



**K&RVIN
BARNES
SOLICITORS**

Equality Act

Presenter:

Gareth Kervin










*(Partner and Director of Kervin
& Barnes Solicitors)*

Part One



The new law

Background

Previous framework:

-  Disability Discrimination Act
 -  Sex Discrimination Act
 -  Equal Pay Act
 -  Race Relations Act
 -  Age Discrimination Act
 -  Gender reassignment under SDA
 -  Marriage and civil partnership discrimination under SDA
 -  Employment Equality (Sexual Orientation) Regulations
 -  Employment Equality (Religion or Belief) Regulations
- fusion of nine individual pieces of legislation and some 100 orders and regulations

Objective of the Equality Act

-  The EA does not just deal with employment. In addition to the general S1 socio-economic policy, it deals with discrimination in relation to goods and services, public procurement etc.
-  In relation to employment, its aims are:
 - Codification
 - Deal with issues raised by case law
 - Extend protection
 - Simplification










How it operates

Framework:

- ▣ Equality Act
- ▣ Schedules to the Act
- ▣ Explanatory Notes
- ▣ Guides
- ▣ Codes of Practice (EHRC drafted)
 - S42 allows the old CP's (race, sex, DD) to be used until new ones replace them
- ▣ Implementation and transition arrangements
 - Oct 2010, April 2011 and 2013
 - Discrimination that takes place
 - wholly before 1st October 2010 = previous framework
 - after, or straddles 1st October 2010 = Equality Act









Protected Characteristics

Protective Characteristics have not changed (S4):

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

Prohibited Conduct



Prohibited Conduct (incl.):

-  Direct discrimination
-  Indirect discrimination
-  Discrimination arising from a disability
-  Duty to make reasonable adjustments
-  Combined discrimination
-  Pregnancy and maternity discrimination
-  Harassment
-  Victimisation

Direct Discrimination





Direct Discrimination (s13)

“A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.”



-  Therefore the requirement for a real or hypothetical comparator, who does not share the protected characteristic, is retained
-  No comparator necessary in maternity and pregnancy discrimination

Direct Discrimination (Cont)

Association and Perception:

-  S13 does not refer to the PC of any particular person (except marital or civil partnership status)
-  Previously with age, sex, disability, gender reassignment – the complainant needed to have one of those characteristics
-  The DDA was interpreted by EAT in Coleman v Attridge Law 2008 as moving away from this
-  The EA has accepted that modification and extended it to all strands of discrimination

Direct Discrimination (Cont)

-  Thus if someone treats (A) unfavourably because (A) looks after elderly patients, that can be discrimination because of Age (even though (A)'s age is not the reason for the treatment) – “Associative discrimination”
-  If someone treats (A) unfavourably because they think (A) is homosexual, that can be discrimination because of sexual orientation (even though (A) is not in fact homosexual) – “Perception discrimination”

Direct Discrimination (Cont)

Combined Discrimination (from April 2011, if brought into force)


In Bahl v Law Society 2004 CA noted that the absence of protection for combining protected characteristics was a problem

S14

- KB Dual (i.e. only two)
- KB Only in relation to direct discrimination
- KB Do not have to succeed on both PC's
- KB Potential defence – if can show not disc. because of either/or
- KB Would bring a claim under both individual PC's and then also s14 (Direct Discrimination)
- KB Doesn't apply to marriage and civil partnership, and pregnancy and maternity

Disability Discrimination

"A person (P) has a disability if (P) has a physical or mental impairment, and the impairment has a substantial and long-term adverse effect on his ability to carry out normal day-to-day activities".

 No longer necessary to look at “capacities” including mobility, manual dexterity, physical coordination etc

In addition to direct, indirect, victimisation and harassment there are the additional claims of:

 Discrimination arising from disability; and

 Failure to make reasonable adjustments

Disability Discrimination (Cont)

- Ⓚ s60 – unlawful to ask an applicant about health – enforceable by EHRC
- Ⓚ If do ask – burden shifts to employer to prove the info was not relied upon
- Ⓚ Therefore it isn't a blanket ban – can also enquire whether an employee is able to undergo an interview (e.g. wheelchair access for interview/selection)
- Ⓚ Can ask questions to comply with diversity monitoring; to establish whether an applicant has a disability



Disability Discrimination (Cont)

Discrimination arising from disability:

- KB Disability Related Discrimination now “discrimination arising from disability” (s15)
- KB Designed to counter the problems encountered by London Borough of Lewisham v Malcolm HL 2008
 - HL said the correct comparator is non-disabled person otherwise in the same circumstances e.g. in sickness cases – someone with the same absence record but no disability
- KB Under EA – (A) discriminates against a disabled person (B) if (A) treats (B) unfavourably “because of something arising in consequence of (B)’s disability”, and (A) cannot objectively justify the treatment
- KB If the treatment is because of (B)’s disability, it is direct discrimination
- KB S15(2) – potential defence where (A) did not and could not reasonably have been expected to know, (B) had the disability
- KB Now no reason for a comparator (therefore avoiding Malcolm difficulties)
- KB There is now, under the EA, indirect disability discrimination – but this is likely to be over-shadowed




Disability Discrimination (Cont)

Duty to make reasonable adjustments (s20) has three aspects:

1. Where a provision, criterion or practice (PCP) or physical feature puts a disabled person at a disadvantage compared to a non-disabled person;
 2. The employer must make reasonable adjustments to avoid the disadvantage; and
 3. Where, but for the provision of an auxiliary aid, a disabled person would be at a substantial disadvantage, there is a duty to take reasonable steps to provide that auxiliary aid.
-  Duty does not apply where employer could not reasonably be expected to know of the disability and that the person will be at a disadvantage
-  Not DD to treat (A) not as favourably as (B) (a disabled person)

Indirect Discrimination

Indirect Discrimination (s19):



-  extended to cover disability and gender reassignment - the DDA 1995 made no provision for indirect disability discrimination, which requires an element of **group** disadvantage; it focused on the disabled person's **individual** circumstances
-  Harmonises the various definitions of indirect disc. (already broadly codified following EU Directives)
-  Indirect discrimination for pregnancy or mat. leave is dealt with under indirect sex discrimination

Indirect Discrimination (Cont)

S19 – Indirect discrimination occurs when:

- Ⓚ A applies a provision, criterion or practice (PCP) to (B)
- Ⓚ That PCP applies to persons who do not share the relevant PC
- Ⓚ The PCP would or actually puts persons who share (B)'s characteristic at a disadvantage when compared with persons whom (B) does not share the characteristic
- Ⓚ The PCP would, or actually puts (B) at that disadvantage, and
- Ⓚ The PCP is not a proportionate means of achieving a legitimate aim

Indirect Discrimination (Cont)





-  Thus the new definition extends protection to those who *would* be (not just have been) put at a disadvantage i.e. those deterred by a discriminatory PCP
-  Objective justification for indirect discrimination remains the same

Pregnancy and Maternity Discrimination

Pregnancy and Maternity Discrimination (s18):




- ❏ If treated “unfavourably” because of the pregnancy or an illness resulting from it; because she is on compulsory mat leave; or because she exercises or seeks to exercise the right to ordinary or additional mat leave
- ❏ Comparator not necessary

Harassment




-  Protection is extended to colour and nationality
-  Victims do not need to actually possess the PC
-  Unwanted conduct “related to a relevant PC” which has the purpose or effect of violating B’s dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for (B) i.e. association and perception are included
-  Extends liability for employers for acts of a 3rd party where the harassment has occurred on at least 2 former occasions and it has not taken reasonable steps to prevent it

Victimisation




Victimisation (s27):

-  (A) victimises (B) if (A) (subjects (B) to a detriment because (1) (B) does a protected act or (2) (A) believes that (B) has done, or may do, a protected act.
-  A protected act = (1) bringing proceedings under the Act; (2) giving evidence or information in connection with proceedings under the Act; (3) doing any other thing for the purposes of or in connection with the Act; (4) making an allegation (whether or not express) that (A) or another person has contravened the Act.
-  Extended to cover victimisation for seeking, making or receiving a “relevant pay disclosure” i.e. a disclosure to establish if there is a connection between pay and having (or not having) a particular protected characteristic

Instructing and causing discrimination

-  s111 harmonises the various strands
-  Now unlawful for A to instruct, cause or induce B to discriminate, harass or victimise C, or to attempt to do so.
-  B and C can now bring proceedings if they are subjected to a detriment by A's actions, even if the instruction isn't carried out







Objective Justification

-  The "objective justification" test is used in relation to indirect discrimination, direct age discrimination and discrimination arising from a disability only
-  The ECJ held in *Bilka-Kaufhaus GmbH v Weber von Hartz [1986] IRLR 317* that the measures taken by the employer:
 - Must correspond to a real need on the part of the employer
 - Must be appropriate with a view to achieving the objectives pursued
 - Must be necessary to that end
-  The EA adopts the wording "proportionate means of achieving a legitimate aim" as a summary of the ECJ's position

Part Two

What should you
do next?

1. Changes to recruitment

-  Questions about access needs, such as a wheelchair ramp, are ok but generally all medical issues should be dealt with at the end of the process.
-  Therefore, questions, such as ‘how many days sickness absence have you had in the last year’, should also be avoided prior to offer.
-  Any monitoring forms should be kept apart from the main application form.
-  Application forms should concentrate on information that is relevant to a person's ability to do the job in question, rather than, dates of birth etc.
-  Can medically screen after a job offer but if an issue is identified, duty to make reasonable adjustments is triggered. Do you want the knowledge?
-  Potential penalties include litigation and an investigation by the EHRC. Therefore review existing application forms and the recruitment process.



2. Refresh your equality and diversity policy

- ☒ State your values on equality and diversity and explain how they will be put into practice.
- ☒ make clear unlawful to discriminate because of: age; disability; gender reassignment; marriage and civil partnership; pregnancy and maternity; race; religion or belief; sex and sexual orientation.
- ☒ Make sure staff are aware of the policy and understand their rights and responsibilities.
- ☒ Training and monitoring are essential.
- ☒ Refer to potential personal liability.
- ☒ Possible separate diversity and inclusion policy.



3. Harassment policy?

- KB Is a separate policy necessary?
- KB Harassment is unwanted conduct related to a protected characteristic – a group protected by equality legislation, e.g. sex – which has the purpose or effect of violating an individual’s dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for them.
- KB EA will increase protection from harassment. e.g. where the unwanted conduct is directed at **a colleague** - just need to show it caused an offensive environment.
- KB Include protection from third party harassment and relevant complaints process.



4. Review policy/provisions on pay discussion between employees

-  Unlawful to prevent/restrict employees discussing pay with colleagues, if purpose is to establish if pay differences exist that are related to protected characteristics (e.g. age).
-  EA - employers can still require employees not to discuss pay where the discussion is not related to a protected characteristic.

5. Review family leave/dependants policies

-  Review and amend to avoid any associative discrimination
-  Include right to request proof of 3rd party disability

6. Review sick leave policy

-  Provide for sickness caused by associative disability
-  Include right to require proof of 3rd party disability

7. Carers policy?

- KB Require employee to register care for a disabled third party
- KB Avoids indirect discrimination
- KB Include right to require medical evidence of 3rd party disability
- KB Requirement to agree a carers support plan

Questions?