

The Equality Act 2010 – Roger Cheves, employment lawyer with Slee Blackwell Solicitors offers some explanatory notes for employers

The Equality Act 2010 has replaced nine major items of discrimination legislation and other related measures that have been introduced over recent years. Most of the provisions of the Act came into force on 1 October 2010.

Although the Equality Act aims to harmonise existing discrimination laws, it also aims to take further steps to extend equality and protection from unfairness and discrimination on grounds of disability; age; sex; sexual orientation; gender reassignment; race; religion or belief; marriage and civil partnership; and pregnancy and maternity - 'protected characteristics'.

Many of the obligations regarding discrimination in the workplace appear to remain the same but there are subtle changes that are not immediately apparent to the casual reader, because the Act extends some protections to characteristics that were not previously covered and also strengthens some areas.

The Core Points from the Act:

There are two types of Discrimination:

Direct Discrimination

This occurs where the reason for a person being treated less favourably than another is one of the protected characteristics. The new definition extends the cover to instances where a person does not have the protected characteristic but has suffered less favourable treatment because of their association with someone who does - discrimination by association - or where the victim of less favourable treatment is wrongly thought to have a protected characteristic - perception discrimination.

Indirect Discrimination

This occurs when a policy or practice which applies to everyone has an effect which particularly disadvantages a person with a protected characteristic, unless the person applying the policy or practice can justify it by showing that it is a proportionate means of achieving a legitimate aim.

Indirect discrimination can also occur when a policy would put a person at a disadvantage were it to be applied. For instance, where a person is deterred from doing something, such as applying for a job, because a policy which would be applied would result in his or her disadvantage.

Indirect discrimination reaches all the protected characteristics apart save for pregnancy and maternity.

Harassment

Harassment is unwanted conduct related to a protected characteristic which has the purpose or effect of creating an intimidating, hostile, degrading, humiliating or offensive environment for the complainant or of violating the complainant's dignity. Harassment applies to all the protected characteristics apart from pregnancy and maternity and marriage and civil partnership. It means that an employee may complain of behaviour he finds offensive, even if it is not directed specifically at him and he does not need to possess the relevant protected characteristic themselves.

Third Party Harassment

An employer may be liable for harassment of an employee by a third party, for example a customer or client. This protection previously only applied on the ground of sex. It has now been extended to cover disability, age, gender reassignment, race, religion or belief and sexual orientation. It is unlawful for an employer to fail to take reasonably practical steps to protect an employee from harassment by a third party because of a protected characteristic where such harassment is known to have occurred on at least two previous occasions. The person responsible for the harassment need not be the same on each occasion.

Victimisation

Victimisation takes place where one person treats another badly because he or she has, in good faith, carried out a 'protected act', for example taken action, or supported any action taken, for the purpose of the Act, including in relation to any alleged breach of its provisions. Victimisation also occurs where one person treats another badly because he or she is suspected of having done this or of intending to do so. A person is not protected where he or she maliciously makes or supports an untrue complaint. Only an individual can bring a claim for victimisation.

Under the Act, victimisation is technically no longer treated as a form of discrimination, so there is no longer a need to compare treatment of an alleged victim with that of a person who has not made or supported a complaint under the Act.

Disability

The definition of disability remains essentially the same. A person is disabled if they have a physical or mental impairment which has a substantial and long-term adverse effect on their ability to carry out normal day-to-day activities. Crucially, the Act removes the requirement to consider a list of eight capacities, such as mobility or speech, hearing or eyesight, when determining whether or not a person is disabled. This change will make it easier for some to demonstrate that they are a disabled person.

The Act replaces the concept of disability-related discrimination with a new protection from discrimination arising from disability. This means that a person discriminates against a disabled person if they treat them unfavourably because of something arising from, or in consequence of, their disability where the employer or other person acting for the employer knows, or could reasonably be expected to know, that the employee has a disability, unless the treatment can be shown to be a proportionate means of achieving a legitimate aim. This means that there is no need for a disabled employee to establish that his or her treatment is less favourable than that experienced by other, non-disabled employees.

Indirect discrimination has been extended to the protected characteristic of disability.

An employer has a duty to make reasonable adjustments to help employees overcome disadvantages arising from impairment. Failure to do so cannot be justified. It is clear that this duty includes a requirement to provide an auxiliary aid, such as job application forms in large print for someone with a visual impairment or a specially adapted computer keyboard for an employee with arthritis, if this would overcome the substantial disadvantage to the disabled person.

Age

The Act protects people of all ages. However, different treatment because of age is not unlawful direct or indirect discrimination if the employer can justify it – i.e. can demonstrate that it is a proportionate means of achieving a legitimate aim. Age is the only protected characteristic that allows an employer to justify direct discrimination.

The Act continued to allow employers to have a Default Retirement Age (DRA) of 65 until the Employment Equality (Repeal of Retirement Provisions) Regulations 2011 came into force. on 6 April 2011. Under the Regulations, 5 April 2011 was the last date on which employers could issue a notification for compulsory retirement using the statutory DRA procedures.

From 6 April 2011, it is no longer lawful compulsorily to retire an employee on the grounds of age unless the dismissal can be objectively justified as a proportionate means of achieving a legitimate aim.

Gender Reassignment

A transsexual person now has the protected characteristic of gender reassignment.

The Act defines this as being where a person has proposed, started or completed a process to change his or her sex. He or she is no longer required to be under medical supervision to come within the definition.

It is discrimination to treat transsexual people less favourably for being absent from work because they propose to undergo, are undergoing or have undergone gender reassignment than they would be treated if they were absent through illness or injury.

Pre-Employment Health Questionnaires

In order to protect job applicants with a disability from discrimination during the recruitment process, the Act prohibits the use of questionnaires on an applicant's general health and related issues prior to a job offer being made. This includes prohibiting the use of such questionnaires before selecting a pool of applicants from whom the successful candidate will be chosen.

The measure does not prevent employers from asking job applicants any questions about their health but stipulates that they are only allowed to do so for specific purposes, for example deciding whether a job applicant can carry out a function that is essential ('intrinsic') to the work concerned.

Equal Pay

The Act allows an employee to bring a claim of direct pay discrimination using a hypothetical comparator where no actual comparator of the opposite sex exists.

Pay Secrecy Clauses

The Act makes pay secrecy clauses unenforceable and provides that individuals who discuss their pay with one another in order to find out if there might be pay discrimination with regard to any of the protected characteristics are protected from victimisation, even if their employment contract requires them not to discuss their pay.

Positive Discrimination

The Act allows an employer to take 'positive action' in certain situations. Positive action is lawful where it is necessary to prevent those who share a particular protected characteristic from suffering a disadvantage connected with that characteristic or if their participation in an activity is disproportionately low.

There are also provisions that allow positive action specifically in the process of recruitment and promotion, in limited circumstances. These provisions came into force on 6 April 2011 and mean that it is not unlawful to recruit or promote a candidate who is of equal merit, in relation to the specific job or position for which they have applied, to another candidate for the same post if the employer reasonably thinks that:

the candidate has a protected characteristic that is under-represented in the workforce; or
people with that characteristic suffer a disadvantage connected to that characteristic.

This kind of positive action is only allowed where it is a proportionate way of addressing the under-representation or disadvantage. It is not permitted for an employer to appoint a less suitable candidate just because he or she has a protected characteristic that is under-represented or disadvantaged.

Organised Religion

Where employment is for the purposes of an organised religion, an employer is permitted to apply a requirement to be of a particular sex or not to be a transsexual person, or to make a requirement related to the employee's marriage or civil partnership status or sexual orientation, but only in narrowly defined circumstances.

The Burden of Proof

In any claim where someone alleges discrimination, harassment or victimisation under the Act, the burden of proving his or her case starts with the claimant. Once the claimant has established sufficient facts, which in the absence of any other explanation point to a breach having occurred, the burden then shifts to the respondent to demonstrate that no breach of the provisions of the Act has occurred.

Employers seeking advice on the new Equality Act 2010 can contact Roger on 01392 423000 or email him at roger.cheves@sleebblackwell.co.uk

