

Protected Characteristics under the Equality Act 2010

Background

The Equality Act 2010 came into force on 4th October 2010. The Act sought to codify the many pieces of primary and secondary legislation relating to discrimination. The Act also introduced some further protection against discrimination.

The Equality Act 2010 provides protection against discrimination which relates to certain listed characteristics which people may possess. These are known as "protected characteristics".

Some protections relate specifically to only one of those characteristics. Others provide the same protection to all of the characteristics.

This paper seeks to identify each of the protected characteristics and any changes to the definition of those characteristics since the introduction of the Equality Act 2010. The paper will also address the protection against discrimination provided in relation to each of the characteristics.

It is important to note that there have been very few reported cases in relation to the Equality Act to date. As time goes on since the Act came into force it is likely that there will be more and more decided cases.

Protected characteristics

The protected characteristics under the Equality Act 2010 are as follows:-

- Age

- Disability
- Gender reassignment
- Marriage and civil partnership
- Pregnancy & maternity
- Race
- Religion or belief
- Sex
- Sexual orientation

Age

No change under the Act. The Act protects people of all ages. The most obvious form of age discrimination adversely affect those who are older (e.g. passing over older employers for promotion or not appointing an older applicant for a job). Protection applies to inequality of treatment with regard to any age. For example any job recruitment exercise, which specifies that an applicant must have a certain number of years' experience, may discriminate against younger applicants, unless that requirement is justified.

Gender reassignment

The Equality Act 2010 introduces a new definition of gender re assignment. Under the old rules it was necessary for a person to be under medical supervision to be protected. That is no longer the case under the Equality Act. A transsexual person is someone who proposes to, starts or has completed a process to change his or her gender. A person because protected because of their gender reassignment where they:

- Make their intention known to someone – this could be a doctor or a colleague. Once they have proposed to undergo gender reassignment they

are protected even if they do not take further steps, or they decide to stop later on. They do not have to have reached an irrevocable decision that they will undergo gender reassignment, but as soon as there is a manifestation of this intention they are protected.

- Start or continue to dress, behave or live full time, or part time, according to the gender they have identified as a person.
- Undergo treatment related to gender reassignment such as surgery or hormone therapy, or
- Have received gender recognition under the Gender Recognition Act 2004.

This will make it easier for transsexual people to get protection against discrimination e.g. a woman who decides to live as a man but does not undergo any medical procedures would be covered.

Race

No change. The protected characteristic of race includes; colour, nationality, ethnic origin, and national origins.

Caste is not yet an aspect of protective characteristic of race, so inequality of treatment between different castes will not (without accompanying racial distinction) be actionable in relation to the protective characteristic of race. However, there is a specific power to amend the Equality Act to change the position in relation to caste. It remains to be seen whether this government will make the appropriate regulations.

Sex

The definition of the protected characteristic of sex amounts to the same under the Equality Act.

Any reference in the Equality Act to a person who “ has a particular characteristic” applies to either a man or to a woman.

Whilst the most obvious forms of sex discrimination will adversely affect women, the protection applies to inequality of treatment of men as well.

Marriage & civil partnership

No change. A person has the protected characteristic:

- Of marriage if a person is married
- Of civil partnership if the person is a civil partner

People who are not married or who are not civil partners do not have this protected characteristic. It is not possible to claim discrimination, for example, on the basis of being unmarried or divorced. None of the following categories have the protective characteristic; single people, engaged people, divorced people, people whose civil partnerships have dissolved.

Pregnancy & maternity

No change. A woman is protected against discrimination on the grounds of pregnancy or maternity during the period of her pregnancy or any statutory maternity leave to which she is entitled.

Religion or belief

Religion under the Equality Act 2010 means any religion and any reference to religion also refers to a lack of religion.

Belief means any religion or belief, and any reference to belief also refers to a lack of belief.

Protection against discrimination on these grounds is relatively new and there is not a great deal of guidance from the domestic courts. The Equality Act statutory note states that the religion must have clear structure and belief system. Definition includes highly recognised religions in the UK and the statutory note states that the following are all religions for the purposes of the Equality Act; Baha'ra, Buddhism, Christianity, Hinduism, Islam, Judaism, Rastafarianism, Sikhism, Zoroastrianism.

Denomination or sect within a religion can also be considered as a protected religion or religious belief such as Protestants and Catholics within Christianity. The European Court of Human Rights has also recognised other groups of religion including the Church of Scientology, Druids and the Divine Light of Zentrum.

Under the original version of the Employment Equality (Religion or Belief) Regulations 2003, the definition of "religion or belief" was "any religion, religious belief or similar philosophical belief". From 30th April 2007 the word "similar" disappeared from the definition. In other words, philosophical beliefs no longer have to be similar to religious beliefs in order to qualify for protection. This would appear to have widened the range of beliefs that are protected, but the exact ambit of protection is not precisely defined.

In the case of *Grainger - v - Nicholson* [2010] IRLR 4 the Employment Appeals Tribunal held that there must be some limits placed on the philosophical belief to be protected and set out the following principles based on previous case law and the European Convention on Human Rights.

- The belief must be genuinely held
- It must be a belief rather than an opinion or view point based on the present state of information available
- It must be a belief as to a weighty aspect of human life and behaviour.
- It must attain a certain level of cogency, seriousness, cohesion and importance.
- It must be worthy of respect in a democratic society, be not incompatible with human dignity and must not conflict with the fundamental rights of others.

The Equality Act explanatory notes state that any cult involved in illegal activities would not satisfy these criteria, adherence to humanism and atheism would be beliefs for the purposes of this definition, but adherence to a particular football team would not be.

In the case of *Lisk v Shield Guardian* (unreported) the Employment Tribunal held that an employee's belief that they should wear a poppy was a not a philosophical belief capable of protection. The Tribunal said that the belief lacked cogency, cohesion and importance.

This can be compared to the case of *Power v Greater Manchester Police* UKEAT/0087/10/ZT in which spiritualism (contacting the dead) was held to be a belief for the purpose of the Act.

Still outstanding is the extent to which political beliefs may be protected. In *Grainger* the EAT thought that membership of a particular political party would probably not amount to a philosophical belief. However, a political philosophy or doctrine such as Socialism, Marxism, Communism or free- market Capitalism could well qualify for protection.

A question then arises as to whether political philosophies, which are viewed as abhorrent or obnoxious by the majority of society, might be protected by these regulations. In *Grainger* the EAT said that any belief which was not “worthy of respect in a democratic society” or is not “consistent with basic standards of human dignity or integrity” would not qualify for protection. This suggests that Fascism would not qualify for protection under the Act.

However, given that the Act purports to protect “any religion” or any “religious or philosophical belief” and does not contain any “get out” clause In relation to beliefs that the vast majority of people would find objectionable, it is likely that *Grainger* will not be the last word in resolving the legal position in relation to this.

Disability

Under the Equality Act a person is disabled if they have a physical or mental impairment which has a substantial long term adverse effect on their ability to carry out normal day to day activities.

There is no need for a person to have a medically diagnosed cause for their impairment what matters is the effect of the impairment not the cause. It is

important to note that under the Disability Discrimination Act 1995 it was necessary to show that the alleged impairment amounted to a clinically well recognised illness.

In relation to physical impairment:-

- HIV infection, cancer and multiple sclerosis are covered from the point of diagnosis.
- Severe disfigurement (such as scarring), but not including tattoos and body piercing is covered even if it has no physical impact on a person with the disfigurement, provided the long term requirement is met.
- People who are registered as blind or partially sighted, or who are certified as being blind or partially sighted by a Consultant Ophthalmologist, are automatically treated as disabled under the Act.

The other tests to apply to decide if someone has protected characteristic of disability are:-

- The length that the effect of the condition has lasted or will continue. In order to have the protected characteristic the condition must be long term. Long term means that the impairment is likely to last for the rest of the person's life or has lasted at least 12 months or where the total period which it lasts is likely to be at least 12 months. If the person no longer has the condition but it is likely to recur, they are likely be considered a disabled person.
- The effect of the impairment. According to the Secretary of State's guidance relevant factors in assessing the effect of an impairment include:-
 - 1 Time taken to carry out an activity.

- 2 The way it is carried out.
 - 3 The cumulative effects of impairment.
 - 4 How a person can reasonably expect to modify their behaviour to limit the effect of the impairment.
 - 5 The effect of the environment.
- The extent to which “normal day to day activities” at work or at home are made more difficult.
 - Whether the condition has this impact without taking into account the effect of the correct measures such as medical treatment, counselling, prosthetic limbs, walking stick or wheelchair, surgical pins and plates. The only exception to this is the severity of impairments to sight is that the severity of impairment to sight must be judged by taking into account the correct effect of contact lenses or glasses.

There are certain conditions excluded which may not amount to impairment including:-

- Addiction to alcohol or non prescribed drugs, unless the addiction was originally the result of the administration of medically prescribed drugs or other medical treatment.
- Tendency to set fires.
- Tendency to steal.
- Tendency to physical or sexual abuse of others.
- Exhibitionism or voyeurism.
- Hay fever (although it may be taken into account where it aggravates the effect of another condition).

In the case of *J. -v- D.L.A. Piper UK* (UKEAT/0263/09/RN) the EAT gave some guidance for tribunal when determining the issue of disability. The tribunal said that in cases where there may be a dispute about the existence of an impairment it will make sense to first decide whether the claimant's ability to carry out normal day to day activities is adversely affected on a long term basis and then to consider the question of impairment in light of those findings. In many incidences, the answer to the question as to whether there is impairment will follow as a matter of common sense inference from the answer to the enquiry regarding adverse effects.

Types of discrimination and the Protected Characteristics to which they apply

Direct Discrimination

Direct Discrimination occurs where someone is treated less favourably than another person because of a protected characteristic they have. Direct discrimination is prohibited in relation to all of the protected characteristics under the Equality Act.

Discrimination by Association

This is direct discrimination against someone because they associate with another person who possesses a protected characteristic, for example, a mother who is passed over for promotion because she is a carer of a disabled child. Prior to the implementation of the Equality Act 2010 this already applied to protected characteristics of race, religion or belief and sexual orientation. Now it has been extended to cover age, disability, gender reassignment and sex. Discrimination by association does not apply to marriage and civil partnership, or pregnancy and maternity.

Perception Discrimination

This is direct discrimination against an individual because others think they possess a particular protected characteristic. It applies even if the person does not actually possess that characteristic. Prior to the implementation of the Equality Act this already applied to age, race, religion or belief and sexual orientation and has now been extended to cover disability, gender reassignment and sex. It does not apply to marriage and civil partnership, or to pregnancy and maternity.

Indirect Discrimination

Indirect Discrimination can occur where there is a condition, rule, policy or practice which applies to everyone but particularly disadvantages people who share a protected characteristic. Indirect discrimination can be justified if the employer can show that it was a proportionate means of achieving a legitimate aim.

Indirect discrimination already applied to age, race, religion or belief, sexual orientation and marriage and civil partnership has now been extended to cover disability and gender reassignment. It does not apply to pregnancy and maternity.

Harassment

Harassment is "unwanted conduct related to a relevant protected characteristic, which has the purpose or effect of violating that individual's dignity or creating intimidating, hostile, degrading, humiliating or offensive environment for that individual". Harassment applies to all protected characteristics except for pregnancy and maternity and marriage and civil partnership. Employees will now be able to complain of behaviour they find offensive even if it is not directed at them and the claimant need not possess the relevant characteristics themselves.

Employers are also protected from harassment because of protection and association.

Third Party Harassment

The Equality Act makes employers potentially liable for harassment of their employees by people who are not employees of the same company. This could include customers or clients. An employer will only be liable when harassment has occurred on at least two previous occasions, where the employer is aware that it has taken place but has not taken reasonable steps to prevent it from happening again.

This type of harassment already applied to sex. It has now been extended to cover age, disability, gender reassignment, race, religion or belief and sexual orientation. It does not cover marriage and civil partnership or pregnancy and maternity. However, there is currently a government consultation in relation to this and indications suggest that this type of discrimination will be abolished.

Victimisation

Victimisation occurs when employees are treated badly because they have made or supported a complaint or raised an agreement under the Equality Act, or because they are suspected of doing so. An employee is not protected from victimisation if they have maliciously made or supported an untrue complaint.

Victimisation applies to all of the protected characteristics under the Equality Act. Further, there is now no longer a need to compare the treatment of a complainant with that of a person who has not made or supported a complaint under the Act.

In relation to protected characteristic of disability, discrimination arising from disability is also prohibited. A person discriminates against a disabled person if he/she treats a disabled person unfavourably because of something arising in consequence of that disabled persons disability and he cannot show that the treatment is a proportionate means of achieving a legitimate aim and he knew or could reasonably has been expected to know that the disabled person had the disability.

In relation to a protected characteristic of disability the law also imposes a duty to make reasonable adjustments.

Conclusion

The Equality Act appears to have expanded the scope of 'protected characteristics' and increased the protection against discrimination in relation to each of them. Whether these rights now come under attack from this government remains to be seen.

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