

WRIGLEYS

— SOLICITORS —

EMPLOYMENT LAW FOR CHARITIES SEMINAR JUNE 2005

DIVERSITY IN THE WORKPLACE

Presented by Fiona Wharton, Solicitor

Whether you feel the law in this area has gone too far or if you feel it has not yet gone far enough, the legislation around discrimination and equal opportunities is a reality with which we all now live and which is here to stay. The fact that a new governing body, an Equality Commission, bringing together the different strands of equality legislation is proposed, means this area is not going to go away. Too often employers tend to look at the basic position as set out in discrimination and equal opportunity legislation without considering the practical effect. Indeed, I would like to suggest that there are in fact valid business reasons for promoting diversity. The advantages that come from recognising and promoting the differences are often overshadowed by the negative aspects that differences can create. Those who just look at discrimination are missing an opportunity to make the most of their staff.

I am going to start by giving some key statistics, going on to outline the current law in brief and then finally by discussing the promotion of diversity in the workplace and giving some good practice guidance. There is more detail on discrimination legislation than I have time to discuss today.

The law on discrimination largely seeks to promote the rights of the following groups:

- Women
- Working Parents
- Religious and Ethnic Minorities
- Transsexuals, gays and lesbians; and
- Young and old workers

SOME STATISTICS

WOMEN

- *Around 45% of the workforce*
- *45% of women now return to work after childbirth, compared with 24% in 1979*
- *Women still paid on average 19% less than men*

- *Fewer women in senior positions*
- *Two out of five women in the workforce, work part time*

AGE

- *19 million aged 50 or over (40% of adult population)*
- *By 2020 this will have increased by a further 3 million*
- *By 2014 more people over 65 than under 16*

RACE/RELIGION

- *70% Christian*
- *8% Minority Ethnic Groups*

DISABILITY

- *9.5 million disabled adults, of which 7 million are of working age but of whom only 3.3 million are working.*
- *Less than 5% of people with disabilities use a wheelchair at all times*
- *6.8 million carers in the UK*
- *3 million combine caring with working*

The common problems experienced by all these groups are:

- *Earn less*
- *More likely to be unemployed or work part-time*
- *Under representation in management positions*

RESULTS OF DISCRIMINATION AND LACK OF EQUAL OPPORTUNITIES

- *18 million days a year lost because of bullying*
- *Static workforce*
- *No creativity*

- *Decreased moral*
- *Narrow outlook*
- *Clients will not benefit from a multicultural workforce*
- *May limit attracting different classes of clients*
- *May not attract and retain a valuable workforce*

And finally, if the worst comes to the worst and a case of discrimination reaches an Employment Tribunal, these statistics show what you might expect in terms of potential financial impact.

Equal Opportunities Review (figures for 2003)

- *£4.2 million awarded for race, sex and disability discrimination cases by Tribunals*
- *One or two awards around or above £100,000*
- *In 2002 there was a race discrimination award of £800k and a sex discrimination case of £1.4 million*

LEGISLATION

In the October 2002 consultation 'Equality and Diversity: The way ahead' the Government confirmed its intention to make equality legislation more coherent and easier to use. Since then the Government has sought to 'use the same wording, where appropriate, for all direct discrimination, indirect discrimination, harassment and victimisation'. Legislation introduced since 2002 has sought to follow this through, although we are still some way from either coherent or easy to use legislation

Current equality legislation dates back more than 35 years, I have put up here a list of some of the ones which you will recognise. It is not intended to be comprehensive, just to give you an idea of the extent of legislation in this area, and it is, as you should be aware, an area that is ever growing.

- *Equal Pay Act 1970*
- *The Rehabilitation of Offenders Act 1974*
- *Sex Discrimination Act 1975*
- *Race Relations Act 1976*
- *Disability Discrimination Acts 1995 and 2005*
- *Employment Rights Act 1996*

- *Protection from Harassment Act 1997*
- *Human Rights Act 1998*
- *The Part Time Workers (Prevention of Less Favourable Treatment) Regulations 2000*
- *Sex Discrimination (Indirect Discrimination and Burden of Proof) Regulations 2001*
- *Employment Equality (Sexual Orientation) Regulations 2003*
- *Employment Equality (Religion or Belief) Regulations 2003*
- *The Independent Schools (Employment of Teachers in Schools with a Religious Character) Regulations 2003*
- *The Gender Recognition Act 2004*

To come:

- *Equal Treatment Amendment Directive*
- *Age Discrimination Regulations*

I now want to highlight a few key threads in relation to main elements of equality legislation. This is intended by way of a summary, and specific requirements for each of the Race Relations Act, Sex Discrimination Act, Disability Discrimination Act and other Equality Regulations apply.

In particular there remains some question whether the Government has correctly implemented the EU Framework Employment Directive 2000/78.

Additionally since the Government chose to introduce the relevant strands of the Framework Directive through regulations under the European Communities Act 1972 rather than by way of amendment to the principal legislation we are currently left with a mixture of old rules and new so that more than ever, every case must be determined upon its own facts. For example the new definitions of direct discrimination on grounds of race do not apply to colour.

It also means that discrimination outside of the sphere of employment and vocational training is not dealt with under the new rules, unlike the provision of goods, services and facilities, housing and education to which discrimination on grounds of race, sex and disability have been extended.

The common strands now appearing through discrimination and equality legislation cover the following:

DIRECT DISCRIMINATION

A person (usually referred to as A) discriminates against another person (the victim is known as B) if on a prohibited ground (race/religion or belief/sexual orientation) A treats B less favourably than he treats or would treat other persons.

This definition is applied to Race Discrimination, Sex Discrimination and discrimination on grounds of Religion or Belief or Sexual Orientation. A slightly different definition applies in Disability Discrimination. Its effect is the same and, save for narrow Genuine Occupational Requirements, an employer cannot justify direct discrimination which is automatically unlawful.

The victim does however need to identify a comparator, one who's circumstances are the same or not materially different. Where there is no actual comparator it is permissible to create a hypothetical character.

One difference between Sex and other discrimination is that the relevant wording refers to 'her' sex requiring the discriminatory conduct to be relevant to the victim, whereas under Race, Religion and Orientation the conduct can be based upon a mistaken belief as to Race, Religion or Orientation or even on the basis of some third party's characteristics where the victim suffers some detriment.

There remains a great deal of uncertainty surrounding the burden of proof. Since 2001 in Sex claims and 2003 in Race claims a victim has been required to demonstrate that there is sufficient evidence from which a Tribunal can conclude that discrimination occurred. Once that level, wherever it may be set has been reached the employer is required to prove that there is an adequate explanation. In the absence of an adequate explanation the tribunal will find that the victim was unlawfully discriminated against.

VICTIMISATION

A person (A) victimises another person (B) if A treats B less favourably than he treats or would treat other persons by reason that B has done a protected act. The protected acts are set out in the legislation and include having made a claim under the relevant legislation, or given evidence or information in connection with such a claim.

HARASSMENT

A person (A) subjects another person (B) to harassment where, on prohibited grounds A engages in unwanted conduct which has the purpose or effect of:

- (a) violating B's dignity; or
- (b) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.

There is no requirement that the victim must make any objection to the conduct in order that it may become 'unwanted'. The tribunal will assume certain conduct as unwelcome, such as racist and homophobic remarks. Recently the existence of pornography in an office was held to give rise to an intimidating environment where the female employee hadn't even seen it, but was aware of its existence.

In harassment claims there is no need for a victim to identify any comparator. In addition where the conduct has the purpose (ie where A knew that such conduct was unwanted or would be unwanted) of violating B's dignity or creating an intimidating hostile, etc environment then the victim does not have to show that their reaction was reasonable.

Only where a tribunal is looking at the question of whether such conduct had the requisite 'effect' is a tribunal concerned with whether, in all the circumstances including the perception of B, it should reasonably be considered as having that effect. This introduced an objective test to limit the subjective reaction of B in circumstances such that a remark was entirely innocent and without any connection with the prohibited ground.

INDIRECT DISCRIMINATION

A person (A) discriminates against another person (B) if....A applies to B a provision, criterion or practice which he applies or would apply equally to other persons but:

- (a) which puts or would put persons similar to B at a particular disadvantage when compared to other persons;
- (b) which puts B at that disadvantage; and
- (c) which A cannot show to be a proportionate means of achieving a legitimate aim.

In order to satisfy an indirect discrimination claim there has in the past been a great deal of emphasis on producing statistical evidence to demonstrate the disparate effect of any provision, criterion or practice. Claims have been lost or won on the correct identification of a comparator pool. With new legislation introducing claims for discrimination on grounds of religion or belief, or sexual orientation the dearth of available statistical evidence will it is hoped put an end to over reliance on this form of evidence. In addition the impact of the burden of proof remains to be tested to determine whether it be enough for a victim to demonstrate a difference in treatment which causes them a disadvantage sufficient to put the employer to proof of whether that treatment can be shown to be legitimate and proportionate.

Who is covered?

The above rules apply to Office Holders and Contract Workers. It will not apply to volunteers unless they are held to be employees.

It will apply to those who work wholly or partly at an establishment in Great Britain and to those who, even though they work wholly outside of Great Britain

- (a) their employer has a place of business in Great Britain,
- (b) their work is for the purposes of that place of business and
- (c) they are ordinarily resident in Great Britain at the time they apply for or are offered the employment or at any time during the course of employment.

This is a totally different test from claims brought under the Employment Rights Act 1996 where claims for unfair dismissal must relate to employment in Great Britain

Post termination events

The rules apply to events that occur after the employment relationship has come to an end, for example in relation to references, where the conduct complained arises out of and has a connection with that employment relationship.

Positive Action

In promoting training some positive discrimination is permitted to address discrimination on grounds of Race, Religion or Belief or Sexual Orientation. But care must be taken in that promoting or encouraging certain groups to apply for particular jobs they are not preferred over other groups which may suffer discrimination as a consequence.

Some specific considerations

SEX DISCRIMINATION

The Consultation: Equality and Diversity: Updating the Sex Discrimination Act which closed on 31 May proposes various changes including:

- A new definition of indirect sex discrimination in employment matters and vocational training.
- Prohibiting harassment and sexual harassment in employment and in vocational training.
- Making it clear that less favourable treatment of women on grounds of pregnancy or maternity leave is unlawful sex discrimination.
- Extending the protection for people who work overseas for a company in Great Britain.
- A change to the little used exception to the SDA where an employer could refuse to offer a particular job to someone who was undergoing or had undergone gender re-assignment.
- Coverage of people in the special position of being an office holder rather than an employee.
- Clarifying how the SDA applies to ministers of religion.

DISABILITY DISCRIMINATION

The Disability Discrimination Act 1995 (Amendment) Regulations 2005 introduced the new definition of direct discrimination, but kept the old provisions of less favourable treatment for a

reason relating to a disability and failure to make a reasonable adjustment. It is not possible to justify any direct discrimination.

The small employer exception which excepted organisations with less than 15 employees from the requirement of the Disability Discrimination Act came to an end in October 2004.

Under the Disability Discrimination Act 2005 the definition of "Disabled persons" will include people with progressive conditions of cancer, HIV and MS and amendments to definition of mental illness to widen the scope of conditions that may amount to a disability. Changes will come into effect by in October 2005.

WORKING PARENTS

Maternity Rights

A woman (who is an employee not a "worker") is entitled to time off to attend antenatal appointments with permission

The employer must carry out a risk assessment for new or expectant mothers in the workplace.

Maternity Leave

- Ordinary Maternity Leave (OML) is paid leave.
- All employees are entitled to 26 weeks Ordinary Maternity Leave
- An employee must have 26 weeks continuous service with their employer by the start of the 14th week before the expected week of childbirth (EWC) to qualify for Additional Maternity Leave (AML).
- AML is unpaid unless there is a contractual entitlement.
- Notice of intention to take ML by the end of the 15th week before EWC. Notice must state that (1) she is pregnant; (2) the week her baby is expected to be born; and (3) when she wants her ML to start. This can be amended on 28 days notice.
- Women do not need to give any further notice of their intention to return to work.

Maternity Pay

- SMP is 90% of earnings for six weeks then 20 week at £100 (or 90% of earnings for full 26 weeks if less than £100 a week).
- Employers able to claim back 92% of payments made, or 100% if entitled to small employers' relief plus an additional amount in compensation if the employers' portion of National Insurance Contributions paid on SMP.
- Maternity leave and pay - no qualifying period of OML but there are conditions for AML

The recent case of Michele Alabaster against the Woolwich Building Society (now part of Barclays) which was supported by the Equal Opportunities Commission and went to the ECJ recognised that a woman on maternity leave does not need to find a male comparator when bringing a claim of equal pay.

Paternity Rights

- Only employers, not workers, can claim paid paternity leave
- Can be taken for birth of or adoption of a child
- Must have been employed for 26 weeks by end of 15th week before the expected week of childbirth
- Must be the partner or father of the child
- Notice requirements – notice by the end of the 15th week before the baby is due. Notice must state (1) the week the baby is due; (2) whether they wish to take one or two weeks' leave; and (3) when they want their leave to start. This can be amended on 28 days notice.
- Paternity pay. [See notes on Maternity Leave]

Parental Leave (including Adoption)

Parents of children under five (or 18 if the child is entitled to disability allowance) are entitled to 13 weeks unpaid leave to care for the child. Available to both men and women if they have responsibility for the child and have at least one year's continuous service. Special rules apply for parental leave relating to children born or adopted before 14 December 1999.

- Notice requirements – 21 days notice.
- Thirteen weeks of one week slots for each child or 18 weeks for parents of disabled children (multiples of one day) with up to four weeks in any one year.
- Unpaid.
- Employers are entitled to postpone for up to six months if they can justify for business reasons.

Adoption Leave

- This entitlement is available to individuals or one member of a couple where they adopt jointly.
- Continuous service requirement of 26 weeks.
- Only where newly matched with a child for adoption by an adoption agency.

- 26 weeks OML plus 26 weeks AML.
- OML is paid [AML is unpaid subject to contractual arrangements]
- Statutory Adoption Pay (SAP) for up to 26 weeks (see rates above).
- Adopters must notify employers of intention to take leave within seven days of being notified of match.
- Notice must state (1) when the child is expected; and (2) when they want their adoption leave to start.
- No further notice is required to return to work.

Time off for Dependents

- No notice requirements.
- Unpaid – unless the employer decides otherwise by discretion or it has been negotiated into the employment contract.
- To deal with emergency situation, for example, death of a dependent or if child care arrangements break down. It does not, however, extend to caring for the child but only what is reasonable to make alternative arrangements.

Flexible Working Rights

Flexible Working Regulations 2003

- An employee with a child under 6 (or 18 if disabled) is entitled to ask (ie not receive) for a change in their Terms and Conditions of Service to care for that child.
- 26 week's continuous employment.
- Application procedure – in writing, explanation.
- Permanent.
- Employer entitled to reject request in specified grounds.

Part Time Workers

Part Time Workers (Prevention of Less Favourable Treatment) Regulations 2000

I do not propose to go into detail in this area as this is covered in the morning session on “Atypical Workers”.

I would just add to this section that the Maternity Alliance had just put forward a “Baby Manifesto” with 10 key demands including increased maternity pay, paid parental leave and an automatic right to work flexible hours for parents of children under the age of two. It was also announced in the Queen’s Speech on 17 May that legislation would be put forward in respect of wrap around care for school age children and an extension of maternity leave and pay. There has also been a recent consultation called Work and Families: Choice and Flexibility which closed on 25 May. [More information on this can be found on the DTI website.]

TRANSGENDER EQUALITY

Sex discrimination (Gender Reassignment) Regulations 1999

Gender Recognition Act 2004

Protects against direct (but not indirect) discrimination to anyone who intends to undergo, is undergoing or has undergone gender reassignment, but only as far as employment and vocational training are concerned.

No obligation to disclose status as condition of employment

And finally

AGE

It is anticipated that age discrimination regulations will be implemented in October 2006 following a consultation process. Up until now there has just been a voluntary code of practice that has been largely ignored by employers. . A MORI survey in 2001 found ageism to be the most common cause of discrimination at work.

GOOD PRACTICE GUIDANCE

That’s what every employer has to comply with. The next stage is to consider best practice in your own organisations.

As a starting point, an employer must of course comply with relevant legislation but merely complying with legislation is not a substitute for good practice.

1. Equality policy

It is a good idea to have an equality policy. Set out your aims and objectives and make sure that the policy is available to all workers. Your policy should cover:

- Accessibility – it should be clear to all staff where this policy can be accessed.
- Monitoring – how this will be conducted and for what purpose.
- Reviewing procedures – tell staff how and when this will happen.

- Training and guidance – particularly for managers and those involved in recruitment or disciplinary procedures. I know, for example, that when I was at Comic Relief, it was something that was available to all staff not just managers and all staff were encouraged to attend.
- How bullying and harassment will be tackled (this will need to comply with the minimum requirements of the statutory disciplinary and grievance procedures which were introduced as of 1 October 2004).

By the very fact of having an Equality Policy, you are sending a message to the organisation that equality in the workplace is viewed as a "good thing".

2. Recruitment and Selection

Before I go into detail here I just want to add that those of you from charities will, following this year's new SORP, need to have a recruitment policy for Trustees also and much of the principals I am talking about today would be useful within that context.

Things to do:

- Remove questions about age and date of birth from application forms and questionnaires and be careful about the language you do use. For example, don't refer to the organisation as being a young dynamic company. This could amount to indirect discrimination against older workers.
- Don't recruit informally. Statistically it is more likely for a male to recruit a male.
- Think about WHERE you advertise. Only using websites may discriminate against older workers (and disabled persons). Although following the Disability Discrimination Act, most websites have increased their accessibility.
- Only ask necessary questions – for example, asking if a person can drive where it is not necessary for the job may discriminate against those who cannot drive – perhaps disabled persons. Or, for example, it is not necessary to a secretarial role even within a faith organisation to establish the faith of the secretary. It is unlikely that the faith of a secretary will affect her ability to do her job. This would be relevant if directed at individuals applying for a post as a minister of religion. Or, to take another example, it may be relevant to ask the faith of a person at an interview for head teacher of a faith school but not of a cleaner at the same school.
- Ensure employment agencies are compliant with legislation and implement good practice procedures also.
- Consider special arrangements for interview, for example, attendance by disabled persons.

3. Training and Development

This should be open to all staff on an equal basis, and all staff should be aware of the training policy.

Promotion. This must, of course, be carried out on merit but equally should not discriminate against certain classes of employees. For example, people who work part time should not be passed over for promotion as this might amount to indirect discrimination under the Sex Discrimination Act. As we have seen far more women than men tend to work part time.

4. Monitoring

The key thing here to bear in mind is only to collect information you are going to use. It is recommended that you should monitor both who is applying to work for your company and your existing workforce. Questions to ask relate to religion and sexual orientation and ethnicity. You should make clear to employees and applicants what use you intend to make of information gathered.

5. The Workplace

Think about adjustments you may need to make – not just to comply with legislation such as the provision of disabled toilets and making your website DDA compliant, for example with the use of non-flash, plain text or different coloured background alternatives. And this will need to be continually reviewed. From my own experience, for example, the employer may think they have complied with DDA legislation by having a disabled toilet facility. However, if this toilet is nearer than others which are in a different part of the building so all members of staff are using the disabled facility, this means that any disabled employees may be disadvantaged. Other staff should be asked to be considerate. This is the sort of thing that might generate bad feeling.

6. Working Practices

Working practices should be dealt with, as with most of these areas, in a common sense manner. If you have Jewish employees then by having team meetings always on a Friday afternoon is not going to provide a feeling of equality amongst that particular class of employee or workers (and you should consider volunteers here also).

An employer should also have clear procedures for dealing with requests for time off to attend religious holidays to avoid confusion at a later date. This is an area that, if not handled properly, can clearly be a problem not only for any particular religious groups, but also other employees who may feel aggrieved if one group is being treated differently to others. This kind of thing can create bad feelings and undermine staff morale.

Other working practices an employer should consider include:

- Dietary requirements in staff canteen.
- Dress requirements.
- Sensitivity in wording invitations to social gatherings. And consider here whether it would always be appropriate to hold social events which revolve around pubs or the consumption of alcohol.
- Work/life balance after work socialising may disadvantage working parents or carers of disabled parents.

- Flexible working.
- Job sharing.
- Part time working. However, employers will need to remember that training courses must still be open to part-time workers and they must not otherwise be less favourably treated.
- Flexible hours.
- Term time working
- Working from home.
- Voluntary reduced hours.

Another example, is the setting up of prayer rooms. It was recently reported in Personnel Today that the BBC, Shell and London Underground are going to implement the setting up of prayer rooms for their staff.

7. Atmosphere

- Ensure staff know senior management are engaged with and support the promotion of diversity
- Remember the employer is responsible for its staff at work, for example, if a case of discrimination arises
- Keep records (in line with Data Protection legislation of course)
- Be prepared. Employers are much better protected as a rule from claims of discrimination or from general staff discontent if they can show they considered certain situations and their implications in advance.
- Procedures - tie in your equality policy with other staff policies, for example, disciplinary and grievance procedures. These procedures should be updated as necessary to comply with legislation and in consultation with your staff.
- Use monitoring effectively
- Embrace differences
- Listen to your staff – discuss specific needs
- Monitor the situation – times and people and their requirements change

CONCLUSION

I hope this session has given you some insight into a complicated and developing area and perhaps given you some food for thought to take back to your organisations.

Fiona Wharton
Wrigleys
9 Cookridge Street, Leeds LS2 3AG
fiona.wharton@wrigleys.co.uk
Telephone 0113 244 6100

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