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Guernsey's new discrimination law: What will it mean in practice?

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The reaction locally has been mixed. Some welcome the changes, seeing them as crucial if we want to keep up with global expectations, and attract and retain talent. Others are less enthusiastic, fearing that the new law goes too far and places an unduly high burden on employers.

In the latest edition of Business Brief magazine we reflect on the proposals for Guernsey's new discrimination law and what employers can do to prepare for its introduction.

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Noting the differing views of businesses and other stakeholders, the Committee for Employment and Social Security has sought to take a proportionate approach to the new legislation. Of course, not everyone will agree that its final proposals are proportionate. On the whole, the proposals seem to fall somewhere between the laws of Jersey and the UK. For example, religious belief will be protected in Guernsey, unlike in Jersey. However, there will be no protection for other beliefs, as there is in the UK.

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It is proposed that compensation for discrimination in the workplace will be capped at six months' pay, plus up to £10,000 for injury to feelings. In the UK, compensation for discrimination is uncapped, and based largely on financial losses. This can sometimes lead to significant awards being made, especially where the discrimination has led to the termination of the individual's employment. Awards for injury to feelings can also run into the tens of thousands of pounds. The Guernsey proposals place a limit on the total exposure of the employer, and give greater certainty to both parties in terms of the outcome they can expect, should a claim succeed. The proposed cap on compensation is however higher than in Jersey, where compensation is limited to £10,000. Employers in both islands should also bear in mind that if an employee has more than one complaint of discrimination, or has also been unfairly dismissed, the total award may exceed the above limits.

There has been a lot of debate about the proposed definition of "disability", which is wider than in the UK and Jersey. Under the proposed definition, a considerable proportion of the population could be considered disabled for discrimination law purposes, at least at some point in their working lives, and the expressed concern is that this may give rise to lots of unmeritorious claims. However, it is important to remember that the definition will not in itself give rise to any liability on the part of the employer. A disabled person will often be at no disadvantage or only a minor disadvantage in the workplace compared to a non-disabled employee, and in such cases the duty to make reasonable adjustments will not be triggered. If the duty is triggered, employers will not need to make adjustments if it would create a disproportionate burden on them to do so. This means that, while the duty to make reasonable adjustments will inevitably lead to some additional costs for local businesses, employers are not being asked to write a blank cheque for anyone who may request changes to their role or to their workspace. In fact, based on my experience in the UK, many of the adjustments typically requested have either no or minimal cost attached. To the extent that more significant costs may be involved, these can often be offset to a greater or lesser extent by higher employee productivity once the disadvantage caused by the disability is removed.

A narrower definition can present its own challenges. In particular, there is often disagreement in the UK as to whether the employee is disabled for discrimination purposes, and the parties end up needing to obtain expert medical evidence and attend a separate preliminary hearing to determine whether the claim can proceed. Guernsey's proposed definition should at least avoid these additional costs in many cases.

Another respect in which the proposed Guernsey legislation differs from the UK and Jersey legislation is in the inclusion of carer status as a protected ground. In the UK and Jersey, carers are often protected through claims of indirect sex discrimination and/or disability discrimination by association, and so this does not represent a significant departure from the level of practical protection available. It does however remove some grey areas which exist in the UK and Jersey and should make the law easier to understand.

One change which is undoubtedly positive for both employers and employees is the introduction of pre-claim conciliation, where the parties will have a chance to try to resolve matters before a claim is brought, using an independent conciliator. A similar scheme was introduced in the UK in 2014 and has been very successful. In the year to March 2021, around 70% of potential claims in the UK were resolved at the early conciliation stage. In some of these cases, a settlement was reached, but in many more, no money was paid and the potential claimant simply decided not to issue proceedings following conciliation.

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Other new powers may prove less useful for employers. For example, the new power to strike out claims which have no reasonable prospect of success is likely to be of limited use to employers facing discrimination claims, unless the Guernsey courts choose to depart from the stance taken by the UK courts. UK courts and tribunals have proven reluctant to strike out claims for discrimination in all but the clearest cases, on the basis that the strength of a discrimination claim can rarely be ascertained without hearing the full evidence.

Another proposal which, if adopted, is unlikely to be relied upon frequently is the employer's right to take positive action in relation to recruitment. The Committee's Policy Paper says that "diversity...may be the determining factor in an appointment, other things being equal". A similar right exists in the UK. However, it is seldomly used in practice, because it is rare that two candidates are exactly equal in all respects save for the fact that one of them is from an under-represented group. Most employers choose not to rely on the positive action provisions in relation to recruitment, rather than face a potential claim from the unsuccessful candidate.

One of the best ways to minimise the risk of claims under the new legislation – and therefore minimise cost and disruption to the business – is to ensure that you are properly prepared for the changes. My top tips for employers are as follows:

1. Review existing policies and procedures to ensure that they comply with the new legislation. Employers who do not yet have an anti-discrimination policy should put one together.
2. Conduct an audit of employees' pay, bonus and other terms and conditions to check that any differences can be explained other than by reference to a protected ground and are not indirectly discriminatory. It is worth noting that any employees who are paid less due to a protected ground could be awarded up to six years' arrears of pay, and the normal cap on discrimination awards would not apply.
3. Organise regular training for employees regarding their obligations under the new legislation. This should help prevent discrimination or harassment from occurring, and may also provide a defence to claims in certain circumstances.
4. Start to think about the types of adjustments that may be required by disabled employees and whether it would place a disproportionate burden on the company to make them.
5. Check whether you are currently asking questions about any of the protected grounds as part of the recruitment process, and if so consider whether these questions need to be amended or deleted.

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