

Equality in the DIFC

December 2014 – January 2015

The Dubai International Financial Centre (DIFC) is a federal financial free zone which, in contrast to the other UAE free trade zones, has its own set of unique laws and regulations, including an employment law. Employment matters in the DIFC are governed exclusively by the DIFC Employment Law (Law No. 4 of 2005, as amended) which is loosely based upon the employment regime in England and Wales. One of the guiding principles of the DIFC Employment Law is the promotion of fair and equitable treatment between employers and employees; a principle which the DIFC has sought to achieve through the introduction of express anti-discrimination provisions which prohibit discriminatory treatment or conduct on the basis of an employee's membership of a protected class (specifically, sex, marital status, race, nationality, religion and/or mental or physical disability).

Unlawful discrimination

- Under the DIFC Employment Law, unlawful discrimination against an employee is divided into three separate categories:
- direct discrimination: less favourable treatment on one of the protected classes.
- indirect discrimination: the application of neutral provisions, criteria or practices ("PCP") which put employees of a particular protected class at a disadvantage not faced by others who do not share that particular class. For example, a requirement for all staff to be on-site on a Friday lunchtime would disproportionately affect Muslims as Friday prayers take place at that time (salat al-jumu'ah).

harassment: unwanted treatment or conduct which has the purpose or effect of creating an intimidating, hostile, degrading, humiliating or offensive workplace. The "purpose or effect" wording broadens the scope of the harassment provisions to the extent that notwithstanding the fact that the intent of the treatment or conduct was not to create a hostile or offensive workplace, if the effect on the complainant was that it created just that, such treatment will be sufficient to fall within the net of protection.

The discrimination and harassment provisions do not extend to capture associative or perceptive discrimination; accordingly, the complainant's actual protected characteristic (e.g. disability) does not have to be the reason for the discrimination or harassment. This is in contrast to the position in England and Wales where, for example, an employee denied a promotion because her manager believes she will not be able to focus on her new role due to caring responsibilities for her disabled mother may be able to bring a claim for discrimination because of her association with a disabled person.

Whilst both direct and indirect discrimination are defensible on the grounds of a bona fide (i.e. genuine) occupational requirement or (in the case of indirect discrimination) where the employer can show the PCP to be a proportionate means of achieving a legitimate aim, the offence of harassment cannot be justified on such grounds. The DIFC Employment Law defines a genuine occupational requirement as a requirement reasonably necessary for the normal performance of a particular role or occupation.

An employee has a disability for the purposes of the DIFC Employment Law if he has a mental or physical impairment which has a substantial and long-term adverse effect on his ability to carry out his duties in accordance with the employment contract. An impairment has a long-term effect if it has lasted at least 12 months or is likely to last at least 12 months. If the employer fails to make reasonable adjustments to any physical feature of the workplace or the applicable PCP would, if made, enable the employee to otherwise meet the genuine occupational requirement, this will amount to disability discrimination.

Positive Discrimination

In many jurisdictions the concept of positive discrimination (that is, treating one person more favourably than another because of their membership of a particular protected class) is generally prohibited in the workplace context. Under the DIFC Employment Law, employers are permitted to positively discriminate in favour of disadvantaged groups, including (but not limited to) those that are disadvantaged because of mental or physical disability.

There are also separate (and specific) positive discrimination provisions in the DIFC Employment Law such as reduced working hours for fasting Muslim employees during the Holy Month of Ramadan.

Pregnant employees

Additional protections for pregnant women are laid down in the DIFC Employment Law, which provides that an employer shall not, because of an employee's pregnancy or maternity leave, terminate employment or change the position or condition of employment without the employee's prior written consent. Moreover, an employee has the right to return to work at the end of maternity leave to the same role or a suitable alternative on the same terms and conditions, and with same seniority rights she would have had had she not taken maternity leave.

Remedies for breach of anti-discrimination provisions

Notwithstanding specific anti-discrimination provisions, the DIFC Employment Law fails to expressly provide for any scheme of statutory compensation (such as future loss of earnings or an award for injury to feelings as provided for in jurisdictions such as England and Wales) for breach of the laws prohibiting discrimination. It is therefore, at present, unclear what approach or test the DIFC Courts will apply in determining the level of compensation to be awarded for a successful claim.

Vicarious liability

Under the DIFC Employment Law, an employer may also be held vicariously liable for the actions of its employees (e.g. for bullying or harassment) committed in the course of employment. In order to avoid liability, an employer must demonstrate that the employees responsible for the bullying, harassment, etc., acted outside the course of their employment or that it took reasonable measures to prevent the employees concerned from committing the acts in question.

Practical measures and best practice

From a practical perspective, the DIFC's express anti-discrimination provisions are more likely to promote and enhance the success of a global business than frustrate it and those companies genuinely committed to equal opportunity are less likely to be subjected to complaints of unlawful discrimination. As a minimum, it is recommended that companies operating in the DIFC are mindful of the following best practice:

- awareness and understanding of the DIFC's anti-discrimination framework.
- the introduction of a company-wide equal opportunities policy.
- robust training on the equal opportunities policy across the company but in particular, bespoke and periodic training for those within the organisation who will be tasked with applying and implementing the policy in practice (such as managers and HR professionals).
- periodic review and auditing of such equal opportunity policies and practices to determine the level of compliance within the business and issues requiring resolution going forward.