

# Cherchez la femme

As discrimination claims by female partners are on the rise firms should ensure they can produce evidence of best practice and consistent processes if faced with such a claim, says **Clare Murray**

**TWENTY-ONE DAYS**; ten days; two hours: the diminishing periods of advance warning that many equity partners are now being given by senior management of their imminent departure from the firm.

The impression in some cases is that an equally short amount of time may have been dedicated by senior management to assessing the legal risks, planning the strategic and tactical handling, and documenting the selection process for those partner departures.

The consequent vacuum of supporting evidence behind the decision-making process can place those firms at greater potential risk of discrimination allegations and (as tribunals generally prefer written evidence), can often severely undermine the firm's possible defence to such claims.

## Finding flaws in the selection process

Discrimination cases are often cracked open by a well-placed written grievance by the partner, a subject access request under the Data Protection Act 1998 and a detailed discrimination questionnaire submitted to the firm. Such standard processes frequently expose any vulnerabilities and flaws in the firm's selection process.

Professional service firms are often reluctant to provide answers to such information requests or any meaningful rationale behind the decision-making process, typically because they fear – sometimes unnecessarily, that the reasons and documentation they have may not withstand detailed scrutiny. Best practice steps such as those outlined here should go some way to helping firms to minimize the risk of successful discrimination claims by exiting partners.

Over recent months an increasing number of female partners have expressed the view that they have been unfairly and particularly targeted by the processes for selecting partners for exit. These partners mostly appear to fall mainly into certain key categories:

**1.** There are those female partners who have taken periods of maternity leave and whose financial performance has been affected both by their absence and by the time it often takes to rebuild their figures on their return from leave. Junior equity partners, who are

still building their practice and may need longer and need more support to re-establish themselves on return from maternity leave, seem to be particularly affected by financial-based partner selection criteria. And those female partners who take two periods of maternity leave within a period of three to five years again appear to be more frequently affected by financial-based selection criteria – either due to the reality of their practice and performance being affected by two or more relatively close periods of leave or by the unfair perception of lack of commitment to being a partner.

**2.** Female partners with childcare responsibilities who work part time are often more likely to be adversely affected by financial performance selection criteria; we have seen cases where, in their haste, the firm actually forgot that the partner worked part time and that a pro rata adjustment needed to be made to financial targets. On reassessment, they discovered in one case that the partner was actually overachieving against targets; however the damage was already done to the relationship with the partner by the mistake.

**3.** An increasing number of female partners in predominantly male firms or departments have suddenly been faced with an unexpectedly negative partner development review, which is then used as the basis for their selection for departure. A history of decent or even excellent appraisals may have been ignored in the firm's decision to select in such circumstances.

## Discrimination protections for female partners

Section 11 of the Sex Discrimination Act 1975 makes it unlawful for a firm (including an LLP) to discriminate against female equity partners in relation to, among other things, expulsion, or by subjecting them to any other detriment, including for example by de-equitization. As the courts have recognised that direct evidence of discrimination is rare and the tribunals have to infer discrimination from all the material facts, a female partner is assisted somewhat by the burden of proof in discrimination cases.

She has to prove facts from which inferences could be drawn that the firm has treated the female partner less favourably on the grounds of sex. If she does so, then the burden of proof shifts automatically to the firm, which must then prove on the balance of probabilities that the expulsion or de-equitization was not on the grounds of sex. If the firm does not provide a satisfactory non-discriminatory explanation for the treatment, the tribunal must draw an inference of discrimination against the firm.

Therefore if the firm does not have a thorough, well-thought-out and consistently applied system and paper trail to support the assessment and selection process for partner exits, it will find itself at a significant disadvantage in trying to show a non-discriminatory reason for selection.

If the female partner is successful, her main remedy is loss-based compensation, subject to a duty to mitigate, but without any maximum limit. Given the challenges in the current market, this could run to a number of years' profit share, including any shortfall suffered if a lesser paid role elsewhere is secured. There is also normally a relatively modest award for injury to feelings. Subject to certain limited exceptions, any claim must normally be brought to an employment tribunal within three months of the relevant act of discrimination.

However, while the recently publicised £40m race claim against a leading firm of accountants may suggest otherwise, the greatest cost to a firm facing any discrimination claim is usually the potential long-term damage to its brand, its reputation, its recruitment and retention of female talent, and its ability to satisfy the exacting equal opportunity requirements of multinational corporations in new client tendering processes. Taking simple best practice steps to prepare for partner exit processes and minimize the risk of discrimination claims should be a core component of any firm's risk management and business planning processes.

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