December 2011

Review

Marriage discrimination at work

Is it unlawful for an employer to treat an employee less favourably, not because she is married, but because she is married to a particular man?

We suspect that your answer to this question is probably no, but in fact the Employment Appeal Tribunal in ***Dunn v Institute of Cemetery and Crematorium Management UK*** has recently concluded otherwise. Its decision could have significant implications for employers that have husbands and wives working in the same department or reporting line or those that hire married couples to manage a business.

Mr and Mrs Dunn worked for the Institute. During her employment, Mrs Dunn raised a number of grievances about proposed changes to her contract of employment. She was dissatisfied with the Institute's response and subsequently resigned and brought various claims, including that she had been unlawfully discriminated against on the ground of being married to Mr Dunn contrary to the Sex Discrimination Act 1975. She argued, for example, that the Institute's Chief Executive had produced evidence at her grievance appeal that related to alleged misconduct on the part of her husband. She said that he would not have done this in respect of any other employee.

The SDA 1975 (and the Equality Act 2010 that has replaced it) makes it clear that it is unlawful for an employer to discriminate, either directly or indirectly, against married persons and civil partners "on the ground" that they are married or a civil partner. The marriage provisions were originally introduced back in the 1970s because it was (in the words of the EAT) "not uncommon for employers to dismiss women workers when they got married", no doubt to avoid the patter of tiny feet anywhere near the workplace. In other words, the thrust of the legislation was to protect women who were treated less favourably simply for being married. Hold that thought, as we will come back to it later.

The Liverpool Employment Tribunal rejected Mrs Dunn's claim of direct marriage discrimination, on the basis that any less favourable treatment by her employer was because of her close relationship to Mr Dunn rather then the mere fact she was a married person. It accepted the Institute's argument that she would have been treated in the same way if she had simply been co-habiting with Mr Dunn. The Tribunal's decision accords with the orthodox interpretation of the legislation.

When this matter came before the EAT it had very little to go on in terms of previous authority, as there has been very little case law in this area. It took the view in the end that the Institute had acted unlawfully by treating Mrs Dunn less favourably because she was married to Mr Dunn. It said that it was clear on the facts that Mrs Dunn had been treated as she was because of her relationship to Mr Dunn and that she had been "treated as an adjunct to his family". There was, for example, no reason for the Institute to raise in her grievance proceedings matters relating to Mr Dunn unless they were married (though on the facts this is debatable). The EAT referred to a previous case in which the Chief Constable of the Bedfordshire Constabulary was held to have unlawfully discriminated against a female inspector on marital grounds after she was turned down for a job in the division led by her husband because "as the spouse of a serving officer [she] could not work in the same Division because she would not be a competent and compellable witness against her spouse in any criminal proceedings".

> "The EAT's decision has caused something of a stir because it has arguably widened the scope of the marital status discrimination provisions"

The EAT's decision has caused something of a stir because it has arguably widened the scope of the marital status discrimination provisions. As mentioned earlier, the concept of marriage discrimination was originally introduced to stop employers treating women less favourably because they were married, i.e. not because they were married to a particular man.

Take, for example, the situation where a husband and wife both work for the same employer, but the husband resigns to go and work for a direct competitor. The employer is contemplating moving or dismissing the wife because it is concerned that she may, even inadvertently, pose a security risk and leak information to the rival firm. Leaving aside any issues of fairness for now, would this constitute unlawful marriage discrimination? Prior to the EAT's decision in ***Dunn*** you may have been inclined to say no. After all, the less favourable treatment (the dismissal) was not because the employee was married per se, but because she was in a close personal relationship with an employee of a direct competitor. However, in ***Dunn*** the EAT appeared to reject this approach. It said that to raise the comparison of Mr and Mrs Dunn living together without being married was in its view to go only part of the way in the comparator test.

So, where does this leave us? This decision means that employers need to be cautious when contemplating any form of action against a married employee or one in a civil partnership that is linked in any way to the fact they are married or in a civil partnership e.g. a rule preventing a person from working with his/her spouse to avoid security risks or the reality or perception of bias or favouritism in staff management decisions. An argument that you would have treated somebody else who was in a close personal relationship in the same way may not be sufficient to defeat a claim of marriage discrimination.

And on that cheery note, the very best wishes for the Festive Season from the Labour & Employment team.

FURTHER INFORMATION

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