

Labor and Employment Client Service Group

From Bryan Cave, London

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New UK Equality Act

The Equality Act 2010 (the "Act") received Royal Assent on 8 April 2010. The majority of the provisions under the Act are due to come into force in October 2010. The Act, which replaces existing separate legislation for each strand of discrimination law (for example, sex, race, sexual orientation etc.), purports to unify and harmonise the law surrounding discrimination and equality. However, the Act also makes significant changes to existing legislation.

Some of the key changes to note are:

Discrimination (including harassment)

- Introduction of "dual discrimination" claims, under which a claimant will be able to bring a combined claim for less favourable treatment that covers several grounds at the same time. This will be important when a claimant argues he or she has faced detrimental treatment because of the interaction of the protected characteristics (for example a woman may claim she was subjected to a disadvantage because she is an Asian female).
- The test for maternity- and pregnancy-related discrimination in employment has been altered so that women will only have to show that they have been treated "unfavourably" as opposed to "less favourably". The rationale for this change is to account for that fact that there cannot be a male comparator for pregnancy related discrimination.
- Under the current law, in order to establish discrimination the claimant would need to show that he/she had been discriminated "on the grounds of" a particular protected characteristic, such as sex. However, under the Act, discrimination must be shown to be "because of" a protected characteristic. The government states that this expands the definition of discrimination to include associative discrimination such as discriminating against a mother whose child is disabled and perceptive discrimination, for example, assuming that someone is homosexual or of a particular age.
- The above provision is extended to the definition of harassment, i.e. conduct "related to" a particular characteristic as opposed to "on the grounds of" that characteristic. Therefore, there is no need for the claimant's characteristic to be the reason why the harasser acted as he/ she did.

- The concept of indirect discrimination will be broadened to disability and gender reassignment discrimination.
- The decision of the House of Lords (which is now the Supreme Court) in *Lewisham v Malcolm* has been reversed, considerably widening the scope for employees to bring claims for disability "arising from" a disability. In brief, this form of discrimination occurs where an employer treats an employee less favourably because of "something arising in consequence of" the worker's disability, and such less favourable treatment cannot be objectively justified. This is easier for the employee to prove than direct discrimination, which is discrimination "because of" disability.
- In order to prove victimisation under the Act, there is no longer a need to identify a comparator.
- Under the current law, an employer can defend potential discrimination claims using the defence of a genuine occupational requirement (race, religion/belief, age and sexual orientation discrimination) or genuine occupational qualification (sex, gender reassignment and race cases). In line with the objective of the Act, the law has now been harmonised into a single defence of occupational requirement.
- The concept of "positive action" has been extended under the Act to cover situations whereby two candidates of "equal" ability apply for the same job. In this situation one candidate may be selected based on their "characteristics", if they are deemed to be underrepresented in the workforce.
- The Act has curtailed the use of pre-employment health questionnaires. Although they will still be permitted, employers will need to be careful about what questions are asked and for what purpose.

Pay

- Equal pay under the Act is also amended to ban pay secrecy clauses being written into contracts of employment. Therefore, an employer can no longer prevent his/her employee from discussing pay with other colleagues.

Enforcement powers

- The powers given to employment tribunals will be increased to include the power to make recommendations covering an employer's whole workforce, not just in relation to an individual claimant.

Territorial scope

- Under the current law, provisions are made for the territorial extent and scope of the legislation, primarily, stipulating that protection will be afforded to those individuals who are present "wholly or partly" in the Great Britain. However, the Act is silent on this point. It is uncertain how this will be interpreted, however it may be that the Act is deemed to apply more narrowly than current discrimination legislation, which applies to any employment "wholly or partly" in Great Britain.

As will become evident from the above snapshot of the Act, the Act seeks to harmonise the law. In addition, it increases the protection afforded to claimants by expanding the scope of the applicable laws and also increases the heads of claim they are likely to seek to invoke.

It is advisable to seek legal advice in this area to avoid breaching the new statutory provisions.

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