

Equality Act & Discrimination Seminar

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Equality Act and Discrimination

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Equality Act 2010

- Intentions according to Government Equalities Office
 - Helping to make Britain a more equal society
 - Provides new cross-cutting legislative framework protecting the rights of individuals



Equality Act 2010

- Advance equality of opportunity for all
- Update, simplify and strengthen the previous legislation
- Deliver a simple, modern and accessible framework of discrimination law
- Protects individuals from unfair treatment and promotes a fair and more equal society



Equality Act 2010

- Simplifies 116 pieces of equality legislation into a single Act



Equality Act 2010

- Protected characteristics
 - Age
 - Disability
 - Gender reassignment
 - Marriage or civil partnership
 - Pregnancy and maternity



Equality Act 2010

- Protected characteristics
 - Race
 - Religion and belief
 - Sex
 - Sexual orientation



Equality Act 2010

- Anticipated timetable
 - Main provisions October 2010
 - Integrated Public Sector Equality Duty, dual discrimination protection April 2011
 - Ban on age discrimination in the provision of goods, facilities, services and public functions 2012



Equality Act 2010

- Anticipated timetable
 - Private and voluntary sector gender pay transparency regulations 2013
 - Publication of diversity data 2013



Equality Act 2010

- Principal Changes include
 - Single Justification test
 - New ways to claim discrimination re disability
 - Remedying the *Malcolm* case
 - Restrictions re health related questions from employers
 - Association and Perception



Equality Act 2010

- Reasonable adjustments by service providers
- Transparency and private sector
- Definition of disability
- Dual discrimination
- Single Equality Duty



Equality Act 2010

- Auxiliary aids as reasonable adjustment
- Harassment
- Victimisation



Equality Act 2010

- Single “Justification” Test
 - A proportionate means of achieving a legitimate aim
 - Test is objective
 - Applies to all indirect discrimination, discrimination because of disability and direct age discrimination – S13(2), S.15(1)(b) and S19(2)



Equality Act 2010

- Single “Justification” Test
 - Test creates a higher threshold than existing “material to the circumstances and substantial” test
 - Does not apply to most direct discrimination cases i.e. defence not available
 - Applies to Employers and Service Providers



Equality Act 2010

- Disability Discrimination
 - Discrimination arising from disability
 - Indirect discrimination
 - Replace “disability related discrimination” test



Equality Act 2010

- Disability Discrimination
- Malcolm case
 - Restricted use of comparators
 - Made a claim for disability related discrimination harder to prove
 - New S15 does not require disabled person to show less favourable treatment than a comparator



Equality Act 2010

- Need to make reasonable adjustments not to be anticipatory
- Employer must have knowledge of disability or ought reasonably to be aware of it for the duty to exist



Equality Act 2010

- Pre-employment Health enquiries
 - Section 60 provides that an employer must not ask about a job applicant's health before offering a job
 - Limited exceptions apply e.g. need for reasonable adjustments so applicant can attend interview or assessment
 - Impact on the Burden of Proof



Equality Act 2010

- Association and Perception
 - S13 definition of Direct Discrimination
 - A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others
 - Makes no reference to any particular person



Equality Act 2010

- Association and Perception
 - Presently, complainant re sex, disability, gender reassignment and age has to possess the protected characteristic
 - Change means associative discrimination is covered
 - Also covers perceived characteristics
 - Only exception is perceived marriage/civil partnership



Equality Act 2010

- Service Providers
 - Easier to claim need to make reasonable adjustments
 - No longer necessary to show that provider's practice makes it "impossible or unnecessarily difficult" to access the service



Equality Act 2010

- Service Providers
 - New test – does the practice place the disabled person at a substantial disadvantage
 - Extends threshold in employment to service provision



Equality Act 2010

- Transparency and the Private Sector
 - Gender pay gap
 - Prohibition on secrecy clauses
 - Possible regulations re Gender pay gap reporting



Equality Act 2010

- Disability definition

An impairment is to be taken to affect the ability of the person concerned to carry out normal day-to-day activities only if it affects one of the following-

 - a) Mobility;
 - b) Manual dexterity;
 - c) Physical co-ordination;
 - d) Continence;



Employment Contracts

- d) Physical co-ordination;
- e) Continence;
- f) Ability to lift, carry or otherwise move everyday objects;
- g) Speech, hearing or eyesight;
- h) Memory or ability to concentrate, learn or understand; or
- i) Perception of the risk of physical danger



Equality Act 2010

- Schedule 1 capacities now removed
- Makes the pursuit of claims easier
- Definition of disability now in S.6 and Schedule 1 to the new Act



Equality Act 2010

- Dual Discrimination
 - Previously unable to combine protected characteristics
 - S14 – can now combine two characteristics
 - Only covers direct discrimination
 - No mention of indirect discrimination, harassment or victimisation



Equality Act 2010

- Marriage and civil partnership excluded
- Pregnancy and maternity excluded
- Designed to cover where single claim may not succeed



Equality Act 2010

- Positive discrimination:
 - (1) The defence of occupational requirement is introduced across all protected characteristics;
 - (2) Positive discrimination to allow employers to promote someone from an under-represented group when faced with equal candidates



Equality Act 2010

- Single Equality Duty
- Effective from April 2011
- General Duty
 - S156 must have due regard to the need to advance equal opportunities etc
 - No private law remedy for breach but can still be challenged by judicial review



Equality Act 2010

- Single Equality Duty
- Specific Duties
 - Yet to be confirmed
 - Will be further legislation
 - Will include public procurement
 - Publish information re gender pay gap, ethnicity and disability employment rates



Equality Act 2010

- Auxiliary aids and services were excluded from ambit of DDA 1995
- Now changed S20(5)
 - Employer now has duty to provide aids and services so far as reasonable
 - Now recognised that this may be a reasonable adjustment



Equality Act 2010

- Harassment
- S40 – employers to be liable for harassment by third parties
 - Could be customers or suppliers
 - Only applies if employer is aware of at least two previous incidents
 - Obligated to take such steps as are reasonably practicable to prevent conduct



Equality Act 2010

- Victimisation
- Current test amended
 - S27 new test -A person (A) victimises another (B) if A subjects B to a detriment because:-



Equality Act 2010

- Victimisation
 - a) B does a protected act, or
 - b) A believes that B has done, or may do, a protected act
- Does away with need for a comparator



Equality Act 2010

- Detailed draft Guidance and Codes of Practice presently going through consultation
- Final amendments due in July 2010
- Likely to be substantial documents as Equality Act itself is 251 pages long, has 218 Sections and 28 Schedules



Sex, Race & Religion or Beliefs – The Equality Act

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Previously.....

- Race Relations Act 1976
- Sex Discrimination Act 1975
- Employment Equality (Religion or Belief) Regulations 2003



Definitions

- Direct discrimination now
- “because of”
- replaces “on the grounds of”



Definitions

- Protected characteristics
- Includes sex, race and religion or belief, marriage and civil partnership, pregnancy and maternity, gender reassignment



Associative discrimination

- New concept introduced by Equality Act for most of the protected characteristics

Exceptions –

- Marriage & civil partnership s.13(4)
- Pregnancy & maternity s.18



Perceptive discrimination

- Discrimination because of a person's perceived characteristic
- Exception – marital/civil partnership status



Dual discrimination s.14

- Possible now to bring a dual claim based on 2 protected characteristics
- age, disability, gender reassignment, race, religion or belief, sex or sexual orientation



Dual discrimination

- Direct discrimination only
- Exceptions:
 - Marriage & civil partnership
 - Pregnancy & maternity
- Because – no comparators



Dual discrimination

- The evidence does not need to support each of the combined characteristics if taken separately
- Can bring single strand claims in addition



Dual discrimination

- Defence s.14(4)
- If it is not direct discrimination because of either or both of the characteristics in the combination



Dual Discrimination

- Ministry of Defence v Debiq EAT 2009
- Indirect discrimination on dual grounds of sex and race discrimination



Burden of Proof

- Reverse burden of proof
- Previously applied to only certain types of claim
- Now applied to any proceedings in contravention of the Equality Act s.136



Sex Discrimination

- No specific provision for indirect discrimination for pregnancy /maternity s.19
- Such claims will continue to be dealt with as indirect sex discrimination



Race Discrimination

- New definition of indirect race discrimination
- Protects a person who is deterred by a discriminatory PCP from seeking employment
- Definition includes “it puts or would put.....at disadvantage”



Religion or Belief

- Definition of religion or belief includes lack of religion or belief s.10
- Case law on what amounts to belief



Religion or Belief

- Grainger plc v. Nicholson

- Philosophical Belief – Must be:

- Genuinely held
- A belief *not* an opinion or viewpoint
- A belief as to a weighty and substantial aspect of human life and behaviour



Religion or Belief

- Grainger plc v. Nicholson (cont.)

- Philosophical Belief – Must be:

- Have a certain level of cogency, seriousness, cohesion and importance
- Worthy of respect in a democratic society, not incompatible with human dignity and not conflict with fundamental rights of others



Religion or Belief

- Chondol v Liverpool City Council

- Complaint about Mr Chondol from service user
 - *“He was talking about God and church and crap like that”*
- Dismissed – brought claim of discrimination and unfair dismissal
- Not discrimination – dismissal on grounds of inappropriate behaviour rather than Mr Chondol’s religious belief



Religion or Belief

- **McFarlane v Relate [2010] EWCA Civ B1**
 - Christian counsellor
 - Dismissed for failing to confirm counselling of same sex couples
 - Claims of direct and indirect discrimination dismissed



Religion of Belief

- Specific defences for:-
 - Organised religion; and
 - Employments where ethos based on religion or belief



Religion or Belief

- Defence in paragraphs 2 & 3 of Schedule 9 of Equality Act 2010
- Apply only to direct & indirect discrimination in recruitment, training, promotion, transfer & dismissal



Religion or Belief

- Organised religion requirement
employer can apply requirement of:-
 - Particular sex
 - Not be a transsexual
 - Requirement related to marriage, civil partnership or sexual orientation



Religion or Belief

- But ONLY where requirement is to comply with doctrines of religion; or
- To avoid conflict with strongly held religious convictions of significant number of religion's followers



Religion or Belief

- Ethos based on religion or belief

Para 3

- Employer with ethos to apply requirement of particular religion or belief
- But ONLY if it is a requirement of the work and applying it is a proportionate means of achieving a legitimate aim



Equality Act 2010: Focus on Sexual Orientation; Age and Disability

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Sexual Orientation

- Previously dealt with by
 - The Employment Equality (Sexual Orientation) Regulations 2003
 - Now simply one of ‘protected characteristics’ – s.4 EA 2010
 - English v. Thomas Sanderson Blinds – the rise of ‘perceived discrimination’



Sexual Orientation

- English v. Thomas Sanderson
 - Case brought under Regulation 5 of Regulations:
 - A subjects to B to harassment where on grounds of sexual orientation, A engages in unwanted conduct which has purpose or effect of
 - Violating B’s dignity
 - Creating intimidating, hostile, degrading, humiliating or offensive environment for B



Sexual Orientation

- English v. Thomas Sanderson
- Claimant subjected to 'banter' of homophobic nature
- Basis was that he had been to Boarding School and lived in Brighton
- Accepted by both parties that he was not homosexual



Sexual Orientation

- Brought claim for harassment by virtue of Sexual Orientation Regulations
- Unsuccessful – EAT ruled that banter not on grounds of Claimants sexual orientation
- BUT...



Sexual Orientation

- Court of Appeal disagreed
- 2:1 majority
- Found was discrimination on grounds of sexual orientation
- Should focus on basis for harassment rather than attributes of particular victim



Sexual Orientation

- Now definitely covered
- Perceptive discrimination
- S.26(1) EA –
 - “A person (A) harasses another (B) if –
 - A engages in unwanted conduct **related to** a relevant protected characteristic and
 - Conduct has purpose or effect of violating dignity etc...”



Sexual Orientation

- Note different wording from direct discrimination:
 - ‘Related to’ as opposed to
 - ‘Because of’
 - Harassment claims easier to prove?



Age Discrimination

- Largely the same
 - Still lawful to discriminate in relation to
 - Retirement Age
 - Benefits based on length of service
 - NMW
 - Redundancy pay
 - Life assurance for ill-health retirement



Age Discrimination

- New exception
 - Provision of benefits related to child care
 - E.g. Workplace creche
 - Childcare vouchers
 - Also power for Minister to specify age-related exception to personal pension schemes



Age Discrimination

- Retirement Age
 - Still 65
 - Will be phased out
 - Coalition programme states aim to 'phase out default retirement age'
 - No indication when – in Heyday stated aim by Government to move review forward to 2010



Age Discrimination

- Seldon v. Clarkson-Wright
 - Partner compulsorily retired at age 65
 - No exemption for compulsory retirement for partners (unlike employees)
 - EAT said that assumption there could be tail-off in performance at 65 was discriminatory
 - Subject to Appeal – listed 29th or 30th June 2010



Age Discrimination

- Relationship with access to Pension

- Woodcock v. Cumbria, ET
- Issuing Employee with notice of redundancy so as to avoid Employees right to enhanced payments was discriminatory;
- But justified – proportionate means of achieving a legitimate aim



Age Discrimination

- Relationship with access to Pension

- Wooster v. Tower Hamlets LBC
- Unfair Dismissal and Age Discrimination
- Refused to allow secondment to continue and access to redeployment to prevent Claimant attaining enhanced rights
- Was discrimination – *but* no defence of justification was advanced
- At Court of Appeal – awaiting judgment



Disability Discrimination

- New definition of disability:

- S.6 EA 2010 and Schedule 1
- ‘Day to day’ activities – impairment no longer has to affect capacities
 - Mobility
 - Manual dexterity
 - Physical co-ordination
 - Speech, hearing, eyesight



Disability Discrimination

- New definition of disability
 - Government of view that this list served little or no purpose
 - May make it easier to prove disability
 - But old case law still applies...



Disability Discrimination

- Proving disability
- 'Long-term' – normally 12 months or more – same wording in EA as in DDA
 - *Mc Dougall v. Richmond College, CA*
 - When deciding whether impairment has long-term effect, Court should only look at information available to Employer at time of making decision



Disability Discrimination

- Proving disability
- Meaning of 'likely'
 - Used in Schedule e.g. likely to be at least 12 months
 - *SCA Packaging v. Boyle, HL*
 - 'Could well happen' **not** 'more likely than not'
 - Lower than 51% chance?



Disability Discrimination

- 'Day-to-day activities'
- Chief Constable of Dumfries & Galloway v. Adams
 - Refers to activities found in a range of employment situations
 - Doesn't cover a specialised skill



Disability Discrimination

- Disability-related discrimination
 - Previously s.3A DDA:
 - Person discriminates if
 - *“For reason which **relates to** the disabled person’s disability he treats him **less favourably**” etc...*



Disability Discrimination

- Disability-related discrimination
 - Now s.15 EA
 - Person discriminates if
 - *‘A treats B **unfavourably because of** something arising in consequence of B’s disability’*
 - Wider definition – why?



Disability Discrimination

- Government say s.15
 - *“aimed at re-establishing 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 employer...to defend the treatment.”*



Disability Discrimination

- Mitigates effect of House of Lords decision in *London Borough of Lewisham v. Malcolm*:
 - Appropriate comparator a non-disabled person who is otherwise **in same circumstances** as disabled claimant
 - Much harder for claimants to succeed on disability-related discrimination



Disability Discrimination

- Return to previous position?
 - *Clark v. Novacold, CA*
 - Appropriate comparator need not be in same or similar circumstances as disabled claimant
 - Not the same as in s.15



Disability Discrimination

- S.15 much wider than **Novacold**
- Removes need for comparator entirely
- Defence of justification still available
- Much easier to succeed under s.15



Disability Discrimination

- Balance tips in Claimants favour
 - “Treat unfavourably” vs. “Treats less favourably”
 - Unfavourable treatment easier to prove
 - Sounds more like detriment – as borne out by Explanatory notes



Disability Discrimination

- Less favourable vs. Unfavourable
 - Less favourable
 - Mere unfavourable or unfair treatment not enough (**Zafar v. Glasgow CC, HL**)
 - Detriment
 - Test whether reasonable worker would feel disadvantaged by reason of employer’s act (**Shamoon v. Ulster Constabulary, HL**)



Disability Discrimination

- Less favourable vs. Unfavourable
 - Shift in focus to defence on justification grounds?
 - “Proportionate means of achieving a legitimate aim”
 - Watch this space...



Disability Discrimination

- Discrimination by Association
 - Coleman v. Attridge Law
 - Mother claimed unfairly discriminated against owing to relationship with disabled child
 - Referred to ECJ
 - Where less favourable treatment based on relationship with disabled child, contrary to prohibition on direct discrimination



Disability Discrimination

- Discrimination by Association
 - Coleman v. Attridge Law
 - Referred to EAT
 - Underhill J effectively inserted to wording to legislation:
 - “A person also directly discriminates against a person if he treats him less favourably than he treats or would treat another person by reason of the disability of another person.”



Disability Discrimination

- Discrimination by Association
 - Now extended to all strands of discrimination by virtue of s.13
 - *“Because of a protected characteristic”*
- Again arguably wider than *“by reason of...”*


