Discrimination and the Equality Act 2010

Overall purpose

- Consolidates existing legislation
- Harmonises rules (to some extent) across different types of discrimination, by defining various 'protected characteristics'
- Removes some anomalies between different types of legislation
- Removes anomalies created by case law
- Creates new public sector equality duties

Time-scale

Most of the provisions came into force on **1 October 2010**. Those which do not are indicated in the text (please see the summary at the end of this document).

Definitions of discrimination

Section 4 of the Equality Act 2010 lists various 'protected characteristics' that form the basis of discrimination law. The Act makes it unlawful to discriminate in employment (and various other areas) on the grounds of any one of those protected characteristics or on grounds of a combination of two of those characteristics – but not, for some reason, on grounds of three or more of those characteristics (dual or 'combined' discrimination – see below). The protected characteristics are:

- age
- disability
- gender reassignment (i.e. transsexuals)
- marriage and civil partnership
- pregnancy and maternity
- race
- religion and belief
- sex
- sexual orientation

There has been no change from the list of characteristics protected under previous legislation. Sections 5 to 11 of the Act further define the characteristics, mainly replicating the previous definitions with minor amendments.

Different types of discrimination

1. Direct Discrimination (s.13)

DEFINITION:

A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favorably than A treats or would treat others.

Examples:

a. Not promoting an employee because she is a woman (direct sex discrimination)

b. Not paying a bonus to an employee because that employee is disabled (direct disability discrimination).

Comment:

Therefore, if an employee has been treated unreasonably, but the employer shows that it treats or would treat all employees of any sex, race, religion, etc in the same unreasonable way, there will be no discrimination (*Zafar v Glasgow City Council [1998] IRLR 36*).

There are two points to note about this definition:

a. The requirement for a comparator is retained. If there is no real comparator, tribunals may use a hypothetical one (*Balamoody v UKCC [2002] IRLR 288*).

b. The words '*on the grounds of'* in the previous legislation have been replaced with '*because of'*. The intention has not been to change the meaning but to make the legislation more accessible. Mr Justice Underhill in *Amnesty International v Ahmed [2009] IRLR 884* took the view that there can be no objection to using '*because of'* as a synonym for the phrase '*on the grounds of*' provided the phrase is not used to import a test for causation. It is likely that tribunals will continue to apply the current statutory test in determining the discriminatory reason for the treatment.

One change in the law on discrimination intended by Parliament was that associative and perceptive cases will now be covered under the definition of direct discrimination, widening its interpretation considerably.

Associative discrimination

The definitions no longer refer to the characteristics of the individual (except marriage and civil partnership) – so whereas previously, sex discrimination was discrimination on grounds of the individual's sex, now less favourable treatment because of sex (anyone's – it does not have to be the victim's) amounts to direct discrimination.

Example:

A white woman who left her job because of her employer's racist policy of not hiring vehicles to black people was the victim of unlawful race discrimination.

Direct discrimination would therefore cover carers of people with disabilities as in *Coleman v Attridge Law* [2010] ICR 242.

Perceptive discrimination

Similarly, less favourable treatment because of how the perpetrator perceives the victim amounts to direct discrimination.

Example:

A person who is discriminated against because they are perceived to be gay or to hold a particular religious belief.

2. Combined Discrimination (s.14)

DEFINITION:

(1) A person (A) discriminates against another (B) if, because of a combination of two relevant protected characteristics, A treats B less favourably than A treats or would treat a person who does not share either of those characteristics.

(2) The relevant protected characteristics are – (a) age; (b) disability; (c) gender reassignment; (d) race (e) religion or belief; (f) sex; (g) sexual orientation.

(3) For the purposes of establishing a contravention of this Act by virtue of subsection (1), B need not show that A's treatment of B is direct discrimination because of each of the characteristics in the combination (taken separately).

Comment:

The law on combined discrimination is not yet in force.

The previous Government were working to a timetable of April 2011. The Coalition Government have yet to confirm commitment to this date.

The change in legislation attempts to acknowledge that those who have been discriminated against and disadvantaged can fall within multiple protected characteristic categories. Previously, a Tribunal hearing a direct discrimination case may not make a global finding that, for example, a Claimant was treated less favourably because she is a 'Pakistani woman' (*Bahl v Law Society [2004] IRLR 799*).

Note that:

a. Only direct combined discrimination is covered by this new provision.

b. Claims can only be brought in relation to a combination of two (and not more) of the 'protected characteristics', the belief being that allowing more than two protected characteristics as a combined claim would be unworkable, too burdensome and would complicate what might otherwise be simple claims. But arguably, allowing combinations of two protected characteristics complicates claims unnecessarily. For example, a person who believes that they have suffered discrimination based on three protected characteristics (for example, race, gender and sexual orientation) could bring six alternative claims:

    i. Race and gender;

    ii. Race and sexual orientation;

    iii. Gender and sexual orientation;

    iv. Race;

    v. Gender;

    vi. Sexual Orientation.

    Bear in mind that everyone has at least four protected characteristics (sex, race, age and sexual orientation) giving rise to 10 possible claims.

c. Not all protected characteristics are covered. Those that are excluded are: pregnancy/maternity and married/civil partner status are excluded.

d. An employee need not show that that the employer's treatment is direct discrimination because of each of the characteristics in the combination taken on their own. The following example is given in the explanatory note:

A black woman is passed over to work on reception (a promotion) because her employer thinks black women do not perform well in customer service roles. However, the employer can point to a white woman of equivalent qualifications and experience and similarly a black man who work in similar roles. In these circumstances the Claimant would need to compare her treatment because of race and sex combined to prove that she has been subject to less favourable treatment.

However, the fact that neither sex nor race is the sole cause of the less favourable treatment does not mean that a claim for direct race discrimination and direct sex discrimination would fail as the protected characteristic need not be the sole cause of the less favourable treatment. Another example from the draft EHRC Code of Practice is as follows:

Child care centre do not employ a gay man for fear of safety to children. This would present a combined sexual orientation and sex discrimination claim.

Again, as the protected characteristic does not have to be the only cause of the less favourable treatment, the treatment could be compared with that of a gay woman (sex discrimination) or a straight man (sexual orientation discrimination). This completely nullifies the effect of the provision provided by s.14: arguably the claims that can be brought individually.

e. Under subsection (4), a combined discrimination claim cannot succeed where the employer, with reference to any statutory provision, can show that its treatment of the employee was 'not direct discrimination because of either or both of the characteristics in the combination'. For example if it can be shown that it is an occupational requirement for the job for it to be held by a woman then denying a black man for the job would not be unlawful. A combined sex and race discrimination claim would not succeed.

3. Indirect discrimination (s.19)

DEFINITION:

(1) A person (A) discriminates against another (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of B's.

(2) For the purposes of subsection (1), a provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of B's if:

(a) A applies, or would apply, it to persons with whom B does not share the characteristic,

(b) it puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it,

(c) it puts, or would put, B at that disadvantage, and

(d) A cannot show it to be a proportionate means of achieving a legitimate aim.

(3) The relevant protected characteristics are - age; disability; gender reassignment; marriage and civil partnership; race; religion or belief; sex; sexual orientation.

Prior to the Equality Act 2010, the definition of indirect discrimination varied depending on the protected characteristic. The Act harmonises the definition across the protected characteristics and also extends indirect discrimination to gender reassignment and disability.

The new legislation does not explicitly provide for indirect discrimination against pregnant women and those on maternity leave and therefore these will continue to come under indirect sex discrimination.

The wording 'would put' in the indirect discrimination definition is designed to protect those applicants who would be deterred from applying for a job because they know that a provision, criterion or practice would prevent them from being successful.

Examples:

a. Excluding part-time workers from benefits such as pension schemes could be indirectly discriminatory (since generally more women than men work part-time). Part-time workers are now also protected by separate regulations (The Part-time Workers (Prevention of Less Favourable Treatment) Regulations 2000, SI 2000/1551).

b. Refusing a request for part-time working could similarly be indirectly discriminatory (since more women than men are likely to want to work part-time). There are now specific rights to request flexible working (The Flexible Working (Eligibility, Complaints and Remedies) Regulations 2002, SI 2002/3236 and The Flexible Working (Procedural Requirements) Regulations 2002, SI 2002/3207).

c. The inclusion of a mobility clause in a contract of employment which entitles employers to insist that an employee relocates may amount to unlawful indirect discrimination against women, because a woman is more likely to be the secondary earner (Meade-Hill v British Council [1995] IRLR 478.

Objective Justification (or now, 'a proportionate means of achieving a legitimate aim')

The 'objective justification' test applies to indirect discrimination and direct age discrimination and has previously varied in its wording within different legislation. The wording in the Act imports the more recent wording in UK legislation and does not adopt the wording of the European directives. The effect, however, is essentially the same.

A provision, criterion or practice is discriminatory in relation to a relevant protected characteristic *if the employer cannot show it to be a proportionate means of achieving a legitimate aim* (s.13).

4. Harassment (s.26)

DEFINITION:

(1) A person (A) harasses another (B) If:
(a) A engages in unwanted conduct related to a relevant protected characteristic, and
(b) the conduct has the purpose or effect of:
(i) violating B's dignity, or
(ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.

(2) A also harasses B if:
(a) A engages in unwanted conduct of a sexual nature, and
(b) the conduct has the purpose or effect referred to in subsection (1)(b).

(3) A also harasses B if:
(a) A or another person engages in unwanted conduct of a sexual nature or that is related to gender reassignment or sex,
(b) the conduct has the purpose or effect referred to in subsection (1)(b), and
(c) because of B's rejection of or submission to the conduct, A treats B less favourably than A would treat B if B had not rejected or submitted to the conduct.

(4) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account:
(a) the perception of B;
(b) the other circumstances of the case;
(c) whether it is reasonable for the conduct to have that effect.

(5) The relevant protected characteristics are - age; disability; gender reassignment; race; religion or belief; sex; sexual orientation.

With the exception of pregnancy/maternity and marriage/civil partnership the protection from harassment will be harmonised across the protected characteristics.

Again the definition is no longer 'on grounds of' the individual's protected characteristic – so it could include 'associative' and 'perceptive' harassment.

Harassment of employees or of job applicants because of a protected characteristic is unlawful.

Sexual harassment also includes any form of unwanted verbal, non-verbal or physical conduct which is of a sexual nature, and which has the purpose or effect referred to in (1) and (2) above; and less favourable treatment because the victim has rejected or submitted to unwanted conduct of a sexual nature or related to sex or gender reassignment.

ETs must take the Claimant's perception into account. So if the claimant considers their dignity has been violated or any of the other circumstances described in (1) and (2) above apply, then a complaint of harassment will probably succeed provided that conduct could reasonably be considered as having that effect.

Harassment by third parties (s.40)

Section 40 of the Act deals with third party harassment. An employer will be liable for harassment in the following circumstances:

- A third party harasses an employee in the course of that employee's employment;
- The employer knows of at least two occasions when that employee has been so harassed (whether or not by the same person); and
- The employer has failed to take reasonably practicable steps to prevent the harassment.

5. Victimisation (s.27)

DEFINITION

(1) A person (A) victimises another person (B) if A subjects B to a detriment because –
- *a. B does a protected act, or*
- *b. A believes that B has done, or may do, a protected act.*

(2) Each of the following is a protected act –
- *a. Bringing proceedings under this Act;*
- *b. Giving evidence or information in connection with proceedings under this act;*
- *c. Doing any other thing for the purposes of or in connection with this Act;*
- *d. Making an allegation (whether or not express) that A or another person has contravened this Act.*

(3) Giving false evidence or information , or making a false allegation, is not a protected act if the evidence or information is given, or the allegation is made, in bad faith.

includes making or seeking a 'pay disclosure' – see below.

Knowledge of the protected act is a pre-condition to a finding of victimisation and it is wrong to rely on the drawing of inference (*Scott v London Borough of Hillingdon* [2001] EWCA Civ 2005).

The House of Lords in *Swiggs v Nagarajan* has held motivation to treat less favourably is not required. Furthermore, the protected act must be the sole or dominant reason for the less favourable treatment (*Chief Constable of the West Yorkshire Police v Khan* [2001] IRLR 830).

Example:

St Helen's MBC v Derbyshire: a strongly worded letter, sent to 39 (out of 510) employees who refused to sign up to a union agreed compromise of multiple equal pay claims, informing them if they went ahead and won it would result in job losses for them and their co workers, constituted victimisation. The Court of Appeal overturned this decision but the House of Lords has since reinstated the EAT findings. The Lords found that the employer had gone further than was reasonable when protecting its interests.

However, an application for costs against an unsuccessful claimant coupled with an offer to accept the amount of costs in full and final settlement was considered a reasonable protection of the employers' interests and so did not amount to victimisation in *Bird v Sylvester* [2008] IRLR 232.

Although the Act has removed the need for a comparator in victimisation claims this is unlikely to lead to any change in the law. The test is simply: why A has subjected B to a detriment? - which will undoubtedly still involve comparing A's treatment of others.

The new definition of discrimination only provides for protected acts under the Equality Act 2010 and does not extend to things individuals have done under the previous discrimination legislation.

Example:

An employee in January 2010 brought a claim against his employer under the RRA 1976. In December 2010 the employer decides against giving the employee his Christmas bonus because of the trouble the employee caused by bringing his claim earlier on in the year.

Instructions to discriminate (s.111)

It is unlawful to instruct another to discriminate because of any of the protected characteristics.

The person instructed and the victim may complain to an employment tribunal (unlike currently, where only EHRC can bring proceedings) if they have been subjected to a detriment.

Changes from previous legislation specific to particular types of discrimination

To try to replicate rules under the previous legislation, where the various forms of discrimination had slightly different definitions, there are special rules applicable to certain of the protected characteristics.

In these notes we include some key points from existing case law, most of which will remain relevant.

1. Gender reassignment

The Equality Act 2010, s.7(1) defines gender reassignment as a process which is undertaken for the purpose of reassigning a person's sex by changing physiological or other characteristics of sex and includes any part of such a process. There is now no need for the individual to be under medical supervision.

The EAT has held that a dismissal for poor performance resulting from the side effects of gender reassignment was not unlawful discrimination. This is because the side effects of the process are *not* gender-specific (*Ashton v Chief Constable of West Mercia Constabulary* (unreported) 27 September 2000 EAT (1381/99)).

A v Chief Constable of West Yorkshire Police [2004] UKHL 21 emphasised these difficult areas when the sensibilities of third parties have to be taken into account. The key, the Lords felt, was ensuring that people acted professionally in carrying out duties involving physical contact (i.e. a police search).

Once the gender reassignment process has been concluded, 'woman', 'man' and 'men' will refer to the acquired gender of a post-operative transsexual who is visually and for all practical purposes indistinguishable from non-transsexual members of that gender. This decision is in accordance with Article 8 of the European Convention on Human Rights.

The Act will also protect transsexuals against indirect discrimination and the Act's direct discrimination and harassment provisions are arguably wide enough to protect discrimination based on perception and association.

2. Age

Treating one age group less favourably than another, or applying a provision, criterion or practice that disadvantages one age group, amounts to discrimination, with one major exception. Less favourable treatment on grounds of age is not direct discrimination if it is a proportionate means of achieving a legitimate aim (EA 2010 s.13(2)). So compulsory retirement at a set age, although less favourable treatment on grounds of age, has been held not to amount to direct discrimination where it could be justified (*Seldon v Clarkson Wright & Jakes Court* of Appeal 28 July 2010).

In that case, the factors which led the Court of Appeal to conclude that retirement was justified as a proportionate means of achieving a legitimate aim were:

- The need to provide promotion opportunities for younger staff;
- To facilitate planning; and
- To avoid the need to expel older partners whose performance was deteriorating due to age.

The Act itself in Schedule 9, Part 2 exempts various matters from the scope of the legislation. For example:

(a) A default retirement age for employees of 65 is permitted. Other categories of worker (for example, partners or part-time judges) may only be compulsorily retired if to do so can be justified (see for example *Hampton v Lord Chancellor* [2008] IRLR 258 where compulsory retirement of a recorder was held not to be justifiable);

(b) It is permissible to refuse employment to job applicants within six months of the retirement age;

(c) Although benefits based on length of service tend to favour older employees, such benefits are generally permissible where the person less favourably treated has less than five years' service; and even where service exceeds five years, it is still permissible if the benefit fulfills some business need (schedule 9 paragraph 10);

(d) The national minimum wage is reduced for younger employees, but paying such employees less as a result does not breach the legislation (sch 9 para 11);

(e) Enhanced redundancy payment schemes, even though based on age and length of service, do not breach the legislation so long as they broadly follow the statutory scheme.

The regulations on age discrimination (the Employment Equality (Age) Regulations 2006) remain in force to the extent that they affect unfair dismissal legislation. Those regulations:

(a) Provide that 'retirement' is a fair reason for dismissal; and

(b) Impose on employers a duty to consider requests to work on after retirement.

The ECJ has recently held that a German law restricting applications to join the fire service to those under the age of 30 could be defended as a genuine occupational requirement (or an occupational

requirement under the new Act) under Article 4(1) of the EU Equal Treatment Framework Directive (No.2000/78).1

3. Religion or belief

Belief must be more than just an opinion. It must be a belief 'on a weighty and substantial aspect of human behaviour'; must attain a certain level of cogency, seriousness and cohesion and importance; must be worthy of respect in a democratic society; and must not conflict with the fundamental rights of others.

A belief in man-made climate change and the resulting moral imperatives was held to be capable of being such a belief. Pacifism and vegetarianism were also given as examples of such beliefs (*Grainger PLC v Nicholson* [2010] IRLR 1).

However, in *McFarlane v Relate Avon Ltd* [2010] EWCA Civ 880, it was found that the EAT had correctly decided that a counselling organisation had not breached the Employment Equality (Religion or Belief) Regulations 2003 reg.3(1)(a) or reg.3(1)(b) when it dismissed one of its relationship counsellors who refused to counsel same sex couples on sexual matters because of his Christian beliefs. Although the law protected a person's right to hold or express their religious beliefs, it did not protect the substance or content of those beliefs on the ground only that they were based on religious precepts. This principle is likely to be maintained under the EA 2010.

4. Race

The Equality Act 2010 clarifies the provisions on indirect discrimination, harassment and occupational requirements apply to race and ethnic and national origins but also to colour and nationality, removing the 'twin-track' anomaly which had developed following the *Race Directive (2000/43/EC)*.

The definition of 'race' is non-exhaustive and includes 'colour; nationality; ethnic or national origin'. The wording suggests that it could also include other factors such as caste. 'Ethnic origin' includes 'descent' – (*R v Governors of JFS* [2010] IRLR 136 – an education case where admission of a pupil to a school depended on whether the pupil's mother was Jewish, either by descent or orthodox conversion).

5. Pregnancy and Maternity

The wording in section 18 defines pregnancy and maternity discrimination as unfavourable treatment because of pregnancy or because of illness suffered as a result of it.

1 Wolf v Stadt Frankfurth Am Main Wolf v Stadt Frankfurt am Main (C-229/08); [2010] IRLR 244.

It is likely that tribunals will treat such regard 'unfavourable treatment' as similar to suffering a 'detriment', namely 'a reasonable worker would or might take the view that she had been disadvantaged.' This is to be assessed from the employee's perspective.

6. Disability discrimination

The numerous regulations currently supporting the DDA 1995 have been consolidated within the Equality Act 1995.

The definition of disability in the Equality Act is based on the definition found in the DDA 1995.

A person has a disability for the purposes of the Act if at the time of the alleged discriminatory act he has a physical or mental impairment which has a substantial and long-term adverse effect on his ability to carry out normal day-to-day activities (in the EA 2010 day-to-day activities are no longer listed).

Addiction to or dependency on alcohol or any other substance will be specifically excluded from the scope of the Act under regulations shortly to be issued, which will largely replicate earlier regulations made under the Disability Discrimination Act 1995. Impairments resulting from or related to addiction can be a disability. For example, a depressive illness may have been caused by an addiction to alcohol (an excluded condition) but the depressive illness itself could still be an impairment (*Power v Panasonic Ltd* [2003] IRLR 15). The position from the DDA 1995 in this respect remains unchanged.

The Office of Disability Issues is currently consulting on statutory guidance to aid interpretation of the definition of 'disability' (www.officefordisability.gov.uk).

Overall the Act does not significantly widen the definition of disability but the removal of the day-to-day activities may reduce the burden on employees to prove their case.

A condition is 'long-term' if it has lasted or is likely to last 12 months or more and may include recurring impairments. Examples of substantial adverse effects include:

- Difficulty in going up or down stairs
- Inability to carry a lever-arch file
- Inability (without hearing aid) to hold a conversation over the telephone
- Inability to recognise by sight a known person
- Becoming out of breath after walking a mile or carrying out DIY activities
- Severe dyslexia (*Paterson v Commissioner of Police of the Metropolis* [2007] IRLR 763)

The fact that a Claimant can carry out normal day-to-day activities in all circumstances save those of his particular employment does not prevent a finding that the employee is disabled (*Cruickshank v VAW Motorcast Ltd* [2002] IRLR 24 EAT). For further guidance, see the examples set out in the Government's guidance on matters to be taken into account when assessing disability which is available from the Department for Work and Pensions.

Conditions arising as a result of exposure to long-term stress may fall within the definition of disability under the Act as well as other, more easily identifiable, illnesses. However, without more, stress and depression will not constitute a disability.

Discrimination on grounds of disability is defined slightly differently from discrimination for other protected characteristics. The following amounts to disability discrimination:

1. *Direct Discrimination* (i.e. less favourable treatment because of disability – but not because a person does not have a disability (s.13(3))

2. *Discrimination arising from disability* (s.15) – this is intended to replace the disability-related provisions under the DDA 1995 and is designed to avoid the consequences of *Malcolm*. The Act's explanatory notes advises that the aim is to re-establish an appropriate balance between enabling a disabled person to make out a case of experiencing a detriment which arises because of his or her disability, and providing an opportunity for an employer or other person to defend the treatment. The definition for discrimination arising from a disability is as follows:

   A person discriminates against another if, knowing of the person's disability, he treats that other less favourably than others because of something arising as a consequence of the disability.

   For example, that they work more slowly or need special equipment or need more time off work, unless the treatment is a proportionate means of achieving a legitimate aim. An employer's knowledge of disability is required for liability to arise.

   An employer can only avoid liability for detrimental treatment under s.15 where the treatment in question is proportionate means of achieving a legitimate aim.

3. *Indirect discrimination* - this now applies to disability cases. A Claimant must be disadvantaged by a "provision, criterion or practice" of the employer and that the "provision, criterion or practice" puts or would put persons sharing the Claimant's "characteristic" at a disadvantage. Sharing the Claimant's characteristic refers to persons who have the same disability. Many 'reasonable adjustment' cases could possibly also be reframed as indirect discrimination disability cases – e.g. dismissing after a set period of sickness absence.

Example:

A person is off work for a substantial period because of a disability. So the employer dismisses. Discrimination unless dismissal is 'proportionate'. Generally, that would mean that the period of the absence must have been so long that the employer cannot reasonably be expected to put up with it any longer.

4. *Reasonable adjustments* - If working conditions or any feature of the premises puts a disabled job applicant or employee at a substantial disadvantage, the employer must make a reasonable adjustment to prevent that disadvantage arising: physically altering the premises, altering working hours, allocating certain duties to another person, giving training, providing specialised equipment, modifying procedures for interview or assessment or providing supervision. A failure to comply with the duty to make reasonable adjustments is discrimination (s.20).

   No duty arises where it is not possible to make reasonable adjustments to accommodate a disability (*Quinn v Schwarzkopf* [2002] IRLR 602).

   There remains no requirement for employers to make anticipatory adjustments. A duty to make reasonable adjustments only arises when a specific employee's disability is known.

   The Court of Appeal has decided that there is no failure to make a reasonable adjustment just because an employer does not continue to pay a disabled employee who has exhausted his or her sick pay entitlement (*O'Hanlon v Commissioners for HMRC* [2007] EWCA Civ 283).

   The 'auxiliary aid' provisions are extended to employment cases – i.e. where an individual would be at a substantial disadvantage but for an auxiliary aid, the employer must take such steps as are reasonably practicable to supply that auxiliary aid (s.20(5)).

Disability: Pre-employment Health Questions (s.60)

Employers, those engaging contract workers and others seeking to take on workers must not, before offering employment or putting in a selection pool (what about offering with a view to subsequently withdrawing?) ask questions about the job applicant's health except (s.60(6)):

(a) To determine if there any special requirements for the job interview or other recruitment process;

(b) To establish whether the candidate will be able to carry out a function intrinsic to the work;

(c) Monitoring diversity;

(d) Checking whether the positive action provisions could apply;

(e) Where having a particular disability is an occupational requirement, so long as that requirement is a proportionate means of achieving a legitimate aim.

This is enforceable only by the EHRC.

If such questions have been asked and none of the permitted reasons apply, the burden of proof is on the employer in any subsequent disability discrimination claim based on the recruitment to which the question related.

An employer can still avoid liability by showing that the specific disability was not the reason for rejecting the applicant.

Questions:

Questions about past health are likely to fall foul of the provisions in section 60(6) as the essential question is whether the applicant is currently able to carry out all intrinsic functions of the job and therefore past health questions will not be relevant.

Liability of employers

Employers may be liable for acts of discrimination committed by their employees in the course of their employment (s.109) whether done with the employer's knowledge or approval or not2 – even at social events after work and drinks in pubs after work. Employers should, take steps to prevent their employees discriminating, for example, clarifying that discrimination or harassment will be regarded as a disciplinary office, providing training and ensuring that there is a well-publicised equal opportunities policy.

Employers may defend claims based on the acts of discrimination of their employees by proving that they took such steps as were reasonably practicable to prevent employees from discriminating or harassing etc, in the course of the employment.3

Employers can be held responsible for discriminatory acts of employees committed during the course of employment with or without the employer's knowledge or approval. Making arrangements which could leave an employee vulnerable to sexual harassment by third parties can also make the employer liable for harassment by third parties.

2 Jones v Tower boot Co. Ltd [1997] IRLR 168 CA; Chief Constable of the Lincolnshire Police v Stubbs [1999] IRLR 81; Dubou Aluminium Co. v Scilaam [2003] IRLR
3 Equality Act 2010, s109(4). See, for example, Hussah v HM Prison Service (unreported) 8 May 2002, EAT (1250/00).

Aiding discrimination (s.112)

A person who aids another to discriminate unlawfully is treated as discrimination unlawfully. Employees who make their employer vicariously liable are treated as aiding their employer.

What makes discrimination unlawful?

Discrimination is prohibited at every stage of employment including:

(1) The making of arrangements for the purpose of determining who should be offered employment;

(2) The terms offered for that employment;

(3) Refusing or deliberately omitting to offer employment;

(4) Access to opportunity for promotion, transfer or training;

(5) Access to any other benefits, facilities or services;

(6) Dismissal; or

(7) Subjecting to any other detriment (before the provisions on harassment, most harassment fell within this).4

Contract workers (s41)

Discrimination by 'principals' (generally those using workers supplied by an employment agency, but can be wider – see example below) is similarly unlawful.

> *Example*
>
> Mr Woodhouse transferred from the Council to an ALMO. He retained responsibility for checking work carried out by a department of the Council. He complained of race discrimination by a member of that department. The Court of Appeal held that s7 RRA (now s41 EA) was wide enough to cover this situation. *Leeds City Council v Woodhouse* [2010] EQCA Civ 410

Codes of Practice

The Commission for Equality and Human Rights can issue Codes of Practice which ETs must take into account. Codes of Practice relating to discrimination which were in force before the Equality Act was enacted were:

(1) The Equal Opportunities Commission's Code of Practice on sex discrimination, equal opportunities policies, procedures and practices in employment (1985);

4 Equality Act 2010, s.39.

(2) The Commission for Racial Equality's Code of Practice on the duty to promote racial equality (2002);

(3) The Equal Opportunities Commission's Code of Practice on equal pay (2003);

(4) The Disability Rights Commission's Code of Practice: Employment and occupation;

(5) The Commission for Racial Equality's Code of Practice on racial equality in employment (2005); and

(6) The Equal Opportunities Commission's Code of Practice on Gender Equality Duty (2007).

Existing Codes of Practice remain in force until they are replaced (s.42 Equality Act 2006). Codes of Practice under the Equality Act 2010 have been prepared but only a draft Code of Practice on Equal Pay has been published.

Employment

The definition of 'employment' in the discrimination legislation is wider than the definition of an employee working under a contract of service used in, for example, unfair dismissal law, and can include not only employees (working under a 'contract of service') but also those who work under a contract personally to 'do work'. It has been held to include contract workers.5 The House of Lords has also held that, in certain circumstances, partners in law firms providing services to a Housing Association may be employed by the Housing Association.6

Discrimination after employment ends

Discrimination taking place after employment has ended may be unlawful. It must arise out of, and be closely connected to, the previous employment (as would be the case with discriminatory appeals, or the provision of a reference which has been influenced by discrimination).7

Occupational requirements

It is a defence to a discrimination claim to show that the act complained of amounts to imposing an occupational requirement which is a proportionate means of achieving a legitimate aim (e.g. actors, advisors to minority groups).8

This represents a change from the previous provisions. The word 'genuine' has been dropped – the Government felt this was too obvious to deserve mention. It also harmonises the rules across all forms of discrimination. There is now no need for the occupational requirement to be indispensible – just that it is

5 Harrods Ltd v Remick [1997] IRLR 583
6 Kelly v Northern Ireland Housing Executive; Loughran v Northern Ireland Housing Executive [1998] IRLR IRLR 593
7 Equality Act 2010, s108
8 Equality Act 2010, Schedule 9 Part 1

a proportionate means of achieving a legitimate aim. The legitimate aims are not specified, as they were in the previous legislation (eg authenticity, decency etc).

Unlike previously, this defence is now available to disability discrimination claims.

For example (this is given in the Guidance to the Act), a society that aims to help deaf people may stipulate that a particular office holder should be deaf and have sign language as his first language. While that may not be absolutely necessary, it will not be unlawful if the requirement is a proportionate means of achieving a legitimate aim. (But it is difficult to see who could have brought a claim in the first place. Non-disabled people cannot complain if a disabled person is given preference).

Employers should review any GOQs they have previously relied on to check they satisfy the new rules.

Existing employees who were recruited or promoted under a valid GOQ will not be affected.

Positive action

(Section 158 is in force. Section 159 is partially in force where it relates to recruitment and promotion it is not yet in force)

Minority or gender quotas for particular jobs or similar devices which are intended to achieve a 'balanced' workforce are prohibited under UK law. In European law there is an exception for positive sex discrimination which removes 'existing inequalities which affect women's opportunities'. Positive action measures which gave one sex (or someone with any other protected characteristic) an absolute or unconditional right to a benefit or more favourable treatment were unlawful.

This has now changed with the Equality Act 2010.

Section 158 gives general exemptions from the discrimination provisions to enable individuals to overcome or minimize disadvantages connected to a protected characteristic, in relation to 'participation in an activity', where:

(a) Those with that protected characteristic are at a disadvantage; or

(b) Those with the protected characteristic have special needs; or

(c) Participation in that activity is disproportionately low amongst those who share that protected characteristic. In the context of employment, this probably permits the same sort of actions as the positive action provisions of the previous legislation – i.e. training and encouragement to apply.

Section 159 will permit employers to recruit or promote a person with a protected characteristic where there is an equally qualified person who does not have that protected characteristic.

'Equally qualified' does not just mean with equal formal qualifications. They can include skills and experience. The EHRC's Draft Code of Practice suggests establishing a set of objective criteria and objectively assessing against those criteria.

Bringing a claim

Most complaints relating to employment have to be brought in an employment tribunal. Claims (except for breaches of the employment equality clause – see below) have to be brought within three months of the act complained of (s.123).

Time limits

Individuals may make a claim to an employment tribunal. The time within which a complaint must be presented to the tribunal is three months beginning with the date when the act complained of was done.9

If a continuing act, the time-limit runs from the discontinuance of that act. The EAT has held that an act extends over a period of time if it takes the form of a policy rule or practice, in accordance with which decisions are taken from time to time. A succession of specific instances may indicate a practice.10 A tribunal should consider whether the employer is responsible for an act extending over a period as distinct from a succession of unconnected or isolated specific acts rather than concentrate on the existence of a policy/practice/regime. This may mean that an employee can rely on evidence of events stretching back years which would be out of time if they were not part of a series. 11

Tribunals have jurisdiction to consider a complaint even if it is out of time if, in all the circumstances, it is just and equitable to do so.12 The Court of Appeal has held13 that this should be the exception rather than the rule.

Late claims have been allowed in the following circumstances:

- The delay was down to incorrect legal advice;14
- A claim was brought three years too late because the complainant only became aware of the existence of the right to claim following a European Court decision;15
- The employee only discovered the evidence to support his claim, which was nine years late, after using the Data Protection Act 1998 to access his personnel file.16

9 Equality Act s.123
10 Owusu v London Fire and Civil Defence Authority [1995] IRLR 574
11 Hendricks v Commissioner of the Metropolis [2003] IRLR 96
12 Race Relations Act 1976, s 68 and Sex Discrimination Act 1975, s 76
13 Roberbon v Bexley Community Centre [2003] IRLR 434
14 Hawkins v (1) Ball and (2) Barclays Bank plc [1996] IRLR 258
15 Mills and Crown Prosecution Service v Marshall [1998] IRLR 494

Burden of proof

Under s.136 Equality Act 2010, when a claimant establishes facts from which a tribunal could conclude that a case of discrimination is made out, the tribunal is required to uphold that complaint of discrimination unless the respondent proves that he did not commit the act, thereby shifting the burden of proof to the respondent at that point. It has been assumed that this only applies to direct discrimination but there does not appear to be any reason why it could not apply to indirect discrimination.

Questionnaires

Section 138 Equality Act 2010 provides for the 'questionnaire procedure'. Employers are not required to answer the questions, but a failure to do so, or to do so adequately within eight weeks, can (but does not necessarily17) lead to an inference by a tribunal that discrimination did occur. This procedure helps possible Claimants to obtain information, sometimes in order to consider whether it is worth bringing a claim.

Representative Actions

There was no scope for representative actions under the previous legislation. Any person wishing to seek a remedy from discrimination must do so themselves. Bodies such as trade unions and the EHRC could not bring proceedings in their own name on behalf of a group.

This position essentially remains and no provision for representative actions has been included in the Act. To allow more time to consider the point the previous Government took the view that primary legislation was not required in any event as section 7 of the Employment Tribunals Act 1996 gives the Government power to introduce representative actions by way of regulations.

Remedies

(a) An order declaring the rights of the complainant and respondent as to the act complained of;

(b) Award compensation (on which there is no upper limit);

(c) A recommendation for the respondent to take such action within a specified period as the tribunal considers practicable for the purpose of obviating or reducing the adverse effect on the complainant of discrimination complained of. Recommendations can relate to the individual bringing the complaint or others – so a recommendation could now be made where (as in the majority of cases) the employee has left. Recommendations need to be proportionate and based on evidence. For example the tribunal could recommend that the Respondent:

16 *London Borough of Southwark v* Afolabi, [2003] IRLR 220.
17 *D'Silva v NATFHE* [2008] IRLR 412

- Introduces an equal opportunities policy;
- Ensures its harassment policy is more effectively implemented;
- Sets up a review panel to deal with equal opportunities, harassment and grievances;
- Re-train staff;
- Makes public its selection criteria used for staff transfer or promotion.

If a recommendation is not complied with, the complainant can apply to the tribunal to have the amount of compensation increased – but only in so far as the failure relates to the complainant.

Beyond that, recommendations are not binding and therefore employers will not face any enforcement actions should they not comply. However, such failings could later be used in support of further discrimination cases against the employer.

Recommendations do not apply to equal pay claims.

Compensation may include:

- Financial compensation
- Compensation for injury to feelings
- Aggravated damages (where the motive or the manner of discrimination heightened injury to the complainant's feelings)
- Compensation for personal injury. 18

Interest may be included on awards of compensation.

The EAT has confirmed19 that any psychiatric injury suffered does not have to be reasonably foreseeable. It is enough that the discrimination caused the injury.

In cases of harassment, injury to feelings is often the only head of damages available. The Court of Appeal has produced guidelines for 'injury to feelings' awards. They identified three broad bands of compensation for injury to feelings – between £18,000 and £30,000 for the most serious cases involving a lengthy campaign of harassment, £6,000 to £18,000 for serious cases not meriting an award in the highest band;

18 HM Prison Service v Salmon [2001] IRLR 425
19 Essa v Laing [2004] IRLR 313

Example:

The tribunal awarded compensation of £14,000 for injury to the feelings where the employer had conducted a campaign to oust her from its employment after she had brought a sex discrimination claim.

And £500 to £6,000 is to be awarded for less serious cases, such as an isolated or one-off act of discrimination.20 These should be regarded as fairly flexible guidelines and the injury to feelings caused will vary from individual to individual. *St Andrews Catholic Primary School Governors v Blundell* EAT, 06 August 2010

Equality of terms of employment

These provisions replace the Equal Pay Act 1970 and apply only to differentials in terms of employment between men and women. The main difference is that these provisions can apply to any contractual terms – not just pay.

Chapter 3 of Part 5 of the Equality Act 2010 (which replaces the Equal Pay Act 1970) makes provision for the protection of employees and office holders against discrimination on grounds of sex in the terms of their contracts of employment. The Act deems that a 'sex equality clause' is included in a woman's contract of employment (rather than the 'equality clause' of the Equal Pay Act). The sex equality clause has the effect of bringing the claimant's terms of employment up to the standard of the male comparator (the legislation applies to men as well). The 'demarcation' between the equality provisions' and the sex discrimination provisions means that employees could use hypothetical comparators if there is no real comparator – using the discrimination provisions.

The sex equality clause, once activated, continues to operate until the Claimant's contract is changed by agreement, even if there ceases to be any valid comparators. For example, if a female employee is entitled to equal pay with a male employee, but that male employee ceases to be a valid comparator (e.g. because he is promoted, or leaves, or the female employee transfers to another employer under TUPE), then her pay will remain at the higher level of that of her comparator.21 Once a clause is amended by the sex equality clause, it remains amended until something changes the employee's terms of employment – eg she is promoted or agrees to revised terms of employment.

The sex equality clause modifies a woman's contract in any situation where the woman is engaged on:

- 'Like work' to a man;

20 Vento v Chief Constable of West Yorkshire Police [2002] EWCA Civ 1871, [2003] ICR 318, [2003] IRLR 102, CA, updated by Da'Bell v NSPCC [2010] IRLR 19.
21 Sodexo Limited v Gutridge [2009] IRLR 721, Court of Appeal

- On 'work rated as equivalent' to work done by a man; or
- On work of 'equal value' to that done by a man.22

The equality clause can also modify a contract where the comparator has been given a lower rating but is nevertheless paid more.23

In the case of pensions schemes, the legislation implies a 'sex equality rule' which modifies the rules of the pension scheme to make them no less favourable for men than for women.

Generally the Claimant must be in the same employment as the comparator – i.e. must have the same employer or an associated employer as the Claimant and work at the same establishment, or at another establishment where common terms of employment apply. However, claims have been permitted under Article 141 of the Treaty of Rome using as comparator:

- A male predecessor;24
- A male predecessor who did less work than the female successor but who received more pay;25
- An immediate male successor as a 'notional contemporaneous comparator';26 but not a successor who was only employed some time after the period in respect of which the claim is made.27

Same employment

The fact that the Claimant has the same employer as the comparator is not enough. They must either:

- Work at the same establishment; or
- Work at different establishments but have 'common terms of employment'.

Two employees may work at the same 'establishment' even if they have different workplaces, so long as they are part of the same operation. Thus employees of a local authority working at a school were held to work at the same establishment as community workers and others employed by the council at various different locations – the council itself was held to be a single establishment.28

22 Equality Act 2010m s65
23 Redcar & Cleveland Borough Council v Bainbridge [2007] IRLR 984
24 Macarthys Ltd v Smith [1979] ICR 785
25 Hope v SITA UK Ltd UK, EAT 0787/04MAA
26 Diocese of Hallam trustees v Connaughton [1996] IRLR 505
27 Walton Centre v Bewley [2008] IRLR 588
28 City of Edinburgh Council v Wilkinson and others, EATS/0002/09/BI We have been informed that this is being appealed.

'Common terms and conditions' for these purposes need only be substantially comparable rather than identical.29

The EAT has held that Article 141 was wide enough to allow a Claimant teacher to compare herself with a comparator teacher employed by a different local authority employer which was not an associated employer.30

The Court of Appeal has held that a part-time lecturer whose services were supplied to a principal by an agency could not compare herself with one of the principal's full-time employees. The Court of Appeal referred a number of questions to the European Court of Justice including whether working in the same service or establishment, but with different employers, amounts to working in the same employment for the purposes of Article 141.31 The ECJ has decided that where the differences identified in the pay of workers performing equal work or work of equal value cannot be attributed to a 'single source' then there is no one body which is responsible for the inequality and which could restore equal treatment, and that therefore the situation was not within the scope of Article 141.32

Material Factor Defence (s69)

An employer has a defence if the variation between a man's and a woman's contract is due to a material factor which is not the difference of sex.33

Examples:

- Market forces;34
- 'Red-circling'; *Fearnon v Smurfit* [2009] IRLR 132 – need to consider motive for introducing + continuing.
- Different collective bargaining arrangements unless such arrangements clearly result in women generally receiving less pay than men where that cannot be objectively justified.35
- Bonus to get around pay freeze in 1970s – not GMF in 2004! Plus no monitoring conducted (*Hartlepool v Dolphon* [2009] IRLR 168)
- Reward those taking part in 24/7 working (*Blackburn v Chief Constable of West Midlands* [2009] IRLR 135)

29 British Coal Corporation v Smith [1996] IRLR 404 and Scullard v (1) Knowles and (2) Southern Regional Council Education & Training [1996] IRLR 344
30 South Ayreshire Council v Morton [2002] IRC 156
31 Allonby v A Carington & Rossendale College & Others [2001] IRLR 364
32 Lawrence & ors v Regent Office Care Ltd & ors [2002] IRLR 822
33 Equality Act 2010, s69
34 Rainey v Greater Glasgow Health Board [1987] ICR 129
35 British Airways plc v Grundy [2008] IRLR 814

In acknowledgement of the equal pay cases brought as a result of the job evaluation schemes which incorporate an element of pay protection introduced by local authorities and the NHS (the 'Single Status' and 'Agenda for Change' schemes respectively) section 69(3) states: *'the long-term objective of reducing inequality between men's and women's terms of work is always to be regarded as a legitimate aim'*– but the question will remain of whether it is proportionate (s69(3)). This suggests that a pay protection arrangement which perpetuates discriminatory pay for a limited period could be justified.36

Before the Equality Act 2010 came into force the effect of the decision in *Armstrong and others v Newcastle Upon Tyne NHS Hospital* was that where statistics show that a differential in pay between two groups disadvantages women more than men, the employer may show that the differential has a non-sex based reason but there was no requirement to justify it objectively. The Equality Act 2010 (s69(1)(b) and (2)) appears to have changed this, and suggests that a material factor which leads to a statistical difference in pay or other contractual rights between the sexes is only lawful if it is a proportionate means of achieving a legitimate aim.

Therefore the material factor must not be itself tainted by unlawful sex discrimination. A pay practice which disproportionately affects one sex may be influenced by discriminatory factors. If it is, the employer had (under the Equal Pay Act case law) to provide objective justification for the pay differential.37 S69 attempts to resolve the conflicting case law on the point: if the factor has a disproportionate effect on one sex over the other, the employer must establish 'a proportionate means of achieving a legitimate aim' (s.69(1)(b) and (2)) (Villalba v Merryl Lynch and Co.38 and Armstrong and others v Newcastle Upon Tyne NHS Hospital39).

Demarcation between sex equality clause cases and sex discrimination cases (ss.70 and 71)
The sex equality clause affects wages, salaries, holiday pay, sickness pay and other contractual benefits; while the sex equality rule affects pensions. If the sex equality clause applies (or would apply but for the material factor defence) then the discrimination provisions are excluded. But if the sex equality clause does not apply, then a direct (or dual) discrimination claim can be made (s.71(2)).

If the claim is in respect of a non-contractual benefit, consideration should be given to whether this claim should be brought under the sex discrimination provisions instead.

Similarly, if the sex equality clause has no effect because there is no actual comparator. It would not be easy to establish direct pay discrimination based on a hypothetical comparator. How often does an employer say to a female employee: "I would have paid you more if you were a man?!"

36 Redcar & Cleveland Borough Council v Bainbridge and other; Surtees v Middlesborough Council and others [2008] IRLR 776
37 North Yorkshire County Council v Ratcliffe [1995] ICR 833, HL.
38 Villalba v Merrill Lynch & Co Inc [2006] IRLR 437, EAT
39 [2006] IRLR 124

But possibly this could allow claims using a successor as a comparator (which previously has not been possible – *Walton Centre v Bewley* [2008] ICR 1041).

The two sets of provisions are mutually exclusive.

Equal value cases

The procedure in equal pay claims where the claim is based on an allegation of 'work of equal value' differs from other types of equal pay claims and most employment tribunal claims. In such cases, there is an initial hearing to consider whether it is necessary to obtain an independent expert's report to determine whether the work is in fact of equal value. If a tribunal thinks that it can determine the issue of work of equal value without the assistance of an expert's report, it may do so.40 However, it may not do so without giving the parties the opportunity to adduce their own expert evidence.

Questionnaires

A questionnaire procedure can be used by Claimants in equal pay claims in the same way as sex, race and disability discrimination claims.41 This enables claimants and potential claimants to check whether male colleagues (for female claimants – vice versa for male claimants) are being paid more for the same or equal work. In many cases, they can find out just by asking their colleagues; or a group of workers can agree amongst themselves to disclose their terms of employment to each other, or to a trade union or to employee representatives. Any term of a contract prohibiting this is void.42

Pay disclosure clauses (s.77)

Section 77 does not prohibit secrecy clauses. However, clauses in employment contract prohibiting disclosure of or seeking information about employees' pay are unenforceable to the extent that they prevent people finding out if there is a connection between pay and a protected characteristic (a 'relevant pay disclosure').

Any detriment imposed for making or seeking a relevant pay disclosure amounts to victimisation.

Remedies

Claims concerning an alleged breach of a sex equality clause or rule may be brought in an employment tribunal. Such claims must be brought within six months of the termination of employment. The Act does not specifically state that such claims cannot also be made in the civil courts and, if so, whether the same time limits would apply.

40 Sex Discrimination and Equal Pay (Miscellaneous Amendments) Regulations 1996, SI 1996/438.
41 Equality Act 2010, s.138
42 Equality Act 2010, s.77

Employment is treated as having terminated where employees agree to new terms of employment which are sufficiently different from the old terms to be regarded as a different contract,43 unless, despite the changes, it can still be said that there is a 'stable employment relationship'.

'Employment' in 'stable employment relationship' means the nature of the work rather than legal terms of employment. Employment is also treated as coming to an end, with new employment starting, when the employment transfers under TUPE;44 although the terms of employment, as amended by the equality clause, will continue after the TUPE transfer and the time limit for a complaint of a breach of such transferred terms will be six months from the end of that transferred employment rather than the date of the transfer.45 In cases where the employer has deliberately concealed a 'qualifying fact' from the woman the qualifying date will be six months after the date she discovers this fact.

A 'qualifying fact' is a relevant fact without knowledge of which she could not reasonably have been expected to make a claim. Where the woman is under 18 years old or is of unsound mind, then the qualifying period will be six months after she turns 18 or ceases to be of unsound mind (Equality Act 2010, s129(3)).

The Claimant, if successful, is entitled to a declaration that the equality clause applies and compensation for loss of any benefits she would be entitled to as a result, going back up to six years if necessary (but not a recommendation – see above). In calculating the amount of pay to which a successful Claimant is entitled, tribunals have held that the Claimant cannot claim that he or she should be paid *more* than their comparator.46 Compensation for injury to feelings and aggravated damages cannot be awarded (unlike most other forms of discrimination claims).47

Remedies for breach of a sex equality rule applicable to pension schemes are: a declaration; an order for retrospective membership of the pension scheme from any date after 1976; or (in the case of members of the pension scheme who are receiving a pension) arrears of benefits going back six years from the date of the application to the tribunal. 48

Pension Aspects of the Equality Act 2010

The Equality Act 2010 also has implications in the pensions' sphere. The Act mainly consolidates the discrimination aspects applicable to pensions, however it does also make some changes that should be noted.

43 See for example, Cumbria County Council v Dow (No 2) [2008] IRLR 109
44 UNISON v Allen [2007] IRLR 975
45 Limited v Gutridge and Others [2009] IRLR 721, Court of Appeal
46 Evesham v North Hertfordshire Health Authority EA [2000] IRLR 257 CA
47 City of Newcastle upon Tyne v Allen (2005) HLJR 619 EAT
48 Equality Act 2010, ss133 and 134.

Age Discrimination

The very nature of Pension Scheme means that age discrimination is inherent.

What is age discrimination?

To have a valid age discrimination claim, a person must be able to show that they have been treated worse than another worker whose position is either the same as, or not materially different from theirs.

Age Discrimination can be direct or indirect:

- Direct discrimination means treating a person less favourably than another on grounds of age or apparent age.
- Indirect discrimination is applying a provision, criterion or practice which, though apparently age-neutral, in practice puts persons of a particular age or age group at a disadvantage.

Legislation

The Employment Equality (Age) Regulations 2006 ("**Age Regs**") were introduced on 1 October 2006 and apply to pension practices from 1 December 2006.

Therefore, from 1 December 2006, pension schemes have had to be operated in such a way as to avoid discriminating against members, or prospective members, on the grounds of age.

Discriminatory rules and practices in relation to rights accrued before 1 December 2006 are not affected.

Exemptions

A discriminatory practice will not be unlawful if it:

- falls within the series of exceptions (which were listed in schedule 2 of the Age Regs); or
- can be "objectively justified".

An action can be objectively justified if it is a *proportionate means of achieving a legitimate aim*. Objective justification is a balancing act where the legitimate (non age-based) aim is considered against the effects of the discriminatory practice. The greater the discriminatory effect, the more difficult it will be to successfully objectively justify.

Impact of the Equality Act

The Act repeals Schedule 2 of the Age Regs however the exceptions that were contained in schedule 2 are to be carried forward in the Equality Act (Age Exceptions for Pension Schemes) Order 2010.

Sex Discrimination

What is sex discrimination?

To have a valid sex discrimination claim, a person must be able to show that they have been treated worse than another worker whose position is either the same as, or not materially different from theirs.

Sex discrimination can be direct or indirect:

- Direct discrimination means treating a person less favourably than another on grounds of their sex.
- Indirect discrimination is applying a provision, criterion or practice which puts a woman (or a man) at a disadvantage when compared to a member of the opposite sex and where the person in question is disadvantaged.

Legislation

The Sex Discrimination Act 1975 and related regulations set out the law as it stands in relation to sex discrimination.

Exemptions

An action which is directly discriminatory will not be unlawful if it is a genuine occupational qualification.

An indirectly discriminatory provision will not be unlawful if it can be "objectively justified".

A provision can be objectively justified if it is a *proportionate means of achieving a legitimate aim*. Objective justification is a balancing act where the legitimate (non sex-based) aim is considered against the effects of the discriminatory practice. It appears that cost alone is unlikely to amount to a legitimate aim and the case law seems to indicate that the legitimate aim has to be reasonably necessary.

The greater the discriminatory effect, the more difficult it will be to objectively justify.

Examples of Sex Discrimination

Part-time workers

Excluding part-time workers from membership of the scheme where those part-time workers are predominantly male or female may constitute indirect sex discrimination.

Unequal Normal Retirement Ages

Differing normal retirement ages ("**NRAs**") between the sexes after the judgment provided in the case of Barber Guardian Royal Exchange Assurance Group ("**Barber**") which was given on 17 May 1990.

Background to Barber

European sex discrimination law (Article 119 of the Treaty of Rome (now Article 141 of the Maastricht Treaty)) introduced the requirement for men and women to receive equal pay in respect of equal work.

Barber established that pension benefits are "pay" for the purposes of these requirements and that for all periods of Pensionable Service from 17 May 1990 onwards benefits must be equal for males and females, including NRAs.

As a result of Barber, from 17 May 1990 pension benefits had to be levelled up in value for any period of service from 17 May 1990 to the date when valid steps are taken in relation to the pension scheme to provide fully for equal treatment on the value of benefits of male and female members. The period from 17 May 1990 until the date that the pension scheme took such valid steps is known as the "**Barber Window**".

Most pension schemes prior to Barber provided for unequal NRAs for male and female members of the scheme – typically these were age 60 for females and age 65 for males. The practical effect of "levelling-up" was that members receiving the "lower value" of pension benefits as a result of accruing pensionable service against a higher NRD (typically 65), accrued pensionable service against the lower NRD (typically 60) throughout the Barber Window.

Impact of the Equality Act

The Equality Act 2010 brings together and strengthens the previous discrimination legislation. The Equality Act regulations confirm there is no change to discrimination exceptions.

Extension of non-discrimination Rule

There is a non-discrimination rule which is currently implied into all pension schemes. This relates to:

- age;
- disability;
- religion or belief; and
- sexual orientation.

Impact of the Equality Act

Section 61 of the Equality Act extends the non-discrimination rule so that it includes:

- gender reassignment;
- marriage and civil partnerships; and
- sex.

The non-discrimination rule will not apply to pension credit members.

Replacement of existing rules

Equal Treatment Rule

The Pensions Act 1995 stated that all occupational pension schemes must include an equal treatment rule.

What is it?

The Equal Treatment Rule:

- requires that from 17 May 1990 the Principal Employer (and the Trustees of the Scheme) has had to carry out its functions in such a way as to avoid discriminating against members of the Scheme, or prospective members, on the grounds of their sex;
- is included in every pension scheme; and
- relates to the terms on which persons become members and how members of the scheme are treated.

Impact of the Equality Act

The provisions of the Pensions Act 1995 relating to the Equal Treatment rule are replaced by section 67 of the Equality Act.

Unfair Maternity Provisions

The Social Security Act 1989 defines "unfair maternity provisions".

What are the rules on "unfair maternity provisions"?

They require that any woman who is on paid maternity leave is treated as if she is working in respect of any rule within the pension scheme relating to:

- scheme membership;

- accrual of scheme rights; and
- determination of benefits.

Where an employee is on paid maternity absence either during ordinary maternity leave or additional maternity leave, and irrespective of whether the employee is in receipt of contractual maternity pay or statutory maternity pay, the position is that:

- the employer has an obligation to maintain pension benefits as if the employee was at work (and therefore pay employer contributions to the pension scheme on the basis of the employee's salary before she went on maternity leave);
- if there is a requirement in the pension scheme for the continuation of employee contributions into the pension scheme whilst the employee is on maternity leave, this will have to be complied with. However, the employee's contributions will be based on their salary that the employee receives during maternity leave;
- it is also arguable that the "shortfall" between the employee's pension contribution payable based on the pay that they receive during paid maternity leave and the pension contribution that would be payable had the employee paid contributions based on their full salary, will fall to the employer to pay.

Impact of the Equality Act

These requirements are replicated at section 75 of the Act, and the unfair maternity provisions in the Social Security Act 1989 are to be repealed.

Statutory power for Trustees to make non-discrimination alterations

The Equality Act provides trustees of pension schemes with an overriding power to make "non-discrimination alterations" to the rules of their scheme by way of a resolution. This ability can be utilised where:

- trustees do not already have power to amend the scheme; or
- the procedure to amend the scheme is:
    - "liable to be unduly complex or protracted"; or
    - "involves obtaining consents which cannot be obtained or which can be obtained only with undue delay or difficulty".

Default retirement age

The government has decided to bring forward its proposed review of the default retirement age. This was originally scheduled to take place in 2011 but will now begin later in 2010.

Consultation is still underway in relation to this but there remain many questions that employers should begin thinking about in the event that the default retirement age is scrapped. The most notable one from a pensions perspective is what pension provision would be put in place for employees who remain in employment post age 60/65?

Equality duties

Gender Pay Reporting (s.78)
Section 78 of the new Act provides the Government with the power to issue regulations requiring employers whose **employees total 250** or more to publish information relating to their employees pay as a means of highlighting any discrepancies between the pay of male and female employees.

Section 78 of the Act has been controversial and the previous Government committed not to use the power until 2013. Section 78 is still being considered under the Coalition Government.

Gender equality duty under s.76A SDA 1975
This requires public authorities, in performing their public functions, to have regard to the need to eliminate unlawful discrimination and harassment and to promote equality of opportunity between men and women.

The Sex Discrimination Act 1975 (Public Authorities) (Statutory Duties) Order 2006 SI 2006/2930 requires certain authorities (including local authorities) to prepare and publish:

- A gender equality scheme. That scheme must set out how the authority proposes to fulfill its gender equality duties and how it intends to assess the impact or likely impact of its policies and practices on equality between men and women. This has to be reviewed every three years.
- An annual report setting out the actions the authority has taken.
- (Authorities employing 150 or more employees) to publish an equal pay statement explaining the authority's policy on equal pay. This has to be reviewed once every three years.

The 2007 Code of Practice remains in force until replaced. This aims to:

- Eliminate unlawful discrimination and harassment; and
- Promote equal opportunities between men and women.

Socio-economic duty (s.1)

This is to require specified public bodies to take account of social disadvantages when taking strategic decisions.

The Act sates in section 1 that:

An authority to which this section applies must, when making decisions of a strategic nature about how to exercise its functions, have due regard to the desirability of exercising them in a way that is designed to reduce the inequalities of outcome which result from socio-economic disadvantage.

Strategic decisions are decisions about:

- How it goes about its business;
- Setting priorities and targets;
- Allocating resources; and
- Commissioning services.

Those to be placed under the socio-economic duty set out in this section will include Government ministers and departments, local authorities and NHS bodies.

This could include employment strategies such as trying to employ more women, people with disabilities, ethnic minorities and people from different socio-economic backgrounds.

No proposals have been made yet.

Public sector equality duty – s.149 (expected April 2011)

This is to cover equality in the 'core' protected characteristics – i.e. sex, race, age, disability, sexual orientation, religion or belief.

Existing public sector equality duties cover race, disability and gender.

Section 149(1): General equality duty on public sector organisations listed in schedule 19 (which includes local authorities and NHS bodies). The general duty means they must have regard to the need to:

- eliminate discrimination, harassment, victimisation and any other conduct prohibited by the Equality Act 2010
- advance equality of opportunity
- Foster good relations across protected characteristics.

Section 149(2) also imports a duty on others who exercise public functions but only in the exercise of those functions.

Specific duties will be by regulation (s.153) or by Order under s.155 re: public procurement functions – i.e. imposing on contractors requirements e.g. for gender breakdown.

A consultation document has been published (the GEO's 'Equality Act 2010: the Public Sector Equality Duty – August 2010). An earlier consultation document was published in June 2009, with proposals for specific duties; and a policy statement was published in January 2010. The Government has considered the results of consultation on those documents and has developed a 'new approach'.

Draft 'Equality Act 2010 (Statutory Duties) Regulations 2010' is annexed to the document.

The EHRC will publish a Code of Practice on Equality Duty and will work with the Public Sector Transparency Board.

Broadly the proposals are:

- Strip out unnecessary prescription, processes and top-down targets
- Free up resources for front-line services
- But 'bring data into daylight' so citizens can judge, challenge, applaud and hold to account' public bodies

Public bodies with 150 or more employees are to publish from **2011** annual details on:

- Information about the protected characteristics of employees – for example, the gender pay gap, proportions of ethnic minorities distribution of disabled employees.
- Assessment of impact of policies
- The information it took into account when assessing impact
- Details of engagement with those with an interest when assessing impact.

There will be no need to set out proposed steps to achieve equality objectives. This is to be published annually, starting with 4 April 2011.

By 2 April 2012 and once every four years thereafter, public authorities must publish one or more objectives which it reasonably thinks it should achieve. Those objectives must be specific and measurable and the means of measuring the extent to which those objectives are achieved must be set out.

Consultation ends on 10 November 2010.

Summary

Provisions which came into force on 1 October 2010:

- The basic framework of protection against direct and indirect discrimination, harassment and victimisation in services and public functions; premises; work; education; associations, and transport.
- Changing the definition of gender reassignment, by removing the requirement for medical supervision.
- Levelling up protection for people discriminated against because they are perceived to have, or are associated with someone who has, a protected characteristic.
- Applying the European definition of indirect discrimination to all protected characteristics.
- Extending protection from indirect discrimination to disability.
- Introducing a new concept of "discrimination arising from disability", to replace protection under previous legislation lost as a result of *Malcolm*.
- Harmonising the thresholds for the duty to make reasonable adjustments for disabled people.
- Extending protection from 3rd party harassment to all protected characteristics.
- Making it more difficult for disabled people to be unfairly screened out when applying for jobs, by restricting the circumstances in which employers can ask job applicants questions about disability or health.
- Allowing hypothetical comparators for direct gender pay discrimination.
- Making pay secrecy clauses unenforceable.
- Introducing new powers for employment tribunals to make recommendations which benefit the wider workforce.
- Harmonising provisions allowing voluntary positive action.

[Obtained from the Government Equalities Office website]

Provisions the Government is still considering:

- The Socio-economic Duty on public authorities
- Dual discrimination
- Gender pay gap information
- Positive action in recruitment and promotion

[Obtained from the Government Equalities Office website]

Contact us

Edward Benson
t 0115 976 6211
e ebenson@brownejacobson.com

Iain Patterson
t 0121 237 3924
e ipatterson@brownejacobson.com

Ray Silverstein
t 020 7337 1021
e rsilverstein@brownejacobson.com