

The Equality Act 2010

UNISON guide to branches



This guidance is amended and updated from the original TUC briefing on the Equalities Act 2010.

Equality Act 2010

Background

On 1 October 2010, most of the Equality Act 2010 came into force, replacing the various pieces of existing discrimination legislation.

Purpose and Scope of the Act

The purpose of the Act is essentially to:

1. Harmonise the existing discrimination law by consolidating separate discrimination legislation into a single Act; and
2. Extend the scope of protection to areas beyond the field of employment in areas where this did not previously exist.

What are the main changes?

The Act sets out a number of provisions which strengthen and extend protection from discrimination in the employment field, including:

- Improved protection for disabled people and their carers;
- Extended protection from discrimination to people who suffer because they associate with others who have a protected characteristic;
- Making pay 'gagging' clauses in persons' contracts, unenforceable;
- Extending the existing race, sex and disability duties on public bodies to religion or belief, sexual orientation and age (from April 2011);
- Enabling employment tribunals who find against employers to make recommendations that they should introduce or change workplace policies or practices so as to address discrimination and disadvantage.

The following provisions are likely to come into effect in April 2011:

- Positive action – the ability of an employer to choose a person with a protected characteristic for recruitment or promotion when choosing between two equally qualified people.
- The new general public sector equality duty and the specific duties which supplement this. This extends the public sector duty to cover all protected

characteristics, rather than just sex, race and disability as was previously the case.

The government has indicated that it will not implement the following:

- Socioeconomic duty – this was a public sector duty to have due regard to the desirability of addressing socioeconomic disadvantage.
- Gender pay reporting – this was to be a compulsory pay reporting process; however the current Government has indicated that it prefers a voluntary approach.

The position is unclear in relation to:

- Dual (or combined) Discrimination – this was a provision to outlaw discrimination on grounds of two or more protected characteristics: for instance because someone is a Muslim man, or because someone is an older woman. The government is “currently considering how ...they can be implemented in the best way for business and others...”

This briefing outlines the key concepts underpinning the Act and considers the employment-specific provisions, the likely effect of the Act on public bodies and considers some of the challenges that lie ahead for UNISON and its members.

Key Concepts

Underpinning the Act are the key concepts of ‘protected characteristics’ and ‘prohibited conduct’.

Section 4 draws together all of the personal characteristics that are currently protected under existing legislation.

Referred to in the Act as **protected characteristics**, they are:-

- Age
- Disability
- Gender reassignment
- Marriage and Civil Partnership
- Pregnancy and Maternity
- Race
- Religion or belief
- Sex
- Sexual Orientation

Each is defined and explained in Chapter 1 of the Act.

Section 13 of Chapter 2 defines the range of conduct which will amount to unlawful discrimination under the Act – known as **prohibited conduct**.

Prohibited conduct includes:

- Direct discrimination
- Indirect discrimination
- Discrimination arising from disability
- Harassment
- Victimisation
- Failure to make reasonable adjustments in order to accommodate a person's disability

It is important to note that not all of the protected characteristics are covered by the prohibited conduct set out above. For instance, there is no protection against harassment on grounds of marriage and civil partnership or pregnancy and maternity (although the latter is likely to amount to harassment because of sex, which is covered). Where certain protected characteristics are excluded the Act refers to the '*relevant* protected characteristics'.

Direct discrimination

Direct discrimination arises where the reason for treating a person less favourably than someone else or others, is a protected characteristic. Other than in certain specified circumstances, the person does not themselves have to have the particular protected characteristic, provided that the protected characteristic is the reason for the treatment.

The definition is sufficiently broad to cover situations where the reason for the unfavourable treatment is because of a person's **association** with someone who has a protected characteristic (e.g. the carer of a disabled person) or because the person is **perceived** to have a protected characteristic (e.g. perceived to be gay).

Discrimination by association or perception on grounds of marital and civil partnership status is excluded. A person must show that the reason for the unfavourable treatment is their *actual* marital or civil partnership status, i.e. because they are either married or a civil partner.

Indirect discrimination

Indirect discrimination is extended in the Act and now applies to gender reassignment and disability discrimination. The Act also harmonises the various definitions of indirect discrimination that exist in the current legislation. The Act does not extend the scope of indirect discrimination to pregnancy and maternity, however, this may amount to indirect sex discrimination.

Unlike direct discrimination which can never be justified (other than for age), a seemingly neutral policy that is applied to everyone but which disadvantages a group of people with a particular protected characteristic, will only amount to

unlawful discrimination if it cannot be justified. To show justification, an employer must show that the policy, criterion or practice is a proportionate means of achieving a legitimate aim.

Example: an employer who proposes to change the shift patterns of the entire workforce, the effect of which would be to disadvantage women with caring responsibilities, will not be liable for unlawful discrimination where the proposed changes are justified as being a 'proportionate means of achieving a legitimate aim'.

It may for instance be a legitimate aim to have shift working to maintain 24 hour production. However, it may not be proportionate to make everyone work the new shift patterns if the objective could be achieved in a less discriminatory way, eg through volunteers. Cases like this will always depend on the particular facts of the case.

Discrimination arising from disability

This new provision makes it unlawful to treat a disabled person unfavourably not because of the person's disability itself but for a reason which arises from, or in consequence of, the disability.

The important thing about this new provision is that you do not need to show that the disabled person has been treated worse than a non-disabled person would have been in exactly the same circumstances. The relevant issue is whether, because of the effects of their disability, they have been treated unfavourably without justification.

Example: Under the law before this provision, if a person had a long period of time off work because of their disability, then the employer was not discriminating by dismissing that person, if it would also have dismissed a non-disabled person for the same amount of absence. The problem is that it was unlikely that a person would have that level of absence unless they were disabled, so the law did not really address specific challenges faced by disabled people. Under the new law, if the absence was disability related and the employer dismissed without justification, it would not matter whether the employer would have dismissed a non-disabled employee for the same level of absence.

However, an employer who is able to justify such treatment will not be liable for disability-related discrimination. Similarly, an employer who does not know (and could not have reasonably been expected to know) that the person has a disability, will not be liable.

Where an employer has no knowledge of a person's disability and could not have reasonably been expected to know then, as stated above, the employer will avoid liability for discrimination. Moreover, the disabled person will not be protected under the Act against unlawful discrimination.

Employers should be encouraged to monitor disability in the workplace and disabled people given the necessary assurances (e.g. that any information disclosed will remain confidential and will not be used to the detriment of the disabled person) in order to facilitate disclosure.

Trade Union Officers and reps asked to advise members, may find the Equality and Human Rights Commission's Statutory Codes of Practice on Employment and Equal Pay helpful sources of further information (see website references at the end of this guidance.)

Harassment

The broad approach taken by the Act in relation to direct discrimination is also adopted in section 26 which sets out three key forms of harassment, as follows:

- 1) Harassment which applies to all protected characteristics apart from pregnancy and maternity and, marriage and civil partnership, involves 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 recipient or otherwise violates their dignity;
- 2) Sexual harassment – unwanted conduct as defined above which is of a sexual nature; and
- 3) Harassment which is unfavourable treatment because someone has either submitted to, or rejected sexual harassment or harassment which is related to sex or gender reassignment.

Whether the person harassed actually has the protected characteristic which is the reason for the unfavourable treatment is irrelevant. It is enough to show that the unfavourable treatment relates to 'a relevant protected characteristic'. The question for consideration is not therefore, 'Has this person been harassed *because* they are black, gay, a woman...' etc, but, 'Is the unwanted conduct *related to* a (relevant) protected characteristic?'

In a recent case the Court of Appeal decided that the homophobic bullying of a man by his colleagues all of whom were aware that he was heterosexual; (indeed, the victim knew that his colleagues were aware that he was heterosexual) nevertheless amounted to unlawful harassment on grounds of sexual orientation.

Section 26 extends the scope of harassment in employment to colour or nationality (where no protection currently exists) and **Section 40** extends the liability of employers for repeated harassment of their employees by third parties to all the protected characteristics covered by harassment. That said; protection from harassment under section 40 is an unfortunate 'three strikes' type of provision. Liability only arises if a third party harasses an employee (in the course of their employment) 'on at least two other occasions' which has been reported to the employer and in respect of which the employer has failed to take appropriate action to address.

Victimisation

The Act takes a slightly different approach to the old legislation where a person suffers victimisation.

The new provision effectively removes the need to consider the difference in treatment between a person who has done a protected act (or intended to) and another who has not. It also allows for a victimisation claim to be pursued where a person is treated unfavourably because they are suspected of having done a protected act. Protected acts include complaining about discrimination, giving evidence or information on behalf of others who have pursued claims under the Act or, bringing court or tribunal proceedings for discrimination.

Duty to make reasonable adjustments

The Act consolidates the reasonable adjustment provisions in the DDA 1995 and harmonises the legal language used. Wherever a disabled person is placed at a substantial disadvantage in comparison to a non-disabled person, the duty to make reasonable adjustments will arise.

The requirements of the duty are threefold and may involve:-

- a) Doing things differently, e.g. changing policies or practices so as to accommodate a person's disability, altering working hours, reallocating duties or tasks etc.
- b) Altering the physical environment, e.g. rearranging office interiors or providing access to a building
- c) Providing equipment (auxiliary aids) or services, e.g. specialist IT equipment, additional training, providing a reader or interpreter.

A failure to comply with one of the reasonable adjustment requirements will amount to discrimination against a disabled person. A failure to make reasonable adjustments cannot be justified – the only question is whether the adjustments are reasonable for the employer to make.

Pre-employment health and disability enquiries

The need to respond to health or disability related questions as part of the recruitment and selection process has had a disincentive effect on some disabled people applying for work. It is also considered to be one of the main reasons why disabled people are not shortlisted for interview.

The new Clause 60 prohibits prospective employers asking health questions of applicants (including whether an applicant has a disability), until the applicant has been able to successfully pass an interview, or some other assessment, to show that they meet some of the non-health requirements of the job.

Enquiries made, other than for a specific purpose, are banned. The Equality and Human Rights Commission is responsible for enforcing the ban. Additionally, an applicant who believes that a prospective employer has relied on information given in response to a non-specific purpose enquiry (e.g. withdrawing an offer or not offering employment) may pursue a claim in the tribunal.

The specific purpose exceptions include:

- Finding out whether a job applicant would be able to participate in an assessment to test their suitability for the particular job;
- Enquiries as would help an employer to assess whether reasonable adjustments need to be made to enable the disabled applicant to participate in an interview;
- Questions designed to assess whether the applicant would be able to carry out a core function of the job, with reasonable adjustments having been made as appropriate;
- Enquiries for the purpose of monitoring diversity (in which case applicants ought to be advised how the information disclosed will remain secure)
- Enquiries as would assist an employer to take positive action in employment for disabled people;
- Identifying suitable candidates for a job where there is an occupational requirement for the person to be disabled.

Example: A woman applies for a job as an office manager. She has diabetes. The employer insists on a pre-employment “medical” during which this condition is disclosed. As a result, the offer is withdrawn. The woman is able to enforce this in a tribunal as discrimination.

However, if she was sent to a medical for no good reason, but they still gave her the job and did not subject her to any detriment on the basis of that medical, then she would not be able to bring an individual claim, although she could complain to the Equality and Human Rights Commission who have powers to investigate (but not to give the individual compensation).

There is also an exception relating to enquiries made for the purposes of national security vetting.

Equal Pay

Unfortunately, the Act retains the distinctive approach to gender discrimination in pay and contractual terms by broadly replicating the existing provisions of the Equal Pay Act 1970.

However, in a small development, s.71 provides that a person for whom the equality clause has no effect (ie because she does not have a comparator) can bring a claim that relates to pay as a sex discrimination claim. This means that it would be possible to use a hypothetical comparator. However, proving a claim will still not be straightforward because the claim would need to be brought as a direct, rather than an indirect, sex discrimination case and the difference in pay would have to be on grounds of her sex. Also, with a hypothetical comparator it may well be hard to determine the value of a claim if you are not comparing yourself to an existing person with a particular pay rate. In practice, this is a rather limited right.

Gagging Clauses

This new provision renders unenforceable any term of employment, appointment or service which is designed to prevent people from disclosing their pay to others or alternatively from asking their colleagues how much they are paid where the purpose of the discussion is to check whether there is a potential equal pay or discrimination claim.

Positive action – sections 158 and 159

Section 158 effectively restates the current law with regard to taking positive action, i.e. employers may target training and encourage applications from groups which are under-represented in the workplace and additionally, take positive action in respect of employees who share a protected characteristic, e.g. are disabled, where they encounter disadvantage as a result of the protected characteristic.

However, **Section 159** of the Act (which will come into effect from April 2011) will permit an employer to choose a person on grounds of a particular protected characteristic for a job or a promotion, where they are equally qualified for the job or promotion. For example, an employer seeking to redress the underrepresentation of women employed in senior positions within the organisation may, if faced with a male and female candidate 'as qualified as' each other, appoint the woman candidate. But the employer must not operate a 'blanket' policy of appointing women over men and be able to demonstrate, if challenged, that the positive action taken is a proportionate means of achieving a legitimate aim. There is no obligation on an employer to take positive action: it is completely voluntary.

Example: An employer has identified through its HR policies that it has very few black managers, although a high proportion of black employees in general. To create a more representative management structure, it may, on a case by case basis, look at the qualifications of applicants for manager jobs, and, where the qualifications of two candidates are equal, the employer may select a black candidate over a white candidate. This example is likely to be a proportionate means of achieving a legitimate aim.

Employment Tribunal ‘recommendations’

Section 124 of the Act allows employment tribunals to make recommendations in discrimination but not equal pay cases, where an employer has failed to defend a discrimination claim, to take ‘specified steps’ to alleviate the adverse effect of discrimination by, for example, introducing or changing their policies or practices to address discrimination and disadvantage. Tribunal recommendations need not be confined to the successful claimant, but may benefit a category of workers or the entire workforce. Section 124 is welcomed by UNISON and the TUC as an important positive step in the promotion of good equalities practice in the workplace.

Exceptions

The Act simplifies and streamlines the limited exceptions to the non-discrimination rule currently available, by incorporating a single ‘occupational requirement’ test applicable to all equality strands. The exceptions are set out in Schedule 9 to the Act.

Current exceptions governing non-contractual payments to women on maternity leave and payments dependent upon marriage (or civil partnership) status have been retained, as have the exceptions for organised religions.

Default Retirement Age abolished

Since the Equality Act was passed, the government has announced that the default retirement age is set to be phased out between 6 April and 1 October 2011. The change means that:

- From 6 April 2011, employers will not be able to issue any notifications for compulsory retirement using the default retirement age procedure;
- Between 6 April 2011 and 1 October 2011 only people who were notified before 6 April and whose retirement date is before 1 October 2011 can be compulsorily retired using the DRA;

- After 1 October 2011, employers will not be able to use the default retirement age procedure to compulsorily retire employees.

Public Sector Equality Duty

The Act consolidates the existing public sector equality duties which cover race, disability and gender into a single duty which is extended to age, sexual orientation, religion or belief, gender reassignment and pregnancy and maternity. It is not extended so as to cover marriage and civil partnership.

Specific equality duties to supplement the new general equality duty will be enacted in April 2011. There are different specific duties for Scotland, Wales and England. The draft specific duties for Wales and Scotland are more detailed, whereas the England legislation deliberately waters down the procedural element of the existing specific duties, meaning that there may be a move away from formal equality impact assessment statements.

Branch guidance on potential claims for breaches of the public sector equality duties will be amended as the new duties come into force.

Statutory Codes of Practice

Statutory Codes of practice on Employment and Equal Pay accompany the Act. The Codes are available to download from the Commission's website: www.equalityhumanrights.org.uk or in hard copy (including in Braille, large print etc) from the EHRC and Government Equalities Office (GEO). The Codes of practice can be found that this link:

<http://www.equalityhumanrights.com/legal-and-policy/equality-act/equality-act-codes-of-practice/>

Public Sector and Education affiliate unions have, alongside the TUC, assisted EHRC to produce draft Codes for the new Public Sector Equality Duty. This is still in draft form.

Further guidance

The EHRC's guidance on the Equality Act can be found at:

<http://www.equalityhumanrights.com/advice-and-guidance/new-equality-act-guidance/>

The Government Equality Office's guidance can be found at:

http://www.equalities.gov.uk/equality_act_2010/equality_act_2010_what_do_i_n.aspx

Further legal advice

If you need further legal advice on anything to do with the Equality Act, you should contact the Region who can either advise you further, or obtain advice as necessary from our solicitors or legal services section. Members who consider that they have a potential discrimination or equal pay claim should fill out and submit a Case form in the normal way.