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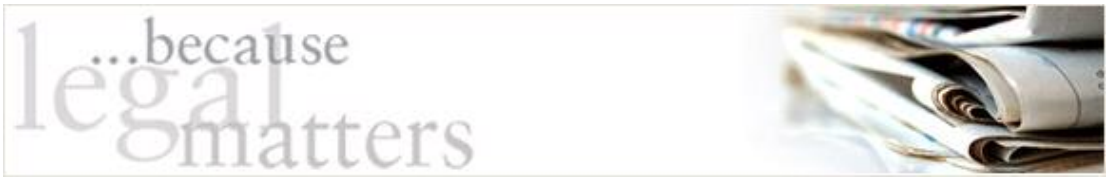

The Equality Act 2010

The Equality Act 2010 consolidates 40 years of discrimination law. Trainee Solicitor Chris Elwell-Sutton outlines the main changes brought about by the new Act.

In the 40 years since the Equal Pay Act of 1970, a host of statutes, regulations and court judgments have appeared, gradually building up a body of law governing matters relating to equality and discrimination in the workplace. As workplaces have become more diverse environments, the general aim of these legal developments has been to stamp out discriminatory and prejudiced practices at work and to ensure that all employees are treated fairly.

One main problem with this legal regime, from an employer's point of view, is that this body of law has become increasingly confusing and inconsistent. The disparate nature of the legal authorities involved has meant that even the most responsible employers have found it difficult to be sure that their policies and decisions in relation to these issues are always compliant with the law.

There has also been a perception among lawmakers that the existing regime was too weak in some areas to offer an adequate level of protection to employees in certain circumstances.

It was with these issues in mind that The Equality Act 2010 (the Act) was passed, becoming law on 1st October 2010. The Act has a clear dual aim, both "to *simplify and strengthen the law*" and to replace all previous legislation in this area. In the long run, this is likely to make it easier for employers to understand and comply with their responsibilities, but it is crucial for anyone who employs staff to understand and apply the changes laid out in the Act immediately in order to avoid incurring unwanted – and expensive – legal liabilities.

Protected characteristics

The protection offered by the Act applies to what it calls "protected characteristics". These are the personal characteristics that can give rise to discrimination or the other unlawful activities described in the Act. The eight protected characteristics are:

- Disability
- Marriage and Civil Partnership
- Pregnancy and maternity
- Race
- Religion or belief
- Sex
- Sexual orientation
- Gender reassignment

Discrimination

The concept of "discrimination by association" means that an employer can be guilty of discriminating against an employee because of their association with another person with a protected characteristic.

This concept was already in force in relation to race, religion or belief and sexual orientation. Now it also covers age, disability, gender reassignment and sex. The definition of “perception discrimination” has been similarly widened, so to discriminate against an applicant because he looks middle-aged, even though he is in fact far younger, is still age discrimination.

Harassment

Defined in the Act as “unwanted conduct related to a relevant protected characteristic, which has the purpose or effect of violating an individual’s dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for that individual”, harassment is clearly unacceptable in the workplace. There are two main changes introduced in the Act in relation to harassment.

First, harassment no longer has to be directed at an employee for that employee to make a claim against the employer. Employees can now make claims against employers on the basis of the atmosphere created by the harassment of another employee. Secondly, employers' liability for harassment of their staff by third parties (which already applied to sexual harassment) has now been extended to cover age, disability, gender reassignment, race, religion or belief and sexual orientation. In all these respects, employers must take all reasonable steps to stop harassment of their employees.

The increasingly wide and serious liabilities for employers in these areas mean that it would be sensible for employers to develop a zero-tolerance approach to matters of discrimination and harassment – and to be seen to have communicated this clearly to all members of staff.

Disability

A great deal of change has taken place under the Act in relation to the rules governing how disabled employees and job applicants must be treated.

First, the definition of disability has changed so that it is more broadly understood than before. A disability is now defined as a physical or mental impairment which has a substantial and long-term adverse effect on a person's ability to carry out normal day-to-day activities. This could include, for example, dyslexia.

Secondly, disabled people are now protected from indirect discrimination. Direct discrimination, in which a person is treated differently simply because he or she is disabled, is already unlawful. Indirect discrimination, on the other hand, occurs when a “provision, criterion or practice” applied by an employer puts the employee, and others who have the same disability, at a “particular disadvantage” compared with other employees. In such a case, even though the policy may be applied across the company, the disadvantage to the employee in terms of the effect of the provision, criterion or practice means that unlawful discrimination has nonetheless occurred.

Thirdly, the Act reverses the precedent set by the House of Lords' judgment in London Borough of Lewisham Council v Malcolm, in that disabled people are now protected against unfavourable treatment “*because of something arising in consequence of*” their disability.

In practice, this could mean that even if an employer can demonstrate that they would have treated a disabled employee's non-disabled counterpart in exactly the same way, the fact that the treatment arises because of something that flows from the disability makes this unfavourable treatment unlawful. For example, to discipline an employee with dyslexia for making spelling mistakes may now be unlawful – even though an employee without the condition would have been disciplined for exactly the same errors – since the spelling mistakes arose as a consequence of the employee's disability.

As with other protected characteristics, however, indirect discrimination in relation to disability can be justified if an employer can demonstrate that it is a “proportional means of achieving a legitimate aim”. For example, a spelling test that puts job applicants with dyslexia at a disadvantage could perhaps be justified if the job in question was a newspaper sub editor – a role in which accurate spelling is crucial – but would be unlikely to be justifiable in the application process for a job as a machine operator, in which spelling is far less important to the role.

Finally, in a move that may have a particularly significant effect on disabled job applicants, the Act makes it unlawful for employers to present job applicants with health questionnaires, or to ask questions about their health, before making them an offer of employment, except in certain special circumstances. If you require further clarification on this issue, please contact our Employment team.

Quite apart from the obvious ethical imperative not to discriminate against disabled people, the business case for employers to take serious note of the above changes could hardly be clearer. 2009 saw a 12 percent rise in disability discrimination claims with the average award against employers amounting to more than £50,000.

Gender reassignment

Previous employment law provided protection for transsexuals – people who live and act as members of the opposite sex and who may undergo surgery to change their sex. However, the Act has done away with the requirement that only those transsexuals who are under medical supervision are protected. It is now

unlawful to discriminate against a male employee who dresses and lives as a woman, even if the man has no intention of undergoing gender reassignment surgery.

Furthermore, any employee who is considering gender reassignment surgery must be afforded the same freedom to take time off for the surgery, or for other appointments connected with it, as an employee with an illness or other medical appointment. Finally, like a person's disability, a person's transgender status now attracts protection from indirect discrimination.

Pay secrecy clauses

It is not unusual for employers to bar their staff from discussing their salaries with each other through pay secrecy clauses in employees' employment contracts. However, the Act renders these clauses unenforceable if they attempt to bar staff from discussing discrepancies in pay that may be related to protected characteristics.

For instance, if a worker believes that he is being paid less than a colleague on account of his race and asks the other colleague how much he earns in order to verify his suspicions, he cannot be disciplined for doing so, regardless of any term in his employment contract.

The future

In their attempts not to discriminate against members of the groups most often defined as victims of the activities outlined in the Act, employers sometimes run the risk of discriminating against other groups. For example, when making redundancies, the law firm Eversheds aimed to ensure that a female solicitor was not discriminated against on the grounds of pregnancy by giving her top appraisal grades for the period on which she was on maternity leave. A male colleague made redundant as a result established that this process amounted to sex discrimination and the firm was ordered to pay him a six-figure sum. The added rigour of the new Act may well lead to actions by employers that invite more claims of this nature.

The above outlines some of the main changes currently in force. Positive action, combined discrimination and new rules for public sector bodies are all among the elements of the Act that will be implemented over the course of the next two years. We will provide further updates on these developments in due course.

For the moment, it is clear that, in some cases, time, effort and expense will be required for employers to ensure they are fully compliant with the new equality legislation. It is equally clear, however, that failure to get one's house in order could be a costly mistake.

If you are an employer requiring practical advice on how to make sure your procedures, decisions and recruitment processes are compliant with the new Act, please contact our Employment Team for an informal initial chat. We will also be happy to advise you if you are an employee, former employee or job applicant and believe that you have received treatment that is contrary to the Act.

Our fully-resourced Employment Team will be pleased to answer any questions on related matters: please contact the following on +44 (0)20 7749 2700 or email them

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