

Employment News

The newsletter of Employment Law Plus

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Jill Kelly
Solicitor and Principal of
Employment Law Plus



What does the Equality Act mean in practice?

The much publicised Equality Act came into force on 1 October, or at least most of its provisions did. There has been a lot of hype in the media about the huge changes which it has brought it. However, most of the new Act just repeats and replaces the Race Relations Act, Sex Discrimination Act, Equal Pay Act and other discrimination laws.

The types of discrimination covered by the Equality Act are therefore: age, disability, gender reassignment, marriage and civil partnership, pregnancy and maternity, race, religion or belief, sex and sexual orientation. These are called "the protected characteristics".

There are some changes to words used in the legislation which are not intended to change its meaning and we shall have to see what the courts make of that. The Equality Act also writes into UK legislation case law developments which the courts were already applying.

However, the Act has brought in some definite changes which will have a practical application for employers and employees:

Asking health questions

There is a new general ban on asking candidates questions about their health before making an offer of employment. However, there are some important exceptions to this including:

- Finding out whether the candidate will be able to undergo the recruitment assessment and whether he will need any adjustments made to accommodate a medical condition
- Establishing whether the candidate will be able to carry out a function intrinsic to the work
- Monitoring diversity

More protection for disabled staff

A new sort of disability discrimination is introduced called "discrimination arising from a disability". This tackles the barriers which were put up to disability discrimination claims by the House of Lords decision in *Malcolm* in 2008. This decision made it really difficult for employees to bring claims that their employer had treated them less favourably because of the effect of their disability on

their ability to carry out their work.

Now, disabled employees will be able to bring this sort of claim and, to defend the claim, the employer will have to show that it was justified in treating the employee detrimentally. For example, if an employer dismisses an employee who has been off work with a disability for an extended period, the employer will have to justify the dismissal in order to escape liability for disability discrimination.

Harassment claims

There is increased protection for employees who suffer unlawful harassment in the course of their employment from third parties, such as customers and suppliers. The employer will be seen as responsible for such harassment if it occurs on at least two occasions, the employer knows about it and the employer has failed to take the steps which would have been reasonably practicable to prevent the harassment.

There have been provisions like this for some time protecting employees from sexual harassment, but now they apply to all the protected characteristics.

Asking about pay

It was thought that the Act would ban employers from preventing employees asking colleagues what

they are paid. However, the Act does not in fact go quite as far as this. It says that contract clauses which require an employee to keep their salary confidential will not be enforceable if pay information is shared in order to find out whether there is a connection between pay and a protected characteristic. So, "pay secrecy" clauses are not banned altogether.

Positive action

There is a limited extension to the steps which an employer may take to favour candidates for employment and promotion who have a protected characteristic. Before the employer can do anything, it must reasonably believe that people with a certain protected characteristic suffer a disadvantage. The action it takes must be aimed at minimising that disadvantage. However, the employer can only favour one candidate over another to minimise this disadvantage if the person the employer favours is as qualified as the other candidates.

Put simply, favouring a black candidate over a white one, because of race, will only be allowed if the black candidate is as qualified as the white candidate to fill the job and the employer has identified that black people are under-represented in the workforce.

Perceptive and associative discrimination

The Act reflects case law developments by banning discrimination because of a perceived (as against an actual) protected characteristic and discrimination because of someone else's protected characteristic. For example:

- Harassment of a colleague because he is thought to be gay even if, in fact, he is straight
- Treating an employee detrimentally because she has to take time off to look after her disabled son, even though she is not disabled herself

Immediate steps for employers to take

- Review equal opportunities procedures to ensure they have up to date references
- Review template compromise agreements to ensure that the Equality Act is correctly referred to
- Review recruitment procedures to ensure that any questions about health are lawful

- Review contracts with supplies and customers to ensure that harassment of your staff is outlawed

Contact Jill Kelly for assistance.

For more information on Discrimination in Employment after the Equality Act 2010, come to the November meeting of the South Oxfordshire HR Network, where Jill Kelly will be giving a presentation on this subject. If you are not already on the invitation list for Network meetings, email us to be added: jkelly@employmentlawplus.com.

We will be sending out invites with the date of the meeting shortly.

Retiring employees – where are we?

The government is consulting on phasing out the retirement age of 65 completely, rather than just increasing the retirement age from 65. The consultation ends on 21 October. The proposal is for a six month transitional period from April 2011, ending with full abolition of the default retirement age, in October 2011.

So, if the employer has given correct notice of retirement before April 2011, with a retirement age before October, the

employer will be able to use the reason of retirement to end the employee's employment without liability for unfair dismissal or age discrimination. However, employers will lose the ability to retire employees, relying on the default retirement age of 65, for notifications given after April 2011 or for dismissals after October 2011.

In theory, it will still be possible for employers to retire employees who reach the company retirement age, but the employer will have to justify the retirement age which will create huge uncertainty over whether or not the employee could bring an age discrimination and unfair dismissal claim.

Some employers are taking steps now to compulsorily retire employees who have already reached the age of 65 or will reach it before October 2011.

To have your say on the consultation, go to <http://www.bis.gov.uk/retirement-age>

Flexible working for all

The government has announced that it intends to consult on extending the right to flexible working to all employees. This was a liberal democrat manifesto commitment.

Overseas employees' rights

Employees working outside Great Britain have severe curtailments on their right to bring claims in British employment tribunals. (They may well have other employment rights in the country in which they are working.) However, the restrictions on bringing claims in Britain have recently been chipped away.

In *Duncombe v Secretary of State for Children, Schools and Families*, the Court of Appeal decided that an employee working in Germany could bring a claim for unfair dismissal based on the right to permanent employment under the Fixed Term Employees Regulations because his contract was stated to be governed by English law.

This follows the case of *Bleuse v MBT Transport Ltd* which decided that employees should still be able to bring claims based on EU law in UK tribunals, even when they worked abroad. In that case, Bleuse was able to make a claim in the UK under the Working Time Regulations despite the fact that he worked abroad.

Employees sent on secondment abroad need to be aware that they may be sacrificing important employment law rights in

the UK. They could try to negotiate contractual terms to try to preserve the equivalent of their statutory rights.

Employers should not assume that an employee working abroad cannot bring employment claims in the UK tribunal and should take advice before acting in a way which could contravene UK employment law.

The Equality Act has just changed the rules of the game for staff working abroad bringing discrimination claims. The rules governing this have been taken away completely, and now the same principles will govern UK discrimination claims by foreign workers as govern unfair dismissal claims. The *Duncombe* and *Bleuse* cases will apply.

Adjustments for disabilities

How far does an employer have to go in making reasonable adjustments to accommodate a staff member with a disability? It is old hat that employers must consider if there are any suitable vacancies which should be considered for the individual. But what about if an alternative job which the individual could do is already filled by someone else?

In *Chief Constable South Yorks Police v Jelic*, Jelic was a police officer who

suffered from chronic anxiety syndrome which meant that he was not able to work in a role with any significant contact with the public. The Force had no vacancies in roles which were suitable for Jelic and decided to retire Jelic on medical grounds.

Jelic complained that this was disability discrimination because the Force had not considered the adjustment of swapping him with a colleague who was undertaking a role which Jelic could do, and giving the colleague the public facing role. The court agreed with Jelic that the Force should have swapped him with his non disabled colleague. However, the colleague's views would have been considered. Also, forcing the colleague to redeploy to a different role was easier in the Police Force because of the disciplined nature of the role.

Although other employment environments may not have the same "discipline" as the police, swapping roles is something which employers may have to at least consider and, if there is a suitable option, discuss with the non disabled colleague who would need to be swapped out. It is arguable that, if the contract gives the employer the right to move the colleague to a different role, after consultation, the employer should do so unless there

are particularly compelling reasons against it.

The court emphasised that the swap must be reasonable. For example, that it may not be reasonable for an employer to require a woman who works flexible hours due to child care commitments to swap her job with that of a disabled person who works longer hours.

National Minimum Wage increases

The NMW increased from 1 October to £5.93 per hour. The age that workers become entitled to this adult worker rate also fell from 22 to 21. The rate for 18 to 20 year olds increased to £4.92 and that for under 18s to £3.64.

The South Oxon HR Network November meeting will be on Discrimination in Employment after the Equality Act 2010. For an invite email Jill

jkelly@employmentlawplus.com

For help with any employment law issues, call Jill Kelly on 01235 861919

