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Lynn Featherstone MP
Parliamentary Undersecretary of State
(Minister for Equalities)
Government Equalities Office
2 Marsham Street
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By post and email

30 June 2011

Dear Minister

Equality Act 2010

I write on behalf of the Employment Lawyers Association ("ELA"), which is an unaffiliated group of specialists in employment law who represent both employers and employees. It is not our role to comment on the political merits or otherwise of proposed legislation; rather we make observations from a legal standpoint.

ELA's Policy and Legislative Committee consists of solicitors and barristers (both in private practice and in-house) who meet regularly for a number of purposes, including considering and responding to proposed new laws and other consultation papers.

We set up a working group under the chairmanship of Stephen Levinson (RadcliffesLeBrasseur) to respond to the request by the Equalities Office to make observations on some shortcomings in the Equality Act 2010. We have confined our response to relatively technical issues but this does not mean they do not have a significant impact on the working of the Act

Contributors to this paper are identified in the Appendix.

All references to 'the Act' and section numbers refer to the Equality Act 2010 unless otherwise stated.

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Sections 13 and 25: Pregnancy Discrimination

The problem:

Section 25 defines pregnancy discrimination as acts contrary to s18, which only covers acts against a woman. Section 13 doesn't mention pregnancy discrimination, whereas it expressly states that marriage discrimination claims can only concern the employee's marriage and not treatment due to association with a married person. This leaves it unclear whether the intended affect of s25 is to only permit pregnancy discrimination claims from women under s18 (as ACAS and EHRC publications suggest), or to permit pregnancy claims from men e.g. less favourable treatment because of associating with a pregnant women under s13 (as suggested by a number of commentators).

The solution:

Our proposal is that Government amends section 13 to confirm that a pregnancy claim is permissible under s13 and by someone other than the pregnant woman

Section 55 and 56: Reasonable adjustments and work experience

The problem:

It is unclear whether the duty to make reasonable adjustments applies to the provision of work experience. It seems so, but only by a rather tortuous route following it through as follows: ss55 and 56 in Part V of the Act covers "employment service-providers", defined to include providers of work experience (s56 (6)). Section 55(6) provides that the duty applies to the providers of employment services, but not in relation to the provision of a vocational service. Subsection 56(7) defines the types of vocational service to which the duty does not apply as employment services other than ss 56(6)(b) work experience. So the duty does apply to work experience providers.

The solution:

As it is unsatisfactory to leave this point obscure redraft with a positive statement that the duty does apply to work experience providers.

Sections 72 – 76: Pregnancy and maternity equality

The problem:

ELA members have reported that the provisions addressing pregnancy and maternity equality are cumbersome and difficult to understand. The sections could therefore benefit from simplification.

In particular in relation to the regime for payments to women on maternity leave there are now three slightly different formulations of the exception relating to pay:

- The Maternity and Parental Leave etc. Regulations 1999 refer to "sums payable to an employee by way of wages or salary";
- Section 76 of the Act (which essentially precludes women from claiming pregnancy discrimination in certain circumstances) refers to a "term of work that relates to pay";
- Schedule 9, part 3, paragraph 17 of the Act (which is an exception to the pregnancy discrimination protection) refers to "the payment of money to an employee by way of wages or salary."

These are small differences, but the exact wording does have an impact when considering a woman's entitlement to, for example, a bonus paid in the form of stock options.

Solution:

Redraft adopting a consistent usage.

s. 108: harassment of former employees

There is an apparent oversight in the Act, which excludes former employees from the protection available against discrimination and harassment.

Section 108(7) expressly excludes former employees from protection against victimisation, apparently based on a misunderstanding, as set out in the explanatory notes, that post-termination victimisation is not mentioned in s 39 and is covered under the separate victimisation provisions contained in s.27.

As the statutory protection in place pre-October 2010 no longer exists, former employees now need to rely on case law rather than the Act for protection against victimisation, which leaves some uncertainty.

Solution:

Redraft s108 (7) to ensure that s108 is only excluded for victimisation covered by s39 – or amend s27 or delete s108(7)

Sections 120, 127 and 144: jurisdiction issues

The problems:

Section 120 gives the tribunal jurisdiction to include all claims under Part 5 (including equal pay claims), and s123 says that the normal 3-month time limit applies to these claims.

Section 127 then gives the tribunal jurisdiction over equal pay claims (for a second time) and subjects them to the 6-month time limit. Section 144 then says that only s120 claims can be compromised (not s127), but s120(4) and 120(5) bring equal pay claims outside the prohibition on waiver. This complexity is unhelpful and is likely to lead to unnecessary litigation.

Solution:

S144 should be redrafted to permit the compromise of s127 claims, and s 120 should be amended so that it does not apply to equal pay claims.

Section 123: limitation period

The problem:

Section 123 (1 provides that proceedings may not be brought after 3 months or such other period as the ET thinks just and equitable. It has been suggested this could mean that the ET can insist on proceedings being issued BEFORE the expiry of the 3-month period which creates undesirable uncertainly

Solution:

Redraft to clarify the intention. We suggest amending s123(1)(b) to refer to such other longer period.

s.147: Compromise Agreements

The problem:

This issue is now notorious. Section 147(3) sets out the requirements a compromise agreement must satisfy to settle a claim under the Act. However, Section 147(5)(d) appears on its face to preclude a qualified lawyer who is acting for a party to a complaint from advising that party on the compromise agreement and therefore from meeting the requirement in section 147(3) that the complainant receive advice from an independent advisor. If correct, the effect of this is that compromise agreements cannot be used to settle claims arising under the Act.

The Explanatory Notes to the Act do not suggest that any change to current practice was intended and it is widely considered that this is a drafting error. The present situation, in which different QC's have made public their divergent views and the Law Society has alerted the whole solicitor's profession to the problem, makes the present position uncertain and difficult for advisers. If the intention of the consolidation was to make resolving disputes easier for parties and their advisers the drafting of this section has had the opposite effect. The uncertainty requires complicated explanations to be given to clients and each time this is done emphasis is bound to be given to the uncertainty caused by the drafting, which is bound to give a poor impression to the public of the quality of the Act and tend to bring the law into disrepute.

The solution:

This section is amended to reflect the pre-existing position. For example ss147 (5)(d) might read, "a person who is acting for a person (other than the complainant) within paragraph (a)."

Schedule 27: Pension entitlement during unpaid maternity leave.

The problem:

Schedule 7 of the Act repeals Schedule 5 Social Security Act 1989 and replaces it with section 75. Two points arise: (i) the Maternity Regulations 1999 still refer to Schedule 5 SSA, so the Act ought to have amended them in this regard to refer to s75. (ii) Section 75 only applies to occupational pension schemes, whereas Schedule 5 covered group personal pension schemes too. As we understand it, there was no intention to change the position and, the legal position as to whether employer contributions to a personal pension scheme continues during unpaid OML or AML is unclear, including where the employer contribution is normally conditional on an employee contribution.

Solution:

Amend the Act to provide clearly whether or not, when employer contributions are required, these include topping up the employee contribution shortfall due to that being assessed as a % of actual pay (i.e. SMP if that is what the employee is getting).

Territorial Scope

The problem:

Unlike the previous single strand legislation, the Act does not include any express territorial limitation. Paragraph 15 of the Explanatory Notes to the Act states:

'As far as territorial application is concerned, in relation to Part 5 (work) and following the precedent of the Employment Rights Act 1996, the Act leaves it to tribunals to determine whether the law applies, depending for example on the connection between the employment relationship and Great Britain.'

The position on territorial scope is now uncertain, relies on case law and has become very fact specific. This encourages litigation.

Solution:

It would provide certainty for all if the precise territorial scope of the legislation was specified or, in the alternative, if Parliament intended a change of approach, that this is made explicit.

Yours sincerely

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Appendix

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