

The Equality Act 2010

The Equality Act received Royal Assent on 8 April 2010, shortly before the Labour Government left office. Its purpose is to consolidate and strengthen the law, by replacing the nine existing major pieces of discrimination legislation with one set of rules aimed at achieving greater equality, as well as introducing some new concepts. Whilst there remains uncertainty as to whether the Coalition Government will bring all of its provisions into force, the main parts relating to employment law take effect on 1 October 2010.

Consolidating discrimination law

Key concepts

The Act is based on nine "protected characteristics" (a term used throughout the Act), which are essentially the ones we know under existing discrimination legislation:

- age
- disability
- gender reassignment
- marriage and civil partnership
- pregnancy and maternity
- race
- religion or belief
- sex
- sexual orientation.

Following this list, general principles, similar to existing ones, are set out to show what categories of people are included in the protected characteristics.

In relation to the protected characteristics, the well-known concepts of direct discrimination, indirect discrimination, harassment and victimisation are set out. However, several important changes are made to these concepts:

- **Direct Discrimination** includes less favourable treatment "because of" a protected characteristic. This covers less favourable treatment of a person:
 - because they are associated with someone with a protected characteristic, e.g. an employee caring for a disabled child or an elderly relative (however there is an exception relating to the provision of childcare for employees)
 - based on a mistaken perception that the victim has one of the protected characteristics.

Previously this protection did not apply in some UK discrimination strands, but it now applies to all the protected characteristics, with the exception of marriage and civil partnership (where the victim has to be themselves married or a civil partner).

- **Dual discrimination** is a new concept of direct discrimination because of a combination of two relevant protected characteristics. Thus a Muslim man might be refused a job as an air steward because he is stereotyped as a "terrorist" but separate claims of direct race or sex discrimination might not succeed if an employer can show that it employs Muslim women and non-Muslim men in the same role. This new provision allows a discrimination claim on the basis of the two protected characteristics taken together (except those of marriage and civil partnership, and pregnancy and maternity). This provision is currently under review by the Government and it is not clear when or even whether it will be brought into force.
- **Harassment** includes unreasonably failing to prevent the harassment of an employee by a third party in the course of their employment (e.g. a customer or supplier) if it occurred on more than two occasions (whether or not by the same third party) and the employer was aware of that. This extends the liability for harassment by third parties under the Sex Discrimination Act 1975 to the other protected characteristics (except marriage and civil partnership, and pregnancy and maternity). Harassment is also where there is unwanted conduct "related to" a relevant protected characteristic, which would cover harassment based on association or a mistaken perception, as well as, for example, a person who witnesses racial abuse if it causes an offensive environment for him or her.
- **Victimisation** is treated as a claim in its own right, not as a form of discrimination, and there is no need for a comparator in such a claim. The claimant only has to have suffered a detriment for doing or being suspected of doing a "protected act" (e.g. alleging a breach of the Act, giving evidence or bringing proceedings under the Act, or seeking/making a "relevant pay disclosure" – see Pay Secrecy Clauses below).
- **Instructing, causing or inducing** discrimination, harassment or victimisation is prohibited for all the protected characteristics.

Disability Discrimination

As well as the general changes to discrimination law, there are several important changes in particular to disability discrimination.

Definition of disability

The definition of "disability" under the Equality Act 2010 is largely the same as under the Disability Discrimination Act 1995 (DDA). However, the requirement that an impairment has to affect one or more of a specified list of capacities (such as mobility, manual dexterity, physical co-ordination, speech etc) has been removed. There simply has to be a physical or mental impairment which has a long-term and substantial adverse effect on the person's ability to carry out day-to-day activities.

Indirect disability discrimination

All of the protected characteristics now have the same definition of indirect discrimination, apart from pregnancy and maternity. As a result, indirect disability discrimination, which did not exist under the DDA is introduced as a new concept. Indirect Discrimination applies where a "provision, criterion or practice" puts or would put people of the claimant's group, and the claimant themselves, at a particular disadvantage, unless it can be shown to be a "proportionate means of achieving a legitimate aim". In disability cases, the group must have (or have had) the same disability.

Discrimination arising from disability

The DDA concept of 'disability-related discrimination' is replaced by a similar concept of 'discrimination arising from disability'. This occurs where a person (A) treats a disabled person (B) unfavourably because of something arising in consequence of B's disability.

B does not need to show the treatment was less favourable than that of a comparator. Under the DDA, a House of Lords decision had meant it was harder for employees to succeed in disability discrimination claims because of how a comparator was interpreted. 'Discrimination arising from disability' under the Act essentially restores the law to its pre-2008 position.

There is a defence if the treatment can be shown to be a proportionate means of achieving a legitimate aim, or the employer did not know, and could not have been expected to know, that B had the disability.

Duty to make reasonable adjustments

The Act contains similar provisions to the DDA duty to make reasonable adjustments for persons with a disability. However, there is a new duty for employers to provide an auxiliary aid if without that aid the disabled person would be at a substantial disadvantage (e.g. computer software). Although technically new for employers, this really only reflects current practice.

Pre-employment health enquiries

A new provision prevents employers from asking job candidates questions (including orally) about their health (including any disability) before they are offered a job. Asking questions is not of itself disability discrimination, but if an employer acts on a candidate's answer, it may be. There are exceptions where enquiries are in order to make reasonable adjustments to enable a disabled person to participate in the recruitment process, or to establish whether they will be able to carry out a function intrinsic to the work, or for monitoring diversity in job applications, or for supporting positive action, or where the disability is an occupational requirement.

Employers who do ask health or disability-related questions before the job offer stage might be required to prove to an Employment Tribunal that they did not discriminate if the individual did not get the job, which is not likely to be easy.

This provision is intended to prevent pre-employment questionnaires being used to discriminate against people who declare a disability before selection for interview or other stages. Employers would be able to screen people about their health once a job offer has been made in order to make reasonable adjustments or where necessary withdraw the offer, provided this can be properly justified.

Extending discrimination law

A new equality duty on public bodies

Previously public authorities were subject to three separate equality duties designed to tackle discrimination and promote equality in the fields of race, disability and gender. These separate duties are replaced by a single duty that also extends to cover all the protected characteristics with the exception of marriage and civil partnerships. The Equality Duty requires public authorities to have due regard to the need to eliminate discrimination, harassment and victimization, advance equality of opportunity and foster good relations between different groups. The new duty is expected to come into force in April 2011, with specific duties set out in regulations.

The previous pledges that requirements would be laid down for procurement decisions, so as to ensure that contractors demonstrated equality standards and contributed to the delivery of the Equality Duty, has been dropped. Instead organisations will have the freedom to buy goods and services in the way they see fit. However, they would have to publish information on their performance of the equality duty every year.

Public sector socio-economic duty

In addition to the single Equality Duty, the Act opens with a new clause obliging key public authorities to have due regard to reducing socio-economic disadvantage when making strategic decisions about the exercise of their functions. According to the previous government this is designed to close the gap between rich and poor. There is no definition of "socio-economic disadvantage" and each public body specified is to determine which socio-economic inequalities they are in a position to influence. The Conservatives unsuccessfully tried to remove this duty during the passage of the Bill, so it is doubtful that this provision will be brought into force.

Pay secrecy clauses

So-called 'pay secrecy clauses', which prohibit discussions about pay between colleagues or with ex-colleagues, will be banned insofar as a person seeks to make a "relevant pay disclosure". A relevant pay

disclosure is a disclosure made in order to find out whether or to what extent there is a connection between pay and a protected characteristic. A person who makes or seeks a disclosure is protected from victimisation.

This is not a blanket ban on pay secrecy clauses, which could still be effective in so far as they prevent disclosure of pay to competitors etc.

Caste discrimination

The Act includes a new power to outlaw caste discrimination as part of the race discrimination provisions. The amendment does not of itself outlaw caste discrimination but the power is given for this to be introduced in the future. A report looking into the issue to see if action is needed is due to be published, and if caste discrimination is deemed necessary, a consultation and secondary legislation would ensue.

Default Retirement Age

The current Default Retirement Age (DRA) exceptions to age discrimination are contained in a Schedule to the Act. However, the Government has announced its intention to phase out the DRA and the procedure relating to the right to request to work beyond retirement age, starting in April 2011. By October 2011, there would be no DRA. Contractual retirement ages would have to be justified as being a proportionate means of achieving a legitimate aim, and there would have to be a fair reason for dismissal as well as a fair procedure. Retirement will no longer be one of the potentially fair reasons for dismissal. Whilst this will occur after implementation of the Act, it should be borne in mind by employers as early preparation for this will be crucial.

Extension of prohibition on age discrimination

Age discrimination is already prohibited in the field of employment. This will be extended to cover the provision of goods, facilities and services and carrying out public functions in relation to people aged 18 and over. It is recognised that it will be important not to prevent discrimination that may be important for other public policy reasons such as free bus passes or swimming for over 60s or flu jabs for older and younger people. For this reason although the necessary powers are included in the Act, they will be implemented in phases from 2012.

Provision of information on gender pay

Public authority employers with 150 or more staff will have to report on gender pay, ethnic minority and disabled employment as part of the Equality Duty.

The Act also contains a controversial provision requiring private sector employers with 250 or more employees to publish information showing the differences in pay between their male and female employees. Employers who do not comply could face civil or criminal penalties. The previous government had pledged to use the provision if voluntary reporting on equality did not improve sufficiently by 2013. Whether this will be brought into force in amended form or at all is unclear: the views of the Conservatives and the Liberal Democrats on it before the election were different and a united Government policy has not been announced.

In the mean time, the Equality and Human Rights Commission (EHRC) has made recommendations on voluntary reporting following consultation.

Extension of 'positive action'

The Act allows employers to recruit a person from an under-represented group over another candidate who is "as qualified as" them ('positive action'). However employers must be able to show they do not have a general policy of treating people with a protected characteristic more favourably than others ('positive discrimination'), which remains unlawful. They also have to show that the action is a proportionate means of achieving the aim in question.

Again it is not clear whether the Coalition Government will bring this provision into force. If it does, it is extremely difficult to envisage how this will work in practice, with most commentators of the view that it will be hard to show that the candidates are as qualified as each other and that it will be far too risky for

employers to use positive action in a recruitment exercise. In any event, if brought into force, positive action will be entirely optional.

New enforcement powers for Employment Tribunals

Employment Tribunals can currently make recommendations in discrimination cases if they find for the Claimant, but only if those recommendations will directly benefit the successful claimant. Since the Claimant has often left employment, this power is limited. Under the Act it is extended to allow for recommendations benefitting the employer's wider workforce with a view to preventing similar discrimination in the future. Failure to comply with a recommendation within a specified timescale could result in an award of compensation, or compensation being increased. However this provision does not apply to equal pay claims.

Recommendations will be included in the Tribunal's judgment, which are intended to be available on their website. Future Claimants or their representatives would therefore be able to search for any existing recommendations prior to bringing a claim.

What action do employers need to take?

Employers should:

- review existing policies and procedures and amend them to account for the new provisions in the Act
- review recruitment procedures and documentation to ensure pre-employment health enquiries are not used or can be justified under the Act. If Genuine Occupational Requirements are relevant to your organisation, please note there have been some changes to these – contact us for more information
- review any pay secrecy clauses and consider their purpose: should employees be released from them, or should such clauses be amended in the light of "relevant pay disclosures"?
- train employees throughout your organisation on the changes and new obligations, particularly in respect of discrimination based on association or perception, harassment by third parties, and disability discrimination
- consider introducing equal opportunities monitoring forms if you do not already do so and ensure you have a system in place for using the information gathered to promote equality in your workplace
- ensure you are familiar with ACAS/EHRC Codes of Practice and Guidance on the Act.

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