

## Introduction to the Equality Act 2010

The Equality Act 2010 replaced the pre-existing discrimination legislation including the Sex Discrimination Act 1975, The Race Relations Act 1976, The Disability Discrimination Act 1995 and the Equal Pay act 1970. The Act is concerned with discrimination and harassment in respect of the following protected characteristics: age, disability, gender reassignment, marriage and civil partnership, pregnancy and maternity, race (including nationality), religion or belief, sex and sexual orientation.

There are a number of types of discrimination and unlawful conduct under the Act, in particular direct discrimination, indirect discrimination, in the case of disability, failure to make reasonable adjustments, harassment and victimisation.

Two forms of discrimination that were not covered by the pre-existing legislation are:

associative discrimination – treating someone else less favourably because of their association with a person with a protected characteristic e.g. the carer of a disabled person; and

perceptive discrimination – treating a person less favourably because they are perceived to have a protected characteristic even if they do not.

The Act protects “employees” but the definition of an employee for the purposes of the EqA is wider than that which applies to claims such as unfair dismissal and redundancy and covers job applicants, workers including agency workers and, in some cases, former workers.

### **Direct discrimination**

A worker claiming direct discrimination must show they have been treated less favourably than a real or hypothetical comparator. The exception to this is pregnancy or maternity discrimination where a comparator is not required. There is no legal defence against direct discrimination i.e. it cannot be justified except for direct discrimination on the basis of age.

### **Indirect discrimination**

Indirect discrimination occurs where an employer applies a “provision, criterion or practice” (“PCP”) which puts an individual at a disadvantage compared to others due to their possessing a protected characteristic unless the employer can demonstrate that the PCP was a proportionate means of achieving a legitimate aim.

The often-cited example of this is an employer requiring an employee to work full-time. This requirement could disadvantage women as a group since Tribunals accept that women in society bear a greater share of domestic and childcare responsibilities than men and are more likely to wish to work part-time. Unless the employer can objectively justify the need for a full-time worker to carry out the role, the requirement could be indirectly discriminatory on the basis of sex.

### **Harassment**

Harassment occurs if an individual engages in unwanted conduct related to a protected characteristic which has the purpose or effect of either:

- Violating the recipient's dignity; or
- Creating an intimidating, hostile, degrading, humiliating or offensive environment for the recipient.

It is important to note that a one off incident can amount to harassment and that the recipient need not have made the harasser aware that the conduct was unwanted.

As with direct discrimination an employee is protected from harassment based on someone else's protected characteristic (associative harassment) or based on the perception that the employee has a protected characteristic. For example homophobic bullying based on a mistaken belief that an employee was gay would be unlawful.

### **Victimisation**

The victimisation provisions under the Act protect employees from less favourable treatment on the grounds that they have:-

- Brought proceedings under the Equality Act;
- Given evidence in proceedings under the Act;
- Done any other thing in connection with the Act;
- Alleged that another person has contravened the Act.

The Act does not require a claimant to show less favourable treatment with reference to a real or hypothetical comparator and as with direct discrimination, victimisation need not be consciously motivated.

### **Territorial scope**

The Act does not specify any territorial scope but the test is the same as the test for claims such as unfair dismissal under the Employment Rights Act 1996 i.e. whether employees mainly work in Great Britain.

### **How should your organisation protect itself from claims of discrimination in recruitment?**

The Act provides that an employer must not discriminate against or victimise a person in the arrangements it makes for deciding who to offer employment to, as to the terms on which it offers employment or by not offering employment i.e. job applicants are protected.

Advertisements for vacant posts, shortlisting and selection must all be carried out in a non-discriminatory way and any questions about protected characteristics must be avoided. The exception to this relates to disability. While it is unlawful for employers to ask applicants any question about health or disability during the recruitment process until a job has been offered, questions can be asked to establish whether adjustments to the recruitment process are required and to establish whether the applicant is able to carry out a function intrinsic to the post applied for.

Managers involved in recruitment must be provided with equal opportunities training to ensure compliance.

## **Avoiding claims from current employees**

An employer must not discriminate or victimise an employee as to their terms of employment, in the way it affords access to opportunities for promotion, transfer, training or for receiving any other employment benefit, by dismissing an employee or by subjecting an employee to any other detriment. Again, regular training for all staff is key but this is a complex area and good quality HR and legal advice should be available.

## **Former employees**

Former employees are protected from discrimination and harassment if the acts arise out of and are closely connected to the employment relationship and would have been unlawful had the relationship been continuing. An example would be the withholding of a reference due to a previous complaint or providing a discriminatory reference.

## **Vicarious liability**

Employers may be liable for the unlawful acts of their employees and this is where vicarious liability arises. Under the Act claims may be brought against the organisation as well as against an individual manager or fellow employee who was responsible for the discrimination, harassment or victimisation in question. There is however a defence available to the employer if it can show that it took all reasonable steps to prevent the employee from doing the discriminatory act. This is the reason (apart from the moral reason) why it is imperative for organisations to investigate any complaints of discrimination or harassment and take appropriate action so that they can rely on this defence in an Employment Tribunal if future complaints arise. The sort of action that should be taken will include disciplinary action against the perpetrator if an unlawful act is established following disciplinary proceedings, training for all staff, clear rules aimed at avoiding discrimination arising contained in an Equal Opportunities policy, Harassment policy, disciplinary rules, Code of Conduct and other relevant procedures.

## **When may discrimination be lawful?**

There are a number of exceptions under the Equality Act. The most important are occupational requirements and positive action.

### **Occupational requirements**

It is permissible to impose a requirement that job applicants possess a particular protected characteristic for some jobs. The ability to rely on an occupational requirement is very limited but might cover, for example, a job where intimate personal care is delivered. If an occupational requirement is identified, the need for it should be kept under review.

The requirement must be a proportionate means of achieving a legitimate aim

There is an additional occupational requirement that applies to employment for the purposes of an organised religion where it is necessary to employ someone of a particular sex or sexual orientation to comply with the doctrines of the religion or to avoid conflicting with the strongly held religious convictions of a significant number of the religion's followers.

Employers with an ethos based on religion or belief may, in certain circumstances, show that being of a particular religion or belief is an occupational requirement. Again this is a narrow exception and likely to only apply to roles closely associated with the religion such as ministers of the religion.

## Positive action

Although positive discrimination remains unlawful under the Act there is provision for employers to prefer someone with a protected characteristic above others where people with that protected characteristic have particular needs or are disproportionately under-represented.

There are two positive action provisions:

- Where an employer reasonably thinks that people with particular protected characteristics are disadvantaged, have different needs or are disproportionately under-represented, they can take proportionate measures to enable or encourage people with that characteristic to overcome that disadvantage.
- In recruitment and promotion if an employer reasonably thinks that people with a particular protected characteristic are disadvantaged or disproportionately under-represented, the employer can treat the person with the relevant characteristic more favourably than others as long as the person is “as qualified as” others.

An employer would need to provide evidence of under-representation and the action must be a proportionate means of overcoming or minimising that under-representation.

Positive action in recruitment has been little used probably due to the fear of litigation as it is likely to be difficult to meet the requirement of equal qualification. If an employer were to apply positive action they would need to be able to justify the decision to an unsuccessful candidate to protect themselves against a discrimination claim.

## Equal opportunities policies

While it is not a mandatory requirement an equal opportunities policy can set minimum standards of behaviour and reduce the risk of legal action and will be vital (in common with the other measures outlined above) in defending tribunal claims.

## Monitoring

Monitoring the composition of your workforce will be of benefit in identifying areas where there may be problems e.g. disparities of pay or status that need to be identified. An Employment Tribunal will expect you to undertake regular monitoring and data collected may provide vital evidence in defending claims. Monitoring should take place on an anonymous basis and it will be important to ensure that managers responsible for collecting and collating data are trained in the data protection issues that arise.

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