

Headline

news from **Head  Office**

Autumn 2010

Equality Act 2010

As you may or may not be aware the new Equality Act 2010 came into force on 1st October 2010 with the aim of overhauling the existing system of legislation regarding all types of discrimination and replacing it with one single Act of Parliament.

The new Equality Act has been hyped up somewhat in the press as resulting in a radical overhaul of Employment Law within the UK and consequently having a significant impact upon Human Resources within British employers.

In reality the new Equality Act does not really introduce too many changes however we will briefly explain some of the changes that have been introduced by the new Act.

1. Discrimination by Association

The concept of 'Discrimination by Association' was initially introduced following the case of *Coleman v Attridge Law* in which the ECJ held that the provisions of the Equal Framework Directive extended to protect those, who while not disabled themselves, are treated unfairly because of their association with a disabled person.

The Equality Act has extended this principle so that it now covers the protected characteristics of race, religion or belief, sexual orientation, age, disability, gender reassignment and sex. This will have effect wherever there is direct discrimination against someone because they associate with another person who has one of the protected characteristics e.g. you dismiss an employee because you learn that their partner has specific religious beliefs. This could have wide ranging implications and extend discrimination protection to a large number of employees who were not previously covered.

An example of this can be found in the recent case of *Kulikaoskas v MacDuff* which was dealt with under the old law. Here the EAT was asked whether the idea of associative discrimination could be applied to a male employee who was allegedly dismissed because of his partner's pregnancy. The EAT ultimately held that the protections for pregnancy under the Sex Discrimination Act extended only to acts of discrimination against a woman on the ground of that woman's pregnancy and that any relevant European Directives did not support the idea of associative discrimination on the grounds of the 'uniquely female state of pregnancy'.

The EAT were cautious to note that the position would be unclear under the provisions of the New Equality Act. If the Act is given a wide interpretation then it is more than possible that this would be considered unlawful associative discrimination.



2. Creating an Intimidating, Hostile, Degrading, Humiliating or Offensive Environment

The Act defines harassment as "unwanted conduct related to a relevant protected characteristic and the conduct has the purpose or effect of violating a person's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for that person". Effectively this means that an employee can now claim for harassment even in circumstances where the conduct complained of is not directed at them. The employee may not even need to have the relevant protected characteristic to which conduct relates.

An effective example would be where one employee is witness to homophobic treatment of another employee. While the employee who is the subject of the discrimination will have a claim so will the witnessing employee if (having regard to all the circumstances) they can show that the conduct had the effect of violating their dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment.

3. Discrimination by Perception

The Act also expands upon the concept of Discrimination by Perception. This is discrimination on the grounds that you think an employee has a particular protected characteristic, even if in reality they do not have a protected characteristic. Again if we take the example of an employee who is subject to continued homophobic taunts and banter based on stereotyped views of homosexuality. Here there would no longer be a question of whether the employee was homosexual; the fact that the treatment was based on a perception of his sexuality would be enough to give rise to a claim.

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Helmont House, Churchill Way, Cardiff, CF10 2HE
E: info@askheadoffice.co.uk www.askheadoffice.co.uk

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4. Third Party Harassment

Under the old discrimination principles only the Sex Discrimination Act provided protection to an employee who is subject to unwanted conduct from a third party.

The Equality Act now extends this type of claim to each of the protected categories; sex, age, race, religion or belief, sexual orientation, disability and gender reassignment.

An employee may have scope for a claim where they have been subjected to unwanted conduct on two occasions of which the employer was aware and subsequently failed to take any action preventing it happening again. Here an example would be where an employer uses a company to service their photocopiers and several female staff members report inappropriate conduct on the part of a repairer but the employer fails to take any action.

5. Enquiries about Disability or Health

Employers can no longer ask applicants; health related questions, to complete Health Related Questionnaires or attend a medical examination before offering them a job. Should an employer do so and act in reliance on this information the applicant will have a claim under the Act and the employer may face enforcement action from the Equality and Human Rights Commission.

Instead employers are only allowed to ask basic questions such as whether there are any reasonable adjustments that the candidate would like you to make to assist them in the application process, or whether the candidate will be able to carry out a particular function which is essential to the job. This prohibition will in all likelihood include asking any questions about an applicant's sickness absence history.

However, once the stage is reached when the employer is to offer a candidate the job the employer can at this point send a questionnaire if the nature of the job means that persons with certain disabilities would not safely be able to perform an essential part of the job role. The employer should then make it clear that the job offer is subject to a successful completion of the questionnaire.

6. Pay Secrecy Clauses

'Pay Secrecy' was the subject of a great deal of scrutiny in the build up to the Equality Act and a complete ban on all such contractual clauses was purported. The Act does not go as far as a complete prohibition but what it does make clear is that any contractual clause which is designed to prevent employees from making, seeking or receiving "relevant pay disclosures" will be unenforceable. Further any employee who gives, seeks or receives any "relevant pay disclosure" must not be subjected to any detriment by the employer.

The term will only be unenforceable in respect of disclosures where "there is, in relation to the work in question, a connection between pay and having (or not having) a particular protected characteristic". Effectively this means that a term seeking to restrict conversations

about pay and benefits between two colleagues where neither party is contemplating discrimination could still be enforceable however if either party's reason for having the discussion relates to a protected characteristic then such a clause would be rendered unenforceable.

Overall the use of secrecy clauses has been diminishing for years at all but the top level of business. These changes, while not an outright prohibition, may well be the last nail in the coffin as in almost all circumstances all an employee will have to do to overcome and alleged breach of such a term is state that when the discussion took place they were contemplating possible discrimination.

7. Dual Discrimination

One further part of the Act which sought to introduce the concept of 'Dual Discrimination' did not come into force on 1st October. At present if a company has a policy of not employing for example, black African males, then potentially this may not be discriminatory if the company can show that it employs both males and black African females. Under Dual Discrimination there would be no such defence for discrimination such as this. There is now some uncertainty as to whether or not Dual Discrimination will be implemented in the future however at present the Government have tabled a date of April 2011 for the introduction of Dual Discrimination.

8. Tribunal Powers

If an employee brings a claim for discrimination in a Tribunal and is successful then the Tribunal can now make recommendations to the employer to reduce the risk of further discrimination taking place which the employer must follow even if the particular employee who brought the discrimination claim has subsequently left the company.

Conclusion

The Equality Act 2010 does not really introduce too many new laws that were not already in existence under previous legislation. Instead, the main crux of the Act has been to harmonise the existing legislation so that it all falls neatly under one Act and to extend some areas of discrimination so that they now apply to nearly all of the protected characteristics of age, disability, gender reassignment, marriage and civil partnership, pregnancy and maternity, race, religion or belief, sex, and sexual orientation.

If you have any queries relating to any of the articles in this magazine, please contact our legal advisors on 0845 217 8650



EU Votes on Extended Maternity Rights

Towards the end of October the European Parliament voted in favour of amendments to the EU Pregnant Workers Directive. These amendments are not without controversy and while the proposals are some way from becoming law in the UK their effect could have far reaching implications for employers.

The amendments proposed by the parliament include:

- A compulsory fully paid maternity leave of 6 weeks following childbirth
- 20 weeks' maternity leave on full pay
- Right to two hour long periods off for breastfeeding
- A blanket ban on workers being required to undertake night work or overtime in the 10 weeks prior to child birth or during the breastfeeding period

The majority of concerns related to whether it was in the interests of Member States to substantially increase maternity rights at a time when many national governments are looking at unparalleled cuts in public spending and business are facing serious financial problems. The obvious question many are asking is where the money would come from should women be guaranteed the right to 20 weeks' maternity leave on full pay, the struggling business or the beleaguered public purse.

With austerity now being the buzz word across Europe it is likely that these proposals will face considerable opposition when they face a vote by national governments. The likely result would be a substantially diluted version of the proposals being agreed. However even in a diminished capacity there will likely be some form of extension to fully paid maternity provision in the not too distant future.

Further extension to Flexible Working Rights

The Government has now announced that the right to request flexible working arrangements will extend to all parents with children under the age of 18 from April 2011. As it stands employees have the right to request a flexible working pattern if they have a child under the age of 17 (18 if the child is disabled) or if they are a carer for certain adults.

While this change may not seem extensive (according to the Government it will give the right to a further 288,000 employees) this is likely to mark the first phase of more extensive plans on the part of the new coalition Government. Alongside this there is going to be a consultation on whether the right to flexible working should be extended to all employees along with the introduction of a more flexible parental leave system.

The suggested parental leave system would build on the rights that are coming in April in respect of shared parenting. For children born after 3rd April 2011 and in certain circumstances if a mother returns to work before the expiration of her maternity the father may take up to six months extra leave. The consultation will look at ways of "encourage(ing) shared parenting from the earliest stages of pregnancy".



Default Retirement Age of 65 to be Scrapped

The Government has also announced that they plan to scrap the Default Retirement Age of 65 from 1st October 2011. These changes will prevent employers from forcing an employee to retire when they reach the age of 65 unless it can be objectively justified.

The changes also mean that from 6th April 2011 employers will not be able to provide their employees with a compulsory date of retirement following their 65th birthday. Only employees who are notified of their retirement date before 6th April 2011 and where the retirement date itself is due to be before 1st October 2011 can be forced to retire.

The Government's thinking behind these changes is the hope that it will encourage employees to work for longer before retiring which should ease the current strain on public finances.



The Government was scheduled to enter a period of consultation to run until the end of October 2010 that was to assess the proposals put forward and would also consider giving additional support and guidance to both employees and employers.

Christian council worker loses unfair dismissal claim

A former housing official for Wandsworth Council has lost his claim against the local authority for unfair dismissal.

Duke Amachree was sacked in January 2009 from his position as a homelessness prevention officer after telling a woman with an incurable illness that she should "put her faith in God".

The Council fired Mr Amachree after the woman complained about the "30-minute barrage" she received from the Christian employee.

He took his case to an employment tribunal, claiming for unfair dismissal, religious discrimination and breach of contract but the court found in favour of the local authority on the grounds for gross misconduct.

Mr Amachree said: "This is sad day for Christians who simply want to live out their faith in the workplace without fear."

The Christian Legal Centre, who backed the case, said that the Council had told the Claimant that saying "God Bless" to a client could result in a full-on investigation into the employee's work practice if a complaint was received about it.

BBC face Age and Sex Discrimination from Former Countryfile Presenter

Miriam O'Reilly is bringing claims of sex discrimination and age discrimination against the BBC after she was a dropped as a presenter when the show "Countryfile" was moved to a prime time slot.

In her witness statement submitted to the Employment Tribunal she spoke of her concern when 8 months before being dropped she was warned "to be careful with those wrinkles when high definition comes in". She went on to claim that this was further evidence of

the BBC's view that women presenters on TV needed to look young while stating that a male presenter would never be asked about wrinkles or offered hair die.

The reason given to Ms O'Reilly as to why she would be no longer working on the show was that the format was being "refreshed". Ms O'Reilly stated that she was devastated when she was told the news that she and three other female presenters would lose their posts following the show's relaunch. The show's main presenter John Craven along with Adam Henson and Ben Fogle continued in their posts after the transition whilst Julia Bradbury and Katie Knapman were brought on as new presenters.

An easy way out of a bad relationship?



One of the by-products of having a diverse and wide range of personalities within the workforce is that conflict is bound to happen. Often minor conflict can be resolved informally or more formally through grievance or disciplinary procedures. However there are often occasions where relationships breakdown beyond repair and where both parties become entrenched in their positions.

We often get calls from employers who would like to remove problem employees from their business but often the employee will not be inclined to resign of their own accord and the employer may not have reasonable grounds to dismiss them safely or may not wish to take on the risk of an unfair dismissal claim.

In these situations one option is to enter into a compromise agreement (sometimes called an exit agreement) between the employee and employer. The agreement in its simplest form is one where the employee relinquishes their right to sue the employer in return for the employer making certain payments to the employee.

The terms of the agreement are agreed through the usual process of negotiation. As the contents of those negotiations may prejudice the parties should an agreement not be reached then the discussions should only be held on a 'without prejudice' basis, meaning the contents of discussions may not be referred to in Court. Before discussions such as this commence it is recommended that both parties understand the contents of the meeting are without prejudice. It is also important that an employer does nothing to risk that protection during negotiations by threatening the employee with dismissal should agreement not be reached.

During the negotiations it is common to address issues such as notice pay, compensation in respect of any accrued or future benefits (pensions, health benefits, holiday, cars, etc), the wording of an agreed reference, whether new restrictions will apply and any ex gratia payments to be made. It will also state what claims or potential claims are to be compromised. An agreement may also allow for certain payments to be made tax free further incentivising the employee to sign (depending on their nature and the contract of employment).

Although coming to an agreement in often frustrating and emotive situations can be challenging and even against the desire of the employer it does offer a safe exit from the business as there is minimal risk of claims from the employee. They are especially productive where a dismissal would be potentially unfair or unreasonable or where the employee is likely to claim at Tribunal, even where they have limited prospects of success as there few costs for the employee to bring a claim. They can also be agreed in a relatively short time frame.

For the agreement to be binding it must meet certain legal requirements including the employee seeking independent legal advice on the terms and effect of the agreement. It is standard practice for the employer to pay towards the costs for this and the industry norm is £250-£500+VAT.

However these agreements can also be used when things haven't broken down completely but both parties wish to agree a safe exit. For example in cases of long term sickness or redundancy the agreement can be drafted to state the reason for the termination allowing the employee to claim on appropriate insurance while the employer has the added security of the protection of the agreement making for a more mutual exit.

If you have such a situation it is recommended that you contact Head Office to discuss the use of compromise agreements in more detail.

Conducting a Full Disciplinary Procedure

From time to time the majority of employers will encounter the regretful situation where they suspect that an employee may have committed an act of misconduct. Whether the employer decides to overlook the incident or to simply have a quick chat with the employee is obviously a decision for the employer. However, if the employer decides that they may want to take disciplinary action against the employee then it is crucial that the employer conducts a full disciplinary procedure before any disciplinary action is taken to ensure compliance with the ACAS code.

Following the ACAS code is essential as a failure to do so on the part of the employer could result in the employee obtaining an increase on his damages of up to 25% should he subsequently bring a successful claim in an Employment Tribunal.

The key to conducting a full disciplinary procedure is to follow the 5 main points listed below:

1. Carry out a Fair and Reasonable Investigation

The investigation into the alleged misconduct should be carried out by an independent person to ensure that the investigation is as fair and as unbiased for the employee concerned as possible.

As part of the investigation it will be necessary to speak to any witnesses to the incident and to take signed statements from them. Ensure that the right questions are asked in order that all of the relevant information can be obtained. All questions and answers should be written down so that a transcript can be produced. Depending on the circumstances it may also be necessary to review any CCTV and to obtain a report from an appropriate expert.

The investigation should also consider whether any other employees have committed the same offence in the past and should look at how and if they were disciplined to ensure fairness and uniformity. This will be important if the employee later argues that he felt as though his conduct was acceptable.

During the course of the investigation it may be necessary to invite the employee facing the accusation to attend an investigatory meeting. Here the investigating officer should write to the employee providing them advance notice and offering them the right to be accompanied by a trade union representative or a work colleague. It should be made clear that this meeting is merely an investigatory meeting and not a disciplinary hearing.

The meeting should not be an interrogation, it should be viewed as an opportunity to get the accused employee's version of events. The meeting should be minuted and the employee should be asked to sign to confirm the minutes are accurate. After this it may be necessary to collect further evidence or re-interview witnesses, ensuring new signed statements are produced if further evidence is provided.



2. Invite Employee to a Disciplinary Meeting

This is often the most crucial phase of any disciplinary procedure. The ACAS Code of Practice on Discipline and Grievance (as well as the statutory dismissal and disciplinary procedures in place before it) requires the employer to set out in writing the alleged conduct which has led them to consider disciplinary action in the invitation to the meeting. It also requires that before the meeting takes place the employee is given details of the action and time to prepare a reasonable response to that information.

- Well in advance of any disciplinary meeting the employer should ensure that the employee has received in writing;
- A date, time and location for the hearing
- Details of the allegations made against them and the potential grounds for action
- Confirmation of the right to be accompanied to the meeting by a trade union representative or fellow work colleague
- Warning about potential outcomes
- Copies of all the evidence/statements the employer is seeking to rely upon

How far in advance the letter is sent will depend on the nature of the allegation. It would not normally be appropriate to hold a meeting on less than 48hrs notice and if the matter is complicated or there is a lot of supporting evidence then you may need to give the employee more time to prepare their response.

3. Conduct Disciplinary Meeting

The person chairing the meeting should be independent if possible and preferably more senior than the person conducting the investigation. The employee must be given an opportunity to put his side of the story across as this will effectively be a question and answer session about the events that took place. At the conclusion of the meeting the employee should be thanked and advised that he will be contacted shortly with the Company's findings.

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It is not normally acceptable to give a judgement at the close of the hearing and there should always be an adjournment so the Chair can consider the evidence. The length of the adjournment will depend upon the complexity of the allegations. It is recommended that for most matters the employee be informed that the decision will be reached the following day and communicated to the employee as appropriate.

4. Write to Employee with outcome of the Disciplinary Hearing

This letter will restate the allegations made against the employee and should then outline the evidence, the Company's findings and any disciplinary action that will be taken eg written warning, dismissal. At this stage you must notify the Employee that he has the right to appeal against the outcome if he wishes.

In order to impose a disciplinary sanction the Chair need not be satisfied the employee is guilty beyond all reasonable doubt but they must be able to say based on the evidence they have a reasonable suspicion amounting to a belief in the employee's guilt. Where the only evidence presented is that of one person's word against the other or the evidence is equally weighted then there will never be sufficient evidence upon which to base a reasonable belief and no further action should be taken.

Where the evidence is sufficient to establish a reasonable belief the Chair must then determine the appropriate penalty/sanction to impose. The employer's decision should be based upon the evidence obtained and what was said at the disciplinary hearing.

The Chair should also check if other employees have been disciplined in similar circumstances. Inconsistency in sanctions imposed on two employees in similar circumstances may lead to a dismissal being considered unfair.

The employer may also look at:

- Previous good conduct
- Whether the employee shows any remorse
- Admissions made

Once a decision has been reached the Chair should communicate the outcome to the employee. Written confirmation of the decision should be provided to the employee within five working days of concluding the hearing. If a disciplinary sanction is imposed then the employee should always be informed of their right to appeal in writing.

5. Conduct an Appeal (if Employee wishes to do so)

If the employee does wish to appeal against the decision the employer should try to ensure that the person who hears the appeal is different to, and preferably more senior than the person who conducted the disciplinary hearing.

If the employee merely conveys their intention to appeal and provides no further detail the employer should write to them requesting a basis for appeal. Should nothing further be forthcoming from the employee within five working days the employer should schedule in the appeal in any event to ensure fairness.

Any sanction imposed as a consequence of the disciplinary hearing is valid from the point of decision and is not deferred until the appeal is held.

An employee could appeal on any ground but normally their grounds will come under one of these three broad headings:

- New evidence
- Unfair penalty (either there is no reasonable belief on which to take action or the sanction is not within the band of reasonable responses)
- Procedural unfairness

The time, date and venue of the appeal must once again be reasonable and the employee should have reasonable written notice of these. The notice should be similar to that of the disciplinary hearing again reminding the employee of their right to be accompanied by a work colleague or trade union representative.

Following a full disciplinary procedure is essential for guaranteeing that the correct decision is reached. It is quite common for investigations to uncover some evidence which causes the employer to find that an employee was not guilty of committing an offence or which suggests that an employee's actions may have been justified or excusable. If an employer fails to follow a full disciplinary procedure but nevertheless takes action against an employee such as dismissal and some evidence later comes to light that may have caused the employer to rethink their decision then the employee may have a strong case for unfair dismissal.

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