

Mist Lifts Over Equality Law Landscape

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While there was some uncertainty over the future of the Equality Act in the months immediately following the general election, developments over the last few weeks have led to the equality legislation landscape, post 1 October 2010, becoming much clearer.

Details have been published of the Act's provisions which will come into force on 1 October and those which are still "under consideration" – see Page 2. It came as no surprise that one of the measures being reviewed is positive action in recruitment and promotion which permits, for example, a woman to be appointed rather than a man, where both are equally qualified, but where women are disadvantaged or are under-represented. The Conservative Party made it known before the election that they considered this to be controversial, as it was viewed to be more of a case of positive 'discrimination', than 'action'.

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The Equalities Office has confirmed that it is planning for the new single public sector equality duty to come into force in April 2011 and consultation has commenced on the specific duties public sector bodies will have to carry out as part of the general duty – Page 2. Draft guidance has also been published on interpreting the meaning of disability, which is crucial as the need to show that an impairment effects one or more day-to-day activities currently set out in a prescribed list will be abolished – Page 3.

We still have a few places left on our one day Equality Act Conference being held on Tuesday 28 September 2010 at The Meeting Venue, 18 Soho Square, London W1D 3QL. At £149.00 + VAT per delegate, this represents exceptionally good value and you can contact Events@smab.co.uk for further details.

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Equality Act implementation details announced

The Government Equalities Office has published [details](#) of the employment provisions of the Equality Act 2010 that will come into force on 1 October 2010 and those which will not be implemented on that date as they are still under consideration by ministers.

The provisions that will come into force on 1 October include the core employment provisions providing the basic framework of protection against direct and indirect discrimination, harassment and victimisation including, the new concept of 'discrimination arising from disability', preventing employers asking job applicants questions about health (including any disability) before making a job offer, except in specified circumstances, allowing hypothetical comparators for direct gender pay discrimination and making pay secrecy clauses unenforceable.

The Government are still considering the Act's provisions relating to: (i) combined discrimination: dual characteristics under S.14, i.e. a right to bring discrimination claims combining two protected characteristics, e.g. race and gender; (ii) the requirement under S.78 for private sector employers with 250 or more employees to publish gender pay gap information; and (iii) positive action in recruitment and promotion under S.159 which permit an employer to take a protected characteristic into consideration when deciding whom to recruit or promote, where people having the protected characteristic are at a disadvantage or are under-represented, but only where the candidates are as qualified as each other.



Equality Act 2010

Consultation commences on specific public sector duties

Consultation has commenced on proposals for draft regulations setting out the specific duties designed to enable public sector bodies to carry out the revised single public sector general equality duty more effectively when it comes into force in April 2011.

The Equality Act 2010 enables the Government to make regulations imposing specific duties on public bodies listed Schedule 19 of the Act to enable them to carry out the single public sector general equality duty (GED) more effectively. With the Government confirming that it plans to implement the single GED in April 2011, which adds sexual orientation, religion or belief and age to the scope of the existing duties relating to gender, race and disability, the Equalities Office has commenced consultation, '[Equality Act 2010: The public sector Equality Duty: Promoting equality through transparency](#)', on its proposals.

Chapter 5 sets out the proposals for specific duties to help public bodies fulfil the aims of the general equality duty. Chapter 6 sets out proposed transitional arrangements from the three current public sector equality duties to the new single duty. Chapter 7 sets out proposals to list additional bodies to those already listed in Schedule 19 who will become subject to the general duty and the specific duties. Consultation closes on 10 November 2010.

Government
Equalities Office

Consultation on guidance on definition of disability

Draft statutory guidance on matters to be taken into account by an adjudicating body (for example an employment tribunal) when determining whether or not an individual has a disability within the meaning of the Equality Act 2010 has been published for consultation by the Office for Disability Issues.

This Guidance will be critical when interpreting the meaning of disability under the Equality Act 2010. While the existing definition of disability will be retained, i.e. a physical or mental impairment which has a substantial and long-term adverse effect on a person's ability to carry out normal day to day activities, the exhaustive list of normal day to day activities, of which one or more must be affected to qualify as an impairment will be abolished, e.g. mobility, manual dexterity, physical co-ordination, etc. Therefore, whilst there remains the requirement for the impairment to affect normal day to day activities, there is no longer a requirement for the normal day to day activities to be one of those on the prescribed list.



The [Draft guidance on matters to be taken into account when determining whether an individual has a disability](#) provides details on the main elements of the definition of disability and what should now be considered when assessing the affect of the impairment on normal day to day activities. Consultation closes on 31 October 2010 meaning that the guidance will not be in place when the new definition of disability comes into force on 1 October 2010.

Wal-Mart asks Supreme Court to end class action lawsuit

Wal-Mart has asked the U.S. Supreme Court to block a mammoth class-action lawsuit encompassing as many as 1.5 million former and current women employees that could cost the firm billions of dollars in damages and go down in history as the largest gender-discrimination case in the U.S.

Wal-Mart has filed a motion with the Supreme Court appealing against a 6-5 lower court decision allowing a class action sex discrimination lawsuit to proceed that could encompass as many as 1.5 m former and current women employees. The lawsuit alleges the Wal-Mart systematically paid women less money than men for doing the same jobs and promoted men to higher positions at a faster rate. If Wal-Mart is found guilty, compensation payouts could be worth billions of dollars as it includes any woman worker employed since 1998.



The San Francisco-based 9th U.S. Circuit Court of Appeals who had allowed the class action to proceed did so on the basis that it was better than "clogging the federal courts" with individual suits. Wal-Mart, however, argues that a potential 1.5-million-member class-action suit is too big to give it a realistic shot at self-defense. Wal-Mart supports its argument by highlighting that the potential number of people covered by the class action suit is larger than the active-duty personnel in the Army, Navy, Air Force, Marines and Coast Guard combined --making it the largest employment class action in history by several orders of magnitude. A decision by the justices on whether to take up the case is not likely until next year.

Dismissal over homophobic email not religious discrimination

In *Haye v London Borough of Lewisham*, an employment tribunal rejected an employee's religious discrimination claim after she was dismissed for sending a homophobic email. The reason for the dismissal was not because of her Christian beliefs, but because of a breach of the employer's email policy.

Mrs Haye is a Christian. She argues that as the Bible states that homosexuality is a sin, then as a Christian she is under a duty to 'speak out' about homosexual behaviour. While Mrs Haye was 'surfing' the internet she discovered a website for the Lesbian and Gay Christian Movement (LGCM) who challenge homophobia in Christianity. Using her work email account, she sent LGCM an email condemning them as sinful, stating, among many other offensive remarks, that "this type of sexuality is not normal". LGCM complained and Mrs Haye was dismissed for using the Council's email system to state "homophobic views", breaching the Council's equal opportunities policy and email policy, both of which prohibit offensive conduct, and bringing the Council into disrepute.



A tribunal rejected Mrs Haye's religious discrimination claim. Her dismissal was not due to her religious views. The reason was that Mrs Haye had misused the Council's email facilities by sending a highly offensive, homophobic email to LGCM, which breached the Council's equal opportunities and email policies. In any event, any non-Christian employee sending similarly offensive emails would have been treated in exactly the same way.

"Younger" establishes prima facie age discrimination

In *Canadian Imperial Bank of Commerce v Beck*, the EAT held that the inclusion of the word "younger" in the specification for a person to replace a dismissed 42 year old amounted to the clearest possible evidence of potential age discrimination, thereby shifting the burden of proof to the employer who failed to prove that discrimination had not occurred.



Mr Beck was made redundant at the age of 42 from his post as Head of Marketing, following a decision made by Mr Meloche, who described Mr Beck and his team as "simply not right" that there was a need to rebuild. A new position as Head of European Derivatives Marketing was created. The person specification included the words "seeking younger, entrepreneurial profile (not a headline profile rainmaker)". The EAT upheld the tribunal's decision that his dismissal was unfair, as the redundancy was a sham and that Mr Beck had been the victim of age discrimination.

Looking at the totality of the evidence: (i) the underlying reason for Mr Beck's dismissal was that Mr Meloche regarded him as "not right for the business"; (ii) contrary to the express advice of HR, the word "younger" had been used in the person specification for the new role; and (iii) Mr Meloche's explanation that the word "younger" meant "less senior" and, hence, less expensive, was unconvincing in the circumstances. The word "younger" constituted the "clearest possible evidence of a prima facie case of age discrimination and the bank failed to prove that discrimination had not occurred.