



## Diversity in the Courts

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Pinnacle hope you all had an enjoyable summer and a good break at some point. This month sees the return of our regular newsletter after its short summer break, and there's plenty to catch up on!

This month, we bring you all the latest news on the Equality Bill, and highlight some of the issues relating to equality and diversity that have been brought before the courts over the past weeks.

In August, the law student with a prosthetic arm who sued upmarket clothing firm Abercrombie & Fitch in a disability discrimination case was triumphant. The tribunal ruled that the firm had both unlawfully harassed Riam Deen and dismissed her without good reason when they relegated her from the shop floor to the stock room because her image did not reflect that of her employers. She was awarded £9,000 in damages.

In South London, the Employment Appeal Tribunal heard how a manager warned an Indian employee who was working her notice that she makes more effort to work out her notice professionally, as their paths might cross again in the future unless she was "married off in India." The court heard how such references to marriage and to India had been made on more than one occasion by the manager. The claimant issued proceedings for harassment on racial grounds, which was upheld by the EAT.

This latter judgement is extremely important in that it sets out how tribunals should analyse whether harassment has or has not taken

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place. If the action in question has the "purpose or effect" of violating a person's dignity or creating a menacing environment on a discriminatory ground, then it will be classed as harassment.

These incidents demonstrate that all employers may be liable for acts of discrimination by their employees and therefore should ensure their policies are up to date and properly communicated to all members of staff.

If you have any doubts about the water-tightness of your organisation's policies or their adoption by your workforce Pinnacle would be pleased to help you ensure you are not the next employer visiting Employment Tribunal - just call 0800 907 1015 or email [contact@pds-hr.com](mailto:contact@pds-hr.com).

## Accommodating Employees With A Disability

A recent decision by the House of Lords means that disability-related discrimination is now very difficult to establish. Employees and job applicants with a disability are now drawing attention to the employer's duty to make "reasonable adjustments" to their premises or their working practices to account for their needs. So how can employers avoid breaching this duty?

You are only obliged to make reasonable adjustments where you know - or could reasonably be expected to know - that the person concerned has a disability and is likely to be considerably disadvantaged in comparison to a person who is not disabled. Your organisation should have appropriate working systems and procedures in place to ensure this information can be gathered confidentially.



Once disability is established, you should consider consulting with the individual, their GP and/or your organisation's occupational health adviser (of you have one) on how the person's ability to fulfil their responsibilities may be affected by their disability, and what reasonable adjustments could be made.

The employee is expected to co-operate if they wish to rely on the employer's duty to make reasonable adjustments. It is possible for you to have knowledge of a disability even if you have not been specifically informed of it.

The range of possible adjustments is limitless, and the Disability Discrimination Act 1995 (DDA) and the Disability Rights Commission (DRC) code of practice provide examples such as:

- Conducting a proper assessment of possible reasonable adjustments;
- Altering hours or the place of work;
- Reallocating certain responsibilities to another employee; or

- Modifying disciplinary or grievance procedures or redundancy selection criteria.

The DDA also provides a list of factors that must be taken into account when deciding whether a step is reasonable, depending on the nature and size of the business, the resulting costs to the organisation and the expected outcome of the adjustment.

Although continued consultation with the employee is recommended, there is no specific guidance on how often reasonable adjustments should be reviewed. The duty to make reasonable adjustments may result in positive discrimination, but this remains subject to the reasonableness requirement.

Because of the confusion of the law in this area it is best to seek good advice from qualified consultants to ensure your organisation is complying with the law. Pinnacle's experts are on hand to guide you and ensure your organisation is not in breach of the Disability Discrimination Act, just a phone call away on 0800 907 1015 or email [contact@pds-hr.com](mailto:contact@pds-hr.com).

## The Equality Bill 2009

The Government is attempting to consolidate all UK discrimination legislation under The Equality Bill 2009, which also includes a number of reforms, of which the two most significant are:

1. Extending the obligations of public sector organisations to promote equality of opportunity, and
2. Widening the scope of age discrimination legislation to cover goods and services.  
We've simplified the Bill and what it might mean to you.

In the main, the obligations of private sector employers will not change a great deal, as most of the Bill's considerable bulk focuses on rewording the law to make it more accessible and easier to understand. Public sector employers, however, are likely to be considerably affected as their duties have been extended to cover three additional discrimination strands: religion, sexual orientation and age, likely to be based on current obligations that apply to race, disability and sex. This is likely to have a knock-on effect on private sector organisations who work with or are contracted to the public sector.

The proposal for compulsory equal pay audits has been dropped, and now the Bill contains a provision to encourage private sector organisations employing more than 250 to publish details about their gender pay gap, hopefully voluntarily. Employers have until 2013 to comply with this, but the Bill contains a power to make this compulsory if organisations have not made sufficient progress by then. Most provisions of the Equal Pay Act have been transferred into the Bill unchanged.



The Bill includes a new general definition of discrimination for employees who are carers that will protect them if they are directly discriminated against, not because of their own characteristics, but because of those of the person for whom they are caring.

It is believed that the Equality Bill will become law in Autumn 2010, but we'll keep you updated and prepare you in time. Now's the time, however, to consider how well prepared your company is to handle diversity issues - and our experts at Pinnacle are here to help you develop and role out sound policies, and to train your staff so they have awareness and knowledge of all the issues around equality and diversity.

Positive action will only be allowed as a tie-breaker when selecting from a group of equally qualified candidates. In such circumstances, employers will be able to choose the candidate from a disadvantaged group.

An Employment Tribunal is likely to look more favourably on an organisation that can demonstrate preventative measures such as educating their staff by investing in the appropriate training. To book a bespoke course for your workforce, or to ensure your policies are up to date, speak to us on 0800 907 1015 or email [contact@pds-hr.com](mailto:contact@pds-hr.com).

## Business Breakfast Briefing & HR Surgery

Pinnacle Development Solutions is pleased to announce that during November it will be holding a free Breakfast Briefing covering an essential area of employment law given these difficult economic conditions, followed by an HR Surgery, allowing you to discuss any issue you may have in further detail and receive some professional guidance from our experts.

Interested? Well, more details will follow in next month's newsletter - or you can email us at [contact@pds-hr.com](mailto:contact@pds-hr.com) for more details.



## National Minimum Wage Increases

With effect from 1 October 2009, the new rates will be as follows:

- For over 21s: £5.80 per hour
- For those aged 18 to 21: £4.83 per hour
- Under 18s who have ceased to be of compulsory school age: £3.57 per hour.

There have also been amendments to the 1999 Regulations in respect of service charges, tips, gratuities and cover charges paid to a worker through the employer's payroll. From 1 October 2009, these payments will not count towards the National Minimum Wage.

Apprentices that have not yet reached the age of 19 and older workers in their first year of an apprenticeship are exempt from the national minimum wage.



The minimum pay rate for apprentices has increased to £95 from £80.

For the purpose of calculating statutory redundancy payments and tribunal basic awards, the cap on a week's pay has increased from £350 to £380.

## Your Questions Answered

"I recently interviewed for a vacant position within my organisation, and made an offer to the successful candidate, which was subject to receipt of satisfactory references and suitable medical clearance. Having received the completed medical questionnaire they have declared they have disability. I am worried that this may have an impact on their ability to perform in the role. As my offer was subject to suitable medical clearance, is there any way I can now withdraw my offer?"

In short that answer is NO. If you do, now they have declared they have a disability which is covered by the Disability Discrimination Act, you would leave your organisation wide open to a Disability Discrimination claim in an Employment Tribunal.

Unlike Unfair Dismissal, there is no upper financial limit to an award at an Employment Tribunal for a Disability Discrimination claim.

You clearly decided to appoint this individual over and above the other candidates, so they must have matched the selection criteria far better than them and you must have felt they would add value to your organisation, which is exactly the way to select and appoint people.

The only reason you now wish to withdraw the offer is because of their disability and the 'potential' impact it may have on their work and your organisation - which would be a clear breach of the Act and discriminatory on your part.

As per the previous article in this newsletter, now that you have been made aware of the persons disability, you have a duty as an employer to understand what the disability is, how it impacts on their day to day life, what, if any impact it may have on their ability to undertake the job, and potentially consider making reasonable adjustments to enable them to undertake the role and/or for the role not to impact their condition any further.

Our advice would be -

### *Step 1 - Speak to the Individual about their disability*

The first and most sensible thing to do would be to speak to the individual. They clearly live with the disability on a day to day basis, and are best placed to tell you how it affects them, how they coped in their previous roles, and what, if any, reasonable adjustments were made or considered for them.

Be sure when you speak to them, you make it clear that you are seeking this additional information in order for you to gain a better understanding of their disability to enable you to determine the level of support they may need.



If you decide to take this step, you MUST gain the consent of the individual prior to arranging the medical and also under The Access to Medical Reports Act 1988, ask for their consent for the Doctor/Consultant to access their medical records, to enable them to obtain a better understanding of their condition and the treatment they may have received.

### *Step 3 - Review*

Once you have received the information from the above two steps, then it's important to discuss it again with the individual, with a view to agreeing a way forward, and enabling them to undertake the role without it impacting their condition further and enabling them to perform in the role as you would wish.

It may be that you have agreed to implement a reasonable adjustment or have decided between to you to allow them to commence the role as its stands and assess how they cope initially.

It's important - whatever decision you take - that you keep the situation under continual review. Do not just make a change to a role or agree something and think that is it and you have discharged your duty as the employer.

Over time their disability may deteriorate and impact on their ability to undertake the role, or the role may change and have a negative impact on their disability.

You must continue to review the situation with the individual to ensure they are coping well, their disability is not getting worse (affecting their ability to undertake the role), and take the necessary steps to improve the situation.

If, after this conversation you still feel you require further information then you may want to consider the next step.

#### Step 2 - Ask them to undergo a medical examination

A medical examination would allow you to ask the Doctor/Consultant about the disability they have, and how it impacts their day to day ability to live, and how it might impact the role you have recruited them for, what the long term prognosis is for the disability, and lastly and most importantly what, if any reasonable adjustment would he/she consider are required now or maybe in the future.

By following the above you will certainly comply with your legislative requirements, but more importantly you will have demonstrated to the individual you value the skills and contribution they can make to your organisation and have a fully committed employee.

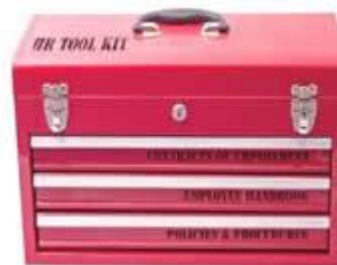
The Disability Discrimination Act is an extremely complex piece of legislation and places many duties on the employer, and the personal and emotive nature of dealing with an individual's disability provides the employer with many challenges. So you should always seek professional advice before trying to deal with these issues.

If you have an issue similar to the above and would like further guidance and assistance with then please contact as us Pinnacle Development Solutions on 0800 907 1015 or email [contact@pds-hr.com](mailto:contact@pds-hr.com).

## Further assistance

If you would like further information on any issues raised by this bulletin, or require advice or assistance with any other human resources matters, please call us today on 0800 907 1015 or [send us an email](#).

And if you'd like complete protection against anything the growing volumes of employment law can find to throw at you, don't forget our [HR Toolkit](#) - the must-have business accessory for 2009!



The information in this newsletter is of a general nature and is not intended to replace professional advice. We recommend you to ask for specific professional advice before taking any action.

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