

Review

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Summer 2010

Discrimination after the Equality Act 2010 What's New?

Just in time before the last election, the Labour Government managed to complete all of the Parliamentary stages of the Equalities Act 2010 and it has now received Royal Assent. The Act replaces some existing anti-discrimination legislation and aims to remove inconsistencies, making it easier for people to understand, enforce and comply with discrimination law.

The Equality and Human Rights Commission (EHRC) have also developed Codes of Practice and non statutory guidance to provide employers and employees with guidance as to how the Act will work in practice.

The Act is currently scheduled to come into force from October 2010. However, the new Government

has indicated that several of the provisions in the Act are not likely to be implemented and in particular those measures regarding Equal Pay, Positive Action and increased duties on public bodies. The latest updates can be found on the Government Equality Office website at www.equalities.gov.uk/equality_bill.aspx

This article contains a summary of some of the key changes the Act will make to employment law, which are correct at the time of writing. The Act will make some changes in other areas which are beyond the scope of this article.



Protected Characteristics

The law will continue to protect people against discrimination on the basis of what the Act calls a “characteristic” of age, disability, gender reassignment, marriage and civil partnership, pregnancy and maternity, race, religion or belief, sex and sexual orientation. These characteristics

are currently protected against discrimination in existing legislation. However, instead of having the legal definitions and tests for discrimination contained in several different acts, the Act will contain all of the relevant provisions.



Employment Tribunals

The Act will give Employment Tribunals the new power to make recommendations to an employer to make changes in the future for the benefit of employees other than the Claimant before them. This means that, for example, where a female employee has left her employment as the result of sex discrimination, the Tribunal can compensate the Claimant who brought the case and also recommend that the employer changes their discriminatory policies in the future so that other employees will not suffer the same discrimination.

The Tribunal will not have any powers to ensure that any employer carries out the recommendations and other employees may not necessarily be aware of any recommendations.

However, this may still benefit future Claimants. For example, Claimants will be able to ask in discrimination questionnaires whether an employer has been required in the past to follow a recommendation by a previous Employment Tribunal to withdraw a particular discriminatory policy. If that employer has failed to follow those recommendations and as a result a new Claimant suffers from discrimination which the recommendation was designed to avoid, it may strengthen that Claimant's claim that they have been discriminated against.

The Act repeals the pre existing provisions in discrimination legislation relating to territorial extent and application and (with the exception of

offshore work and work on hovercraft and shipping - but not aircraft) is silent as to the territorial scope of its employment provisions. This will leave it to Tribunals to apply relevant EU law, from which UK discrimination law largely derives. The test, as established by the decision of the ECJ in the case of Boukhalfa (Case C-214/94) is that EU law applies to activities outside the EU as long as the employment relationship has a “sufficiently close link” with the member state taking into account factors referred to in that decision. Unfortunately this does leave uncertainty and possible inconsistency with the position for unfair dismissal in which jurisdiction is generally determined by where the employee is ‘based’.

Disability Discrimination

The Act contains some key changes to existing disability discrimination law.

The Act will change the definition of ‘disability’ for the purposes of making a disability discrimination claim. Currently, a Claimant has to prove that they suffer from an impairment which affects their ability to do specific ‘normal day-to-day activities’, of which at least one must be included in a specific list in the Disability Discrimination Act. The Act has removed this list, which should make it easier for Claimants to make a claim as they will be able to use their own examples of their ‘normal day-to-day activities’ they have difficulty doing in order to prove they have a disability.

The Act will introduce a new claim Claimants can make if they have suffered discrimination ‘arising from a disability’. This provision is designed to overturn the notorious House of Lords decision in the case of London Borough of Lewisham v Malcolm so that Claimants no longer need to prove that they were not treated the same as a person who does not have their disability. Instead, Claimants simply have to prove that they suffered from a disability and they received less favourable treatment because of something which arose as a consequence of their disability. However, Claimants will still have to prove that their employer knew or reasonably ought to have known of their disability. Employers will also still have a defence if they can prove that the less favourable treatment was justified.

For the first time the Act will allow Claimants to make claims for indirect disability discrimination where an employer applies a provision, criterion or practice to all employees which is discriminatory and puts the Claimant at a disadvantage compared with other people who do not share the Claimant's disability. Claims for such indirect discrimination are currently allowed in relation to other characteristics (for example, sex or age discrimination) but the Act will allow Claimants to make this type of claim in relation to disability discrimination for the first time.

The Act will not change existing law relating to direct disability discrimination; therefore a Claimant will still succeed in their claim if they can prove that their employer treated them less favourably than another person who did not have their disability because of their disability.

Employers will still have a defence to claims for indirect discrimination (as in the case of age discrimination direct discrimination) if they can justify the less favourable treatment. The Act will harmonise the law relating to this so that the same test will apply to all types of discrimination. Therefore an employer will only be able to justify any less favourable treatment if the reason for that treatment is ‘material and substantial’, which is likely to be relatively difficult to prove. However, this test will allow for Tribunals to assess this in all the circumstances of the case, which will allow for some subjectivity.

The Act will also make some amendments to the duty of employers to make reasonable adjustments, so that if a disabled person is put at a substantial disadvantage compared to a non disabled person because they are not provided with an auxiliary aid, an employer will have a duty to take reasonable steps to provide that aid. As with the above claims, a Claimant must also prove that the employer knew or reasonably ought to have known of their disability to succeed in such a claim.

The Act will also make it illegal for employers to ask potential candidates for a job about their health prior to employing them. However there is an exception. Employers may ask pre-employment questions about a candidate's health if they can prove it is necessary to establish whether the applicant will be able to carry out a necessary duty for the work concerned. If that is the case, the employer will be able to ask those questions without the employee being able to make a claim for this reason.

However, if that Claimant then makes a claim for disability discrimination, they may be able to use the fact that they were asked such questions as evidence to support such a claim. For example, a disabled employee who answers questions about their health prior to their employment and is discriminated against because of their disability may be able to use the pre-employment health questionnaire to prove that their employer knew of their disability.



Direct Dual Discrimination

It is now uncertain whether provisions relating to dual discrimination will be brought into force. If they do become law, the Act will introduce a new right for Claimants to claim for dual discrimination where they have suffered direct discrimination on the basis of a combination of two protected characteristics.

For example, a black woman who has been directly discriminated against on the grounds of her gender and race will not have to make two separate claims for race and gender discrimination but will be able to make one claim for dual discrimination. Provided she can prove that she has suffered discrimination

for reasons of at least one of her characteristics (e.g. on the grounds of her gender), then her claim will succeed. Additionally, where as a part of their discrimination claims Claimants are required to prove that a person who did not have their protected characteristic would not have been put at a disadvantage as they were, they will only have to provide one example of such a person, rather than two. It is hoped this will make it simpler and therefore easier for Claimants to make and succeed in claims for discrimination.

It must be noted that claims for dual discrimination may only be made in relation to claims for direct

discrimination, and then only two protected characteristics can be combined. Therefore, for example, a Claimant who is black, female and disabled will not be able to include all three claims for discrimination in their claim for dual discrimination.

Additionally, certain characteristics will not be able to be combined with others. (For example, a pregnant woman will not be able to make a claim for dual discrimination on the grounds of her gender and her pregnancy.) However, such Claimants will still be able to bring separate claims for discrimination as they did before.

Direct Sex Discrimination and Equal Pay

Other provisions of the Act which may not now be implemented relate to Equal Pay. Currently under the Equal Pay Act, to succeed in their claim the Claimant employee must name a 'comparator' (i.e. a male colleague who is doing equivalent work to the Claimant but is being paid more than the Claimant). If the relevant provisions in the Act are brought into force, the Act will give female

Claimants a new ability to make a claim for direct sex discrimination in relation to their pay under their employment contract. Therefore a Claimant will not have to name an actual male colleague who she can compare her salary with and may succeed in her claim if she can prove that she is paid less than a man would be for the same work.

Clauses in contracts which state that employees cannot discuss their pay with others at work will also become unenforceable. This should mean that Claimants will be able to make claims more easily because they will be able to directly compare what they are paid and other employees who discuss their pay with colleagues will also be protected from their employer taking action against them.

Positive Action

It is now doubtful whether provisions relating to Positive Action will be implemented.

However if the relevant implementing legislation is completed the Act will allow an employer to appoint or promote a candidate who is from a minority ethnic background instead of another candidate who is not from that same background, provided those two candidates are 'as qualified'

as each other. It must be emphasised that these actions are different from positive discrimination, which will still be illegal, so for example an employer will not be able to promote such a person if they are not 'as qualified' as another simply because they are from a minority ethnic background.

Even if these provisions become law, it seems unlikely that employers will take Positive Action

because they will not want to take the risk that a candidate who is unsuccessful may make a claim for positive discrimination.

However, employers may be able to use provisions similar to existing legislation to provide training and encouragement to all employees in order to help under-represented groups in the workforce.

Public Sector Duties

It appears that provisions relating to Public Sector Duties are very unlikely to be implemented, however if they do become law the Act will impose a new duty on public sector bodies to consider 'socio-economic' inequalities when they are making 'strategic' decisions and make such decisions based on these considerations.

Although these provisions do not expressly relate to employment law, they may still be relevant to employees. For example, when deciding whether to make redundancies a Local Authority may have to consider the impact of targeting employees who are from an economically deprived area for redundancy.

Individuals will not be able to use these new provisions to make a claim to an employment Tribunal or County Court for compensation. However, they may be able to make an application for Judicial Review.

The Future

The Act it may be less radical than it was originally intended if some of the key provisions are not implemented. However, the Act will almost certainly simplify existing legislation and give Claimants some new useful rights, which will help Claimants to make claims in the future.



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