

The Future of Equal Rights

Sarah Empson looks at the main changes introduced by the new Equality Act and its implications.

Pushed through Parliament in the final wave of bills before the General Election, the Equality Act 2010 (the Act) is employment law's current hot topic. The purpose of the Equality Act 2010 is to consolidate, harmonise and expand existing discrimination law and bulk of the legislation relating to it is expected to come into force in October 2010. However, the Liberal Democrats and the Conservatives have divergent views on various aspects of the Act. What effect will the Coalition Government have on all of this? The Liberal Democrats state that they would have liked the scope of the Act to have been wider, yet the Conservatives think that it has gone too far and made a pre-election promise not to enact all aspects of it. We currently lack a single set of rules relating to the various strands of discrimination and there have been many inconsistencies between the various Acts. This article focuses on the main substantive changes proposed in respect of current employment law.

Definitions

There are a number of new definitions to take on board. The grounds on which discrimination will be deemed to be unlawful will be known as 'protected characteristics.' These are all currently protected by discrimination legislation and include: age, disability, gender reassignment, marriage and civil partnership, pregnancy and maternity, race, religion or belief, sex and sexual orientation. So far as gender reassignment is concerned the definition will no longer require a person to be under medical supervision to come within it.

Direct discrimination

The definition of direct discrimination will be: *'a person (A) discriminates against another person (B) if because of the protected characteristic, A treats B less favourably than A would treat others.'* Current legislation contains a definition of direct discrimination using the phrase 'on the grounds of' rather than 'because of.' The current change of words has

been explained as making the Act more accessible to the 'ordinary user.' It is stated not to change the legal meaning of direct discrimination, however concerns have been expressed that the new definition will lead to a new tranche of case law as to its interpretation.

The new definition makes no reference to the protected characteristic of **any particular person**. On the basis of current law, in relation to: sex, disability, gender reassignment and age, direct discrimination is in any event defined in such a way as to require the complainant to have one of those protected characteristics him or herself. The broader definition will mean that associative discrimination is covered, i.e. if A treats B less favourably because B cares for an elderly relative, A can be held to have been discriminated against B because of **age** even though B's age is not the reason for the treatment.

Perceptive discrimination on the grounds of: race, sex, gender reassignment, disability, sexual orientation, religion or belief and age will be covered ie, discrimination because of the person's perceived protected characteristic. The current law is inconsistent in that only direct discrimination on the grounds of perceived (rather than actual) race, sexual orientation, religion or belief or age is clearly prohibited.

Dual discrimination

The Act will allow claims to be brought in relation to a combination of two protected characteristics, otherwise referred to as dual discrimination. The new provision, however, only permits claims of direct dual discrimination to be brought. Indirect discrimination, harassment and victimisation are not covered. What this will mean is that it will not be necessary for there to be sufficient evidence to support a claim of direct discrimination **'because of each of the characteristics in the combination'** (taken separately) and the tribunal will be able to make a 'global finding', for example that a claimant was treated less favourably because she is a 'Pakistani woman.' It is anticipated that this new provision will result in many more claims. The new rules will come into force in April 2011.

Indirect discrimination

The definition of indirect discrimination has been amended but still includes some of the familiar wording. It applies where:

- A applies a provision, criterion or practice ('PCP') to B,
- A applies or would apply the PCP to persons with whom B does not share the relevant protected characteristic,

- The PCP puts or would put persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share the characteristic, or
- The PCP puts or would put B at that disadvantage and the PCP is not a proportionate means of achieving a legitimate aim.

The Government has retained the defence of a claim of indirect discrimination where there is objective justification by a legitimate aim and where the means of achieving that aim is appropriate and necessary.

Harassment

Under existing legislation there is a right to bring a claim for harassment in the employment context (except for the purposes of marriage and civil partnership, pregnancy and maternity, colour and nationality). The Sex Discrimination Act 1975 further protects employees whose employer knowingly fails to protect them from repeated harassment by a third party, such as a customer or supplier, but protection against third party harassment does not currently exist in relation to other equality strands. The Act will extend protection from harassment in the employment field to colour or nationality, but not to marriage and civil partnership, pregnancy and maternity. Also victims of harassment will not have to have the protected characteristic themselves.

Liability of employers regarding persistent harassment of their employees by third parties will be extended to all protected characteristics covered by the harassment provisions. It will arise if any third party harasses an employee in the course of the latter's employment on at least three occasions (whether or not it is the same third party) and the employer has not taken reasonable, practical steps to prevent the harassment on this occasion.

Instructing and causing discrimination

Again there is currently inconsistency within the various strands of legislation. At the moment it is unlawful for a person to instruct or induce someone to discriminate against, harass or victimise another person, or attempt to do so in respect of certain protected characteristics, such as: gender, race and disability, but not in respect of others, such as sexual orientation. In respect of age it is unlawful to instruct only. The Act extends protection to all protected characteristics.

Disability discrimination

A number of amendments are being made here to close down what are regarded as gaps or deficiencies in the current legislation. In relation to the definition of disability, the current wording is largely retained. However, the Government has dropped the requirement that for an impairment to be considered to affect a person's ability to carry out normal day to day activities, it must affect one or more from a list of specified capacities, including: mobility, manual dexterity, physical co-ordination, speech, hearing or eyesight. It was felt that the list did not serve much purpose.

Pre-employment health enquiries

A major change for prospective employers are the conditions concerning pre-employment health enquiries, which have been thought for some time to be the main reason why disabled job applicants often fail to reach the interview stage.

The Act provides that an employer must not ask about a job applicant's health, including any disability, before offering him or her work. Or, where the employer is not in a position to offer work immediately, before including the applicant in a pool of persons to whom she or he intends to offer work in the future.

An employer will not commit an act of disability discrimination merely by asking about a job applicant's health, but the employer's reliance on such information may lead a tribunal to conclude that discrimination has occurred. Under these circumstances the burden of proof would shift to the employer to show that no discrimination took place.

Questions are permitted, however, if it is necessary to establish whether the job applicant will be able to comply with the requirement to undergo an assessment, such as an interview selection test, whether a duty to make reasonable adjustments will arise in connection with any such assessment, or whether the applicant will be able to carry out a function that is relevant to the work concerned. Employers are also entitled to ask questions to monitor diversity or to take positive action.

In the absence of guidance, the line between appropriate and non-appropriate questions may be unclear. The Act's explanatory notes give the following example: *'An applicant applies for a job in a warehouse which requires the manual lifting and handling of heavy items. As manual handling is a function which is intrinsic to the job, the employer is permitted to ask the applicant questions about his health to establish whether he is able to do the job (with reasonable adjustments for a disabled applicant, if required). The employer would not be permitted to ask the applicant other health questions until he or she offered the candidate a job.'*

Claims for disability discrimination

The Act provides for four potential claims for disability discrimination, including direct discrimination, discrimination arising from disability, indirect discrimination and a failure to make reasonable adjustments. The definition of direct discrimination has been referred to earlier in this article.

Importantly the Act will remove the need to find a comparator in a claim for discrimination arising from disability, thereby overturning the House of Lords' decision in *London Borough of Lewisham v Malcolm* 2008. It had been argued that the effect of this case was to severely limit the effectiveness of the Disability Discrimination Act.

Discrimination will occur where person A discriminates against a disabled person B, if A treats B unfavourably *'because of something arising in consequence of B's disability'* and A cannot objectively justify the treatment. A will have a defence if he did not know and could not reasonably have been expected to know that B had the disability.

The definition of indirect discrimination will be harmonised to cover all strands of discrimination. It applies when an employer imposes a provision, criterion or practice to everybody but which puts those who share a protected characteristic at a particular disadvantage when compared with those who do not share it.

The duty to make reasonable adjustments has always arisen where a provision, criterion or practice or a physical feature of premises puts a disabled person at a substantial disadvantage in comparison with persons who are not disabled. There is an extension to employment law that where, but for the provision of auxiliary aid, a disabled person would be at a substantial disadvantage, the duty is to take such steps as it is reasonable to have to take to provide that auxiliary aid. It is provided that where a duty arises the employer is not entitled to pass on the costs of compliance to the disabled person. The Act provides that the genuine occupational requirement defence will be extended to disability – there is currently no such provision in the Disability Discrimination Act.

Equal pay

Despite 40 years having passed since the Equal Pay Act received Royal Assent, a significant gender pay gap still exists. The outgoing Government felt that improvements could be made by encouraging transparency in a number of different areas. It proposed that the Equality Act would outlaw pay secrecy clauses (clauses in employment contracts banning employees from discussing their pay or bonuses) and certain gender pay gap reporting requirements. The Conservatives confirmed pre-election that they would not

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bring into effect the relevant section dealing with gender pay reporting, which was proposed in the Act. These areas are not covered in detail here.

Positive discrimination and public sector duties

The Conservatives also stated before the election that they would not bring into force the public sector socio economic duty and the new rules on positive action. Whether the Coalition Government will backtrack here remains to be seen.

The public sector equality duty would have required a public authority, in the exercise of its functions, to have due regard to the need to eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by or falls under this Act, to advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it and to foster good relations between persons who share a relevant protected characteristic and persons who do not share it. Authorities had already begun preparing combined equality schemes and impact assessments in anticipation of this development.

Summary

The Act is to be welcomed in its goal to harmonise existing legislation and iron out many illogical inconsistencies. Employers may not welcome the change to the definition of discrimination arising from disability or the potential for confusion with pre-employment health enquiries. Although the Act received Royal Assent on 8 April 2010, in much the same form as introduced in October 2009, some aspects will certainly be a test of the Coalition Government's abilities to negotiate and compromise, given the potential for dispute between the main political parties.

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