

Equal Pay and Prejudice.

By Craig Rothwell

This article highlights some of the ways, apart from sexual harassment, that employees can be discriminated against on the grounds of their sex in the workplace.

Direct discrimination: This occurs when one employee is treated less favourably than another because they are male or female. The 'less favourable treatment' can include practically all acts taken (or lack of action taken) by employers including refusal to train, promote or transfer a (usually) female employee in contrast to another (usually) male colleague. Alternatively, actively dismissing, demoting or refusing to employ a female worker when a male worker would not have been treated in that way will also be direct discrimination.

The key to proving discrimination is for a female employee to compare how they have been treated against someone who has similar skills, abilities or is in similar circumstances but is male. If it can be shown that the only apparent reason to explain why, say, the male colleague was chosen for promotion over his female colleague was because he was male, then discrimination will be proven. Naturally, it is extremely rare for an employer to score such an obvious own goal as to state openly that this was the reason (at least nowadays), so employees often have to rely upon stressing how similarly (or better) qualified they were for the promotion than their male colleague. They may also rely on examples of a generally sexist attitude adopted by colleagues or the company. In the absence of any credible explanation why they were not chosen, and particularly in the context of a sexist work atmosphere, an employer will be found guilty of sex discrimination.

Recruitment and Selection: Employers also need to take care even before an employee becomes an employee as recruitment and selection is one of areas most susceptible to discrimination. As most people are now aware, advertisements need to be carefully monitored

so that terms such as 'waiter' do not slip through without 'waitress' alongside. Frustration at what some might perceive to be ridiculous political correctness should also not be expressed. For instance, one employer included in his advert, 'overhead crane driver/ess – to satisfy damn silly employment legislation.' He was later obliged to visit what he no doubt considered to be the 'damn silly' employment tribunal.

Less obvious is the unintentional discrimination in recruitment that can result from developing close recruitment contacts with single sex schools, colleges or clubs. It therefore is wise to have as many and diverse recruitment contacts as possible.

Selection methods should also be examined to determine whether requirements for candidates are really necessary. Overly complicated application forms can unintentionally discriminate against those with English language difficulties and may constitute race discrimination. Interviews are, however, the real minefields for employers. To attempt to give an original tip in this area: interviewers with a habit of doodling should avoid this on their interview notes. Whilst all present at one Employment Tribunal admired the artistic intricacy of one manager's too impressive doodle of a rooster on a candidate's interview notes, it was 'cock-a-doodle-do' to any chance of a good defence to the discrimination complaint brought by that candidate.

Equal Pay. As a matter of fairness, all employees should be paid the same amount if they are carrying out substantially the same work. If not, and there is a discrepancy which cannot be adequately explained, this opens an employer up to an allegation of discrimination. In law, there are grounds which an employer can rely upon to explain away such a discrepancy (apart from arguing that the jobs are

actually quite different). These are by reference to a seniority system, a merit system or a system that measures earnings by quantity or quality of production or performance.

The process by how the merit system is applied or the quality of performance judged needs of course to be free of any discrimination itself. The best way to ensure this is to have clear criteria available that can be applied objectively in writing by managers to judge an employee's merit or performance. Not only does this help prevent any unfair prejudices having too great a role in the assessment, it should provide a better explanation of the assessment to employees initially, and should an employee subsequently complain, place the company in a better position to justify the assessment.

This article contains information of a general nature and should not be relied upon as a substitute for professional legal advice given with respect to a particular factual situation.

Craig Rothwell is an attorney within Cox Hallett Wilkinson's litigation team specialising in employment law. Craig can be contacted on 295 4630.