

A Brave New World

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The main employment provisions in the Equality Act 2010 came into force on 1 October 2010 creating a new equality landscape for anti-discrimination legislation in Great Britain. However, some aspects of the legislation are still not clear and the transitional provisions could leave us with a two-tier approach for some time.

Most of the Regulations needed to ‘flesh out the bones’ of the new law have been brought into force, including the Equality Act 2010 (Disability) Regulations 2010 which extend the definition of deemed disability to those who are "severely sight impaired" and "sight impaired" – see Page 2.

A significant problem remains, however, with the issue of disability discrimination since we have yet to see the regulations which set out the factors to determine whether it is reasonable for an employer to make an adjustment for a disabled person. In addition, the statutory guidance on matters to be taken into account when determining whether an individual has a disability will not be available until November 2010 and this guidance is critical, now that there is no longer a need to show that an impairment has an adverse affect on one or more of eight normal day to day activities. While the Government have indicated that existing guidance should be relied on, that guidance is clearly out-of-date.

As far as the transitional provisions are concerned, those discriminatory acts which took place wholly before 1 October 2010 will be covered by old legislation, but those that started before 1 October, but continue afterwards, will be covered by the new legislation. Assessing whether there has been a ‘continuous act’ in the sense of an ongoing pattern of discrimination is always difficult, so let’s hope this will be a case of “It will be alright on the night”.

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Tribunal figures for 2009/10 published

Further to the employment tribunal figures made available earlier this year, the Tribunals Service has published an in-depth analysis for the period 1 April 2009 to 31 March 2010 setting out details of the compensation awards made in discrimination cases. The highest award was £729,347 in a disability claim and lowest average award was £4,886 in a religion claim.

The Tribunals Service have published a detailed analysis of the statistics for the Employment Tribunal and EAT for the period 1 April 2009 to 31 March 2010. As far as all the discrimination strand cases are concerned, the analysis shows that age discrimination claims increased by 36%, the claims most likely to be withdrawn are equal pay claims, (71%), and sex discrimination claims, (57%). The claims most likely to be settled as a result of conciliation via Acas are disability discrimination claims at 45%.



Claim Type	Average	Median	Maximum
Race	£18,584	£5,392	£374,922
Sex	£19,499	£6,275	£442,366
Disability	£52,087	£8,553	£729,347
Religion	£4,886	£5,000	£9,500
Sexual orientation	£20,384	£5,000	£163,725
Age	£10,931	£5,868	£48,710

Consolidating disability regulations come into force

The Equality Act 2010 (Disability) Regulations 2010, to support the disability discrimination provisions in the Equality Act 2010, came into force on 1 October 2010 replicating and consolidating the numerous regulations previously supporting the Disability Discrimination Act 1995 (DDA).

The new Equality Act (Disability) Regulations 2010 replicate and consolidate the previous regulations supporting the DDA, including the Disability Discrimination (Meaning of Disability) Regulations 1996 and the Disability (Blind and Partially Sighted Persons) Regulations 2003.



The major change introduced by the new Regulations, which came into force on 1 October 2010, is the two new categories of persons with a visual impairment deemed to have a disability. To reflect the changes in terminology used by consultant ophthalmologists, Regulation 7 now confirms that individuals who are certified by a consultant ophthalmologist as "severely sight impaired" and "sight impaired", (as well as those who are "blind" and "partially sighted"), will be deemed to suffer from a disability. According to the Explanatory Notes accompanying the Regulations, the change is intended to make it easier for the sight-impaired to show they are disabled under the Equality Act.

No changes have been made to the list of addictions and other conditions that are not disabilities, i.e. addiction to alcohol, nicotine or other non-medically-prescribed substance; tendency to set fires, steal, physically or sexually abuse others; exhibitionism; voyeurism; hay-fever, tattoos and piercings.

Businesses 'woefully unprepared' for ageing workforce

Just 14% of UK managers consider their organisation well-prepared to cope with an ageing workforce, despite the impending abolition of the Default Retirement Age (DRA) and the fact that a third of UK workers will be aged over 50 by 2020. This is the main finding of joint research published by the Chartered Management Institute (CMI) and the Chartered Institute of Personnel and Development (CIPD).

The report, [Managing an Ageing Workforce](#), argues that the failure of UK business leaders to adapt to an ageing workforce, despite impending changes to legislation and the proposed abolition of the DRA, is putting the future success of their businesses at risk. 34% of the respondents claim board-level recognition of ageing workforce issues is non-existent, despite the fact that 93% see value in retaining the knowledge and experience of older workers.

The research found that 43% of managers are not well-informed of their organisation's retirement policies and there is a perception that it is hard for younger employees to manage older people (59%). Respondents also claim that age discrimination still exists, with 40% having experienced it at some stage in their careers. A similar number, (41%), say that their workplaces are not age diverse. The CMI and CIPD have made a series of recommendations for senior managers. These include reviewing training and development opportunities for line managers, to ensure they are up to date with changes to retirement policies and are given training to help them handle age-related issues in an appropriate manner and get the best from older staff.



The Employment Team are running a free breakfast seminar on 26 October 2010, entitled 'Coming of Age' which reviews age discrimination under the Equality Act and other age-related matters. Email events@smab.co.uk to book a place.

Corporate gender equality quotas a step closer

EU Justice Commissioner Viviane Reding has indicated that she will consider calling for quotas requiring businesses to hire more women in senior posts if a meeting next year with the chiefs of European companies fails to produce the required results. This is part of the EU Commission's five year gender equality strategy to increase equality in senior positions.



In its new five-year gender equality strategy, launched on 21st September 2010, the European Commission identified increasing equality in the economy, labour market and senior positions, tackling gender violence and promoting equality beyond the EU as its priorities.

Commissioner Viviane Reding is quoted as saying "I have not been an advocate of quotas for women in senior business posts in the past, but given the lack of progress in this area, we might in the future have to consider taking initiatives at the European level. Depending on the outcome of this dialogue with industry, I will consider whether further initiatives will be necessary in 2012". Speaking to the Wall Street Journal, Mervyn Davies, head of the British Government's inquiry into gender inequality, said the UK is also considering adopting quotas as a "last resort" if a better gender balance in listed companies is not reached through less direct measures.

Redundancy during maternity leave - suitable alternative vacancy

In *Simpson v Endsleigh Insurance Services Ltd and others*, the EAT upheld a tribunal decision that the employer was not obliged to offer an employee, whose job had become redundant during her maternity leave, and who had worked in London, a vacancy in Cheltenham. While the work was suitable and appropriate for her to do, its location was substantially less favourable.

If an employee’s job becomes redundant during maternity leave then under the Maternity and Parental Leave etc Regulations 1999 she is entitled to be offered any suitable available vacancy that exists where: (i) the work is both suitable and appropriate for her to do (Reg 10(3)(a)); and (ii) the capacity and place in which she is to be employed, and the other terms and conditions, are not substantially less favourable than those of her previous contract (Reg (3)(b)).

The EAT upheld a tribunal decision that Regulations 10(3)(a) and 10(3)(b) of the Maternity and Parental Leave etc Regulations 1999 should be read together when deciding whether there is a suitable available vacancy for an employee whose job becomes redundant during her maternity leave. Unless a vacancy satisfies both limbs of Regulation 10(3) it will not be a suitable alternative. As a result, the employer in this case was not obliged to offer an employee who had worked in London a vacancy 100 miles away in Cheltenham. While the work was suitable and appropriate for her to do in the circumstances (under Regulation 10(3)(a)), its location was substantially less favourable to her (under Regulation 10(3)(b)) and it did not therefore amount to a suitable alternative vacancy.



Twins do not create entitlement to a double period of leave

In *Chatzi v Ipourgos Ikononikon*, the European Court of Justice held that the Parental Leave Directive creates rights for parents, not children. Therefore where twins are born, that does not mean that the parents have an automatic right to double the period of parental leave.

Mrs Chatzi gave birth to twins. She took nine months' parental leave in respect of one twin then applied for a second period of parental leave in respect of the other twin, which was refused. She appealed to the Greek Administrative Court, who referred the following questions to the European Court of Justice (ECJ): (i) does the Parental Leave Directive (PLD) create a right to parental leave for the child? (ii) if so, where there are twins, does the granting of only one period of parental leave infringe EU law on the grounds of discrimination on the basis of birth?



The ECJ answered "No". Rights under the PLD were conferred upon parents in their capacity as workers, and not upon their children. This was clear from: (i) the stated purpose of the Framework Agreement, to "facilitate the reconciliation of parental and professional responsibilities for working parents"; (ii) from Clause 2.1, which conferred rights upon "workers"; and (iii) from the scope of the Agreement, namely that it applies "to all workers, men and women, who have an employment contract or employment relationship". The ECJ further concluded that there is no direct correlation between the number of periods of leave and the number of children born, so having twins does not lead to an entitlement to a double period of leave.