

Employment Write News

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Since the last Employment Write we have seen a change in Government and a new hard line budget. Below, we review a number of important changes to anti-discrimination legislation together with an analysis of what we can expect from the new Government in the months and years to come.



A wholesale change to discrimination law - What employers need to know

The Equality Act 2010 will come into force in October this year (subject to review by the new Government).

This new, extensive piece of legislation consolidates all aspects of discrimination law in relation to employment matters. Accordingly, the current discrimination legislation in relation to sex, race, disability, age, pregnancy and maternity, marriage and civil partnership, sexual orientation, gender reassignment and religion and belief (referred to in the new Act collectively as the “protected characteristics”) will all be replaced by this important new Act. The new Act also covers discrimination by service providers, landlords and educational institutions (which we do not discuss here). The objective of the legislation is to provide a simplified and harmonised approach to discrimination law. The legislation goes some way to achieving that objective but, in addition, the new legislation includes some significant changes to discrimination law which employers need to note.

Extended Scope

The new Act extends the scope of protection against discrimination by association. Although some of the protected characteristics trigger protection from this form of discrimination under current legislation, the approach is inconsistent. For example, discrimination on grounds of association with a person of a particular age is not covered, and so, a carer of an elderly relative is unlikely to attract any protection on grounds of age.

The current disability discrimination legislation does not, on a literal reading, provide protection from discrimination on grounds of association with a disabled person. However, following the case of *Coleman v Attridge*, the Disability Discrimination Act 1995 (DDA) must now be read so as to protect against discrimination by association with disability. In that case Mrs Coleman (who was not a disabled person for the purposes of the DDA) had care responsibilities for her disabled son. She was allowed to raise a claim in the Employment Tribunal that she had suffered discrimination and harassment from her employer (a law firm) on grounds of her association with her son.

The new legislation expressly extends the concept of discrimination by association to all of the protected characteristics (except maternity and pregnancy). This may mean, for example, that an employee who suffers discrimination by reason of responsibilities to care for a young child or elderly parent may claim age discrimination.

The concept of associative discrimination is not limited to carers. Under the new legislation, there is protection from harassment based on association with any of the key protected characteristics and this will include, for example, protection of an employee because of an association with a transsexual or person of particular sexual orientation.

The new Act also extends the concept of protection against discrimination based on perception. Under current legislation, discrimination based on perceived protected characteristics is again inconsistent. From October 2010, discrimination based on perceived protected characteristics will be unlawful. This will mean, for example, that the perception that a person is disabled, even if that person is not disabled (for the purposes of the DDA), will be unlawful.

Combined Discrimination

A new concept in the 2010 Act is combined or dual discrimination. This term describes discrimination based on the combination of two protected characteristics, e.g. the characteristics of a black woman. The provisions relating to this new concept are not intended to come into force until April 2011. When they do come into force they are likely to result in very complex cases which include allegations of discrimination on multiple grounds.

Harassment

The current sex discrimination legislation is interpreted on the basis that an employer may have liability for the harassment of an employee by a third party. It is also arguable that such protection applies in cases of racial harassment. Protection from harassment by third parties is expressly provided for in the new 2010 Act in relation to all protected characteristics (except maternity and pregnancy and marital and civil partnership status), where the employer has failed to take reasonably practicable preventative steps. This is an area of significant increased exposure and potential liability for employers, particularly given that harassment on grounds of a protected characteristic will include harassment on the grounds of a perceived protected characteristic or an association with a protected characteristic.

Disability Discrimination

As promised, the new Act does aim (at least) to simplify this complicated area of discrimination law. Under the current Disability Discrimination Act 1995 (DDA), a person is disabled if they have an impairment (physical or mental) which has a substantial and long term effect on that person's

ability to perform "normal day to day activities". Normal day to day activities are currently defined as: mobility; manual dexterity; physical co-ordination; continence; ability to lift, carry or otherwise move everyday objects; speech, hearing or eyesight; memory or ability to concentrate, learn or understand and perception of the risk of physical danger.

Under the new legislation this list of normal day to day activities will no longer apply. Employment Tribunals will only need to consider whether the person suffers from an impairment which has a substantial and long term effect. This simplified generic test will allow Employment Tribunals additional discretion but arguably faces employers with even more uncertainty as to which employees fall within the definition of disabled for the purposes of the legislation and which do not. We understand that further guidance in connection with this new simplified test is to be published.

Pre Employment Health Questions

Another development in the area of disability discrimination relates to pre employment health questions. With effect from October 2010, pre employment health questions will generally be prohibited. However, there are numerous exceptions to the general rule. Permitted questions will include, for example: those to establish whether the employee will be able to carry out functions intrinsic to the work offered; those to establish if reasonable adjustments will be required and those for the purpose of monitoring diversity. There is therefore obvious scope for pre employment health questions and the issues which employers must consider are which questions will be permitted and which will not.

Asking pre employment health questions, in itself, will not give rise to any liability but an Employment Tribunal will be able to draw an inference from such questions in its assessment of discrimination claims. The Equality and Human Rights Commission will also have the power to investigate the use of prohibited questions and take enforcement action in its own name, even where no discrimination can be shown to have taken place. The rule therefore has at least some bite.

Equal Pay

The current Equal Pay legislation is also clarified under the new Act. In all material respects the equal pay legislation remains unchanged. However, one notable addition is a new rule concerning secrecy clauses relating to pay. Such clauses will be unenforceable under the new legislation and any action taken by an employer against an employee who has engaged in a "relevant pay discussion" will amount to unlawful victimisation. Relevant pay discussions are discussions between employees to find out whether, or to what extent, there is, a connection between pay and having a particular protected characteristic.

What Employers Need to Do

In anticipation of the new legislation and with a view to limiting liability arising out of the extended scope of the legislation, it would be prudent for employers to review their terms of employment and equal opportunities policies to ensure compliance with the new legislation and best practice.

In particular, employers should review:

- recruitment policies and in particular policies relating to pre employment health questions;
- equal opportunities policies in the context of perceived and associative discrimination;
- policies and precautions in relation to harassment in the workplace (and in particular that from third parties);
- flexible working policies in relation to those employees with care responsibilities;
- the approach to identifying which employees may be regarded as protected under the DDA particularly in the context of the requirement for reasonable adjustments and absence policies (on the basis that until further guidance is issued it would be prudent to assume that the new generic definition will provide protection for additional employees).

What employers should expect from the Coalition Government

Since the General Election and the unusual formation of a Coalition Government, should employers expect a new approach on employment law? The Coalition Government has promised to “review employment and workplace laws, for employers and employees, to ensure they maximise flexibility for both parties while protecting fairness and providing the competitive environment required for enterprise to thrive”. The published Coalition Agreement and the Queen’s Speech which followed have not given us the clarity we had hoped for on what is to come in this area; nor has the recent budget. However, in this article we look at the areas in which employers may be advised to expect future change.

Work and Families

The Government plans to remove barriers to flexible working. The Government's proposals include a system of flexible parental leave (with fathers being able to take leave as well as mothers) and an extension of the right to request flexible working to all employees. The proposed extension in relation to flexible working is to be implemented following full consultation. This is perhaps an indication that, given current economic conditions, any further burden on employers is likely to be cautiously implemented.

Equality Act

The Equality Act (which we discuss above) has been anticipated as one of the key issues for employment law over the next few months. Pre-election, the Conservatives pledged to review the way in which the Act is to be brought into effect and possibly also make some changes to the proposed provisions. There is no reference to the Act in the Coalition Government's programme and the commencement timetable for the Act is rumoured to be under review. With the core provisions of the Act due to come into effect in October, we eagerly await clarification on the Government's position.

Default Retirement Age

The Coalition Agreement stated that the new Government would look to phase out the default retirement age of 65 years. It announced on 24 June 2010 that it intended to look at abolishing the default retirement age and that it was speeding up plans to raise the state pension age for men to 66 as early as 2016, with women following a few years later. The previous Government had proposed that the state pension age would increase in 2024. Details of the Government's plans on a consultation are expected in the near future but it looks likely that a review of retirement is going to form one of the major areas of the new Government's charter.

Immigration

The Government will implement annual limits on the levels of non EU immigration into the UK and implement additional controls on numbers of EU

member workers, where it is able. The Government has promised to consult interested parties, including business, on these measures. However, it has just announced the imposition of an interim cap on non EU immigration to prevent a flood of claims whilst consultation is taking place. It appears likely that employers will find it increasingly difficult to recruit foreign workers for positions in the UK.

Pay Issues

The Government proposes to take action to tackle the gender pay gap. This could involve a range of non legislative and legislative measures. The extension of flexible working would be one of those measures, together with promoting gender equality on the boards of listed companies.

The Government is also seeking to take a number of measures to address levels of pay in both the public and financial services sectors. The rationale for reducing pay in the public sector is obviously to cut the public sector deficit. Such action may have the knock on effect of industrial relations unrest. Trade union leaders have warned of possible strike action and other European states, notably Greece, have seen considerable unrest as a result of their efforts to deal with spiralling debt levels.

The Future

The future is uncertain. The only concrete conclusion that can be drawn at this stage is that perhaps the area of employment law is not one of the major priorities of the new administration. However, change is inevitable, and we are hopeful that the next few months are likely to lead to further details of the Coalition Government's proposed legislative programme and proposals in a number of these important areas.



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