



Equality in employment

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Equality and diversity

Overview

A basic knowledge of the principles behind UK equality legislation and an understanding of how it impacts on the day-to-day running of an organisation are essential for employers seeking to maximise their potential and minimise their exposure to legal claims.

Equality of opportunity and the wider concept of diversity are about treating people fairly and valuing the contribution that individuals can make regardless of their gender, age, sexuality, race, ethnicity, disability, religion or belief, etc. It is about allowing all individuals to maximise their potential. There can be a number of negative consequences for an organisation which allows discrimination or harassment to take place.

These include:

- reduced productivity;
- increased absenteeism;
- resignations and high staff turnover;
- additional recruitment costs;
- poor reputation;
- costly legal claims.

Successful discrimination claims in UK courts and tribunals have potentially unlimited compensation.

Conversely, a genuinely diverse organisation which embraces equality of opportunity can:

- create a pleasant work and study environment and improve motivation;
- create loyalty;
- promote staff retention;
- attract talented individuals;
- limit legal exposure;
- maximise individuals' potential.

Outline of legislation

The Equality Act 2010 is the largest piece of discrimination legislation ever to enter the statute books. It has broad scope covering discrimination not only in employment but also in education, the provision of goods and services, transport, clubs and associations, as well as including additional positive duties for public sector bodies.

In addition to the Equality Act 2010, other legislation also impacts on equality of opportunity. In particular:

- The Human Rights Act 1998;
- Part-time workers are protected by the Part-time Workers (Prevention of Less Favourable Treatment) Regulations 2000;
- Employees who are engaged on fixed term contracts are protected by the Fixed-term Employees (Prevention of Less Favourable Treatment) Regulations 2002;
- Family friendly rights (including regulations providing for maternity, parental, adoption and paternity leave); and
- Certain employees with children or who care for adults also have a right to request flexible working arrangements.
- 1 October 2011 - protection for agency workers under the Agency Workers Regulations 2010.

Protected characteristics – what they cover

The Equality Act outlaws specific types of discrimination which arise because of nine “protected characteristics.” These characteristics are:

- | | | |
|--------------|----------------------|---------------------------------|
| ○ Sex | ○ Religion or belief | ○ Gender reassignment |
| ○ Race | ○ Sexual orientation | ○ Marriage or civil partnership |
| ○ Disability | ○ Age | ○ Pregnancy and maternity |

The nine protected characteristics are likely to be broadly interpreted by the courts and tribunals and it is important to be aware of the scope of the protection. This section considers who exactly is covered by those characteristics.

Sex discrimination

The Equality Act protects men and women from suffering less favourable treatment because of their gender. Discriminatory pay practices between men and women are also prohibited.

Gender reassignment

The scope of protection for transgender individuals has been expanded by the Equality Act. If someone is proposing to live as the other gender, that will be sufficient to confer protection, even if they have not yet gone through with it. Gender reassignment does not now depend on any form of medical intervention but can arise where an individual has expressed a desire to move away from his or her birth gender.

Race discrimination

“Race” includes colour, nationality and ethnic or national origins. An individual will have this protected characteristic if they fall within a particular racial or national group. This confers very wide protection (eg Welsh, Eastern European, African-Caribbean).

In December 2014, the EAT found that the definition of “race” in the Equality Act, which includes “ethnic origin”, is wide enough to encompass caste. The government is required to amend the Equality Act to provide expressly that caste is protected but, at the time of writing, this has not yet been done.

Disability

Disability has a particular legal meaning under the Equality Act (which broadly replicates the definition formerly contained within the Disability Discrimination Act 1995). A person has a disability if he or she has a physical or mental impairment, and the impairment has a substantial and long-term adverse effect on his or her ability to carry out normal day-to-day activities.

Taking the elements of this definition in turn:

1 Physical or mental impairment

Physical or mental impairment covers a wide range of conditions. It can include:

- physical disabilities;
- severe disfigurements;
- sensory impairments such as hearing or sight problems;
- learning difficulties (such as dyslexia), psychiatric and psychological impairments (including some types of depression) ; and
- conditions such as epilepsy, muscular dystrophy, and diabetes.

In December 2014, the ECJ held that obesity may fall within the definition of disability under the Equal Treatment Framework Directive. It will do so if it entails a limitation resulting, in particular, from long-term physical, mental or psychological impairments which in interaction with various barriers, hinder a worker's full and effective participation in their professional life on an equal basis with other workers.

There are however limits to the extent of the protection and, for example, it will not cover addiction to alcohol, nicotine or other excluded substances. Hay fever is also excluded except where it aggravates another condition.

2 What conditions will have a "substantial" adverse effect?

The effect of a condition must be "substantial" for it to be disability. It must be an effect which is more than minor or trivial. Whether the effect is substantial will depend on the particular facts. In determining the effect of an impairment, any measures (such as medication or treatment) are to be disregarded. In other words, the test will be satisfied if the impairment would have a substantial adverse effect if it were not for the treatment.

In some cases an individual will not have to prove that an impairment has a substantial adverse effect:

- Severe disfigurements are deemed to have a substantial adverse effect, but assessing the severity of the disfigurement depends on its nature and degree.
- People suffering from cancer, HIV and Multiple Sclerosis receive protection effectively from the point of diagnosis even if the condition does not yet have any effect on their ability to carry out day-to-day activities.
- Blindness, severe sight impairment and partial sightedness are also deemed disabilities.

3 What is long term?

The effect of an impairment is “long-term” if it has lasted or is likely to last for at least 12 months or for the rest of the disabled person’s life. A condition is still covered if it has stopped but is likely to recur. Individuals who have had disabilities in the past are also protected.

4 What are normal day-to-day activities?

An impairment will only be a disability if it has an effect on normal day-to-day activities. Guidance from the Equality and Human Rights Commission states that normal day to day activities are things people do on a regular or daily basis and gives examples, including having a conversation, household tasks, shopping, and reading or writing. It does not cover things which are not generally considered normal, even if they might be “normal” for the individual concerned, such as playing the violin professionally.

Sexual orientation

The definition of “sexual orientation” in the Equality Act covers sexual orientation towards persons of the same sex, persons of the opposite sex or persons of the same and of the opposite sex (heterosexuals, homosexuals and bisexuals). The Act does not protect discrimination relating to particular sexual practices or fetishes. Discrimination against sado-masochists or paedophiles is not covered.

Religion and belief

Under the Equality Act “religion” means any religion and includes a lack of religion. “Belief” means any religious or philosophical belief and includes a lack of belief.

People who belong to established religious traditions e.g. Jews, Catholics and Muslims, will be covered by these provisions. Those who subscribe to non-conventional religious beliefs are also likely to be protected. It is less clear how far other strongly held beliefs, or alternative lifestyles, will be covered. It is safest to treat people of all beliefs with dignity and respect. The extent to which protection could also extend to protect beliefs in political philosophies (such as communism), is unclear, though it is clear that in principle the definition is wide enough to cover such beliefs..

Age discrimination

The Equality Act protects employees in all age groups, not just older workers.

Pregnancy and maternity

This generally protects employees from discrimination during their pregnancy and maternity leave period.

Marriage and civil partnership

Individuals who are married or in a civil partnership are protected from suffering discrimination on that ground.

Discriminatory behaviour

Overview

The Equality Act protects individuals from suffering four main types of unlawful conduct. These are:

- 1 direct discrimination
- 2 indirect discrimination
- 3 harassment

4 victimisation

Additional protections exist in relation to disability and these are also considered below.

Direct discrimination

Direct discrimination arises where a person is treated less favourably directly because they have a particular protected characteristic. The Equality Act aims to ensure that direct discrimination will also arise where someone is discriminated against because they are associated with someone who has a particular characteristic or because they are perceived to have a particular characteristic.

Examples of direct discrimination:

- Sex: Limiting promotion to male employees because women might have children.
- Race: Refusing to take on Afro-Caribbean clients.
- Sexual orientation: Refusing to employ someone because he or she appears to be gay.
- Disability: Failing to short-list a woman for a job because she has a disabled parent for whom she has caring responsibilities.
- Age: Having a policy of not promoting anyone under 25.

Save for a limited number of narrowly defined defences the general position is that direct discrimination cannot be justified. If there is direct discrimination, there will generally be liability. The main exception to this rule is age discrimination where there is a potential defence of objective justification to direct, as well as indirect, age discrimination. Other narrow defences include where having a characteristic is an occupational requirement or where there has been lawful positive action.

Indirect discrimination

Indirect discrimination is not as easily identified as direct discrimination. It generally occurs where there is a provision, criterion or practice (such as an HR policy) which is applied to everyone but which in fact puts members of a protected group at a particular disadvantage compared to people outside that group.

Examples:

- Race: It may be indirect race discrimination against some individuals to require job applicants to have a particular qualification if it is more likely that members of one racial group will be unable to comply. So, to require GCSE English might be indirect discrimination against an individual from a racial group who was not educated in the UK.
- Sex: It may be indirect discrimination to require a worker to work full time as this may put women at a particular disadvantage if they have childcare responsibilities.
- Age: It may be indirect discrimination to require job applicants to have 10 years' experience as younger workers are less likely to have that experience.
- Religion: It may be indirect discrimination against individuals of some faiths to operate a policy prohibiting any jewellery.

Indirect discrimination may be justified (and not unlawful) if it is a proportionate means of achieving a legitimate aim. Whether something can be justified involves balancing the employer's motivation and business needs against the detrimental effect on the individual. So, for example, an employer with a business based solely in an English speaking country might be justified in wanting some evidence of proficiency in that language but it is unlikely to be proportionate or necessary to require a qualification to have been gained in that country.

Harassment

Harassment occurs where there is unwanted conduct related to a relevant protected characteristic (sex, race, disability, age, etc) and that conduct has the purpose or effect of violating another's dignity or creating intimidating, hostile, degrading, humiliating or offensive environment.

A single incident may amount to harassment if it is sufficiently serious. In the case of sexual harassment in particular, it is important to note that it is the unwanted nature of the conduct which distinguishes harassment from friendly behaviour which is welcome and mutual.

It is important to recognise that, under the Equality Act, an individual can suffer harassment relating to a particular characteristic even if they do not themselves have that characteristic:

- Harassment may arise where a person is subjected to unwanted conduct because he or she is thought or believed to have a particular protected characteristic, even if that perception is mistaken. For example, if an individual is harassed because he or she is perceived to have a mental illness amounting to a disability, that will be unlawful even if the individual does not actually have such a condition.
- Harassment may arise if someone is subjected to unwanted conduct because of the protected characteristic of a person with whom he or she is connected or associated. For example, if an individual is harassed because he or she has a gay brother or a black partner that will be covered.
- An individual may even have a claim if they are offended by conduct or language "related to" a protected characteristic which does not appear to have any relevance to them personally. For example a heterosexual employee could be offended by homophobic insults even if they were not directed at him.

In considering whether conduct is harassment, a tribunal will consider the circumstances of the case including the perception of the victim, and whether it is reasonable for the conduct to have violated dignity or created an intimidating, hostile, degrading, humiliating or offensive environment. This enables tribunals to reject claims from the over-sensitive.

While not an exhaustive list, forms of harassment include:

- physical contact (including violence or threatened violence);
- jokes and pranks;
- obscene gestures, verbal abuse, offensive language;
- cyber-bullying;
- gossip, slander;
- obscene or offensive e-mail, screen-savers etc;

- obscene or offensive posters, graffiti, or letters;
- requests for sexual favours;
- threat of dismissal or loss of promotion for refusal of sexual favours;
- unwanted comments about personal appearance or private life;
- the display of emblems or flags;
- isolation or non-co-operation and exclusion;
- abuse of position of power by bullying or humiliating;
- intrusion by pestering, spying and stalking.

Additional legal problems with harassment and bullying

Harassment and bullying, as well as being unlawful under discrimination legislation can also result in other claims against an employer.

1 Protection From Harassment Act 1997

This legislation was introduced to deal with the problem of stalking, but it has a much wider impact. “Harassment” itself is not defined in the legislation. Judges have said that harassment is to be given its ordinary meaning. It covers conduct which alarms a person or causes distress. There is no need for the victim to show physical or psychiatric injury. A single act cannot be “harassment” under this legislation, it needs to be a “course of conduct” (more than one incident). Judges will award damages which could cover financial loss and anxiety arising from the harassment.

Employees that are victims of harassment may rely on the Protection from Harassment Act to make the employer liable for the conduct of another employee. Any injury does not need to be foreseeable and the employer can still be liable under this legislation even if it has taken all reasonable steps to prevent the harassment from occurring. However, for conduct to be actionable under this legislation it should be sufficiently serious – oppressive and unacceptable – of an order which would sustain criminal liability.

2 Constructive dismissal

An employee might, if pushed too far, be able to claim that the bullying and harassment was a fundamental breach by the employer of the duty of mutual trust and confidence which exists in every employment relationship. Such a breach would entitle the employee to resign and claim constructive, unfair dismissal.

3 Health and safety

Under the Health and Safety at Work Act 1974 employers have a duty to take care of the health and safety of their staff. This includes their mental health as well as protecting them from physical injury.

4 Personal injury

In addition, if an employee were to suffer an illness, say, a nervous breakdown or depression following bullying or harassment the employer might face negligence, breach of contract and/or personal injury claims. In one headline-making case a female worker was bullied by her colleagues and suffered two breakdowns. She did not bring a discrimination claim. The employer had not taken adequate steps to

prevent the conduct which resulted in her breakdown and so the employee brought her claim principally in negligence. She was awarded over £800,000 in damages.

Victimisation

Victimisation under discrimination legislation has a particular meaning. It arises where someone is subjected to a detriment because they have done a protected act (for example, brought a claim, or threatened to bring a claim or make a complaint under the Equality Act 2010). It also applies where a colleague has helped someone with a claim or has given evidence.

Discrimination arising from disability

A new offence of “discrimination arising from a disability” arises under the Equality Act where a person is treated unfavourably because of something arising in consequence of their disability. An employer will have a defence if it can show that the unfavourable treatment was a proportionate means of achieving a legitimate aim.

The statutory Code of Practice prepared by the Equality and Human Rights Commission suggests that this offence will have broad application. It involves simply asking whether an individual has suffered unfavourable treatment because of something arising in consequence of their disability. There is no need for the complainant to point to a comparator. Unlike indirect discrimination, there will be no need to show that any provision, criterion or practice has been applied nor that there is any disadvantage to a particular group sharing the protected characteristic.

Examples:

- An employee on long-term disability-related absence is dismissed because of their absence.
- An employee who suffers from clinical depression which causes him or her to behave aggressively towards a colleague is subjected to a disciplinary procedure and dismissed.

The cause of the employer’s treatment in each example is the consequence of the employee’s disability (the absence in the first example, and the aggression in the second example). The employer’s treatment will be discriminatory unless it is justified. The employer would have to show it was a proportionate means of achieving a legitimate aim. In addition, the employer would need to have considered reasonable adjustments.

An employer will not be liable for discrimination arising from a disability if it did not know, and could not reasonably be expected to know, that the individual had a disability.

The offence is likely to overlap considerably with the duty to make reasonable adjustments. However, there have been suggestions that most dismissal decisions are better analysed as potential offences of “discrimination arising from a disability”, while the focus on the duty to make reasonable adjustments is primarily directed at steps that can help disabled employees hold on to their job.

The duty to make reasonable adjustments

Employers must make reasonable adjustments to prevent disabled persons suffering substantial disadvantage at work. Broadly, it is a duty to make reasonable adjustments where any provision, criterion or practice, or a physical feature of premises places a disabled person at a substantial disadvantage compared with non-disabled people. The duty to make reasonable adjustments also arises in relation to the lack of auxiliary aids. It states that where a disabled person would, *but for the provision of an auxiliary aid*, be at a substantial disadvantage compared to someone who is not disabled, there is a duty to take reasonable steps to provide the auxiliary aid.

The Equality Act states that the employer cannot pass on the cost of a reasonable adjustment to the employee.

For an employer the duty is not a general one. It arises in relation to a particular disabled job applicant or employee.

A failure to make adjustments which would be “reasonable” cannot be justified and will automatically amount to unlawful discrimination. The duty is not an absolute duty but a duty to take reasonable steps. The key question in each case will be what is, or is not, reasonable. This will be judged objectively and will depend on all the relevant circumstances. The Equality and Human Rights Commission’s Code of Practice states that relevant considerations will include:

- whether the adjustment would be effective in preventing the disadvantage;
- the practicability of the step;
- the financial and other costs of the making the adjustments and the extent of any disruption caused;
- the extent of the employer’s financial or other resources;
- the availability to the employer of financial or other assistance to help make an adjustment (such as Access to Work); and
- the type and size of the employer.

Examples:

- It might be reasonable to move an employee with mobility difficulties to an easily accessible office.
- It might be a reasonable adjustment to allow an employee time off for treatment of a disability.
- It might be reasonable to provide other employees with training to allow a deaf colleague to participate fully in meetings.

Equality and diversity in employment

Overview

The Equality and Human Rights Commission has produced a Code of Practice on the Equality Act and its application to employers. The Code is not law, but it can be taken into account by Tribunals in considering whether there has been any breach of legislation. This section considers some of the key areas where equality impacts on the employment relationship.

Recruitment

One of the main areas where employers are exposed to potential discrimination claims is recruitment and promotion. Job applicants who consider that they meet the relevant requirements for a position are likely to make a complaint if they consider that they have been unfairly rejected in the recruitment process. Basic principles of good practice dictate that:

- Job opportunities should be made available to everyone regardless of gender, disability, race, sexual orientation, religion, age, etc. Decisions should be based on ability to do the job.

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- Applicants must be treated fairly.
- The process should be transparent and decisions should be based on objective criteria.
- Every recruitment or promotion process must reflect any equal opportunities or diversity policy.

It can be helpful to have someone qualified in equal opportunities issues, such as a human resources manager, involved in the recruitment process.

Job specifications

Employers usually draw up a job and/or person specification when beginning a recruitment process. To minimise the risk of discrimination, a specification should only require applicants to satisfy criteria which are really necessary for the role. It should distinguish requirements which are essential from those which are simply desirable. In addition, where possible, criteria should be capable of being assessed objectively. This means that requirements for imprecise qualities such “leadership” should be clarified.

Consideration should be given to the required working hours, if a job may be done on a part-time basis, this should be considered.

Examples:

- Indirect race discrimination: if an applicant needs to have a working knowledge of French to do the role, the specification should not require applicants to be “fluent.” This would discriminate against applicants who did not speak that language.
- Disability discrimination: to require applicants to have proficiency in a particular software package might be unreasonable if different, modified software could be used with little difficulty. It will be important to consider reasonable adjustments for disabled applicants.
- Race discrimination: a specification should make clear that where qualifications are needed, equivalent qualifications obtained abroad will be accepted.
- Age discrimination: Carefully consider the experience or qualifications requested as this may discriminate against older or younger workers as the case may be.

Advertisements

Any form of discrimination contained in an advert for a post, or an instruction to a recruitment consultancy to discriminate will be unlawful. Jobs should generally be publicised widely and openly. It can be risky to rely on recommendations from within an existing workforce as this may mean that applicants from other groups of society (especially other ethnicities) are less likely to be employed.

Extreme care is also needed if an internal promotion is made without advertising the post to all staff. If another member of staff who, for example, had a disability was also qualified for the position, the employer would need to be able to justify why that other individual was not made aware of the post.

In sifting through application forms and selecting for interview it will be important that no discriminatory stereotypes or assumptions are applied. Some “serial” tribunal claimants apply for jobs in different names, changing a detail on a form to suggest a different racial origin. Employers who discard an application from one applicant but accept a very similar form from another can find themselves in difficulty justifying their decisions.

Pre-employment health questions

The Equality Act makes it unlawful for a prospective employer to ask questions about an applicant's health before a job offer is made unless one of a limited number of exceptions applies. (Employers will still be able to screen applicants before employment begins).

Pre-offer questions about an applicant's health may only be asked:

- if it is necessary to establish whether reasonable adjustments will be required in the course of the recruitment process (eg. for an interview or an assessment);
- if it is necessary to establish whether the individual will be able to carry out an intrinsic function of the work (eg. for a school teacher to be able to communicate clearly to children);
- for diversity monitoring;
- for the purpose of taking positive action under the Equality Act; or
- if having a particular disability is an occupational requirement of the role.

The rule against asking health questions is enforceable directly only by the Equality and Human Rights Commission. Individuals cannot bring an action simply because a prospective employer has asked an unlawful question. However, if an applicant believes that he or she has been discriminated against because of their response to such a question he or she may bring a disability discrimination claim. In a direct discrimination claim, if the employer has breached the rules against asking questions about health, this will raise a presumption that there has been discrimination and reverse the burden of proof. This means the employer would then have the difficult task of proving a negative and showing that there had been no discrimination. This might be possible if there was clear evidence showing why other candidates had been preferred.

Any questions contained in recruitment documentation relating to health must be removed unless they fall within the permissible exceptions. Employers should continue to ask questions to discover whether applicants need reasonable adjustments in the recruitment process and in order to monitor whether disabled people are applying for roles. However such information should be stored separately. This will help when defending any subsequent claim that the information was used inappropriately.

Interviewing and selection

Using ability tests to measure suitability for a role is commonplace and can be very useful. However, testing (psychometric or otherwise) should not incorporate any form of inadvertent discrimination. This will be significant where a disabled applicant is disadvantaged by, for example, the nature of the written test or the time limit for its completion. Employers will be expected to make reasonable adjustments to eliminate any disadvantage created. It will be important that any such tests are professionally administered and reflect the good equal opportunities practice.

Reasonable adjustments may also be necessary if disabled applicants are invited for interview. For example, if there are physical features of the building which would pose a problem for someone with restricted mobility, or lighting arrangements which might cause difficulty for someone who was visually impaired these issues will need to be addressed.

For a religious applicant, it might be necessary to be flexible about the date of an interview if it might coincide with a religious festival.

Once an interview has taken place, it will be important that decisions are taken based on objective criteria. Stereotypical assumptions about ability, personality or suitability based on gender, race, etc. can lead to an unlawful decision. The classic example is a reluctance to appoint a woman of child-bearing age because of an assumption that she is likely to go on maternity leave.

To minimise the risk of successful claims for discrimination it will be important to be able (as far as possible) to justify the appointment by reference to appropriately weighted objective criteria, the job description, results of justifiable and relevant selection tests, etc.

Appraisals, assessments and promotion

Once an appointment is made, the duty not to discriminate continues throughout employment. This, of course, means that pay and benefits must not discriminate.

Another area where there is a risk of discrimination arising is performance appraisals or reviews. Appraisals and promotions should be based on an individual's merit and ability to do the job and not on stereotypes or assumptions about particular groups.

It is helpful to use consistent, objective, impartial and transparent standards in the appraisal process particularly where the appraisal will have an impact on promotion or a benefit, such as pay or bonuses.

Disability discrimination can present an additional problem in the context of performance reviews. For example, if absence records are taken into account it will be important to consider whether the absence is connected to a disability and whether any adjustments should be made.

Discipline, grievance and dismissal

Employers are vulnerable to discrimination claims in respect of their handling of disciplinary or grievance matters. Policies should be non-discriminatory and must be applied fairly and consistently regardless of an employee's gender, race, etc.

If monitoring of data in respect of grievance and disciplinary issues reveals a disproportionate impact on one or more groups, an employer should take appropriate action to investigate the possible causes and address any latent discrimination issues.

Other areas of vulnerability

- There have been a significant number of religious discrimination claims relating to dress codes. Employers should ensure that policies which may have an adverse impact on employees of a particular faith or belief can be justified. It may be necessary to make exceptions.
- Employers considering redundancies need to check that if policies discriminate on grounds of age, this can be justified.

Liability

An employer can be vicariously liable for discrimination or harassment committed by its employees. Legislation imposes liability on employers for the acts of employees done 'in the course of employment'. This may extend not

just to acts of harassment carried out during working time, but even to acts carried out outside work and off the employer's premises. This may be the case, for example, where harassment occurs at a social event taking place after work.

Employers can defend a claim if they can show that they took all reasonably practicable steps to prevent the employee's unlawful behaviour. The employee will also be liable for his own conduct and, in addition, may face disciplinary action up to and including dismissal. Potential compensation for discrimination claims in the UK is uncapped.

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