

Welcome to the Autumn issue of RJW's Police Federation Equality Matters

Welcome to the Autumn 2010 edition of Equality Matters. On 1 October 2010 the majority of the provisions in the Equality Act came into force. The legislation, ambitious in scope, is intended to replace and streamline all the many and varied statutes and regulations which previously set out our domestic equality protections.

In this edition we therefore take an in depth look at the changes made.

We also consider what further changes may be still to come. As ever we conclude with our usual round up of current equality cases for Police Federation members.

This update is aimed at Equality Representatives, but please feel free

to circulate to any other Federation members who may find it useful.

We would welcome any feedback or suggestions for subjects you would like to see covered in future editions.

Emma Hawsworth and Rachel Harfield
Employment Department
Russell Jones & Walker Solicitors

Equality Act 2010

After years in the pipeline, the Equality Act 2010 is finally in force. So how much does it actually change?

First, the act brings together all the separate 'strands' of discrimination protection. Now, instead of separate legislation prohibiting discrimination on the grounds of race, gender, disability, age, sexual orientation and religion/belief, there is one act with standard definitions of direct and indirect discrimination, harassment and victimisation. These apply, subject to some exceptions and differences, across the seven protected characteristics which are sex, gender reassignment, sexual orientation, race, religion or belief, disability and age. It is also unlawful to discriminate on the grounds of maternity and marriage/civil partnership, although the scope of protection for these two characteristics is more limited.

The introduction of the Equality Act means that the same broad framework of protections will now apply across the board, rather than there being unnecessary differences and inconsistencies in

definitions between the various strands, and separate bodies of case law relating to each. The biggest exception to this is within the disability arena which, whilst harmonised where it could be, maintains some important distinctions from the other protected characteristics. We look at this key area in more detail in our disability section. Direct age discrimination also retains its justification defence in contrast to the other protected characteristics.

One of the other important changes is more consistent protection for those who claim discriminatory treatment on the ground that they are associated with someone with a protected characteristic, or those who are perceived to have but don't actually have a protected characteristic. While there has always been protection under some of the strands for associative discrimination or discrimination on the ground of perception, this was not consistent across the various strands of discrimination. Now there will be stronger protection against direct discrimination and harassment across the protected characteristics, for example for someone who is harassed because of their partner's age or treated less favourably because of a

perception that they are disabled.

There are also new powers for tribunals to make recommendations to benefit the wider workforce, not just the person bringing the claim. We consider separately what this could mean in practice.

Some of the provisions permitting voluntary positive action will come into force. These are similar to those which applied previously to enable employers to encourage under-represented groups in a particular area, by way of additional training for example. However, the more controversial positive action provisions on recruitment or promotion (the 'tie break' provisions) are not being brought into force at this time. It is also important to note that the protection given to whistleblowers and the prohibition on the less favourable treatment of part time workers have not been harmonised into the Equality Act. The separate protection for whistleblowers continues as before under the Employment Rights Act 1996. Likewise the Part Time Workers (Prevention of Less Favourable Treatment) Regulations 2000 remain in force.



Disability – Improved Protection

The disability arena probably sees the largest number of positive changes. There is no change to the primary definition of "disability", that is a physical or mental impairment which has a substantial and long term adverse effect on the individual's ability to carry out normal day to day activities.

However, the interpretation of "normal day to day activities" is less restrictive. Under the DDA the impairment had to affect at least one of eight specific functions such as mobility or manual dexterity. This requirement has now been removed, and this should make it easier for some individuals, particularly those with mental illnesses, to establish that they meet the definition of disabled.

The duty to make reasonable adjustments is retained in the Equality Act and continues to only apply to disability claims. The act now expressly confirms that the cost of making reasonable adjustments cannot be passed onto the disabled individual. The prohibition of direct discrimination, harassment and victimisation also remain. Two new forms of discrimination are however introduced. First, the concept of indirect discrimination now applies in the disability arena. Second, the Equality Act has introduced a new form of "discrimination arising from disability" in an attempt to broadly reinstate the concept of "disability-related discrimination" prior to it being weakened by the House of Lords decision in the case of Malcolm.

Discrimination arising from disability occurs where an employer treats a worker unfavourably because of something arising in consequence of the worker's disability. Both discrimination arising from disability and indirect discrimination are subject to a justification defence, if the employer can show it is a proportionate means of achieving a legitimate aim. These should be important improvements in the level of protection offered to disabled officers.

Recommendations

Historically in successful discrimination cases tribunals have only been able to make recommendations that would benefit the particular claimant. Statistically a large proportion of claimants have left employment by the time their cases are heard which means that recommendations can be relatively rare.

Under the Equality Act a tribunal can now make recommendations that would benefit the wider workforce. This may be an important remedy in its own right given that many claimants' express aim is to try and prevent the discriminatory treatment they have experienced happening to another individual. Recommendations will always be specific to the features of a particular case, however, some examples given in the Act's explanatory notes include recommendations that the employer:

- Introduces an equal opportunities policy;
- Ensures its harassment policy is more effectively implemented;
- Sets up a review panel to deal with equal opportunities and harassment/grievance procedures;
- Re-trains staff; or
- Makes public the selection criteria used for transfer or promotion of staff.



Time Limits and Questionnaires

The time limits for lodging discrimination claims with the employment tribunal have not changed. The time limit continues to be 3 months less 1 day running from the alleged act of discrimination.

The time limits for lodging a statutory questionnaire have changed to address previous inconsistencies between disability and the other protected characteristics. There is now a standardised time limit and questionnaires should be issued either before the claim is lodged or within 28 days of the claim being lodged with the employment tribunal.

There is also a new recommended form for drafting the questions which can be found at:

http://www.equalities.gov.uk/news/equality_act_2010_forms_for_ob.aspx

Enquiries about disability and health

In a new development, the Equality Act now also regulates the use of pre-employment health questions. In general employers are now prohibited from asking questions about an applicant's health before a job offer is made, or before placing the individual in a pool of applicants from which it intends to offer work in the future.

This prohibition is, however, subject to some important exceptions. For example, questions may be asked where they are necessary to establish whether the applicant will be able to comply with a requirement to undergo an assessment (such as fitness testing) or whether reasonable adjustments are required in respect of an assessment.

Questions may also be asked where necessary in establishing whether the applicant will be able to carry out a function that is intrinsic to the role in question.

If health questions are asked in breach of this prohibition there is no automatic finding of discrimination. If a direct disability discrimination claim is brought any health questions asked will be important evidence in the claim, and could assist with shifting the burden of proof onto the Respondent. Otherwise the power to take enforcement action lies in the hands of the Equality and Human Rights Commission.

Transitional Provisions

Discriminatory acts taking place wholly before 1st October 2010 are not covered by the Equality Act and claims will be governed by the old strand specific pieces of legislation. Where a continuing act of discrimination straddles 1st October 2010 the position is not entirely clear. Acts taking place wholly on or after 1st October 2010 are brought under the Equality Act 2010.

One interpretation is that a claim can be brought under the Equality Act in respect of the whole period of discrimination without having to rely on the old strand specific legislative regime. However, to the extent it is necessary to state which piece of legislation is being relied upon, at the current time the safest course of action is to rely both upon the Equality Act and the previous strand specific legislation such as the Sex Discrimination Act or the Disability Discrimination Act.

Still to come?

Some provisions included in the text of the Equality Act have not yet been brought into force. In particular, the intention was to establish a single equality duty on public sector bodies across all the protected characteristics. The government is currently consulting on how best to implement this new wider duty.

The fate of some other provisions is even less certain as the government states that it is still considering the future of:

- The socio-economic duty, that would require certain public authorities to consider "socio-economic disadvantage" when taking strategic decisions about how to exercise their functions;
- Positive action initiative which would allow employers to recruit or promote someone from an under-represented group as a "tie break" where they have a choice between two equally qualified candidates;
- Requirements to publish gender pay gap information;
- Dual discrimination - a prohibition of less favourable treatment that occurs because of a combination of two relevant protected characteristics (for example the less favourable treatment of Asian women).



At present the safest course of action is to rely on both the Equality Act and the previous legislation when bringing a claim.

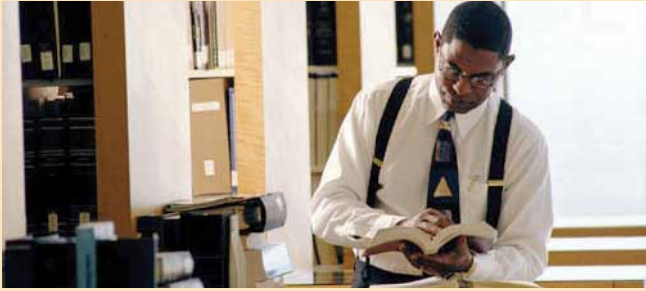
More Information

The act and its explanatory notes together with other information published by the Government Equalities Office can be found at:

http://www.equalities.gov.uk/equality_bill.aspx

The Equality and Human Rights Commission's guidance and their Code of Practice on Employment which is currently before Parliament can be found at:

<http://www.equalityhumanrights.com/legal-and-policy/equality-act/>



Equality Case Watch

In our regular case watch column, we outline some cases of interest on equality issues in which we are acting for Police Federation members.

Disability Discrimination

We are seeing a continued growth in cases concerning unsatisfactory attendance and unsatisfactory performance procedures particularly concerning requirements placed on officers successfully performing restricted roles to return to full duties within a specified period of time. We are also advising in a number of cases alleging that reasonable adjustments should be made to defer the application of attendance management procedures to allow time, with adjustments for officers to return to work and improve their attendance.

As before we also continue to successfully challenge decisions to ill health retire disabled officers against their wishes, where with adjustments suitable roles could have been found for them. For example, we recently achieved an excellent settlement for an officer with a serious disability confining him to a wheelchair which included his reinstatement to the force which had forcibly retired him.

Cases also continue to arise concerning failures by Forces to separately record disability related absences which can lead to detrimental treatment. For example, we are currently representing an individual who was criticised by his line manager and blocked from promotion due to his disability related sick leave record.

We continue to pursue cases for student officers, particularly addressing the issue of whether, if the individual due to their disability is unable to complete their SOLAP a reasonable adjustment would include a transfer to a civilian vacancy.

Sex Discrimination

We successfully acted for Barbara Lynford in her claim against Sussex Police concerning sexual harassment by male colleagues in the firearms team. Our client received a record award of compensation in the sum of £273,132.42 in respect of the injury to her health, feelings, financial losses and aggravated damages. A separate assessment of her pension loss remains outstanding as her ill health retirement application continues.

We continue to see flexible working cases arise particularly in respect of officers in supervisory ranks. For example, we are currently handling a case concerning whether a Force can legitimately insist that promotion to sergeant must initially be into a 24/7 response role and whether the requirements of the probationary period can be met if working bespoke hours. We are also acting for a female custody sergeant who was refused flexible working in her own role and was told if she wished to work flexibly then it was up to her to find her own job without assistance.

We successfully acted for 2 male officers in sex discrimination claims relating to their removal from a specialist post where their female comparator was allowed to remain. The cases settled on favourable terms on the morning of the hearing.

Whistleblowing

We are representing 3 firearms officers in whistleblowing claims who allege they were redeployed after blowing the whistle on unsafe practices by their line manager.

Sexual Orientation Discrimination

We are representing an officer who alleges that there is a general culture of homophobic and racist profiling and comments within a specialist unit.

Age Discrimination

We continue to represent an officer in a claim of indirect age and indirect discrimination relating to the "shield run" public order training course.

Race Discrimination

We are acting for an officer who is challenging a lack of promotion opportunities for BME officers in specialist units. We are also acting for another officer who was subject to overtly racist language by an external trainer.

This update is aimed at Equality Representatives, but please feel free to circulate to any other Federation members who may find it useful.

We would welcome any feedback or suggestions for subjects you would like to see covered in future editions.

Please contact:

Emma Hawsworth e.j.hawsworth@rjw.co.uk

Rachel Harfield r.l.harfield@rjw.co.uk

Please copy any comments to the Secretary of the JCC Equality and Diversity Sub-Committee [Wayne McManus](mailto:Wayne.McManus@polfed.org) Wayne.McManus@polfed.org

Regulated by The Solicitors Regulation Authority (SRA number 54695).
Prepared by Russell Jones & Walker Solicitors 2010.

Equality Matters is for general guidance only and should not be treated as a definitive guide or be regarded as legal advice. If you need more details or information about the matters referred to in this fact sheet please seek independent formal legal advice. This information was correct at time of going to press Nov 2010.