

Sundridge with Ide Hill Parish Council

EQUALITY ACT 2010

Introduction

1. This Legal Topic Note covers the provisions of the Equality Act 2010 ('the 2010 Act') which, in the main, came into force on 1st October 2010. The 2010 Act replaces and brings together previous legislation (such as the Sex Discrimination Act 1975, Race Relations Act 1976, the Disability Discrimination Act 1995 and the Equal Pay Act 1970).
2. Parish councils, parish meetings with a separate parish council and, in Wales, community councils should recognise the importance of the 2010 Act. This Note is aimed at explaining the key provisions of the 2010 Act and at prompting review and changes of policies and practices.
3. This Legal Topic Note gives guidance on the legislation which covers alleged discrimination which occurred on or after 1 October 2010, when the 2010 Act came into force. Alleged discrimination which occurred before 1 October 2010 will continue to be covered under legislation which predated the 2010 Act, and explained in other Legal Topic Notes and Employment Briefings referenced at the end of this Note.
4. The 2010 Act protects individuals from discrimination because of:
 - age
 - disability
 - gender reassignment
 - marriage and civil partnership
 - sex (gender)
 - pregnancy and maternity (a protected characteristic separate to sex)
 - race
 - religion or belief
 - sexual orientation.

In section 4 of the 2010 Act, the above are referred to as 'protected characteristics.' Further guidance as to their definitions is given in paragraphs 14 - 30 below.

Types of unlawful discrimination – definitions

(i) Direct discrimination

5. Pursuant to section 13 of the 2010 Act, direct discrimination occurs when someone is treated less favourably than another person because of a protected characteristic. Direct discrimination is broad enough to include (i) less favourable treatment of a person because of a protected characteristic that he or she is thought to have (this is known as 'perception discrimination'), and (ii) less favourable treatment of a person because they associate with someone who has a protected characteristic (this is known as 'associative discrimination').

Example 1: A manager fails to promote an employee because she is blind. This is direct discrimination based on the employee's disability.

Example 2: A council refuses to let a person hire a hall for his 21st birthday party because his parents are lesbians. This would be direct sexual orientation discrimination because of the person's association with his parents.

Example 3: A council only employs men to be grave diggers because it considers this is a job which cannot be done by women. This would be direct discrimination because of the council's perception that women are unsuited to this work.

6. Direct discrimination can never be justified except in the case of age (section 13(2) of the 2010 Act). A claim of direct age discrimination may be defended if the treatment complained of is a proportionate means of achieving a legitimate aim.
7. A complainant of direct discrimination cannot just claim he or she has suffered less favourable treatment; he or she must be able to show that he or she has experienced less favourable treatment because of a protected characteristic. To establish if there had been less favourable treatment because of a protected characteristic, a complainant (and ultimately a court or employment tribunal) would need to compare the complainant's less favourable treatment to the treatment of another. This comparator exercise is used to test 'like for like' or, put another way, to assess in all respects, other than the protected characteristic, that there is no material difference in the circumstances of the complainant and the person he or she is compared to.

(ii) Indirect discrimination

8. Pursuant to section 19 of the 2010 Act, indirect discrimination occurs when a person applies a "provision, criterion or practice" which disadvantages a person with a protected characteristic and others that share that characteristic and the discrimination cannot be shown as a proportionate means of achieving a legitimate aim. A provision, criterion or practice could include contractual terms, written or unwritten policies, rules or arrangements. Indirect discrimination applies to all the protected characteristics except pregnancy and maternity (section 19 (3)).

Example 1: If a council's dress code policy for staff required men to wear a suit and tie but stipulated no smart dress for women, this may be considered indirect discrimination against men.

Example 2: A council introduces a practice that staff must work specific hours being 8.30am-5.00pm. A female employee is unable to work these hours because she needs to pick her children up from school, and no allowances are made because of those needs. This would put the employee and some other female staff (who also have childcare responsibilities) at a disadvantage, and the council may have indirectly discriminated against the female employee unless the particular hours of work can be justified.

9. A person complaining of indirect discrimination would need to show an appropriate pool of people to whom the provision would apply and disadvantage. Once this disadvantage has been demonstrated, an indirect discrimination claim may only be defended if a person can show that the provision, criterion or practice is a proportionate means of achieving a legitimate aim. A person defending a claim would need to demonstrate that the arrangements complained of are sufficient

to outweigh the negative impact on the complainant and others who share his or her characteristic having considered the implementation of an alternative provision, criterion or practice (and costs) which would not have resulted in the negative impact complained of.

Example; If a disabled person who needs a guide dog is not allowed to enter a council building because of a “no pets rule”, this could be discriminatory unless the council can objectively justify the rule.

(iii) Harassment

10. Section 26 of the 2010 Act defines harassment as “unwanted conduct related to a protected characteristic, which has the purpose or effect of violating an individual’s dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for that individual”. Section 26 confirms that a harassment claim may be brought by the person who is the subject of the harassment but also by someone whose environment is negatively affected by the harassment of another person. A single incident could amount to harassment.

Example 1: A disabled employee, who shares an office with a colleague who is not, is frequently insulted and bullied about her condition by her manager. Both the disabled employee and the non-disabled employee that she shares an office with could claim that they were subjected to harassment by the manager. The employer may also be held vicariously liable for the conduct of the manager.

Example 2; A groundsman shouts abuse at some Irish Traveller children playing in a council owned playing field on account of their ethnic origin. Such conduct may give rise to a claim for harassment against the council.

11. Section 40 of the 2010 Act provides that an employer risks liability for the harassment of an employee by a third party who is not an employee (e.g. a member of the public or a contractor). An employer may only be liable for harassment by a third party if it has occurred during the course of a person’s employment, on at least two previous occasions, and the employer is aware that it has taken place and has not taken reasonable steps to prevent the third party continuing to harass.

12. Harassment as a form of discrimination applies to all protected characteristics except for pregnancy and maternity and marriage and civil partnership (section 26(5)).

(iv) Victimisation

13. Pursuant to section 27 of the 2010 Act, victimisation occurs when a person is subjected to detriment because they have made or supported a complaint under the 2010 Act or because they are suspected of doing so.

Example 1: A female employee has lodged a sex discrimination claim and her manager believes her male colleague will give evidence on her behalf. The manager informs him that it will damage his career if he does so. It is likely that male employee will have been victimised.

Example 2: A service user supports a person’s complaint about a council discriminating against them. That user is subsequently informed that they can no longer access the services being offered by the council. It is likely that the service user will have been victimised.

Protected Characteristics

14. The protected characteristics are set out in section 4 of the 2010 Act, and listed in paragraph 4 above. Additional commentary for some of them is given below.

(i) Age

15. Individuals of any age or apparent age are protected from discrimination. Less favourable treatment of a person because of age is not unlawful direct or indirect discrimination if it is a proportionate means of meeting a legitimate aim. See also paragraphs 6 and 8 above and paragraphs 41 and 42 below.

(ii) Disability

16. Pursuant to section 6 and schedule 1 to the 2010 Act a person is disabled if they have a physical or mental impairment which has a substantial and long-term adverse effect on their ability to carry out normal day to day activities (for example using a telephone, walking, lifting, and reading). An impairment is long-term if –

- (a) it has lasted for at least 12 months,
- (b) it is likely to last for at least 12 months, or
- (c) it is likely to last for the rest of the life of the person affected.

17. The Equality Act 2010 (Disability) Regulations 2010 (the 2010 Regulations), issued pursuant to the 2010 Act came into force on 1 October 2010. The 2010 Regulations confirm that those certified as blind, severely sight impaired, partially sighted, or sight impaired by a consultant ophthalmologist will be deemed to have a disability. They also confirm that persons with cancer, HIV infection or multiple sclerosis are deemed to have a disability.

18. The 2010 Regulations confirm a number of exemptions of groups of people who do not fall within the category of disabled. These include, for example, people suffering from an addiction to alcohol or nicotine.

19. Notably pursuant to section 13(3) of the 2010 Act, if a person (e.g. an employer or a service provider) treats a disabled person more favourably than a non-disabled person, this does not constitute direct discrimination.

Example: A sighted person is not permitted to attend a council meeting with her dog, although a blind person is permitted to attend with his guide dog.

(iii) Gender Reassignment

20. Pursuant to section 7 of the 2010 Act, gender reassignment is a protected characteristic that applies to a transsexual person who is proposing to undergo, is undergoing or has undergone a process (or part of a process) to change their sex (by physiological or other attributes of sex).

21. Section 16 of the 2010 Act provides that it is discrimination against transsexuals to treat them less favourably for being absent from work because they propose to undergo, are undergoing or have undergone gender reassignment than they would be treated if they were absent because they were ill or injured.

(iv) Marriage and Civil Partnership

22. Pursuant to section 8 of the 2010 Act, protection is given to people who have or share the characteristics of being married or being a civil partner. By contrast, a person engaged to be married, a divorcee or a person whose civil partnership has been dissolved are not protected under the 2010 Act.

(v) Pregnancy and maternity

23. Section 17 of the 2010 Act deals with this protected characteristic in non work situations such as in the provision of services and the exercise of public functions. A person discriminates against a woman because of her pregnancy or if, in the period of 26 weeks beginning with the day on which she gives birth, she is treated unfavourably because she has given birth.

Example: If a council, which runs a youth club for teenagers, prevents a teenager from attending because she is pregnant, this would be unlawful.

24. Section 18 of the 2010 Act deals with the protected characteristic of pregnancy and maternity in work situations.

Section 18(6) confirms that the protected period, in relation to a woman's pregnancy, begins when the pregnancy begins, and ends— (a) If she has the right to ordinary and additional maternity leave, at the end of the additional maternity leave period or (if earlier) when she returns to work after the pregnancy; (b) If she does not have that right, at the end of the period of 2 weeks beginning with the end of the pregnancy.

Section 18 (2) and (3) confirm that a person discriminates against a woman if, in the protected period in relation to a pregnancy of hers, he/she treats her unfavourably –

(a) because of the pregnancy, or

(b) because of illness suffered by her as a result of i, or.

(c) because she is exercising or seeking to exercise, or has exercised or sought to exercise, the right to compulsory, ordinary or additional maternity leave.

25. Breast-feeding is not a protected characteristic as defined by section 4 of the 2010 Act (see paragraph 4 above). However section 13(6)(a) specifically makes discrimination against a breast-feeding mother unlawful. The relevant protected characteristic is sex.

Example: It is unlawful for a council to ask a woman to leave a council meeting because she is breast-feeding her baby.

(vi) Race

26. Pursuant to section 9 of the 2010 Act, race includes 'colour, nationality, ethnic or national origins.' These particular terms are not defined in the legislation. Section 9 confirms that a racial group is a group of persons defined by reference to race and that a racial group can be made up of two or more different racial groups. People who have or share characteristics of colour, nationality or ethnic or national origins can be described as belonging to a particular racial group.

Examples: Colour includes black or white. Nationality could include a British, Australian or Swiss

citizen. Ethnic or national origins could include Roma, Chinese or Irish heritage. A racial group could include British Asians.

(vii) Religion or belief

27. Pursuant to section 10(1) of the 2010 Act, religion means any religion (which includes a lack of religion). The Act does not make reference to any particular religion.
28. Belief is defined in section 10(2) as any religious or philosophical belief (which includes a lack of belief). Religious belief is wider in scope than religion. For example, Christianity does not require a Christian to wear a crucifix but a Christian may consider that wearing a crucifix is a manifestation of his or her religious belief.
- Denominations (e.g. Protestants and Catholics within Christianity) or sects within a religion may be a religion or a belief.
29. The definition of a 'philosophical belief' was considered in the case of *Grainger plc v Nicholson* (2010). This employment case concerned Mr Nicholson's strong belief in man-made climate change. The Employment Appeal Tribunal held that for a belief to be covered by the legislation then in force (the Employment Equality (Religion or Belief) Regulations 2003), it must be:
- genuinely held;
 - belief not simply a viewpoint or opinion;
 - relevant to weighty and substantial aspect of human life and behaviour;
 - able to attain a certain level of cogency, seriousness, cohesion and importance and
 - worthy of respect in a democratic society, not incompatible with human dignity and not in conflict with the fundamental rights of others.
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(viii) Sexual orientation

30. Section 12 of the 2010 Act protects a person's sexual orientation towards:
- (i) people of the same sex as him or her (i.e. a gay man or a lesbian);
 - (ii) people of the opposite sex from him or her;
 - (iii) people of both sexes.

Specific Employment matters

31. Discrimination is unlawful in respect of job applicants, employees and workers. A worker is a person employed by a third party (e.g. a recruitment agency) and supplied by that third party to work for another.

(i) Recruitment

32. Section 60 of the 2010 Act relates to the recruitment process and specifically covers the enquiries that can be made before employment. An employer is not permitted to ask questions about a job applicant's health before offering work or, where not in a position to offer work before including the applicant in a pool of applicants from whom the employer intends (when in a position to do so) to select a person to whom to offer work. If an employer does ask health questions before a job is

offered and subsequently does not offer the person a job, the burden of proof will be on the employer to prove that there was no discrimination. An applicant cannot bring an action solely on the grounds that a prohibited question on health was asked. However the Commission for Equality on Human Rights (CEHR) has powers under the Equality Act 2006 to enforce a breach of these provisions.

33. Employers may ask health related questions before a job offer is made only in limited circumstances for any of the following reasons:

(a) Identifying if a candidate is able to participate in an assessment in the recruitment process (e.g. the interview or other process designed to give an indication of a person's suitability for the work) or establishing whether there is a duty to make reasonable adjustments to enable the disabled person to participate in the recruitment process.

If it is made known or is apparent to a council that a job candidate has a disability, it has a duty to make reasonable adjustments for the candidate to undergo the assessment (e.g. making different arrangements to facilitate the candidate's access to the venue for interview, increasing the time given to complete any tests). Example: A job application form which states: 'Please contact us if you need the application form in an alternative format or if you need any adjustments for the interview' would be lawful.

If a disabled person is offered the job, reasonable adjustments may have to be made such as removing or altering a physical feature at the premises where the person will be working or providing auxiliary aids for that person to undertake the work. See also paragraph 35 below.

(b) *To assess whether the candidate is able to perform functions intrinsic to the job, with reasonable adjustments in place. Example: If a council is recruiting a person for buildings maintenance work, it can ask, in the application form or at interview, questions which relate specifically to an applicant's ability to perform aspects of the job such as climbing ladders and scaffolding and lifting if they are intrinsic or fundamental to the job.*

(c) To monitor the diversity of people who apply for work. (NALC recommends that information submitted by applicants in relation to this is not seen or considered by the person(s) responsible for considering a person's suitability for the job advertised).

(d) *Supporting positive action in respect of the employment of disabled persons as permitted by section 158 of the 2010 Act. See paragraph 51 below for further guidance. Example: A council operates a guaranteed interview scheme for all applications for a particular job from disabled persons. This is aimed at improving disabled persons' employment rates within the council. The council must make clear to job applicants that this is why it is asking the question.*

(e) *Establishing whether the candidate has a particular disability if this a requirement of the job. Example: An employer wants to recruit a Deafblind project worker who has personal experience of Deafblindness. This is an occupational requirement of the job and the job advert states this. The employer can ask in the application form or at interview about the applicant's disability.*

34. Section 60 is aimed at ensuring that all job applicants are looked at properly to see if they can do the job in question, and that they are not ruled out just because of issues related to or arising from their health or disability, such as health problems which occasioned sickness absence in a previous

job, which say nothing about whether they can do the job advertised.

35. There is no prohibition on making enquiries about a person's health or disability after a job is offered or offering a job on the condition of the employer making enquiries of the person's health or disability. At that stage, an employer may ask appropriate health related questions to ascertain if someone's health or disability would prevent them from doing the job. The employer must consider whether there are reasonable adjustments that it could make which would enable the person to do the job. However an employer will be open to a claim of direct discrimination if the job offer is subsequently withdrawn because of the person's disability.

(ii) Positive action in respect of recruitment and promotion

36. Employers should always carry out an objective assessment at all stages of recruitment and promotion. However, section 159 of the 2010 Act (brought into force on 6 April 2011) permits an employer to take positive action in recruitment or promotion with the aim of enabling or encouraging persons who share a protected characteristic to overcome or minimise that disadvantage or participate in recruitment or promotion. Section 159(4) provides that an employer is permitted to treat a person with a protected characteristic more favourably for recruitment or promotion than a person that does not have a protected characteristic if the following applies:-
- two candidates, one with a protected characteristic and one without, are "as qualified" as each other;
 - the employer does not have a policy of treating persons who share the protected characteristic more favourably regarding recruitment and promotion than persons who do not share it; and
 - taking action is a proportionate means of achieving the aim of enabling or encouraging persons who share a protected characteristic to overcome or minimise disadvantage or participate in recruitment or promotion.

(iii) Employment contract secrecy clauses relating to pay

37. Pursuant to section 77 of the 2010 Act, employers are not permitted to prevent or restrict an employee from discussing his or her pay with a colleague (or a former colleague) if the discussion is aimed at finding out whether or to what extent there is a connection between pay and a protected characteristic. Whilst, there is no general ban on secrecy clauses in employment contracts, section 77 confirms that they are unenforceable if an employee wants to discuss pay for the above reasons.

(iv) Equality of terms

38. Section 66 of the 2010 Act requires a sex equality clause be read into the terms under which people are employed. The effect of this is that any term in the employment contract which is less favourable than that of the comparator of the opposite sex is modified to ensure that both have the same effect. Where the comparator benefits from a term which is not available to the employee, the effect of the sex equality clause is to include such a term in the employee's contract of employment. Section 71 deals with sex discrimination in relation to contractual pay in circumstances where a sex equality clause would not operate. This could be because there is no comparator doing equal work

with whom an employee can compare his or her pay or other terms. For the first time, a person who is treated less favourably than others by being paid less because of his or her sex (or a combination of two protected characteristics based on section 14 of the 2010 Act, which is not yet in force - see paragraph 56 below) including sex may pursue a claim for direct (or combined) discrimination where an equality clause does not operate.

(v) Defences to discrimination for occupational requirement

39. Pursuant to Schedule 9 of 2010 Act, an employer can defend a claim for direct discrimination if it can show that, having regard to the nature or context of the work –
- (a) the protected characteristic is an occupational requirement,
 - (b) the application of the requirement is a proportionate means of achieving a legitimate aim, and
 - (c) the person to whom the requirement is applied does not meet it (or the employer has grounds for not being satisfied that the person meets it).
40. The occupational requirement defence applies to all protected characteristics and enables an employer to state that only people with a particular protected characteristic are eligible for the job. *Example: It would be lawful for a domestic violence women's refuge to advertise only for female counsellors.*

(vi) Retirement

41. Employment Equality (Repeal of Retirement Age Provision) Regulations 2011 came into effect on 6 April 2011. They repeal and amend provisions in the 2010 Act (and related provisions in the Employment Rights Act 1996 which except certain dismissals based on retirement from constituting direct age discrimination and unfair dismissal). From 6 April 2011, retirement of an employee constitutes age discrimination unless it can be justified as a proportionate means of achieving a legitimate aim. It will no longer be lawful for an employment relationship to terminate by retirement unless the employer can justify it or the employee agrees it to.

(vii) Exceptions to discrimination relating to age

42. There are statutory exemptions to discrimination based on age which are listed in schedule 9, Part 2 of the 2010 Act. These exemptions include:
- ▪ Payment of minimum wage – which is set for those no longer at school and aged 16 and 17 or over.
 - ▪ Dismissal of an employee up until 5 April 2011 based on the default retirement age of 65 .Further guidance as to the statutory process which applied is available in the Employment Briefings referenced at the end of this Note.