



Bindmans

Employment Law

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The Equality Act 2010: uncertain times for employers?

The much-anticipated Equality Act ('the Act') is the single biggest piece of legislation ever created in the UK. It aims to harmonise and enhance all the anti-discrimination law enacted since the 1970s. Once implemented, the Act will cover the same 'protected characteristics' as the current legislation, namely: age, disability, gender reassignment, marriage and civil partnership, pregnancy and maternity, race, religion or belief, sex and sexual orientation.



Although the provisions of the Act have not yet come into force, by October 2010 it is envisaged that it will have replaced much of the existing discrimination legislation and will be the key statute governing equality in the workplace.

The Act was much debated in both chambers of the Houses of Parliament prior to its enactment. The opposing views put forward, the new coalition government and the fact that the Act was passed via the parliamentary 'wash up' prior to the general election, leave room for doubt as to the effect, and indeed the implementation, of many of its key provisions.

Key changes of note to employers include:

1. Gender pay gap reports

The Act includes the power to make regulations requiring private sector employers with 250 or more employees to publish information about pay differences between male and female employees. The previous Labour government confirmed that it would not use these powers until 2013 and, even then, only in the event that large employers failed to volunteer the information.

During parliamentary debate, the Conservatives stated that they would repeal this 'mistaken' provision of the Act. However, in their election manifesto they said that they would impose equal pay audits on some employers. In their manifesto the Liberal Democrats stated that they would impose equal pay audits on all employers with 100 or more employees and require employers to compare the pay of those employees doing equal work, and to identify pay gaps and document plans to eliminate those that cannot be explained satisfactorily. The Coalition Agreement throws little light on the likely joint approach.

2. Positive action

The Act will allow an employer to treat persons with protected characteristics more favourably with regards to recruitment provided that they are 'as qualified as' other applicants for the role. However, the more favourable treatment will need to be a

proportionate means of achieving a legitimate aim in overcoming or minimising the disadvantage that they would otherwise suffer or to encourage participation of that group in the employer's sector. This provision will be entirely voluntary.

The central area for concern is the uncertainty of the phrase 'as qualified as.' The Labour government had stated that it would not be limited to academic qualifications but would extend to work experience and other skills. It remains to be seen how this will work in practice. In contrast to their Liberal Democrat partners, the Conservatives are historically opposed to any form of positive discrimination.

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3. Discrimination based on association and perception

The Act widens the definition of discrimination making reference to treatment 'because of' a protected characteristic. This means that the claimant in a discrimination case will not necessarily need to have the protected characteristic personally but simply be associated with someone who has. For example, if an employer were to treat an employee less favourably on the basis that s/he provided care to an elderly relative, it could be held that the employee was discriminated against 'because of' age.

This wider definition also encompasses perception and means, for example, that a male job applicant with a unisex first name who is refused a job because the employer wrongly believes him to be a woman, could make a claim for direct sex discrimination.

4. Combined discrimination

Under the current legislation, where a claimant believes that they have been discriminated against on the basis of more than one protected characteristics (e.g. sex and race) s/he is required to bring separate claims based on the different protected characteristics but linked to the same incident. Under the new Act, however, claimants will be able to bring combined direct discrimination claims. For example, a black female employee who has been passed over for promotion, instead of bringing a claim for direct race discrimination and a claim for direct sex discrimination, may now bring a combined claim alleging direct discrimination because she is both black and a woman. This amendment means that employers will no longer be able to side-step claims by showing that they did not discriminate against black male employees or against white female employees.

5. Harassment by third parties

Under the Sex Discrimination Act 1975 (as amended) an employer can be held vicariously liable if a third party, such as a supplier or customer, subjects a worker to harassment based on their sex and they fail to take reasonable steps to prevent this. Protection of this kind is not currently afforded to any of the other protected characteristics.

The new Act, however, will extend the liability of employers for actions of a third party to cover harassment on grounds of age, disability, gender re-assignment, race, religion or belief and sexual orientation. This will apply where the harassment has occurred on two or more previous occasions and the employer has failed to take reasonable steps to stop it.

6. Secrecy clauses

The Act seeks to prevent the use of secrecy clauses in employment contracts which prevent employees from discussing the amount that they are paid. It is not a general prohibition on pay discussions, but it does protect those who discuss their pay in relation to the establishment of potential discrimination claims. Any action taken against an employee for such discussions will amount to victimisation.

The obvious pitfall for an employer is that an employee facing disciplinary action for discussing their pay in breach of a contractual term will simply claim that the discussion related to determining whether discrimination had occurred.

Political uncertainty

Uncertainty abounds as to the new Coalition government's position on the Equalities Act as the Conservatives and Liberal Democrats seemingly come from opposite ends of the political spectrum. There was no mention of it in either the Queen's Speech or the Coalition Agreement and so the new government's likely position must be gleaned from parliamentary debate and comment prior to enactment.

"The Act seeks to prevent the use of secrecy clauses in employment contracts which prevent employees from discussing the amount that they are paid."

Nick Clegg commented on the speed of the Act and its likely adverse effect on economic recovery whilst the country is in the “eye of an economic storm”. However, the Liberal Democrats broadly welcomed the Act but would have liked it to go much further.

Ken Clarke, the then Shadow Business Secretary, also criticised the timing of the Act but went further saying that it introduced “rather pointless, bureaucratic legislation”. In contrast to their Liberal Democrat coalition partners, the Conservatives believe that the Act goes too far and they made a pre-election pledge to make key changes and indeed repeal parts of it. The targets of this repeal for a Conservative majority government were likely to have been the very provisions that their new coalition partners would seek to enhance and expand. How much of this commentary can be equated to political, pre-election posturing by the parties remains to be seen. Both parties will now have to find a middle ground before the Act can be implemented.

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Case law update

This update highlights a few important developments in employment law over the last quarter or so.

The case summaries below are not intended as legal advice but rather as a means of flagging up volatile issues.

Should you have any situations which raise similar questions or problems, please contact us for further, more detailed advice.



“The Disability Discrimination Act 1995 (‘DDA’) imposes a duty on employers to make reasonable adjustments to premises or working practices.”

Swapping a disabled employee’s role with a non-disabled employee’s role can be a ‘reasonable adjustment’

Chief Constable of South Yorkshire Police v Jelic

The Disability Discrimination Act 1995 (‘DDA’) imposes a duty on employers to make reasonable adjustments to premises or working practices to accommodate the needs of disabled applicants and employees. The DDA sets out a list of steps which may be taken by an employer to comply with this duty, which includes transferring the disabled employee to fill ‘an existing vacancy’. Tribunals have previously held that the duty could also include transferring an employee to a vacant and more senior post without the need for competitive interviews and could even extend to the creation of a new post for a disabled employee.

In 2002 PC Jelic was diagnosed with chronic anxiety syndrome and was assessed as being unfit for frontline duties. In 2004 he took up a ‘non-confrontational role’ in the Safer Neighbourhood Unit (‘SNU’) which he performed to a consistently high standard. In 2007 PC Jelic’s new role needed to be assessed as SNU officers were increasingly being required to deal directly with members of the public attending the station. Whilst PC Jelic could cope with telephone contact, an occupational health adviser stated that he “would struggle” if his role changed and, in 2008, the Chief Constable approved him for retirement with an ill health pension. PC Jelic brought a claim in the Employment Tribunal (‘ET’) for (amongst other things) discrimination by reason of a failure to make reasonable adjustments.

The ET held that the Chief Constable was under a duty to make reasonable adjustments and found that swapping PC Jelic’s job with a non-client facing job carried out by a fellow officer would have been a reasonable adjustment to make.

The Chief Constable appealed against this decision arguing, in particular, that swapping PC Jelic’s job went well beyond anything contemplated as reasonable by the DDA. However, the Employment Appeal Tribunal (‘EAT’) upheld the ET’s decision that

Key contacts

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it would have been a reasonable adjustment for PC Jelic to swap jobs with another officer so that he could perform a non-client facing role. It stated that the list of steps provided by the DDA were intended to be illustrative rather than exhaustive examples of the steps that could be taken by way of adjustment.

Comment: what constitutes a reasonable adjustment is inevitably fact and context sensitive. The EAT stated that the nature of the police force (as a disciplined service where officers are obliged to follow orders) was a significant factor and accepted that swapping a disabled person's job with another employee would not constitute a reasonable adjustment in every case. However, this case appears to extend the duty on employers to make reasonable adjustments to include consideration of occupied posts, in addition to existing vacancies. At the very least, it illustrates the need for employers to be alert to their positive duties in respect of disabled employees.

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42-year-old who did not fit "younger" profile was discriminated against

Beck v Canadian Imperial Bank of Commerce

Mr Beck was the Head of Marketing at the London office of the Canadian Imperial Bank of Commerce ('CIBC') and was placed at risk of redundancy in April 2008 as the result of a restructuring process. CIBC stated that, as part of this process, there would be "recruitment potential for one team leader, two to three senior marketers and possibly one or two junior employees". However, in an email sent to HR, the Global Head of Marketing set out as a "key priority" the recruitment of a team head with a "younger, entrepreneurial profile". Contrary to HR's advice, the word "younger" was included in the brief sent to a recruitment consultant.

Mr Beck was made redundant in May 2008. He appealed against this arguing that it was well-known that a recruitment consultant had been engaged. CIBC dismissed his appeal stating that "we have not hired and will not be hiring any new employees for these roles (or any equivalent) for the foreseeable future". Meanwhile, however, CIBC continued to recruit.

Mr Beck brought (amongst other things) a claim for age discrimination relying principally on the use of the word "younger" in the recruitment brief. He asserted that he fulfilled all the criteria for the new job (which was much the same as his existing job) apart from the requirement to be "younger". The ET upheld his claim, finding that the use of the word "younger" called for an explanation which CIBC was unable to provide.

Comment: Mr Beck's age discrimination claim succeeded, in part, because the use of the word "younger" in the recruitment brief raised a presumption of discrimination which CIBC was unable to rebut. The case serves as a valuable reminder to employers to avoid using potentially discriminatory words such as 'graduate' (which can be interpreted as 'code' for someone in their early twenties) and 'younger' when recruiting

Employer discriminated against male employee by inflating the redundancy score of a colleague on maternity leave

de Belin v Eversheds Legal Services Ltd

Section 1(1)(a) of the Sex Discrimination Act ('SDA') outlaws less favourable treatment of women on grounds of sex. Section 2(1) provides that the principle of equal treatment applies equally to men. However, this is qualified by section 2(2) which provides that 'in the application of section 2(1) no account shall be taken of special treatment afforded to women in connection with pregnancy or childbirth'.

Mr de Belin was employed as an associate by Eversheds. In September 2008 he was placed at risk of redundancy and was placed in a pool of two alongside Ms Reinholz who was on maternity leave. Both employees were scored against five redundancy criteria, one of which was financial performance which was divided into different parts. The part which proved controversial was termed 'lock-up' and related to the time elapsed between a lawyer undertaking a piece of work and receiving fees for it, with more points being awarded the speedier the turnaround. The relevant reference period was taken as the 12 months preceding 31 July 2008. Mr de Belin scored 0.5 out

of a possible two whilst Ms Reinholz, who was on maternity leave in July 2008, was awarded a notional score of two. Overall, Mr de Belin scored 27 whilst Ms Reinholz scored 27.5. Mr de Belin was made redundant in July and brought claims of direct sex discrimination and unfair dismissal.

The ET decided that Mr de Belin had been discriminated against and unfairly dismissed, finding that the application of the 'lock-up' criteria was unreasonable and constituted less favourable treatment. The ET noted that whilst Eversheds could not have given Ms Reinholz an actual score for the period of her maternity leave, it could have done other things such as omit the 'lock-up' score from the equation or use a different reference period. It also accepted that whilst the meaning of 'special treatment' in section 2(2) SDA was unclear, it could not be read as allowing employers to afford women blanket special treatment.

Comment: in this case the ET had to grapple with the tricky question of what 'special treatment' means under section 2(2) SDA and how far this should be allowed to encroach on the principle of equal treatment between men and women. Employers should be wary of adopting a blanket approach of always 'giving the benefit of the doubt' to employees on maternity leave and should assess alternative ways to mitigate any unfairness which maternity absence might give rise to.

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Firm news

Bindmans LLP is delighted to announce the promotion of Emilie Cole and Shazia Khan to the position of Associate.

Emilie Cole joined the firm 2009 and has rapidly scaled the ranks of the Employment Team consistently demonstrating her unerring ability to secure impressive settlements and tribunal results for a broad client base. Emilie's expert advice and steadfast commitment to her clients distinguishes her as a major solicitor in the field of employment law. More information about Emilie can be found on our web site at [Emilie Cole](#).

Shazia Khan, former Partner of Christian Khan Solicitors, joined Bindmans in 2009. Shazia has continued to excel, providing a variety of expert and tailored advice to journalists, senior healthcare professionals, academics, civil servants, businesses and non-governmental organisations. Shazia also advises on regulatory matters. Her proven outstanding track-record, her continued commitment to her clients and the impressive results she has achieved has firmly placed her at the forefront of her field. The 2009 Legal 500 described her as "*singled out as very responsive*". More information about Shazia can be found on our web site at [Shazia Khan](#).

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“...consolidated its reputation as a leader in the field of unfair dismissal and discrimination claims...”

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Seminars and lectures



In order to meet the needs of organisations and companies that endeavour to keep abreast of their duties and obligations as employers the employment department at Bindmans offers a range of seminars and lectures.

These events can be tailored to the specific needs of your organisation and provide an excellent way to improve your knowledge of employment law rights and obligations. Please contact Shah Qureshi if you have any particular training requirements.

New employment law micro-site launched

We have recently created a new employment micro-site to offer support for professionals and executives, and provide a resource for clients. The new micro-site is accessible via the main **Bindmans' website**. Please click on the link below to view the new employment law micro-site:

- [Bindmans employment law micro-site](#)

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