

Equality Act 2010

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Protected characteristics

- The Act replaces previous legislation relating to discrimination on grounds of sex, pregnancy and maternity, marriage and civil partnership (does not apply to students), race, disability, sexual orientation, gender reassignment, religion or belief, and age
- The old legislation on discrimination on the grounds of sex, race, disability, age, sexual orientation, and religion or belief has been repealed (except in Northern Ireland)
- A new Employment Code of Practice has been created by the Equality and Human Rights Commission and came into force in April 2011
- A non-statutory Code on Further and Higher Education provision is imminent

Enforcement

- An individual can take a claim to a court or tribunal. Where the claim is connected with employment or qualifications it goes to an employment tribunal
- If it relates to a student it goes to the County Court or Sheriff court
- If it relates to goods, facilities or services it goes to the County Court
- The Equality and Human Rights Commission also has enforcement powers
- The sanctions are civil, not criminal

How does the Act affect Universities?

- In two main areas:
- As employer of employees and contract workers
- As an educational establishment providing education to students

Kinds of discrimination

- Direct discrimination, ie treating someone less favourably **because of** a protected characteristic than a person without that characteristic is or would be treated
- Eg rejecting an applicant for a lecturing post because of his race
- Refusing to let a gay student take an optional course because of her sexual orientation

- Indirect discrimination
- Applying a provision, criterion or practice (PCP) which puts those with a protected characteristic at a disadvantage, which puts the claimant at that disadvantage, and which cannot be justified as a proportionate means of achieving a legitimate aim

Indirect discrimination

- Students must speak fluent English
- Lectures will be held on Friday afternoons
- The post is full-time, and job shares are not permitted
- Lecturers must accompany students on regular field trips to archaeological sites
- Applicants for the post must already have a Ph D and have done post-doctoral research for at least three years

- Note that the prohibitions in the Act do not apply to anything in relation to the content of the curriculum, though they do apply to the way that it is taught
- Eg a curriculum includes teaching of evolution. This is not unlawful discrimination against a student who believes in creationism, but it would be unlawful to exclude such a student from a biology degree

Disability discrimination

- The definition of disability remains mostly the same as before, ie a person has a disability if they
- have a physical or mental IMPAIRMENT, and
- the impairment has a SUBSTANTIAL and LONG TERM effect on their ability to carry out normal day to day activities, but
- NB It is no longer necessary to consider the list of 8 capacities (mobility, manual dexterity etc)
- The Guidance on the definition of disability has been revised from May 2011

- Long term means either that it has lasted 12 months, or is likely to last 12 months
- Cancer, HIV and MS are disabilities from diagnosis
- The degree of impairment is to be assessed without medication, prosthesis or other aid, (except for spectacles or contact lenses) if likely to be substantial without their assistance
- Where an impairment is likely to recur, it is to be treated as continuing

Excluded conditions

- See now Equality Act 2010 (Disability) Regulations 2010, which came into force 1 October 2010
- addiction to a substance
- seasonal allergic rhinitis
- tendency to set fires
- tendency to steal
- tendency to abuse others
- exhibitionism
- voyeurism

- X Endowed Primary School v Mr and Mrs T (2009)

- but not the consequences of these conditions eg
- cirrhosis of the liver, drug-induced psychosis

Kinds of discrimination

- (1) DIRECT discrimination: section 13
- Where A treats B less favourably BECAUSE OF a protected characteristic than he treats or would treat others
- The treatment needs to be compared with the way A treats or would treat someone who does not have that characteristic
- eg if A turns down B's job application because B has epilepsy, or is black or a Roman Catholic
- Direct discrimination cannot be justified, except where it is because of age. Blanket bans are not permitted.

Associative discrimination

- If A treats B less favourably because B is associated with someone with a protected characteristic that is direct discrimination even if B does not have that characteristic
- eg B, who is not disabled, is the parent of a disabled child and is denied time off work to care for the child when the parents of a non-disabled child are allowed such time off: Coleman v Attridge Law [2008] IRLR 722 ECJ
- B, who is white, is married to a black woman and is refused employment because the employer is prejudiced against black people

Perceived discrimination

- If the act of discrimination is because of a perceived protected characteristic, this may be direct discrimination even if the victim does not in fact possess that characteristic
- Eg failure to promote an employee because he is thought to be gay, when in fact he is not
- Refusal to employ someone who is thought to be a Jew, when in fact she is Christian

How does this apply to perceived disability?

- J v DLA Piper (2009)
- A barrister applied for a job with a firm of solicitors and was told informally that there was a job for her. She then revealed to the manager that she had suffered from depression. Shortly afterwards the firm decided not to appoint to the job in question, giving the economic downturn as justification
- The depression in question was arguably not in fact a disability because insufficiently long term and insufficiently serious
- Did that matter if the employer discriminated because he thought that the claimant had a disability??

- I suggest that it will be necessary for the claimant to prove that the employer discriminated because he thought the claimant had a condition falling within the statute eg cancer, MS, insulin dependent diabetes, long term depression
- An employer who rejects someone because they have, or have had, a medical problem, however unfair that may be, will not be liable under the Act unless they perceived it to be a condition falling within the statute

- Note that, if OH advises the employer that a person is likely to have a disability, the claimant will be able to argue that an act of discrimination was for a perceived disability, even if the tribunal disagrees with the OH assessment

(2) Indirect discrimination: section 19

- A applies to B a provision, criterion or practice (PCP) which puts or would put persons with whom B shares a protected characteristic at a particular disadvantage when compared with persons who do not have that characteristic, and puts or would put B at that disadvantage, AND
- A cannot show it to be a proportionate means of achieving a legitimate aim
- eg A requires all employees to work full-time, which is difficult for B who has recently returned from maternity leave
- A requires all employees to be at work at 9 am, which is difficult for B who has impaired mobility
- (in disability discrimination this often overlaps with the duty of reasonable adjustment)
- A, a hairdresser requires B to work on Saturdays, which is difficult for B who is a Jew

(3) Discrimination arising from disability: section 15

- A discriminates against a disabled person, B, if he treats him unfavourably because of something arising in consequence of B's disability AND A cannot show that the treatment is a proportionate means of achieving a legitimate aim (this does not require a comparator)
- (This overrules the *Malcolm* decision)
- eg A dismisses B, who has MS, because of his unreliable attendance at work
- A demotes B, who is schizophrenic, because she has poor personal hygiene and other employees have complained
- A rejects B, an applicant for a job, because of his sickness absence record, which is poor because B suffers from recurrent depression

Justification

- The old test of justification in the DDA was 'material and substantial reason'
- The new test is 'proportionate means of achieving a legitimate aim'
- This is more objective than the old test, and it is therefore likely that *Post Office v Jones* [2001] IRLR 384 (where the employer acted within a range of reasonable management responses) will no longer apply
- In practice this may mean that tribunals will have greater power to make their own assessment of competing medical evidence and to prefer the evidence of the clinician over OH

Health and safety as a defence

- Schedule 22
- If a person does anything that he MUST do because of a requirement in an enactment he is not liable for disability discrimination
- Lane Group plc v Farmiloe [2004] UKEAT 0352/03
- But most health and safety obligations are to do that which is reasonably practicable. They should not be used as a “false excuse” to discriminate
- In most cases it will be necessary to show that the respondent satisfied the proportionate means of achieving a legitimate aim test

(4) Duty to make adjustments: section 20 and Schedule 8

- This only applies to disability discrimination. It is a form of positive discrimination which is in general prohibited.
- The duty is only to make REASONABLE adjustments, which is basically a question of effectiveness, practicability and cost
- Occupational health can make suggestions but the decision as to what is reasonable is for the manager
- A failure to make an adjustment deemed reasonable cannot be justified

- An employer is not under a duty to make reasonable adjustments if he does not know and could not reasonably be expected to know:
- in the case of a job applicant or potential applicant that a disabled person may apply;
- that in any other case a person has a disability and is likely to be placed at a substantial disadvantage as a result

Reasonable adjustments

- Three requirements:
- Where a PCP puts a disabled person at a substantial disadvantage to take reasonable steps to avoid the disadvantage
- Where a physical feature puts a disabled person at a substantial disadvantage to take reasonable steps to avoid the disadvantage
- Where a disabled person would, but for the provision of an auxiliary aid (which includes an auxiliary service), be put at a substantial disadvantage to take reasonable steps to provide the auxiliary aid
- A person (A) who is subject to a duty to make reasonable adjustments is not entitled to require a disabled person, in relation to whom A is required to comply with the duty, to pay to any extent A's costs of complying with the duty

Competence standards

- This is an academic, medical or other standard applied by or on behalf of an education provider for the purpose of determining whether a student has a particular level of competence or ability
- No duty to adjust the competence standard, but there is a duty reasonably to adjust the process of demonstrating that a person meets it, eg allowing more time or a laptop to a dyslexic: Project Management Institute v Latif (2007)

Same applies to qualifications bodies

- Burke v College of Law (2012)
- Court of Appeal

Knowledge of the disability

- In general, you cannot be held to have unlawfully discriminated unless you either knew or ought reasonably to have known (constructive knowledge) that a person had a disability. The only exception is indirect discrimination, where you apply a PCP which impacts less favourably on someone with a protected characteristic, and indirect discrimination can be justified if the PCP is a proportionate means of achieving a legitimate aim
- You have no duty to make reasonable adjustments unless you have actual or constructive knowledge of the disability and that the disabled person is likely to be at a disadvantage
- You have no increased duty of care unless you have actual or constructive knowledge of someone's vulnerability (Sutherland v Hatton [2002] IRLR 263)

Section 15

- A is not liable if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability
- Does the employer know what OH knows, but does not reveal to the manager because of the duty of confidence??
- Should the manager reasonably be expected to know what OH knows? Whose reasonable expectation? The worker's? The manager's?
- If the worker asks for something to be kept confidential he cannot reasonably expect the manager to know it
- Should OH regularly ask workers whether they may disclose a possible disability to management?
- See new paragraphs in the Employment Code 5.18 and 6.21: OH knowledge is assumed to have been shared

Is the employer deemed to know what OH knows?

- Hartman v South Essex Mental Health Trust [2005] IRLR 293(Court of Appeal)
- This is a personal injury claim, not a disability discrimination claim, but my view is that it is applicable to all situations where a health professional receives health information in confidence

Section 60

- Employers must not ask health questions (including questions about sickness absence) before making a job offer
- The offer can be conditional on medical clearance and after it any health question can be asked (but remember the Data Protection Act)

Exceptions

- Health questions can be asked pre-job offer in order to make adjustments to the selection process, or
- In order to assess whether the job applicant can perform a function intrinsic to the job, eg eyesight, fitness tests for police officers

(5) Harassment

- A harasses B if he engages in unwanted conduct related to a protected characteristic and the conduct has the **PURPOSE OR EFFECT** of violating B's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for B
- In determining whether conduct has that effect the perception of B, the other circumstances of the case, and whether it is reasonable for the conduct to have that effect must be taken into account
- Gomez v Glaxo Smith Kline (2011)

Harassment by third parties

- Employers can be found liable for harassment by those who are not employees, eg employees of contractors, students
- The harassment must have occurred with the employer's knowledge on at least two occasions AND
- The employer has not taken reasonable steps to prevent it
- The Govt will probably repeal these provisions

(6) Victimisation

- A victimises B if he subjects him to a detriment because he either brought proceedings against A under the Act, gave evidence against him, made allegations in good faith of a contravention of the Act against A or another person or did any other thing for the purposes of or in connection with the Act, or because A believes that B has done or may do, any of the above
- Now freestanding right: no need to involve a comparator

Public sector equality duty

- This applies to most protected characteristics from April 2011
- Public bodies, including universities, must have due regard to the need to
- eliminate discrimination
- advance equality of opportunity and foster good relations, with the exception of marriage and civil partnership