Current Workplace Issues

GORDON MEURIN

We recently received this article from an associate law firm in the United Kingdom. Because the facts are so unusual, and the case shows how far Human Rights jurisprudence can go, we're reprinting it with the permission of Hammond Suddard and Susan Nickson.

"In a recent Tribunal case the Lord Chancellor has come under fire for appointing his Special Adviser from among his personal contacts rather than by open advertisement and competition. As a result, established recruitment practices, such as head-hunting, are being closely scrutinized and it may be questioned whether they are now in contravention of the sex discrimination legislation.

Following the election of the Labour Government in 1997 the Lord Chancellor sought to appoint a Special Adviser. He appointed Garry Hart, a Partner at a leading firm of solicitors and a personal friend of the Lord Chancellor. It was clear from correspondence that personal knowledge had been a key factor in his appointment. The post was not advertised. Following Mr. Hart's appointment Jane Coker, a Partner in an immigration practice, complained to an Employment Tribunal that she had been discriminated against on the grounds of her sex. Ms. Coker claimed that by failing to advertise the vacancy which existed and by recruiting from among his personal contacts instead, the Lord Chancellor had discriminated against her in the arrangements made for the appointment of Special Adviser because his personal acquaintances were predominantly male.

The Tribunal held that the Ms. Coker had been indirectly discriminated against. This was because the Lord Chancellor had in effect applied a requirement or condition that successful candidates had to be personally known to him. On the basis that the Lord Chancellor's professional friends were predominantly male, this had a disproportionately adverse impact on women. That requirement or condition could not be said to be justified, the Tribunal held, in that being friends with the Lord Chancellor could not be said to be a necessary pre-requisite of being able to do the Special Advisor job. Perhaps the very sensitive nature of the role makes this a questionable finding in this particular case but it is clear that for "lesser" jobs, such justification could be very hard to establish.

The Tribunal held that as a result of the discrimination Ms. Coker had suffered a detriment. Had she been given the opportunity to apply for the post of Special Adviser, her application would have received consideration on its merits. Being deprived of this opportunity was a detriment irrespective of whether or not she would ultimately have been appointed.

The Tribunal's decision is perhaps surprising. It rejected the argument that not only women were adversely affected by this requirement - the overwhelming majority of men were also excluded because the procedure which the Lord Chancellor adopted excluded not only all women but also all men who were not of his personal acquaintance. On this basis the requirement was applied equally regardless of gender and there could not be said to be a disproportionate impact on women. The fact that the circle of friends which the Lord Chancellor

2000, 10235 - 101 Street
Edmonton, AB T5J 3G1
PH: 780.423.3003

400 The Lougheed Building
604 1 Street SW
Calgary, AB T2P 1M7
PH: 403.260.8500

201, 5120 - 49th Street
Yellowknife, NT X1A 1P8
PH: 867.920.4542

www.fieldlaw.com

has chosen over time is predominantly male is not within the remit of the sex discrimination legislation, only the procedure adopted by which the appointment was made.

Despite the questionable legal nature of the Tribunal's decision, its potential ramifications are clear. Can an employer now recruit for any post without advertising? Are head-hunters to become a dying breed? If the logic of the Tribunal is followed then any person could challenge an appointment to a post which had not been advertised despite the fact that the individual had not applied for it and was by no means necessarily more suited to it than the person actually appointed. Internal recruitment would also become a questionable practice. Clearly if this decision stands employers will need to ensure that their recruitment processes, whatever they may be, comply with the SDA. Long-established networking practices and "old school tie" appointments may become a thing of the past. If the Employment Appeal Tribunal supports the comments of the Tribunal in this case that word-of-mouth recruitment tends to perpetuate discriminatory situations and is therefore undesirable, it can be taken as an indication of the way in which these practices may be viewed in the future. Instead the emphasis would have to be on a public appointment process, bound to be longer, more litigious and much more expensive. Having a personal contact who fits the bill, wants and is available for the job may become the start of a recruitment nightmare rather than a way round one."

No Canadian court or human rights tribunal has considered this decision to our knowledge. While it is doubtful that this case will become law in Canada, it does illustrate the far reaching effects of human rights law on our everyday practices. We doubt that it will have the effect of putting internal hiring procedures or head hunters out of business in Canada, but it always has the potential.

Hammond Suddards and Field Atkinson Perraton are both associate members of Commercial Law Affiliates, the world's largest affiliation of law firms with offices in more than 200 cities worldwide. This membership allows Field Atkinson Perraton to meet client needs in other jurisdictions by having competent legal counsel available around the world