

## NeTWork: 30<sup>th</sup> December 2009

### Equality Bill Update: Increased Protection for Disabled People

The Equality Bill has now completed its report stage and had its third reading in the House of Commons. The latest version of the Bill contains several amendments, most notably, a new 'clause 40' which deals with pre-employment enquiries about disability and health. The Bill now includes this new provision because these enquiries are thought to be one of the main reasons why disabled people regularly fail to reach the interview stage of the recruitment process.

Under the new provisions if a job applicant can show that the potential employer has contravened certain disability provisions by asking questions about his or her health before making a 'relevant decision', then the new provision shifts the burden of proof onto the employer, so that in the absence of any other explanation, the Tribunal must hold that a contravention has occurred. A 'relevant decision' will include deciding which applicant to offer a job to, or where there is more than one round of interviews, deciding which applicant goes through to the second round.

The new provision will not apply to questions which are asked to establish whether a duty to make reasonable adjustments arises; to monitor diversity in applicants, to enable an employer to take positive action or where the employer requires the potential employee to have a particular disability.

Employers who do make enquiries about job applicants' health will need to carefully consider how the information obtained is used in the future to avoid a potential claim for disability discrimination.

### Religious Discrimination: Employee who was dismissed for refusing to counsel gay couples was not discriminated against

*(McFarlane v Relate Avon Ltd)*

The Employment Appeal Tribunal (EAT) has held that an employee who was dismissed for refusing to counsel homosexual couples was not directly discriminated against on the grounds of his religion.

In this case Mr McFarlane, a committed Christian, worked as a counsellor for Relate. Relate provides confidential relationship counselling services. Mr MacFarlane asked whether he could be excused from counselling same sex couples where sexual issues were involved and Relate refused on the grounds that they considered that such an exemption would contravene the equal opportunities policy, which Mr McFarlane had agreed to follow when he started working for Relate. Mr McFarlane was asked to continue working with same sex couples; however, he refused to do so and was dismissed. Mr McFarlane brought claims which included direct and indirect religious discrimination.

The Tribunal dismissed Mr McFarlane's claims and held that Mr McFarlane was dismissed because of his refusal to follow the terms of the Equal Opportunities policy and not because of his faith. They also held that Mr McFarlane's dismissal was a proportionate means of achieving the legitimate aim of providing counselling services regardless of sexual orientation.

Mr McFarlane appealed the Tribunal's decision arguing that in order for a religious belief to be properly protected, protection should extend to manifestation of that belief.

The EAT upheld the Tribunal's decision stating that whilst there may be occasions where an employer can be shown to object to the manifestation of a belief for the sake of objecting, this situation was not such an occasion and Relate has genuine reasons for their objection.

## **Government U-Turn: on Childcare Vouchers**

The Government has delayed its plans to scrap childcare vouchers after criticism from the public and Labour backbenchers.

Gordon Brown confirmed in a letter to Labour backbenchers that the scheme will continue for the time being and that existing users will continue to get their current tax exemptions.

However, from 2011 all new entrants to the scheme, including higher rate tax payers will only get basic tax relief at 20% and it is likely that the scheme will be scrapped entirely by 2015.

## **Time Limits: Court of Appeal finds ET was correct to extend time for bringing a disability discrimination claim**

### ***(Chief Constable of Lincolnshire Police v Caston)***

In this case Ms Caston complained to the Employment Tribunal that the police force had failed to make reasonable adjustments in relation to her disability. Ms Caston had rejected the police force's proposed adjustments on 10 November and the three month time limit for lodging a claim ran from this date. Ms Caston lodged her claim outside the normal three month time limit on 28 March.

The tribunal was asked to consider whether it would be just and equitable to extend the time limit in view of Ms Caston's disability. Ms Caston suffered from mental problems and had misled her advisors about the facts needed to establish when time started running. The tribunal concluded that it was just and equitable to extend the time for lodging the claim and made reference to comments in a publication 'Employment Court Practice 2007 (ECP)' which stated that a 'liberal approach' should be adopted in relation to extension of time.

The Police Force appealed to the Employment Appeal Tribunal (EAT) on the grounds that the Tribunal has applied a liberal approach to time limits when it should have applied a strict one. The EAT dismissed the appeal and stated that whilst the ECP did not accurately state the law, the Tribunal had reached a decision which was open to it on the evidence, namely that the situation comprised an 'exceptional circumstance' making it just and equitable to extend time.

The Police Force appealed to the Court of Appeal and the appeal was dismissed. The Court decided that the Tribunal's finding that the situation was an 'exceptional circumstance' making it just and equitable to extend time was one open to it on the facts and that it was irrelevant whether the Tribunal considered that it was being liberal or not. The question was whether there was material on which the Tribunal could properly exercise its discretion.

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