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BHSEA Equality Act Seminar

Equality Act 2010

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The Equality Act passed into law in the final few days of the previous Labour Government and the majority of the Act took effect on 1 October 2010. It revokes key pieces of discrimination legislation, including the Sex Discrimination Act, the Race Relations Act and the Disability Discrimination Act.

It was a long-held view that the equality legislation was overdue for reform and needed de-cluttering. The Labour Government's intention was to make the law more accessible and easier to understand, which required bringing together nine major pieces of legislation and around 100 statutory instruments.

The Equality Act 2010 brings together and re-states the existing discrimination legislation and seeks to adopt a single approach where appropriate. It also contains a number of key changes to the law.

Today I will:

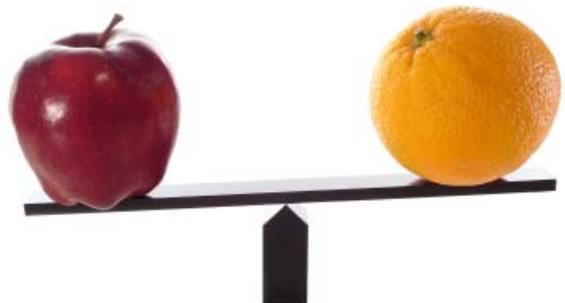
- Firstly look at the key changes to discrimination law;
- Then look at the main changes from a disability perspective; and
- Finally focus on the prohibition of pre-employment health enquires.

### PROTECTED CHARACTERISTICS

The Equality Act renders unlawful discrimination on the grounds of:

- age
- disability
- gender reassignment
- marriage/civil partnership
- pregnancy/maternity
- race
- religion or belief
- sex
- sexual orientation

These are described as “protected characteristics”.



## KEY EQUALITY CHANGES

So what are the main changes that have been, or are to be, introduced by the Equality Act from an employment law perspective?

### Defining discrimination

The first area in which changes have been made is in respect of the definition of discrimination.

- **Replacing the phrase "on grounds of" with "because of"**

The words "on grounds of" or "on the ground of" from the previous legislation is replaced with "because of". According to the Equality Act's explanatory notes the intention is not to change the meaning, but to "make it more accessible to the ordinary user".

- **Perceived characteristics**

Under the legislation, direct discrimination on grounds of **perceived** (rather than actual) race, sexual orientation, religion or belief or age was prohibited (i.e. direct discrimination against an individual because others think he possesses a particular protected characteristic). However, in relation to sex, marital status, pregnancy, disability and gender reassignment there was formerly no clear prohibition of discrimination based on perception. The law now applies to perceived discrimination in relation to any of the perceived characteristics.



The key case on this issue prior to the Equality Act was *English -v- Thomas Sanderson Blinds Ltd* in which the Court of Appeal held that a individual had been harassed on the grounds of sexual orientation, when he was teased about being homosexual because he had been to a boarding school and lived in Brighton, when he was not gay, those teasing him knew he was not gay and he knew that those teasing him did not think he was gay.

- **Discrimination by association**

Under the old legislation direct discrimination based on the race, sexual orientation, religion or belief (but not age) of a person with whom the claimant **associates** was prohibited (i.e. direct discrimination against someone because they associate with another person who possesses a protected characteristic).

However, as with perceived characteristics there was no clear prohibition of discrimination based on association in relation to sex, martial status, pregnancy, disability or gender reassignment.

The key case under the old law was *Attridge Law -v- Coleman* where the Court of Appeal held that Ms Coleman had been discriminated because of her son's disability, in that she was not allowed to work flexibly to enable her to care for him.

The Equality Act now covers associative cases in relation to all protected characteristics. Employers therefore need to be aware of their employees' circumstances. If an employee has been leaving early, the employer should take steps to find out why. If, for instance, it is to look

after a disabled relative then the employer would risk a claim for direct discrimination if it dismissed the employee.

An employer should also make it clear to its workforce that discrimination based on association and perception will not be tolerated. Ideally training should be provided to staff in order to limit the risk of any vicarious liability.

- **Harmonises the definition of indirect discrimination**

Previously, the wording and definition of indirect discrimination varied within the different strands of discrimination legislation and there was no provision for indirect discrimination against disabled persons, or on the basis of gender reassignment. The Equality Act has harmonised the definition in relation to all protected characteristics and extended the scope of indirect discrimination to cover both disability and gender reassignment.

Therefore, employers need to be aware that any measures that affect a disabled employee more than the rest of the workforce could potentially result in an indirect discrimination claim.



- **Harmonises the concept of justification**

Justification in discrimination cases is known as the 'objective justification' test. This test was previously used in indirect discrimination and direct age discrimination. However, the test was differently worded in the various strands of legislation over the years. The Equality Act has harmonised the approach, using the "proportionate means of achieving a legitimate aim" test, rather than following the wording in the relevant European Directives.

- **Harmonises the definition of harassment**

Harassment will now cover associative and perceptive cases, in much the same way as direct discrimination.

Formerly, discrimination legislation provided a freestanding definition of harassment in the employment context, covering all strands of discrimination. However, the harassment provisions under the Sex Discrimination Act were substantially wider than all other strands, particularly in that employers could be liable in certain circumstances for failing to prevent repeated harassment of employees by third parties.

The Equality Act harmonised that protection from harassment in the employment field across all of the protected characteristics (apart from pregnancy, maternity, marriage and civil partnership). It also extended employer liability for third party harassment to all the other protected characteristics (again apart from pregnancy, maternity, marriage and civil partnership).

Therefore, employers will need to make themselves aware if third parties are harassing their employees and if so they will need to take steps to ensure that the harassment stops; doing nothing can ultimately result in the employer being held liable for the third party harassment.

Thinking practically, employers should consider whether anyone amongst their staff has regular contact with third parties. It should be noted that the harassment needs to have occurred on at least three occasions, without the employer doing something about it, in order for the employer

to be liable, but it would be prudent for employers to communicate to their employees the need to report any incidents to the appropriate person in HR/senior management, in order to assist the employer in defending any potential challenge at a later date.

An employee will also now be able to complain of behaviour he/she finds offensive even if it is not directed at him/her and neither does the complainant need to possess the relative characteristic him/herself. This could encompass situations where the behaviour is directed at someone else, who may or may not themselves complain about the behaviour, or it could simply be in the context of bad behaviour that the witnessing employee finds offensive (e.g. racist language).

- **Specific provision for claims of combined discrimination**

The Equality Act introduces the concept of combined discrimination. It has been recognised that some of the worst cases of discrimination are suffered by people falling into more than one disadvantaged group (e.g. Pakistani women).

Once implemented, this provision will enable an employee to bring a claim where the employer treats an employee less favourably because of a combination of two of the following protected characteristics: age, disability, gender reassignment, race, religion or belief, sex or sexual orientation. Marriage, civil partnership, pregnancy and maternity are, rather surprisingly, not potential grounds of combined discrimination.



The treatment that the individual experiences must be prohibited for each of the relevant protected characteristics, but it will not be necessary for claimants to show that the claims would succeed if they were brought separately. Claimants will not be able to bring claims of indirect, combined discrimination, but will be able to bring indirect single-strand claims.

This provision will come into force from 6 April 2011.

### Discriminating lawfully

- **Occupational Requirement defence**

Following the introduction of the new "occupational requirement" defence under the Equality Act there is no longer any need for the requirement to be "genuine" or "determining", presumably on the basis that these words added little value; a requirement that was neither genuine nor determinative of a person's suitability would be unlikely to be proportionate. Further, instead of the former requirement for it to be "proportionate", applying an occupational requirement must now be "a proportionate means of achieving a legitimate aim".

Under the Equality Act, a specific occupational requirement will permit organised religions to discriminate on grounds of sex, marital status, gender reassignment and sexual orientation in certain circumstances.

- **Positive action**

This provision is due to come into effect on 6 April 2011.

The law in Great Britain currently allows only a limited form of positive discrimination:

- Affording members of a disadvantaged group access to facilities for training which would help fit them for particular work.
- Encouraging members of a disadvantaged group to take advantage of opportunities for doing particular work.

However, from April employers will be permitted (but not required) to take under-representation of particular groups into account when selecting between two equally qualified candidates, provided there is no automatic selection of under-represented groups. It is not yet clear how questions of whether two candidates are "equally qualified" will be resolved.

The Act also sets out the general positive action defence and appears to broaden the scope of positive action provisions under the old discrimination legislation, which are limited to "training and encouragement" for under-represented groups. It will allow employers to take proportionate measures not merely to train or encourage under-represented groups to apply for jobs, but also to overcome a perceived disadvantage or to meet specific needs based on a protected characteristic.

In this regard, it comes close to legitimising "reasonable adjustments" outside the disability sphere, albeit on a voluntary basis. This could in theory cover such things as, for example, providing prayer facilities at work exclusively to meet the needs of a religious minority, or providing free English language lessons to non-English-speaking employees.

### Enforcement

- **Strengthens enforcement**

The Equality Act allows employment tribunals to make recommendations to benefit the wider workforce, as opposed to just the claimant in a particular case. Recommendations need to be proportionate and based on the case.

Recommendations are not binding and so an employer will not face enforcement action for failing to comply with a recommendation. However, the tribunal will only make a recommendation in order to help a respondent and, where the respondent fails to comply with the recommendation and then faces a subsequent similar discrimination action, the failure to comply with the recommendation can be used as evidence to support the subsequent claim. Therefore, if an employer is given a recommendation, it would be prudent to follow the advice given.



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## DISABILITY

So what changes does the Equality Act make in relation to disability?

- **Alters the definition of disability**

The Equality Act has removed the “capacities” list (mobility, eyesight, manual dexterity and so on) which the DDA stipulated must be affected. Now a person is disabled if he has a mental or physical impairment and this causes a substantial and long-term adverse effect on the person’s ability to carry out normal day-to-day activities. This should make it less burdensome for an employee to prove his disability.



- **Replaces the concept of disability-related discrimination**

The Equality Act replaces “disability-related discrimination” with “discrimination arising from disability”. This change removes the requirement for less favourable treatment in cases of disability-related discrimination and instead provides that unlawful discrimination occurs when a person is treated **unfavourably** because of something arising in consequence of his disability and it is not a proportionate means of achieving a legitimate aim.

This is a change from the subjective test that existed under the DDA. Under the DDA an employer could justify less favourable treatment of an employee if there was a “material and substantial” reason for the treatment. This gave the employer a “band of reasonable responses” within which it was deemed safe to act.

The new objective test imposes a higher burden on the employer. However, the “material and substantial test” was not in practice as easy to satisfy as first appears, as an employer would still have had to make reasonable adjustments. It is anticipated that the new test will sit relatively comfortably with organisations’ existing discrimination policies and not cause significant challenge in that respect.

The introduction of the objective justification test under the Equality Act is in line with the government’s decision to adopt the same objective justification test across all discrimination strands.

Additionally, there is no unlawful discrimination if the alleged discriminator did not know and could not reasonably have known about the person’s disability.

Discrimination arising from disability was introduced to try and avoid the unwanted consequences of the *London Borough of Lewisham --v Malcolm* case. Prior to *Malcolm* the correct comparator in a case of disability-related discrimination was not simply a non-disabled person, but someone to whom the underlying reason for claimant's treatment did not apply. So, if a disabled person was dismissed for being off sick for six months, and if that absence was related to his disability, the comparator would be someone (whether disabled or not) who had not been off sick for six months. Given that such a comparator clearly would not have been dismissed, the burden would shift to the employer to show justification for its actions.

However, in *Malcolm* the House of Lords took a very different view about how disability-related discrimination works. That case concerned a schizophrenic tenant who was evicted by a housing authority because he had unlawfully sublet his flat. The tenant brought a disability-related discrimination claim under the housing provisions of the DDA, on the basis that he would not

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have unlawfully sublet but for his schizophrenia. He argued that the appropriate comparator for his claim was a tenant who had not unlawfully sublet (that is, a tenant whom the reason for the eviction did not apply). Rejecting this, the House of Lords held that the correct comparator was a non-disabled person who, like the claimant, had unlawfully sublet his flat. Since that comparator would also have been evicted by the housing authority, no disability-related discrimination had occurred.

The *Malcolm* judgement severely limited the effectiveness of the disability-related discrimination provisions. The Equality Act attempted to restore the law to the pre-*Malcolm* legislation.

This will mean that employers will have to remember that the correct comparators in discrimination arising from disability are people to whom the underlying reason for claimant's treatment does not apply. It is not a non-disabled person who shows the same underlying reason. Employers will need to consider carefully any issues arising with a disabled employee and be aware of other employees who have not specifically said that they are disabled, but who show signs of a disability.

- **Introduces indirect disability discrimination**

As mentioned earlier, the Equality Act introduces indirect disability discrimination. Therefore if a disabled employee can show that an employer's "provision, criterion or practice" puts them or would put a person sharing the employee's disability at a disadvantage, he would have a claim for indirect disability discrimination. This brings disability in line with the rest of the protected characteristics.

- **Amends the duty to make reasonable adjustments**

There are only a few minor changes in the Equality Act with respect to the duty on an employer to make reasonable adjustments.

Under the DDA the duty to make reasonable adjustments arose where a "provision, criterion or practice" applied by or on behalf of the employer, or any physical feature of premises occupied by the employer, placed the disabled person at a substantial disadvantage compared with people who were not disabled.



In addition to the "provision criterion or practice" and physical features of the employer's premises, the Equality Act adds a third requirement relating to auxiliary aids. This requirement stipulates that where a disabled person would, but for the provision of an auxiliary aid, be put at a substantial disadvantage in comparison with those who are not disabled, an employer must take such steps as are reasonable to provide the auxiliary aid.

An auxiliary aid is defined in the Act as something which "*provides assistance or support to a disabled person*" which can include specialist equipment such as an "*adapted keyboard or text to speech software*". Additionally, an auxiliary aid could be a service, such as the provision of a sign language interpreter or a support worker for the disabled person.

The Act explicitly states that the costs of a reasonable adjustment should not be passed on to the disabled person.

The Equality Act also makes it clear that the employer's duty to make reasonable adjustments is not "anticipatory", i.e. there will not be a duty to make specific adjustments until an employee's disability is known, or ought reasonably to be known, to the employer.

## PRE-EMPLOYMENT HEALTH ENQUIRIES

### Background

The Equality Act has broadly outlawed pre-employment health enquiries unless they are made for one of the prescribed reasons.

By way of a background, this restriction was not in the original draft of the Equality Bill and was added after lobbying from disabled groups. A spokesperson from RADAR, the disability network, stated that the regulation of pre-employment health questionnaires would “*probably [be] the single biggest difference and improvement that could be made through the Equality Bill*” in relation to disabled people’s employment.

The Equality Bill was amended at the Commons Report Stage to make it easier for disabled job applicants to succeed with direct disability claims where their applications failed after they had been asked questions in relation to their health. This amendment did not prohibit pre-employment health questionnaires and was not seen to go far enough. Therefore, at the Lords Committee stage a prohibition was drafted into the Equality Bill.

### What is a health question?

The Act does not define in detail what a question “*about the health of the applicant*” amounts to. It only states, “*whether or not a person has a disability is to be regarded as an aspect of that person’s health*”.

A common question of an applicant’s former employer is the applicant’s sickness absence record. According to the EHRC Code, “*questions relating to previous sickness absence are questions that relate to disability or health*”. Therefore, such a question is likely to be caught by the prohibition in the Act and it remains to be seen whether it can fall within one of the prescribed reasons that I will come on to.



The Government has yet to issue detailed guidance on what questions are permitted and how to phrase the “necessary” questions in order to establish whether an applicant can carry out a function intrinsic to the work.

For instance, if an employer wants to know if the applicant will be able to engage in the manual lifting and handling of heavy items in a factory, is it simply able to ask at the interview “Do you have any health problems which might prevent you from lifting heavy objects?” or can the application form ask specifically whether the applicant suffers from any number of defined ailments which might potentially affect his ability to lift heavy objects?

## Prescribed reasons

During the recruitment process an employer is not permitted to ask a potential employee about his or her health - apart from for one of the prescribed reasons outlined within the Act, which include questions:

- To determine whether a reasonable adjustment needs to be made for the recruitment process;
- Necessary to establish whether the applicant will be able to “carry out a function that is intrinsic to the work concerned”;
- For the purpose of monitoring diversity;
- For the purpose of taking “positive action” in line with the Act; or
- To establish whether the applicant has a particular disability where having that disability is a requirement of the job.



The restriction applies whether the employer asks the applicant or another person, for example the applicant’s former employer in a reference request.

## Consequences of asking a pre-employment health question

If an employer does ask a pre-employment health question for a reason other than a prescribed reason, then the EHRC will have the power to investigate the allegations and take enforcement action in its own name, even if no discrimination can be shown to have taken place. The EHRC can order an employer to implement an action plan and fine it £5,000.

Whilst asking an applicant pre-employment health questions does not in itself amount to discrimination against the applicant, if the employer then relies upon the answer(s) given when making a decision about whether to employ the applicant, the applicant would be able to bring a disability discrimination claim against the employer.

Therefore, if the employer could show that despite asking a pre-employment health question, the reason for rejecting the applicant was not due to the disability but was, for example, because the chosen candidate was better qualified, it would avoid liability.

Additionally, the employer could avoid liability for direct discrimination by showing that it rejected the applicant because of the consequences of the disability, as opposed to the existence of the disability. Yet, in these circumstances, the employer would need to be able to objectively justify the decision to avoid liability for discrimination arising from disability or indirect discrimination claims: to be able to do this the employer must have carefully considered the matter, including any reasonable adjustments that could be made.

It should also be noted that where an unsuccessful applicant brings a direct disability discrimination claim and the employer asked a pre-employment health question for a non-prescribed reason, the burden of proof will automatically shift to the employer to show that no discrimination took place.



