

**Equality and
Human Rights
Commission**

equalityhumanrights.com

The Equality Act 2010: 15 Months On The Institute of Employment Rights

John Wadham

Group Director Legal

Wednesday 7 December 2011

The Joint Human Rights Committee

“The Equality Bill is one of the most significant human rights measures introduced into Parliament in recent years. It harmonises and simplifies discrimination law and also introduces a number of new measures, including a single equality duty on the public sector, extended protection from discrimination in a number of areas, and a new duty on certain public authorities to consider socio-economic disadvantage in their strategic decision making.”

Overview

This presentation will cover :

- The background to the Equality Act 2010
- Key features of the Equality Act 2010
- Developments since April 2010
- EHRC cases
- EHRC Litigation and enforcement strategy

Background to the Equality Act

- Feb 2005 – launch of Discrimination Law Review (DLR)
- June 2007 – Final Report of Equalities Review published
- DLR proposals for a Single Equality Bill had three goals:
 - Harmonising and simplifying the law;
 - Making the law more effective;
 - Modernising the law.

Modernising

- Simplifying – ie replacing 40 years of discrimination law
 - 35 acts, 52 statutory instruments, 13 codes of practice, 16 EC directives
- Harmonising the law across protected characteristics
- Strengthening the law – e.g. Disability arising from discrimination, disability and health questionnaires, increased scope (association); new tribunal powers

Commencement of the Act

1 October 2010	Most of the Act came into force
5 April 2011	Single, integrated Public Sector Equality Duty (PSED)
6 April 2011	Specific duties for Welsh public authorities The Equality Act 2010 (Statutory Duties) (Wales) Regulations 2011
10 September 2011	Specific duties for England & Wales Equality Act 2010 (Specific Duties) Regulations 2011
Scotland	Consulting on the specific duties

Key new provisions

- Association and perception (s.13)
- Age discrimination in services, public functions and associations (s.28)
- Definition of disability (s.6 and Schedule 1)
- Discrimination arising out of disability (s.15)
- Pre-employment health enquiries (s.60) and EHRC power to enforce ban (s.60(2))
- Gender reassignment (s.7)
- Pay secrecy applies to all protected characteristics(s.77)
- Third party harassment applies to all protected characteristics (s.40(2))

Developments since April 2010

Provisions Not Taken Forward

- The socio-economic duty
- Combined discrimination: dual characteristics
- Gender pay gap information:
instead private and voluntary sector employers are encouraged to tackle the pay gap through greater transparency on pay and other issues such as workforce composition

Nb. Abolition of the default retirement age – 6
April 2011

Age discrimination in services and public functions

- Ban scheduled to commence in 2012 - now subject to the Red Tape Challenge
- 2009 consultation on exceptions:
 - Proposed express exceptions:
 - Financial services sector
 - 'Beneficial concessions' (eg bus passes, discounts)
 - Age-based package holidays
 - Immigration control, park homes, and sport
 - Some age-differentiated treatment *may* satisfy the objective justification test
 - No express exception for health/social care - objective justification only

Third Party Harassment in Employment

- Proposal to consult on removal of the provision on third party harassment

(HM Treasury 'The Plan for Growth' March 2011)

- But see caselaw under previous legislation:
 - EOC v Secretary of State for Trade and Industry [2007] IRLR 327
 - Gravell v London Borough of Bexley [2007] UKEAT 0587 06 0203
 - Sheffield City Council v Norouzi [2011] UKEAT 0497 10 1406
- Breach of mutual trust and confidence?

Red Tape Challenge

- Red tape challenge spotlight on the Equality Act - June 2011
- Whole Act under review but specific risk to:
 - age discrimination when providing goods and services
 - third party harassment
 - ban on pre-employment health enquiries
 - Codes of practice

Cases taken by individuals

- **Coleman v Attridge Law** – (ECJ) extension of the law to cover disability discrimination by association.
- **English v Sanderson Blinds Ltd** (Court of Appeal)
It was held that a person may be protected from harassment related to a protected characteristic even if it is known that they do not have the characteristic in question.
- **Allen v Royal Bank of Scotland** – a service provider may be required to undertake building work to improve accessibility as a 'reasonable adjustment' under the DDA.

Cases taken by individuals (2)

- **Seldon v Clarkson, Wright & James** – claim for direct age discrimination because had to retire at 65 (lost at Court of Appeal – planning to appeal to Supreme Court – EHRC intervening)
- **Chief Constable of West Yorkshire Police v Homer**
 - 60 year old police officer claim for indirect age discrimination (lost at Court of Appeal and appeal going to Supreme Court)
- **Graham v Waste Recycling Group Ltd** – settled – claimant alleged third party harassment.

Interventions in employment cases

- *X v Mid Sussex Citizens Advice Bureau* – volunteers – pending before the Supreme Court.
- *Masih v Awaz FM* – volunteers - pending before the EAT.
- *Seldon v Clark, Wright and Jakes* – age discrimination - pending before the Supreme Court.
- *Kulikaoskas v MacDuff Shellfish & D Watt* – associative discrimination - referred to the ECJ for a preliminary ruling.

Interventions in employment cases

- **Grant v HM Land Registry** – High Court – LGBT employees persons should be able to reveal their sexual orientation on a confidential basis – article 8
- **Eweida v British Airways PLC** – pending before the ECtHR - insufficient weight to Article 9(2) of the Convention

www.equalityhumanrights.com/legal-and-policy/enforcement/ - for full list of EHRC interventions

EHRC Litigation and enforcement strategy

Commission seeking to test law on areas such as:

- Association and perception
- Positive action
- Scope of some exceptions
- Pre-employment disability and health enquiries
- Equal pay - hypothetical comparators, material factor defence, pay protection; new pay secrecy provision

If you think you have a good case to test these or other points please contact the Commission

Public sector equality duty - General duty

- Scheduled public authorities must, in the exercise of their functions, have due regard to the need to -
 - Eliminate discrimination, harassment, victimisation and any other conduct prohibited by the Act
 - Advance equality of opportunity
 - Foster good relations
- Duty applies to bodies which are not public authorities but which exercise public functions

Specific duties

Section 153 - Ministerial power to impose specific duties to help public authorities meet their 'general duty'

Equality Act 2010 (Specific Duties) Regulations 2011

Scheduled public authorities are required to:

- publish information to demonstrate its compliance with the PSED duty
- prepare and publish one or more objectives
- publish the information to the public in an accessible manner.

Specific Duties

The Equality Act 2010 (Statutory Duties) (Wales) Regulations 2011 :

- information about objectives must include a timescale, steps to be taken, and a 'Strategic Equality Plan'
- There must be engagement of groups, such as disabled people,
- express provisions about making and publishing equality impact assessments
- collection and publication of employment monitoring data
- express requirement to have regard to equality in public procurement

PSED - regression or progression?

The former PSED

- Applies to race, gender and disability
- Emphasis on promoting equality of opportunity and good race relations
- Specific duties prescriptive
- Restricted to public authorities and in relation to disability bodies carrying out public functions.

The new PSED

- Integrated - applies to all protected characteristics
- Emphasis on **advancing** equality of opportunity and **fostering** good relations
- Specific duties less prescriptive (save in Wales)
- Applies to any body which carries out a public function.

Role of Equality and Human Rights Commission

- EHRC has a remit across Britain and:
 - Provides advice and guidance
 - Works to implement an effective legislative framework
 - Raises awareness and understanding of everyone's rights
 - Monitors progress - **Triennial Review 11 October 2010**
- Tripartite mandate: to promote and protect equality and human rights, and to foster good relations between groups
- Legal enforcement powers and grant-funding programme
- Statutory powers and duties in Equality Act 2006

EHRC's Codes of Practice

- Codes of Practice for **Employment**, for **Equal Pay**, and for **Services, Public Functions and Associations** – in force
- Draft Code for **Public Sector Equality Duty (England)** - 12 week consultation from January 2012 (subject to Red Tape Challenge)
- Draft code for **Public Sector Equality Duty (Wales)** – anticipating 12 week statutory consultation to commence January 2012 (subject to Red Tape Challenge)

EHRC's Codes of Practice

- Draft Code for the **Public Sector Equality Duty (Scotland)** – specific duties not yet approved by Scottish Government, but anticipating that consultation will launch January 2012
- **Further and Higher Education** in Great Britain – laying is currently delayed because of the Red Tape Challenge
- Codes for **Schools** in England & Wales - and Schools in Scotland – consultation will commence in February 2011 - waiting outcome of DfE consultation on Auxiliary Aids

EHRC's Non-statutory guidance

- The **non-statutory guidance** is intended for a wider public audience, and is being made available in web and hard copy, accessible versions, and in Welsh translation
- Guidance available
 - ‘What’s New’ in the Act
 - 2 guides for Employers, and for Employees
 - 2 guides for Service Providers and for Service Users
 - Guides for Public Sector Duty and Procurement
 - Guidance on pay transparency

<http://www.equalityhumanrights.com/advice-and-guidance/public-sector-equality-duty/>

Enforcement powers (Equality Act 2006)

- **Judicial review** in Commission's name
- **Formal inquiries, binding agreements, investigations and assessments** – disclosure powers (Equality Act 2006 Schedule 2), can lead to further legal action, compliance notice, unlawful act notices and action plans
- **Interventions**
- Apply to county court for an **injunction to restrain** unlawful acts e.g. Pre-disability and health questionnaires

How we've used powers so far

- Individual cases
- Interventions
- Judicial reviews
- Inquiries – Human Rights, Race and Construction, Finance Sector and Gender Equality, Meat Processing industry (migrant workers)
- Investigations and Assessments

**Equality and
Human Rights
Commission**

equalityhumanrights.com

The Equality Act 2010: 15 Months On The Institute of Employment Rights

John Wadham

Group Director Legal

Wednesday 7 December 2011