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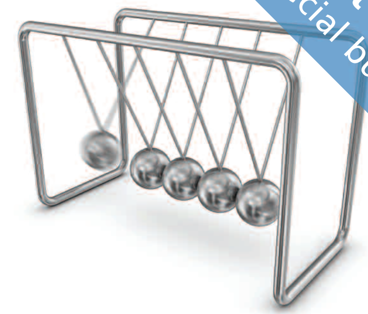


The employment bulletin from Davies Arnold Cooper LLP

October 2010

The Equality Act 2010 (the Act) has been hailed as the most significant piece of equality legislation in the past 40 years. It will for the most part come into force on 1 October this year and will consolidate existing discrimination legislation covering age, disability, gender reassignment, race, religion or belief, sex, sexual orientation, marriage and civil partnership, and pregnancy and maternity (now called 'protected characteristics'), as well as add to and extend key areas of protection.

This bulletin highlights the key changes for employers to note and what your organisation needs to do in order to comply with the Act.

Transitional provisions

The Government has implemented a number of transitional provisions in respect of the Act. Discriminatory acts committed wholly before 1 October 2010 are covered by discrimination legislation in force prior to that date, but acts committed before 1 October and continuing thereafter are covered by the Act. Discriminatory acts that are committed wholly after 1 October will, of course, be dealt with exclusively under the Act.

Direct discrimination – associative and perceptive discrimination

One of the key changes under the Act is that the scope of direct discrimination will be broadened to encompass associative and perceptive discrimination.

Associative discrimination is discrimination against somebody on the basis of their association with someone with a protected characteristic. For example, an employee being discriminated against because they are the parent of a disabled child. Perceptive discrimination is direct discrimination against someone because they are thought to possess a particular protected characteristic which they do not have. For example, where someone is verbally abused because he or she is perceived to be homosexual, even though he or she is heterosexual.

The key point in both cases being that the person bringing the claim does not need to have the protected characteristic. It is sufficient that the treatment is because of a protected characteristic. An individual will also be able to bring a claim for harassment in those situations.

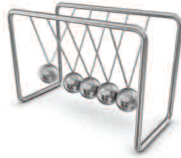
Protection against these types of discrimination will be extended to cover all the protected characteristics, except marriage and civil partnership which will not be covered.

Comment

A point worth noting is that employers do not have a duty to make reasonable adjustments for employees who have responsibilities as carers. However, employers will need to ensure they take a consistent approach to applications for flexible working and do not treat one group of carers (e.g. those caring for elderly relatives) less favourably than others when considering flexible working requests.

Disability discrimination

Whilst the definition of disability remains substantially unchanged, the Act introduces four new types of disability discrimination, including associative, perceptive

and indirect, and discrimination arising from a disability. For example, a disabled job applicant who unsuccessfully applied for a role as a cycle courier could bring a claim if the employer had rejected his or her application on the assumption that he or she would not be able to do the job, without making further enquiries.

Discrimination arising from disability replaces disability-related discrimination and is designed to avoid the consequences of the Malcolm case which decided that the correct comparator was an individual in the same circumstances but without the disability. Under the Act there is no requirement for a comparator. The employer will discriminate against a disabled employee if it treats the employee 'unfavourably' because of something arising from the employee's disability and that treatment cannot be objectively justified as a proportionate means of achieving a legitimate aim. It is anticipated that an employer will still need to consider reasonable adjustments to successfully rely on the justification defence.

The Act requires employers to make reasonable adjustments and provides that the cost of making those adjustments cannot be recovered from the employee. There will be no duty to make adjustments until a specific employee's disability is known or ought reasonably to be known to the employer.

Pre-employment enquiries about health issues are thought to be one of the main reasons why disabled job applicants often fail to reach the interview stage. Consequently, the Act provides that an employer must not ask about an applicant's health, including any disability, before offering the applicant 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 it intends to offer work save in limited prescribed circumstances. One such example is establishing whether reasonable adjustments need to be made for the interview. The Act does not create a free standing right to claim but acting on the responses about an applicant's health may amount to discrimination.

However, the position where employees are required to undergo medical assessments later in the recruitment process is less clear, although it is lawful for the offer to be conditional upon a satisfactory medical assessment. By making offers conditional the employer should not fall foul of the Act but there is a risk of direct or indirect discrimination claims if it seeks to withdraw the offer once it knows of a disability.

Comment

Whilst the definition of disability has not changed, there are a number of new ways in which further claims can be made in this area – we will report such developments as they arise.

Indirect discrimination

The Act harmonises indirect discrimination across all protected characteristics and has extended its scope to cover disability and gender reassignment (see below). There is no specific provision for indirect discrimination against pregnant women or women on maternity leave but this will continue to be covered by indirect sex discrimination.

Indirect discrimination is concerned with a provision criterion or practice (PCP) which has the effect of disadvantaging a group of people with a protected characteristic. An example would be an employer requiring employees to work full time, which would disadvantage women as a group since women are more likely than men to be responsible for childcare.

Establishing indirect disability discrimination may not be straightforward because the disadvantage resulting from the PCP must be suffered by those who share the employee's particular disability. As a result, our view is that there are unlikely to be many indirect disability discrimination claims under the Act. An employee who has been subject to a disadvantage due to his disability is more likely to rely on the duty to make reasonable adjustments or the newly introduced discrimination arising from disability which are less complicated than indirect discrimination and arguably easier to prove.

The Act also protects employees who *would* be put at a particular disadvantage by the relevant PCP, so it protects a person who is deterred by a discriminatory PCP from seeking employment for which he or she is otherwise qualified. For example, if a Sikh man sees an advert for a job for which he is qualified, but does not apply for it because he knows that the company operates a no beards policy which would prevent him getting the job, he could bring a claim for indirect

discrimination. Employers have a defence to indirect discrimination if they can objectively justify the PCP as a "proportionate means of achieving a legitimate aim". A legitimate aim is potentially unlimited, but must correspond to a 'real business need'. Please note that costs alone will not be a legitimate aim. Employers do not need to show that there was no alternative course of action but they must demonstrate that the measures taken were 'reasonably necessary'. The actions will not be considered reasonably necessary if an employer could have used less discriminatory means to achieve the same objective.

Comment

We recommend that employers review their internal policies and practices to ensure that they do not disadvantage any particular group of people with a relevant protected characteristic. If you identify a policy or practice that is likely to discriminate, then you should be prepared to demonstrate that there is a real business need for it and that the policy or practice is a necessary and appropriate way to achieve the business need.

Harassment

The Act harmonises protection from harassment across all the protected characteristics, except pregnancy and maternity (which are treated differently), and marriage and civil partnership (which are excluded).

It includes a new definition of harassment, "unwanted conduct related to a *relevant* particular characteristic", which enables employees to complain of behaviour they find offensive, even if it is not directed at them. As the complainant need not possess the protected characteristic themselves, this includes harassment based on perception and association (see above). For example, a person who is harassed because of their spouse's religious beliefs.

The Act also extends the circumstances in which employers can be liable for failing to prevent their employees being harassed by third parties to cover age, disability, gender reassignment, race, religion or belief and sexual orientation. However, employers will only be liable where harassment by third parties, such as customers or clients, has occurred on at least two occasions, the employer is aware of it and has not taken reasonable steps to prevent it from reoccurring. This is the case even if the person harassing the employee is different on each occasion.

Comment

Employers should consider if they will need to notify customers and/or clients that inappropriate behaviour towards their staff could result in legal liability and ask for evidence that appropriate checks and balances are in place. Clearly such communications will need to be managed carefully.

Victimisation

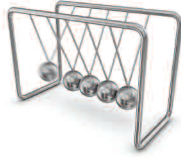
Victimisation occurs where a person (A, usually an employer), subjects another person (B), to a detriment because B has done or A believes B has done or may do, a "protected act". What is new is that: (1) as there is no requirement for a claimant to show less favourable treatment, no comparator is required, and (2) 'relevant pay disclosures' are added to the list of protected acts.

Treating discussions which try to establish whether pay discrimination exists as protected acts is clearly intended to support the effectiveness of the Act's provisions on pay secrecy clauses – but as such disclosures must be made with the possibility of pay discrimination in mind, we anticipate disputes over what constitutes a relevant pay disclosure.

Employers should note that where employees give false information in bad faith their actions will not amount to a protected act, but the evidential burden is on the employer to establish bad faith in these circumstances.

New powers of recommendation for employment tribunals

Under previous legislation, employment tribunals could make recommendations as to the steps an employer must take to reduce the effect of any discrimination on the claimant. The Act extends this power by enabling employment tribunals to make



recommendations to benefit other employees, not just the claimant – note though, that equal pay claims are excluded.

Failure to comply with a recommendation can result in an increase in any compensation awarded to a claimant or, where no compensation award was made, the introduction of an award.

Comment

Whilst recommendations are not binding, our view is that employers should seriously consider complying with them – as failure to do so could be used as evidence by a claimant in a future discrimination claim. We would expect employment tribunals to be critical of an employer's non-compliance in such circumstances.

Gender Reassignment

The Act creates a new definition of 'gender reassignment' which provides greater protection for transgender people.

The new definition will no longer require a person to be under medical supervision to be protected from discrimination – they will be protected if they are proposing to undergo, are undergoing or have undergone a process, or part of a process, for the purpose of reassigning their sex by changing their physiological or other attributes. This means that a person who was born female and decides to live the rest of her life as a man will be protected even if she does so without undergoing any medical treatment or seeking any medical advice.

Compromise agreements

Employers entering into compromise agreements after 1 October 2010 should note that the wording of the section of the Act relating to such agreements has left us all with a potential problem.

Compromise agreements will only work to effectively settle claims under the Act if the requirements of section 147 of the Act are met. As with other statutes a valid compromise agreement requires the employee to receive advice from an "independent adviser". However, this may be more complicated than first anticipated because the wording of section 147 suggests that a solicitor negotiating exit terms or bringing a tribunal claim on an employee's behalf cannot also be their "independent adviser" for the purposes of the compromise agreement.

Comment

Such a literal interpretation is not consistent with the wording of the compromise agreement provisions in other statutes, and we do not believe it can have been Parliament's intention. It is to be hoped that tribunals will interpret the section in such a way as to avoid this problem, and that the Government will act speedily to amend the wording. In the meantime, we recommend that employers ask that a different solicitor (at the same firm) signs the compromise agreement to the one who acts on the employee's behalf to negotiate terms or bring a tribunal claim. We anticipate that this may result in requests from departing employees for their employers to increase the contribution towards their legal costs.

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