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The stated aim of Equality Act 2010 is to create "a fairer future".

While the Act has streamlined and simplified equality law, some provisions have been delayed, some abandoned altogether and some are being considered for abolition. Makbool Javaid, Head of Employment Practice at Simons Muirhead & Burton, examines the likely the key points.



A fairer future?

With the new law having been in force for nearly a year, we look at the key changes, the major impact areas for employers and employees and what may lie in store for the future as the Government's Red Tape Challenge focuses on the Act's provisions.

The Equality Act 2010 ("the Act") brings together and re-states all previous anti-discrimination and equal pay legislation, to give a single approach where appropriate. The Act also introduces some changes and additions to previous law, which are set out in (Figure 1) together with the provisions which the Government has decided to abandon. Some of the changes to anti-discrimination law are already having a significant impact on employment policies, employee rights and tribunal claims and their implications assessed to ensure that a diverse culture, where people are treated with respect and according to their merits and abilities, is achieved.

The key impact areas

The changes brought about by the Act highlight the need to review employment policies, practices and procedures, particularly in respect of the issues examined below, to make sure they are legally compliant and represent best HR

practice. There is also a need to conduct refresher training for managers and communication and awareness sessions with all staff, to ensure they are aware of the revised policies, understand the law and are under no misapprehensions about the organisation's zero stance towards any form of discriminatory behaviour.

Definition of disability

The previous requirement to consider a list of eight capacities, such as; mobility, manual dexterity, ability to lift, speech, hearing or eyesight, etc., when considering whether or not a person is disabled, no longer applies. In the Government's view, the list served little or no purpose in helping to establish whether someone is disabled, and was an unnecessary extra barrier to disabled people taking cases in courts and tribunal. As employers and employees have discovered, the change means it is now far easier for people to demonstrate that they meet the definition of a

disabled person and disability claims were the second highest 'equality' jurisdiction, according to 2010/11 Tribunal Service figures, with 7,200 claims lodged, this may be set to rise, particularly as more and more stress-based disability claims find their way to tribunals.

The focus now on determining whether someone is disabled is not by categorising them according to a 'list', the revision is looking at the impact of the impairment on a person's normal activities, when leading their private lives, e.g. getting washed and dressed, and at work, e.g. using a keyboard. When seeking medical advice in particular, this new guidance must be borne in mind, remembering that, 'normal' should be given its ordinary, everyday meaning, and account should be taken of how far an activity is normal for a large number of people to be carried out on a daily or frequent basis.

Discrimination arising from disability

Another provision aimed at strengthening the protection for disabled people is S.15 of the Act, which introduced a completely new concept: "Discrimination arising from disability". Discrimination will occur where a disabled person is treated unfavourably, not because of his or her actual disability, but because of something arising from, or in consequence of, the impairment, such as the need to take a period of disability-related absence. It is, however, possible to justify such treatment if it can be shown to be a proportionate means of achieving a legitimate aim. For discrimination to occur, however, the employer must know, or reasonably be expected to know, that the person is disabled.

Employers now need to be alert to the fact that here, the issue is not potential discrimination arising because of the person's disability itself, but because of something which happens because of the disability or as a result of it, such as absence due to disability-related ill health. The Act does, however, allow an employer to defend any unfavourable treatment, e.g. where disability-related long-term ill health leads to dismissal. First it has to be shown that there is a legitimate business aim. Then it needs to demonstrate that the treatment was proportionate, i.e. it must actually contribute to the legitimate aim, there is no other less discriminatory way and the benefits to the business far outweigh the discriminatory effect on the individual.

Health questions and disability

Further protection for disabled people can be found in S.60 of the Act, "Enquiries about disability and health", which is another completely new provision designed to address the problem of pre-employment enquiries about health issues. Except in the situations specified in S.60, e.g. whether

reasonable adjustments are needed, ability to perform an essential job function, monitoring disability in application, etc. an employer must not ask about a job applicant's health until that person has been either offered a job (on a conditional or unconditional basis) or before including the applicant in a pool of successful candidates, from whom the employer intends to offer a job, when a suitable position arises.

This limiting of health or disability-related enquiries of applicants is designed to help tackle the disincentive effect that an employer, making such enquiries, can have on some disabled people making applications for work. Employers should ensure that those involved in the recruitment and selection process are clear about the limits involved in assessing disability and health issues, emphasising that use should not be made of 'back door' questions such as "how have you been feeling lately?", which could later be used to infer bias. The EHRC Code makes the important point that, where a disabled applicant voluntarily discloses information about their disability or health, the employer must ensure that, in responding to this disclosure, they only ask further questions that are permitted, as explained above.

Association and perception

The Act extends the protection against direct discrimination and harassment significantly. By providing that direct discrimination will occur 'because of' a protected characteristic, and that harassment is unwanted conduct 'related to' a relevant protected characteristic. The terms 'because of' and 'related to' allows discrimination to be interpreted widely as it makes no reference to the protected characteristic of any particular individual and can include not just the individual who has the protected characteristic, but also: (i) the claimant's association with another person who has the protected characteristic; or (ii) because the claimant is perceived to have the protected characteristic. Previously not all grounds for discrimination and harassment provided this protection, but now all the protected characteristics are covered, with the exceptions of being married or a civil partner, as far as direct discrimination and harassment are concerned, and pregnancy and maternity in harassment cases.

The fact that associative and perceptive discrimination and harassment was unlawful in some respects prior to the Act was often overlooked in training and communication programmes, but now becomes even more important as an awareness issue for managers and their staff as the majority of the protected characteristics are covered. It needs to be made very clear that, for example, there is a potential case of direct discrimination if a man is not offered a job because it is thought he is gay and

wouldn't 'fit in', but he is in fact heterosexual, and a potential harassment claim where a female's colleagues constantly tease her by referring to her husband as the Pope and her home as the Vatican, because he has converted to Catholicism. It is also important to remember that within this context, case law has extended protection in both direct discrimination and harassment to two further circumstances, i.e. because of personal conviction: e.g. where an employee is dismissed because she refuses to carry out an employer's instruction that she must tell black and Asian callers that no vehicles were available for hire, that is 'because of race - *Weathersfield Ltd v Sargent* [1999] IRLR 94.



Change means it is now far easier for people to demonstrate that they meet the definition of a disabled person and as disability claims were the second highest 'equality' jurisdiction according to 2010/11 Tribunal Service figures



As if the complainant has a protected characteristic even though it is known that he or she does not, e.g. a person known not to be a homosexual is nevertheless constantly referred to as a 'faggot', which is 'related to' sexual orientation - *English v Thomas Sanderson Blinds Ltd* [2009] IRLR 206.

Positive action in recruitment and selection S.159 of the Act permits an employer to take a protected characteristic into consideration when deciding whom to recruit or promote, where people having the protected characteristic are at a disadvantage or are under-represented. This only applies where the candidates are as qualified as each other and the Explanatory Notes make it clear that this provision does not allow employers to have a policy of automatically treating people

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who share a protected characteristic more favourably than those who do not have it in these circumstances; each case must be considered on its merits. Any action taken must be a proportionate means of addressing such disadvantage or under-representation.



Whilst the 'positive action' measure is intended to allow flexibility to address disadvantage and under-representation, within the confines of European law, it has proved controversial



Whilst the 'positive action' measure is intended to allow flexibility to address disadvantage and under-representation, within the confines of European law, it has proved controversial and indeed the Government only decided to implement this provision in April 2011 after ministers had considered its implications. To avoid any claims of discrimination, employers need to be particularly alert to the issue of deciding whether one candidate is as qualified as another. The legislation provides no answer, but the EHRC Code states that "as qualified as" should be given a broad meaning, requiring a total picture approach, involving a full and objective assessment of each candidate's suitability, skills, qualifications, competence and professional performance.

Looking to the future

Will the third-party harassment provision survive? Ss.40 (2) to (4) of the Act makes the employer liable for harassment of its employees by third parties, such as customers or clients, over whom the employer has no direct control. Liability arises when harassment has occurred on at least two previous occasions, the employer is aware of it, and has not taken reasonable steps to prevent it happening again. This provision, however, may be short-lived since in the Plan for Growth strategy, which accompanied the 2011 Budget, the Government announced that it will consult "to remove [this] unworkable requirement", thereby saving an estimated £0.3 million.

Figure 1

Key Changes

- **New terminology:** all the grounds previously protected by anti-discrimination legislation are brought together as 'protected characteristics', i.e. age, disability, gender reassignment, marriage and civil partnership, pregnancy and maternity, race, religion or belief, sex and sexual orientation.
- **Meaning of disability:** the requirement to show that an impairment has a substantial adverse impact on one or more of eight listed 'normal day-to-day activities' has been abolished.
- **Meaning of gender reassignment:** changed the previous definition of "gender reassignment" by no longer requiring a person to be under medical supervision to come within it.
- **Direct discrimination:** widens the scope to ensure that associative and perceptible discrimination is prohibited for all protected characteristics (except being married and a civil partner).
- **Indirect discrimination:** scope of protection extended to disability and gender reassignment.
- **Discrimination arising from disability:** new provision i.e. unlawful to treat a disabled person unfavourably as a consequence of something arising out of his or her disability unless the treatment can be justified.
- **Duty to make reasonable adjustments:** introduced a third requirement, in addition to adjusting working arrangements and physical features, i.e. adjustment to provide an auxiliary aid.
- **Harassment definition:** extended the definition of harassment to colour and nationality claims, and the concept of associative and perceptible discrimination to the protected characteristics of sex, gender reassignment, disability, colour and nationality.
- **Third party harassment:** extended protection against third party harassment from just the protected characteristic of gender, to cover all the protected characteristics, with the exception of being married or a civil partner, pregnancy and maternity.
- **Victimisation:** no longer a need to compare the treatment of a person who has carried out a protected act with a person who has not and a claimant only needs to show that he or she has been placed at a disadvantage, not less favourable treatment.
- **Health and disability:** new provision - except in specified situations an employer must not ask about an applicant's health until that person has been offered a job or may be offered a job.
- **Positive action - recruitment and selection:** employer able to treat a person more favourably because of a particular characteristic where candidates are equally qualified, but people with that particular characteristic are disadvantaged (came into force in April 2011).
- **Equal pay - secrecy clauses:** makes contractual pay secrecy clauses unenforceable if they prevent employees from discussing their pay to establish the existence of inequality.

Equality Act provisions the Government has abandoned

- **S.78 Gender pay gap information:** Provided a power to require large employers to report on their gender pay gap from 2013 if voluntary reporting measures have not worked; this will not be enacted while the Government are working with the CBI, TUC and others to develop a voluntary approach.
- **S.14 Combined discrimination:** dual characteristics: Would have made direct discrimination resulting in less favourable treatment because of a combination of two protected characteristics unlawful. The Government stated that this will save £3m.
- **S.1 Public sector duty regarding socio-economic inequalities:** Would have placed a duty on public bodies to consider socio-economic disadvantage when making strategic decisions about how to exercise their functions. The Government described this as just another bureaucratic box to be ticked, when time should be devoted to policies which give people a chance in life, not filling in forms.

Will cutting red tape weaken equality law?

For three weeks in June, the Equality Act became the focus of the Government's Red Tape Challenge website, where comments are invited on specific pieces of legislation. The Equalities Minister, Lynne Featherstone, was quick to make it clear the Equality Act is here to stay as "fairness and opportunity for all remains at the heart of Government." But she added that the Government wants to know whether the Act could be simplified, if certain provisions should be dropped or amended, or whether it should be kept exactly as it is. As the legislation is not even a year old, and is primary legislation largely implementing the requirements of EU Directives, its inclusion in the Red Tape Challenge is puzzling. While it is clear that the Act will remain

in place, the question is - what will it look like in another year's time? We will have to wait and see.

- 1 The new single public sector single equality duty, which came into force in April 2011, is outside the scope of this article.
- 2 The article includes extracts from the Explanatory Notes accompanying the Act, the Equality and Human Rights Commission ("the EHRC") Code of Practice: Employment, and the EHRC Code of Practice on Equal Pay.

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