

## The Equality Act

The much talked about and well publicised Equality Act (the “Act”) is, for the main part, coming into force on 1 October this year. The Act draws together the different strands of UK anti-discrimination law, with the aim of simplifying the legal position, removing inconsistencies currently prevalent in various strands of discrimination law and making it easier for people to understand and comply with them. There are also certain areas where the law is strengthened.

### Impact: what’s new?

The main consequences of the Act which employers should be aware of are as follows:

- It is no longer essential for a complainant to have a protected characteristic (e.g. sex, race, disability etc). It will be enough if they associate with someone with a protected characteristic and suffer from that association, or if they are perceived (wrongly) to have a protected characteristic.
- Disability discrimination now applies to adverse actions taken by an employer “arising from” disability. So an employee who has been absent for six months, on the grounds of a disability-related illness, can challenge a dismissal as being discriminatory, even if the employer would always dismiss someone after six months absence, regardless of whether or not they were disabled.
- Indirect discrimination now also applies to disability discrimination. So, where a provision applies equally to disabled and non-disabled staff, but it adversely affects individuals with the type of disability suffered by the complainant, it will potentially be discriminatory. Both discrimination arising from disability and indirect disability discrimination are capable of being objectively justified.
- Harassment by non-work colleagues on discriminatory grounds can give rise to legal liability for an employer if the complainant has suffered such harassment on two previous occasions. The employer will be able to defend any such claims by showing that it took reasonable steps to stop the third occasion of harassment occurring.
- Employment Tribunals will now be able to make recommendations covering an employer’s entire workforce rather than simply individuals involved in employment litigation. So a Tribunal could, for example, recommend that an employer implements an equal opportunities policy or arranges training for management. Although recommendations are not legally binding, a failure to comply can be relied upon as evidence of discrimination in any subsequent Tribunal proceedings.
- It will generally be unlawful to ask about the health of a job applicant before offering a job. It will be permitted, however, to ask such questions provided they relate to: (a) the ability of the applicant to carry out functions “intrinsic” to the job; (b) whether any reasonable adjustments are needed to enable the applicant to comply with any processes to be gone through before offering the job (e.g. the job interview); and (c) for the purposes of monitoring diversity.
- The Act provides protection for “deterred applicants” who are put off applying for a job because they know that a provision, criterion or practice would prevent them from being successful.

- It will be unlawful to penalise an employee for requesting details of pay from a colleague or providing pay details to a colleague, where such details have been requested or provided with a view to establishing whether any differential in pay is discriminatory. Contrary to some reports, pay secrecy clauses are not banned and can still be incorporated into employment contracts. However, employers will only be able to take disciplinary action in relation to non-adherence in certain circumstances.
- No provisions are included in the Act about its territorial scope. This is to be determined by the Courts and so could be the subject of much litigation.

## Still to come?

One aspect of the Act which has attracted a lot of publicity is the proposed requirement for employers to produce gender pay reports, as well as new provisions relating to positive discrimination and dual discrimination. However, these provisions are not being implemented at this stage. Gender pay reporting is not envisaged to come into force until 2013 and the latter two concepts are not anticipated to take effect until April 2011, with some doubt as to whether the Government will bring gender pay reporting and positive discrimination into force at all.

## Recommendations

- Review your Equal Opportunities Policy (and any related policies, e.g. Harassment Policy) to ensure that it is consistent with the new provisions relating to discrimination under the Act.
- Review any pre-employment health questionnaires and your recruitment process to ensure that inappropriate questions are not asked prior to making a job offer.
- Offer diversity training. One area where we envisage that guidance will be required is in relation to the interview process, where it may be advisable to train managers on exactly what they should and should not discuss regarding an applicant's health.

### ***Nicholas Robertson***

Partner

Tel: +44 20 3130 3919

### ***Christopher Fisher***

Partner

Tel: +44 20 3130 3724

### ***Bernadette Daley***

Partner

Tel: +44 20 3130 3667

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