Presentation: The Equality Act 2010

Jane Byford, Partner, Head of Employment, Martineau Solicitors.

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Jane said that the Equality Act was originally intended to consolidate existing legislation but had developed a wider scope by bringing together 9 previous Acts and about 100 Statutory Instruments. It was considered to be long overdue, needed de-cluttering and making more accessible.

Six discrimination strands in the old laws are now replaced Nine Protected Characteristics: -

- Age
- Disability
- Gender reassignment
- Marriage/Civil Partnership
- Pregnancy/Maternity
- Race
- Religion/Belief
- Sex
- Sexual orientation.

One area where changes have been made is in respect of the definition of discrimination. The Equality Act renders Direct Discrimination unlawful, "because of" these protected characteristics, instead of using the phrase "on the grounds of" from the previous legislation, because the latter was considered to be less accessible to the ordinary user!

The new Act also applies to the issue of "Perceived (rather than actual) discrimination", where direct discrimination is practiced against a person because others 'think' he possesses a protected characteristic. The law now applies to all protected characteristics, whereas previously it only applied to race, sexual orientation, religion or belief or age. Jane cited a key case on this issue, prior to the Equality Act, as English – vs. – Thomas Sanderson Blinds Ltd. in which the Court of appeal held that an 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 at Brighton. 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!

The Equality Act also extends coverage similarly in cases of discrimination against someone who associates with someone possessing the protected characteristics. Under the old laws, case law was drawn from Attridge Law –vs.- Coleman, where the Appeal Court held that Ms Coleman had been discriminated against because of her son's disability, in that she was not allowed to work flexibly to enable her to care for

him. Jane added that this means that an employer needs to be more aware of their employees' circumstances so that, say, if an employee has been leaving work early, the employer should take steps to find out why. There is also a risk of Vicarious Employer Liability occurring, if supervisory levels are not made aware of the Act and its provisions in this respect.

Jane went on to say that the new Act also harmonised and extended the definition of Indirect Discrimination whereby there was an unintended discrimination of, say, a disabled person who might be more affected than the rest of the workforce when certain measures were introduced. She commented that compensation claims are on the increase and that there is no cap on the awards!

Another significant change has been introduced with the definition of Harassment that has also been harmonised. Previously, harassment under the Sex Discrimination Act was substantially wider than in other strands, in that employers could, in certain circumstances, could be liable for repeated harassment of employees by third parties. Harmonisation now means that employers need to make themselves aware if third parties are harassing their employees and make sure that it is stopped. If harassment occurs on at least three occasions, without action by the employer, then liability might occur (3 strikes and you're out!). It would be wise for employers to communicate to their employees the need to report any incidents to senior management, in order to assist with a defence against any potential challenge at a later date. This also means that an employee could complain about behaviour that he/she finds objectionable, even if it is not directed at him/her and neither does the complainant need to possess the relative characteristic. This could cover circumstances where the behaviour is directed at someone else, who may or may not complain themselves. It could be simply the witnessing of bad behaviour, of which the employee complains, like racist language.

Jane went on to say that a special provision for claims of combined discrimination would come into force on 6th April 2011. It has been recognised that some of the worst cases are suffered by people falling into more than one disadvantaged group, such as Pakistani Women.

Jane then went on to describe how the Act provided for Lawful Discrimination through the new "occupational requirement" defence, which does not now need to "genuine" or "determining". This change was introduced, presumably Jane added, on the basis that these words added little value. Examples of this were casting a black man for the role of Othello, or a woman for a job in a hostel for abused women. Mark Hoare of University of Birmingham comment that the Mines and Quarries Act specifically excluded women from underground jobs.

Jane continued by saying that another provision on Positive Discrimination is due to come into force on 6th April 2011. This could see employers placing job adverts in the Minority press, as well as the mass media, to encourage recruitment from particular groups. Employers will be 'permitted' (but not required) to take under-representation of particular group into account when selecting between two equally

qualified candidates. It is not yet clear how questions of whether two candidates are "equally qualified" will be resolved. Jane offered the opinion that this could be blatant discrimination and that it was not good law! If a woman, say, got a job by this process, she would hate to think that she had 'won' it for that reason alone and not on merit!

Regarding enforcement, Jane said that Employment Tribunals had the power to make recommendations to benefit the wider workforce in the whole of an organisation and were not limited to the particular claimant in the case. The recommendations are not binding, as an employer will not face enforcement action for failing to comply. However where a respondent fails to comply with this supportive recommendation and then faces a subsequent discrimination action, the failure to comply can be used as evidence to support the subsequent claim.

Another change that the Act has introduced is in the definition of Disability with the removal of the "capacities" list for mobility, eyesight, manual dexterity etc., which the DDA stipulated must be affected. Now the person is disabled if he has a mental or physical impairment that causes a substantial and long-term adverse effect (> 12 months) on carrying out day-today activities. This makes it less burdensome for an employee to prove disability.

The Equality Act also replaces the "disability-related discrimination" with the concept of "discrimination arising from disability". The effect of this change was highlighted by the case of London Borough of London – v – Malcolm. In this case Malcolm, a schizophrenic tenant, had illegally sub-let his council flat and was evicted. Malcolm argued that the sub-letting was only done because of his condition and therefore he was discriminated against. The House of Lords ruled that this was not so, because a fit person would also have been evicted if he had sub-let. This is apparently unfair and the Equality Act seeks to redress this by using the phrase "discrimination arising from disability", so that Malcolm would not have been evicted under the new law.

Jane added that employers also need to consider carefully any issues with a disabled employee especially if they have not specifically said they were disabled, but who may be showing some signs. In other words, discrimination may occur if an employer knows of the disability AND may also occur if they ***should*** have known! Reasonable adjustments should be made to the workplace or working arrangements to take care of the employee. This extends to the provision of ***"auxiliary aids"***, such as an adapted keyboard or text-to-speech software, at no extra cost to the employee.

Another important area affected by the Act concerns the issue of Pre- employment Enquiries, which are now outlawed, unless made for one of the prescribed reasons. This was not in the original draft of the Bill, Jane said, but was inserted after lobbying from disabled groups who thought it was "probably the single biggest difference that it could make" to employment of disabled people! The House of Lords strengthened the original Commons proposal with an outright prohibition of health questionnaires.

So, this means that an employer is not allowed to ask a potential employee a question about health, apart from for one of the following, prescribed reasons: -

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

Note; It is the last question that is most closely related to the traditional Pre-employment Questionnaires' objectives to identify where applicants' ailments might be aggravated by the requirements/environment of the workplace.
This restriction applies whether the employer asks the applicant or another person, for example, the applicant's former employer in a reference request.

The consequences of asking a pre-employment health question, for any other than a prescribed reason, can be an investigation by the **Equality and Human Rights Commission (EHRC)**, even if no discrimination has taken place! The EHRC can order an employer to implement an action plan and fine it £5,000. If an employer asks a health question, this does not amount to discrimination if he does not rely on the answer in making a decision on whether to employ the applicant. If the chosen candidate can be shown to be better qualified, this would avoid liability. Equally, if the employer could show that an applicant was rejected because of the consequences of the disability, rather than its existence, then liability is avoided. These circumstances need very carefully considered, including the possibility of making reasonable adjustments.

Should an employee bring a direct disability discrimination claim, and the employer asked a pre-employment health question for a non-prescribed reason, the burden of proof automatically shifts to the employer to prove that no discrimination took place. Questions about past health are unlikely to be acceptable, Jane added, because they are not focused on the applicant's current capabilities. Employers should always, therefore, be very wary of asking questions that start "Have you ever suffered from…" Be aware that any measures that affect a disabled employee more than the rest of the workforce could have the potential for an indirect discrimination claim.

Members' Questions

Members asked many questions throughout Jane's presentation and made a lot of contributions to the debate, which could have gone on till next month. All good things must come to an end and the Chairman reluctantly closed the questions by thanking Jane for making a most challenging topic so interesting in a simple and easy-to-understand way.