



Discrimination
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Cloisters

Who is an employee for the purposes of the EqA 2010?

s. 83 EqA 2010:

- “Employment” means—
 - (a) employment under a contract of employment, a contract of apprenticeship or a contract personally to do work;
 - (b) Crown employment;
 - (c) employment as a relevant member of the House of Commons staff;
 - (d) employment as a relevant member of the House of Lords staff.

Protected groups under EqA 2010

EqA 2010 protects the following groups:

- Employees and applicants for work (ss.39-40)
- Contract & agency workers (s.41)
- The police (officers & applicants) (ss. 42-43)
- Partners & LLP members (ss. 44-46)
- Barristers and advocates (ss. 47-48)
- Office holders (judges / directors) (ss. 49-52)

Protected groups under EqA 2010 (2)

- Persons regulated by professional bodies (ss.53-54)
- Vocational training / employment agencies (ss.55-56)
- Trade organisations members & applicants (s.57)
- Local authority members (s. 58)
- (Sometimes) corporations (*EAD Solicitors LLP v Abrams*)

Key Concepts

Protected characteristics

- Prohibited conduct:
 - direct discrimination
 - discrimination by association and perception
 - indirect discrimination & the justification defence
 - harassment
 - Victimisation

Protected Characteristics

- Protected characteristics:
 - Age
 - Disability
 - Gender reassignment
 - Marriage & civil partnership
 - Pregnancy
 - Race
 - Religion and Belief
 - Sex
 - Sexual Orientation
 - Pregnancy and maternity

Age

s.5 EqA

- Particular age i.e. calendar years; or
- Age group i.e. “under 30s” or “middle aged”
- Various exceptions to age discrimination
 - Justification of direct age discrimination
 - Sch 9 Part 2 EqA – e.g. benefits based on length of service, redundancy payments

Disability

s.6 EqA:

- Physical or mental impairment which has an adverse effect on normal day-to-day activities

Physical or mental *impairment*

Effects of the impairment are *substantial*

Adverse effect on *normal day-to-day activities*

Effects must be *long term*

Gender Re-assignment

s.7 EqA:

- *“proposing to undergo, undergoing or who have undergone a process (or part of a process) for the purpose of reassigning their sex by changing physiological or other attributes of sex”*
- No need for medical intervention / procedures - broad definition of “proposing” to undergo
- *Taylor v Jaguar Landrover*: non-binary person held to have the protected characteristic – but not binding

Marriage and Civil Partnership

s8 EqA:

- Only protects persons who are actually married / civil partners, not divorced, widowed engaged, cohabitees or single people
- The discrimination must be because of the status, not the identity of the spouse/partner
- No protection from harassment for spouses / civil partners (s.26(5) EqA)

Race

s.9 EqA as including:

- Colour
- Nationality
- Ethnic or national origin
- Other aspects of race *could* be covered, for example, caste (see *Chandhok v Tirkey*) if closely linked to ethnic origins
- National origin – Code gives e.g. English & Scots

Race (2)

- Ethnic origin – encompasses religious and cultural differences
- *Mandla v Dowell Lee* guidelines:
 - Long shared history
 - Cultural tradition of its own
 - Other factors: geographical origin / descent, common language, common literature, common religion, being a minority or oppressed by wider community

Religion or belief

s.10 EqA:

- “religion” means any religion (or lack thereof)
- “belief” means any religious or philosophical belief (or lack thereof)
- No need to adhere to a mainstream or recognised religion
- No need to believe in the core tenets / well-known features of the religion

Religion or belief (2)

- *Grainger v Nicholson*: a philosophical belief must have all the same features & in addition must have “a similar status or cogency to a religious belief”
- The belief is that of the claimant not the respondent – *Lee v McArthur*
- “Not worthy of respect in democratic society” – *Forstater v CGD Europe*: only excludes beliefs aimed at destroying the rights of others, such as totalitarianism, fascism

Sex

s. 11 EqA 2010:

- A reference to a person who has a particular protected characteristic is a reference to a man or a woman
- Man is a male or boy, woman is a female or girl
- Scope for problems

Sexual orientation

s. 12 EqA 2010:

- Sexual orientation means attraction towards the opposite sex, the same sex and people of both sexes
- There can be discrimination towards someone perceived to be gay – *English v Thomas Sanderson Ltd*

Pregnancy and maternity

s. 18 EqA 2010

- It is a prohibited act if A is treated unfavourably because she is pregnant or an illness in the 'protected period' or is on compulsory maternity leave or has taken or seeks to take ordinary or additional AML.
- No need for a comparator – hence unfavourably
- Protected period is from pregnancy until 2 weeks after pregnancy or the end of maternity leave, whichever is later

Equal pay

- To bring a claim for equal pay, a woman must do equal work to her comparator which is either like work, work rated as equivalent or work of equal value
- Pay includes salary, bonus, allowances, pension, vouchers, holiday and sick pay, training pay
- There must be an actual comparator not a hypothetical comparator

Direct Discrimination

13 EqA 2010:

- A suffers less favourable treatment than B because of protected characteristic
- B, the comparator, can be actual or hypothetical
- The protected characteristic must be the reason for the less favourable treatment conscious or unconscious
- Most direct discrimination cannot be justified (unlike age and disability)

Perceived and Associative Discrimination

- Perceived discrimination is where less favourable treatment occurs because of the discriminator's mistaken belief that the claimant has the protected characteristic – i.e. is gay or is disabled
- Associative discrimination is where less favourable treatment where A does not a protected characteristic but is associated with someone who does – i.e. someone caring for a disabled child
Coleman v Attridge Law

Indirect Discrimination

s. 19 EqA 2010 – 3 elements

- Provision criterion or practice (*PCP*)
- Puts the claimant and the group with the same protected characteristic to a *particular disadvantage*
- There is no *objective justification* for the treatment

Indirect Discrimination – PCP

- No definition in the EqA
- Should not be interpreted restrictively:
BA v Starmmer
- Can be a one-off act but does not apply to every act of unfair treatment suffered by an individual employee – words carry connotation of a “state of affairs”: *Ishola v Transport for London*
- Does not need to be an absolute bar to claimant

Indirect
Discrimination
– particular
disadvantage

- Any disadvantage – does not have to be particularly bad
- Group & individual disadvantage
- Connection with protected characteristic: *Homer V Chief Constable of West Yorkshire Police*
- Not everybody with the protected characteristic has to suffer the disadvantage: *Essop v Home Office* and *Naeem v Secretary of State for Justice* (SC)
- No need to identify the reason why the disadvantage is suffered: *Essop*

Indirect Discrimination –the pool

- Choice of pools for comparison must be logically defensible: *Allonby v Accrington and Rossendale College* (CA)
- Choice of pool should follow logically once the PCP has been identified: *Dobson v North Cumbria Integrated Care NHS Foundation Trust* (EAT)
- Only those affected by the question should be in the pool *Grundy v British Airways*

Indirect Discrimination -proof

- Expert evidence
- Statistics: *Homer*
- ‘Judicial Notice’: *Chew* and *Hacking & Paterson v Wilson*

Indirect
Discrimination
–objective
justification

- *Bilka-Kaufhaus v Weber von Hartz* (CJEU) and *Homer* (SC)
- Is there a legitimate aim?
- Is the PCP proportionate to that aim:
 - i. Appropriate?
 - ii. Reasonably necessary

Indirect Discrimination –legitimate aim

- Legitimate aim means real need
- Saving money is not a legitimate aim of itself but can be combined with another aim '*costs plus*'
- The legitimate aim can be retrospective but will be subject to more scrutiny if it is

Indirect Discrimination –proportionate

Proportionality:

- Appropriate and reasonably necessary to achieve the aim
 - No other less discriminatory alternatives available – but this is loosely applied
 - Another formulation is “does not go beyond what is necessary to achieve the aim”
 - Balancing exercise

Harassment

- s.26(1) – Unwanted conduct related to protected characteristic that has ‘*purpose or effect of violating dignity or creating an intimidating, hostile, degrading etc. environment*’
- s.26(2) – Unwanted conduct of a *sexual nature* which has the same purpose or effect – i.e. specifically sex harassment
- s.26(3) – Less favourable treatment because of submission to, or rejection of harassment of a sexual nature, harassment related to gender reassignment or sex

Harassment — *'related to'*

- *'Related to'* means a connection of some sort to protected characteristic, looser than direct discrimination - *Moonsar v Fiveways Express Transport*
- What is required is an *associative connection* between the protected characteristic and the action taken - *Richmond Pharmacology Ltd v Dhaliwal*

Harassment – violating dignity

- “Violating dignity or creating an intimidating, hostile etc. environment”
- Higher threshold - “less favourable treatment”?
- No need for intent / malice / motive
- Must consider (s.26(4)):
 - Complainant’s subjective feelings
 - Other circumstances of the case
 - Whether its reasonable for the unwanted conduct to have the proscribed effect (objective element)
- *Dhaliwal* – avoid a culture of hypersensitivity

Victimisation

s.27 EqA 2010

- 3 key elements:
 - Previous protected act
 - Subjected to a detriment
 - Detriment “*because of*” protected act – what was the reason for the detrimental treatment
- Many common factors with whistleblowing legislation

Victimisation – protected act

- Protected act:
 - Bringing proceedings under EqA
 - Giving evidence or info in connection with proceedings under EqA
 - Doing any other thing in connection with EqA
 - Alleging that a person has contravened EqA.
- Can include wrong perception
- s. 27(3) – no protected act if the disclosure is made in bad faith

Discrimination arising from disability

- Discrimination arising from disability

Disability – special types of discrimination

- Disability discrimination can take two additional forms:
 - Discrimination arising from disability (s. 15 EqA 2010)
 - Failure to make reasonable adjustments (s. 20 EqA 2010)

Disability —
reasonable —
pre-contract
health
enquiries

s. 60 EqA 2010

- It is unlawful for an employer to make enquiries pre-employment about a potential employee's disability
- An employer is allowed to ask about any reasonable adjustments needed for an interview
- An employer is also allowed to ask whether the employee is capable of the intrinsic elements of the job (i.e. a scaffolder need to climb etc)

Disability reasonable adjustments

- Disability discrimination can take two additional forms:
 - Discrimination arising from disability (s. 15 EqA 2010)
 - Failure to make reasonable adjustments (s. 20 EqA 2010)

Burden of proof

s.136 EqA

- *(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.*
- *(3) But subsection (2) does not apply if A shows that A did not contravene the provision.*

When is discrimination unlawful?

- Must fall within Part 5 EqA (i.e. one of the relevant relationships)
- Must meet the elements of one of the defined types of unlawful conduct
- Who can be liable?
 - Employer
 - Individual liability of perpetrator
 - Secondary liability of employer

Positive Action

- Occupational requirements
- Positive action
- Statutory authority
- Other exceptions

Occupational Requirements

- General ORs (para 1, Sched 9)
- Burden of proof on Employer
- Specific ORs (paras 2 – 5, Sched 9)
 - Religion: “organised religion” & “ethos”
 - Armed Forces
 - Employment Services



Discrimination
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