

HR Focus

December 2009

Welcome to this month's edition of HR Focus – the last one of 2009!

We wish all our readers a Merry Christmas and a Prosperous New Year!

The Equality Bill and Disability Discrimination

New amendments to the draft Bill provide that pre-employment health questionnaires can be proof of discrimination

The Equality Bill is passing slowly through the legislative process and is receiving amendments along the way as a result of the consultation process. One important addition appeared last week. A new section 60 applies to enquiries about disability and health prior employment. As presently drafted, the section will allow an unsuccessful candidate who has given information about a potential disability on a pre-employment questionnaire to use that as evidence of discrimination.

It will be a defence for an employer to show that the information required on the questionnaire was necessary in order to :

1. establish whether it would be necessary to make reasonable adjustments in order to undergo the interviewing process,
2. monitor diversity in the range of people applying for the position,
3. take action over increasing the representation of disabled people in the workplace,
4. establish whether a particular candidate has a disability that is necessary for the particular employment in question

These limited defences do not include the most common reason for requiring the completion of a pre-employment questionnaire: to weigh up the state of health of the candidate in relation to future attendance and performance at work. The purpose of the draft section is to outlaw this practice.

The Bill is not yet law and, indeed, may not survive a general election in its present form. However, employers should be aware of the considerable burden such a change will impose on them if they continue to use pre-employment health questionnaires. Disappointed applicants have always been able to use the argument that questionnaires are potentially discriminatory and employers have been able to rely on other non-discriminatory reasons

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for failing to appoint. This will change. Employers will only be able to justify the use of questionnaires if their purpose is to encourage the employment of disabled people. Without this element, it will be implied that their purpose is to limit access to the workplace and this will be directly discriminatory.

In this month's edition:

Discrimination by association

Following the decision in **Coleman v Attridge Law**, Erica Bedford, Trainee Solicitor in the Liverpool team considers just how far reaching it's implications might be.

Extension of transitional arrangements for Working Time Regulations

Paul McFarlane, Partner in the London office looks at the EU Commission's decision on extending the transitional arrangements in respect of working time for doctors in training.

Discrimination issues in recruitment

John McArdle, Paralegal in the Liverpool team highlights some of the pitfalls employers might face when recruiting.

Question and answer

And in our regular Question and Answer section, Michael Berriman, Partner in the London team answers the query: "We are recruiting a new director and I am keen to include physical and mental examination in the interview process. Can applicants refuse, and how would I need to document the findings and considerations if, for example, I decide not to hire a candidate with a bad medical record or a heart condition?"

As a seasonal addition, we also look at the problems that the festive activities can generate.

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Coleman: a new extension to the DDA or a stark reminder of the current position?

Most of us are now aware of the Employment Appeal Tribunal's decision in the long running case of **Attridge Law -v- Coleman**.

Mrs Coleman was the main carer for her disabled son and applied for flexible working in line with other working mothers with dependants. After being denied sufficient alterations for her needs, she brought a

claim for discrimination on the grounds of another's disability under the Disability Discrimination Act ("DDA").

After consultation with the European Court of Justice, the EAT confirmed that the DDA was intended to cover discrimination on the grounds of another's disability and so created provisions for disability related discrimination and harassment.

However, when considered in context with the current Flexible Working Regulations ("FWR"), the **Malcolm** comparator and the forthcoming Equality Bill, how great an impact will **Coleman** actually have?

Those most likely to gain from the **Coleman** extension are carers for disabled dependants over the age of 18, who require flexible working. However, the FWR already entitles an employee with care responsibilities for an adult, aged 18 or over to make an application for flexible working. So the effect on working relationships under these circumstances will be minimal.

The difference lies in the potential compensation. The FWR caps compensation at 8 weeks' pay; a successful claim of discrimination under the DDA is unlimited. By including the FWR with the DDA through **Coleman**, the EAT has sent a stark reminder that all employees with caring responsibilities, irrespective of age or ability of the dependant, are to be treated the same and will be compensated the same.

Secondly, **Coleman** created provisions for harassment and victimisation. From the wording utilised, this does not have to be directed at an employee who actually has a disabled dependant; but all employees. Again, this is a stark reminder to employers to focus upon creating a working environment where dignity and respect for all individuals are paramount.

Interestingly **Coleman** did not include a provision for making reasonable adjustments. Therefore, to succeed in gaining unlimited compensation under disability related discrimination, employees must show that they have been treated differently from a comparator in the same circumstances. Following the narrower "Comparator Test" in **Malcolm**, this is a very high hurdle for employees to reach. With the inability to rely on the failure to make reasonable adjustments, how likely is it that an employee will be able to bring a successful case before the ET on disability related discrimination alone?

The extensions did not reach to reasonable adjustments for the simple reason that the question was not put before the EAT. As the ECJ made clear, the purpose of the implementary directive was to cover associative discrimination; therefore should the question be put before the EAT, the **Coleman** provisions would probably be extended to include reasonable adjustments.

Finally, **Coleman** must be considered in light of the current political position. The Equality Bill is due to be implemented in 2010. Where will **Coleman** stand then? It is expected that the Equality Bill will bring all discrimination legislation under one umbrella; including discrimination on the grounds of another's disability. Following 2010, the **Coleman** extensions will probably be solidified and strengthened in any event, affording greater protection to all employees.

When considered in context, **Coleman** may not be as far reaching as first thought. It simply reiterates the current FWR provisions and hints at the future under the Equality Bill. It is already good HR practice to ensure that all employees are treated with the same level of dignity and respect and are afforded the same opportunities and benefits. **Coleman** merely stands a reminder of the extent of that good practice.

Erica Bedford, Trainee Solicitor, Weightmans LLP

Commission Opinion – extension of transitional arrangements for the working time of doctors in training in the United Kingdom

Background

The scope of the EC's 'Working Time Directive' was extended to limit the maximum working week of doctors in training to 48 hours from 1 August 2004. However, transitional arrangements were permitted, enabling doctors in training to work an average of 56 hours per week until 31 July 2009. In January 2009, the UK notified the EC Commission that it intended to make use of further transitional provisions under the Directive to allow an average weekly working time of up to 52 hours for doctors in training until 31 July 2012.

The UK's case

The 48-hour limit to the average weekly working time for doctors in training has already been achieved in the majority of cases. However, some will continue to exceed this limit, owing to a shortfall in recruitment to medical training posts and a shortage of locums available to fill the resulting vacancies. The problem is most acute in areas where restructuring leads to staff temporarily being required to provide services at more than one site and in small, remote or highly specialised units. Measures are in place to address these factors but it is anticipated that shortages of medical staff will continue for the next two to three years.

The Commission's consultation

The Commission consulted representatives of other EU Member States and labour organisations on the proposed extension of transitional arrangements in the UK. No Member State raised an objection to the proposal. However, the European Trade Union Conference noted the opposition of the UK TUC and the Hospital Consultants and Specialists Association. They argued that compliance with the 48-hour weekly limit was already realistic in most hospitals. Neither organisation considered that staff shortages were sufficient to justify an extension of the transitional arrangements.

The Commission's Opinion

The Commission accepted that the UK health service had shown a commitment to tackling its culture of long working hours through organisational change and that significant progress had already been made towards meeting the 48-hour weekly limit for doctors in training. It determined it would not be unreasonable for the UK to retain transitional arrangements for this group, reducing their average weekly working time to no more than 52 hours, while further progress towards full compliance was made. However, the Directive only provided for an extension of up to two years at this stage, with the possibility of a further 12-month extension from 31 July 2011.

Conclusions

- it is accepted that the UK requires a further two years from 1 August 2009 before it can apply the 48-hour limit to weekly working time to all doctors in training;
- from 1 August 2009 until 31 July 2011 the average weekly working time for doctors in training in the UK may not exceed 52 hours per week;
- progress in reducing hours should continue to be monitored and, if required, the UK should notify the Commission by 31 January 2011 of its intention to extend these transitional arrangements for a further 12 months to 1 August 2012;
- health service employers should consult with staff representatives and agree measures to reduce working hours to meet the 48-hour limit by the end of the transitional period.

Please do not hesitate to contact **Paul McFarlane, Partner** paul.mcfarlane@weightmans.com should you wish to discuss this case further.

Discrimination in recruitment

Recruiting new employees can be a lengthy and complicated process for employers. This month, we take a brief look at a few key areas and how companies can best avoid claims of discrimination against candidates.

Advertising the role

Before advertising a role, it is good practice to draft a detailed job description and person specification. This will demonstrate that the employer was objectively assessing the skills and experience which relate directly to the role on offer, and was not swayed by, for example, considerations of unlawful discrimination. Care must be taken when creating person specifications however, as some may exclude particular classes of candidates.

Case: **Rainbow –v– Milton Keynes Council**

An employer who advertised a role as suitable for ‘**candidates in the first five years of their career**’ was found to be indirectly discriminating on the grounds of age.

Application forms

Most employers now favour application forms over curricula vitae as this allows all candidates to begin the application process on an equal level. Employers must ensure that reasonable adjustments are made for disabled candidates, for example Braille forms. It is also good practice for employers to accept another form of application if the candidate is unable to fill out the form provided owing to a disability.

Selection criteria

If possible, a panel of managers should be appointed to look through the applications and apply the selection criteria as this will reduce the risk of one manager’s unbalanced decision affecting the process.



The panel should aim to apply objective selection criteria to all candidates throughout the application process, with the weighting of each criterion being decided beforehand.

Interview questions

Interview panels should meet in advance to agree the questions to be put to candidates and ensure that they relate to the requirements of the job role. It is important that all candidates are asked the same questions and that social conversation is kept to a minimum to prevent inappropriate questions being asked about the candidate's private life.

Feedback

A feedback document could prove to be a vital document, should the matter progress to an Employment Tribunal. Any negative comments or criticisms therefore, should be directly relating to the job role.

Case: Dattani v Chief Constable of West Mercia Police

If an employer fails to respond or provides an evasive response to any question asked by an aggrieved person, an employment tribunal may draw an adverse inference of discrimination.

Further, more detailed advice can be obtained by contacting Stuart Jones, Employment Partner.

Weekly dilemma ...physical and mental examinations

We are recruiting a new director and I am keen to include physical and mental examinations in the interview process. Can applicants refuse, and how would I need to document the findings and considerations if, for example, I decide not to hire a candidate with a bad medical record or a heart condition?

The wish to conduct physical and mental examinations of your candidates is understandable, but raises certain legal issues, such as the duty to make reasonable adjustments under UK disability discrimination legislation.

Examinations intended to establish a candidate's medical condition normally involve some form of occupational health assessment. Provided these are properly conducted in clinical terms, they should not put a potential candidate with a disability at the substantial disadvantage that would be necessary for this duty to arise. Greater care must be taken with the resulting report, as this will almost certainly form part of the arrangements for determining whether the candidate is offered employment.

Aptitude tests, whether physical or mental, should likewise be directed towards the central requirements of the job that either an employer cannot adjust or that would not be regarded as reasonable for the employer to adjust.

It is worth remembering that some disabilities will have a specific impact on a candidate's ability to complete the test. Some candidates may, for example, struggle with a particular cognitive element. Some adjustments may be as simple as allowing the candidate more time. The duty to make reasonable adjustments may alternatively be satisfied in how you assess the results of the tests by making specific



allowances or applying a weighting to the results. Many employers consciously enquire about a candidate's disabilities at the application stage so that the assessment stage can be devised or adjusted accordingly.

There is no magic to the way such a recruitment process should be documented generally; it is obviously important to supplement a written recruitment procedure with evidence of any adjustments made, and the legitimate reasons for preferring or rejecting a particular candidate. Thus, any candidate who refuses to undergo the examinations, who withdraws (as is their right), or is eliminated from further consideration will have a much greater difficulty claiming a breach of the duty to make reasonable adjustments.

In the light of these requirements, the simple rejection of a candidate for potential reasons such as a bad medical record or a heart condition would be liable to challenge.

John McArdle, Paralegal, Weightmans LLP

If you have a question which you would like answered in a future edition, please email askemployment@weightmans.com.

Christmas Q&A – the pitfalls of mistletoe and wine

1. Can the employer be liable for discrimination by colleagues at the Christmas party?

Yes. For the purposes of the discrimination legislation, anything done by an employee "in the course of employment" is treated as having been done by the employer. So, if the office Lothario discriminates against a female employee by grabbing her under the mistletoe despite her protests, she can sue the employer.

In deciding whether the employer is liable for discrimination by an employee at an event like a Christmas party, an employment tribunal will consider the following factors, as set out in **Chief Constable of Lincolnshire v Stubbs [1999] IRLR 81 (EAT)**:

- Whether the incident took place on the employer's premises
- Whether the victim or discriminator was on duty
- Whether the gathering included employees' partners, customers or unrelated third parties and
- Whether the event took place immediately after work

A Christmas or leaving party, or even informal drinks with colleagues in the pub immediately after work may be considered an "extension of employment".

It is not necessary to show that the discriminator's actions were sanctioned by the employer and it will be difficult for the employer to show it took all reasonable steps to avoid the discrimination, even where appropriate anti-discrimination policies have been communicated to employees and incorporated within the disciplinary process.

Employers should make it clear that its usual rules and standards of conduct apply to the office party, even if it is held in a different location and out of normal work hours. It is good practice to send out a diplomatic e mail to staff before the party, wishing them a fun evening but reminding them to look out for colleagues who may be enjoying themselves a little too much and to make sure they get home safely. Managers also need to deal swiftly with “over-enthusiastic” behaviour at the party, for example, if it is clear that their attentions are unwanted.

2. Can the employer be liable for discrimination by an entertainer at the Christmas party?

There have been several changes in the law in recent years, on the question of whether an employer is liable for discrimination by a third party such as an office party comedian, who makes discriminatory comments and the law in this area is still uncertain. However, it is clear that an employer will be liable if it fails to take reasonably practicable steps to prevent a third party from sexually harassing an employee in the course of her employment, where the employer knows the employee has been harassed in the course of her employment on at least two previous occasions by a third party (Sex Discrimination Act 1975, Sections 2A and 2B).

Employers should ensure that staff who book entertainers are aware that the employer’s policy of not discriminating will also apply.

3. Can the employer be liable for drug-taking at the Christmas party?

Yes. Offences under the Misuse of Drugs Act 1971 include allowing premises you occupy or manage to be used unlawfully for the purpose of supplying controlled drugs. See <http://drugs.homeoffice.gov.uk/drugs-laws/misuse-of-drugs-act/> for more details. Again, it is important that the employer has a clear policy that is communicated to employees.

4. How can the employer avoid liability for religious discrimination at the Christmas party?

Employers should be sensitive, as always, to:

- Muslim employees who are forbidden from being associated with alcohol
- Employees with religious dietary requirements
- Orthodox Jewish employees who need to be home before dusk on Fridays for the start of the Sabbath

Where possible, the party should not be held on a Friday night and there should be advance consultation about dietary requirements and plenty of vegetarian and non-alcoholic options. If the employer provides a hamper with alcohol, a non-alcoholic option should be made available.

5. How can we deal with absences following the work Christmas party?

Absence management should be an on-going process, although this should be used with a light touch at Christmas time, to avoid de-motivating employees, who will inevitably want to “let off steam” and to wind down leading up to the holiday period. Key features include:

- Recording absence
- Clear requirements for employees to report their absence
- Monitoring individuals and statistics
- Communicating with employees if the absence continues
- Return to work meetings
- Clear standards
- Communicate need for improvement
- Warnings

Michael Berriman, Partner, Weightmans LLP