrine and a profound belief. Therefore one single belief, such as one supporting anti-abortion will not, on its own, amount to a protected belief. Complications may arise with regard to "new age religions" where it is difficult to find a code of beliefs to which anyone adheres as part of a group. A political belief such as communism may be covered as representing an all-encompassing view of the world, but membership of a political party is unlikely to be a protected belief.

What constitutes direct and indirect discrimination, harassment and victimisation is the same as for the Sexual Orientation Regulations (discussed above) but naturally applied to a person of a particular religion or belief.

2. Defences for the employer

The defences relating to a GOR, and "positive action" are the same as those under the sexual orientation regulations. However, in relation to religious discrimination it should be noted that if an employer *does* have an ethos based on religion or belief (i.e. a religious organisation) there is a separate slightly broader GOR defence for which the employer must show that the religion or belief is a genuine and proportionate requirement for the job in question, but not necessarily a determining factor.

Age Discrimination

The Government issued their first consultation document dealing exclusively with the issue of age discrimination in employment and vocational training, "Equality and Diversity: Age Matters", on 2 July 2003. This seeks views on a number of issues including: retirement age; recruitment, selection and promotion; pay and non-pay benefits; unfair dismissal; employment-related insurance and statutory redundancy payments. Draft regulations outlawing age discrimination in the workplace are due to be published next year and the legislation is expected to come into force on 1 October 2006.

It is anticipated that the regulations will follow a similar approach to those for sexual orientation and religion, and we can therefore expect the same principles in relation to direct and indirect discrimination, victimisation and harassment, to be applied to age discrimination. As with the regulations referred to above, direct discrimination may be on the basis of *perceived* age, however, those most likely to be affected are the old and the young.

1. Prohibition of specific practices

- (a) **Retirement age:** one of two proposed approaches will be taken. The first proposition is that it should be unlawful for employers to set retirement ages for their employees unless they can be objectively justified by reference to the specific aims listed in the legislation and only if their particular circumstances make it appropriate and necessary. Alternatively, it is proposed that there be a default age of 70 at which employers would be able to retire employees compulsorily without having to justify their decision, with any earlier retirement age having to be justified in accordance with the legislation.
- (b) **Recruitment, selection and promotion:** it is proposed that employers should be able to apply an age limit to recruitment but only if they can justify doing so.
- (c) **Pay and non-pay benefits:** it is proposed that pay and non-pay benefits based on length of service or experience, if justifiable, would remain lawful.
- (d) **Unfair dismissal:** it is proposed that, subject to there being a justifiable mandatory retirement age or a default age of 70, redress can be sought for unfair dismissal at any age. In addition, the age-related aspects of the basic award will be removed so that it is simply based on the employee's length of service (subject to a maximum of 20 years) and their weekly pay (subject to a statutory maximum).
- (e) **Redundancy:** the cut-off point for entitlement to statutory redundancy payment will depend on the decision in relation to retirement ages and on how that decision is used by the particular employer. In any case, it is proposed that the age-related aspects of the statutory redundancy payments scheme are removed in the same way as for unfair dismissal.

2. Defences for the employer

The general defences relating to a GOR, employment agencies and “positive action” are expected to be the same as those under the religion and sexual orientation regulations except that they will relate to age discrimination and that, in general, an employer wishing to adopt an age-based policy will have to be able to justify it, with evidence, by reference to:

- (a) Specific aims to be set out in the legislation – such as health, welfare and safety; and
- (b) The particular circumstances that make the practice appropriate and necessary.

Enforcement of the New Regulations

In relation to discrimination for sexual orientation and religion or belief, actions may be brought in the Employment Tribunal within three months of the alleged act. If an application is successful, the Tribunal may make a declaration or recommendation, or may order compensation to be paid (with no limit). In certain circumstances an action may be brought in the County Court within six months of the alleged act.

The same enforcement provisions are also anticipated in relation to the legislation to be drawn up relating to age discrimination.

As with equal pay and sex discrimination claims, individuals who believe that they may have been subjected to discrimination on the grounds of sexual orientation or religion or belief may serve a questionnaire requesting an explanation for their treatment and seeking information

relevant to their claim. The answers will be admissible in evidence and any omission to reply or evasive or equivocal response may result in the tribunal drawing adverse inferences.

Employment Agencies

Both the Sexual Orientation and Religion or Belief Regulations specifically deal with discrimination by employment agencies. It is unlawful for an employment agency to discriminate on these grounds against a person:

- In the terms on which the agency offers to provide any of its services
- By refusing or deliberately not providing any of its services: or
- In the way it provides any of its services

Employment agencies have a specific defence if an employer stated that a particular sexual orientation or religious or other belief was a GOR and it was reasonable for the Agency to rely on that statement.

Conclusion

Whilst there is no doubt that the new legislation represents a major step towards equality and diversity in the workplace, it is likely that the tribunals and appeal courts will be called upon to determine complex legal issues which arise from the regulations. It is essential that businesses review their policies and procedures to ensure that they comply with the regulations. ACAS is currently working on practical workplace guidance to assist businesses to understand their obligations.