SQUIRE SANDERS

POST-EMPLOYMENT VICTIMISATION IS NOT UNLAWFUL – OR AT LEAST NOT AT THE MOMENT!

According to the EAT, it is not unlawful under the Equality Act 2010 for an employer to victimise an employee once he has left employment. The reason for this is quite simply that the legislation does not expressly outlaw it – in fact it currently says quite the opposite.

In ***Rowstock Ltd & ors v Jessemey***, J claimed that his former employer had unlawfully victimised him by providing a very poor reference about him after he had left employment. He claimed the company had done this because he had initiated proceedings for age discrimination in the Employment Tribunal concerning the circumstances of his dismissal. His claim did not get off the ground, however, because the Tribunal said that the Equality Act does not actually cover post-employment victimisation. J appealed to the EAT.

The problem here lies in the wording of section 108 of the Act which deals with post-employment discrimination and, in particular section 108(7) which expressly states that "conduct is not a contravention of this section in so far as it also amounts to victimisation".

This is not the same wording as under the "old" discrimination legislation, which had been deliberately amended to outlaw post-employment discrimination in light of European case law and the House of Lords' ruling in ***Rhys-Harper v Relaxion Group***.

The EAT in ***Rowstock*** accepted that it was highly unlikely that the legislators ever intended to legislate away (or fail to make any provision for) post-employment victimisation, but ultimately it said it was stuck with the express wording of the legislation and it was not its job to contradict the express wording of the statute. The EAT did consider whether it could "plug the gap" by interpreting the legislation in such a way as to render such treatment unlawful, but on this occasion it said it was unable to do this because the Act expressly excludes post-employment victimisation.

So, where does this take us? On one level, it is good news for employers in that there is currently no recourse for ex-employees who believe they have been victimised under the Act. This is most likely to be relevant where, as in J's case, an employer has refused to provide a reference or has provided a poor reference simply because the former employee has done a protected act (such as bring proceedings) under the Act. Clearly, something will have to be done to change this. The EAT's stance means that the UK is currently in breach of European law by failing to have measures in place to protect ex-employees in these circumstances. The EAT has given the claimant permission to go to the Court of Appeal, but ultimately if it takes a similar approach it will be down to the Government to change the legislation.

In the meantime, employers should continue to tread carefully when dealing with former employees – ultimately this lacuna in the legislation is a technical argument which should only be used as a last resort.