

EQUALITY ACT 2010

EXPLANATORY NOTES

COMMENTARY ON SECTIONS

Part 5: Work

Chapter 1: Employment, etc.

Section 39: Employees and applicants

Effect

143. This section makes it unlawful for an employer to discriminate against or victimise employees and people seeking work. It applies where the employer is making arrangements to fill a job, and in respect of anything done in the course of a person's employment. In respect of discrimination because of sex or pregnancy and maternity, a term of an offer of employment which relates to pay is treated as discriminatory where, if accepted, it would give rise to an equality clause or if an equality clause does not apply, where the offer of the term constitutes direct or dual discrimination. It also imposes the reasonable adjustments duty set out in section 20 on employers in respect of disabled employees and applicants.

Background

144. This section replaces similar provisions in previous legislation.

Examples

- An employer decides not to shortlist for interview a disabled job applicant because of her epilepsy. This would be direct discrimination.
- An employer offers a woman a job on lower pay than the set rate because she is pregnant when she applies. She cannot bring an equality clause case as there is no comparator. However, she will be able to claim direct discrimination.
- An employer refuses to interview a man applying for promotion, because he previously supported a discrimination case against the employer brought by another employee. This would be victimisation.
- An employer enforces a "no beards" policy by asking staff to shave. This could be indirect discrimination, because it would have a particular impact on Muslims or Orthodox Jews.

Section 40: Employees and applicants: harassment

Effect

145. This section makes it unlawful for an employer to harass employees and people applying for employment. It also makes the employer liable for harassment of its employees by third parties, such as customers or clients, over whom the employer does not have direct control. Liability in relation to third party harassment will however only

arise when harassment has occurred on at least two previous occasions, the employer is aware that it has taken place, and has not taken reasonable steps to prevent it happening again.

Background

146. This section is designed to replicate the effect of provisions in the Sex Discrimination Act 1975 as regards harassment by employers, and extend to the other protected characteristics (apart from marriage and civil partnership and pregnancy and maternity) the position in relation to employer liability for sex harassment under that Act.

Example

- A shop assistant with a strong Nigerian accent tells her manager that she is upset and humiliated by a customer who regularly uses the shop and each time makes derogatory remarks about Africans in her hearing. If her manager does nothing to try to stop it happening again, he would be liable for racial harassment.

Section 41: Contract workers

Effect

147. This section makes it unlawful for a person (referred to as a principal) who makes work available to contract workers to discriminate against, harass or victimise them. Contract workers are separately protected from discrimination by their employer (for example, the agency for which they work and which places them with the principal) under section 39. This section also imposes a duty on the principal to make reasonable adjustments for disabled contract workers (in addition to the duty on the contract worker's employer).

Background

148. This section is designed to replicate the effect of provisions in previous legislation, while codifying case law to make clear that there does not need to be a direct contractual relationship between the employer and the principal for this protection to apply.

Examples

- A hotel manager refuses to accept a black African contract worker sent to him by an agency because of fears that guests would be put off by his accent. This would be direct discrimination.
- A bank treats a female contract worker less well than her male counterparts, for example by insisting that as she is a woman she should make coffee for all meetings. This would be direct discrimination.

Section 42: Identity of employer

Effect

149. This section provides that police constables and police cadets are treated as employees for the purposes of this Part of the Act. It identifies the relevant employer as either the chief officer (or, in Scotland, the chief constable) or the responsible authority as defined in section 43, depending on who commits the act in question.
150. Constables serving with the Civil Nuclear Constabulary are treated as employees of the Civil Nuclear Police Authority.
151. A constable seconded to the Serious Organised Crime Agency (SOCA) or Scottish Police Services Authority (SPSA) is treated as employed by SOCA or SPSA.

152. A constable at the Scottish Crime and Drugs Enforcement Agency (SCDEA) is treated as employed by the Director General of SCDEA.

Background

153. This section is designed to replicate the provisions in previous legislation and extends coverage to constables at SPSA and SCDEA. It also removes the requirement to pay out of police funds compensation and related costs arising from the personal liability of chief officers (or in Scotland, chief constables) for acts which are unlawful under the Act. Payments of compensation and related costs arising from the personal liability of chief officers (or in Scotland, chief constables) will instead be dealt with by the Police Act 1996 and the Police (Scotland) Act 1967, as for all other police officers.

Example

- A chief officer refuses to allocate protective equipment to female constables. The chief officer would be treated as the employer in a direct discrimination claim.

Section 43: Interpretation

Effect

154. This section explains what is meant by terms such as “chief officer” and “relevant Act” used in section 42.

Background

155. This section replaces similar provisions in previous legislation, but includes some additional terms, such as those relevant to the SPSA and SCDEA.

Section 44: Partnerships

Effect

156. This section makes it unlawful for firms (and those intending to set up a firm) to discriminate against, harass or victimise their partners, or people seeking to be partners in the firm. Activities covered by these provisions could include the offering of partnerships or giving existing partners access to opportunities such as training and/or transfers to other branches of the firm. It imposes on firms and people setting up firms a duty to make reasonable adjustments for disabled partners and prospective partners.
157. In the case of limited partnerships, these prohibitions only apply in relation to those partners who are involved with the operation of the firm (general partners).

Background

158. Because partners are mainly governed by their partnership agreements, rather than by employment contracts, separate provisions are needed to provide protection from discrimination, harassment and victimisation for partners in ordinary and limited partnerships. This section is designed to replicate the effect of provisions in previous legislation but also to provide consistent protection in respect of race (whereas previously the protection of colour and nationality differed in some respects from that of race and ethnic or national origin).

Example

- A firm refuses to accept an application for partnership from a black candidate, who is qualified to join, because he is of African origin. This would be direct discrimination.

Section 45: Limited liability partnerships

Effect

159. This section makes it unlawful for a limited liability partnership (LLP), or a group of people setting up an LLP, to discriminate against, harass or victimise a member (or prospective member). Activities covered by these provisions include offers of membership or access to opportunities that the LLP makes available to its members. It imposes on LLPs a duty to make reasonable adjustments for disabled members and prospective members.

Background

160. LLPs are distinct from general and limited partnerships, so separate provisions are needed to provide protection from discrimination, harassment and victimisation for their members. This section is designed to replicate the effect of provisions in previous legislation but also to achieve the same consistency in respect of race as is provided in section 44.

Examples

- An LLP refuses a member access to use of a company car because he has supported a discrimination or harassment claim against the LLP. This would be victimisation.
- An LLP refuses a Muslim member access to its child care scheme because all the other children who attend the scheme have Christian parents. This would be direct discrimination.

Section 46: Interpretation

Effect

161. This section explains what is meant by terms used in sections 44 and 45. As well as defining the types of partnership to which these provisions apply, it establishes what is meant by expulsion from a partnership.

Example

- A gay partner in a firm who, because of constant homophobic banter feels compelled to leave his position as a partner, can claim to have been expelled from the partnership because of his sexual orientation. Should an employment tribunal agree with him, the firm could be found to be in breach of these provisions in a similar way to how the employment tribunal would find for an employee who wins a claim for constructive dismissal.

Section 47: Barristers

Effect

162. This section makes it unlawful for a barrister or a barrister's clerk to discriminate against, harass or victimise a pupil (a trainee barrister) or tenant (including a squatter or door-tenant) in the barristers' chambers, or people seeking to be a pupil or tenant, in relation to the professional relationship between them. It also imposes on barristers a duty to make reasonable adjustments for disabled pupils and tenants.
163. It also makes it unlawful for a person instructing a barrister (for example, a client or instructing solicitor) to discriminate against, harass or victimise a barrister in relation to the giving of instructions.

Background

164. This section replaces provisions in previous legislation providing similar protection for barristers, pupils, tenants and prospective pupils or tenants in barristers' chambers.

However, it no longer protects clients and clerks from discrimination by barristers because they can respectively seek redress under the “services” provisions or under other work provisions (section 39 and section 41) of the Act.

Examples

- A barrister treats a female pupil less favourably than his male pupils by allowing her to be involved in a narrower range of cases, because of assumptions about the kind of cases women can handle competently. This would be direct discrimination.
- A clerk gives instructions to a Christian barrister in his chambers in preference to a Hindu barrister, because he fears that the barrister’s religion would prevent him representing a Christian client properly. This would be direct discrimination.

Section 48: Advocates

Effect

165. This section makes it unlawful for practising advocates and their clerks to discriminate against, harass or victimise devils (trainee advocates) or members of the stable (a group of advocates working in shared premises) or people seeking to be a devil or member, in respect of the professional relationship between them. It imposes on advocates a duty to make reasonable adjustments for disabled devils and stable members.
166. It also makes it unlawful for a person instructing an advocate (for example, a direct access client or instructing solicitor) to discriminate against, harass or victimise an advocate in relation to the giving of instructions.

Background

167. This section replaces similar provisions in previous legislation. However, as with the section on barristers, this section no longer protects clients and clerks from discrimination by advocates because they can respectively seek redress under the “services” provisions or under other work provisions (section 39 and section 41) of the Act.

Examples

- An advocate treats one devil less favourably than another by refusing to allow him to be involved in a particular case because he fears the devil’s sexual orientation may affect his involvement in the case. This would be direct discrimination.
- An advocate puts pressure on a stable member to leave because the member is disabled and the advocate does not want to make reasonable adjustments. This would be direct discrimination.

Section 49: Personal offices: appointments, etc.

Effect

168. This section makes it unlawful to discriminate against, harass or victimise people who are or wish to become personal office-holders. These provisions apply in so far as other work provisions do not – this means that where office-holders are also employees, they will be protected by the provisions dealing with employment in respect of their employment relationship. In respect of sex or pregnancy and maternity discrimination, a term of an offer of an appointment to office which relates to pay is treated as discriminatory where, if accepted, it would give rise to an equality clause or, if that is not the case, where the offer of the term constitutes direct or dual discrimination.
169. Personal office-holders are people who perform a function personally at a time and place specified by another person and who, in return, are entitled to payment (other

than expenses or compensation for lost income). Section 52(4) provides that, where a personal office is a public office at the same time, it is to be treated as a public office only.

170. An office-holder can be appointed by one person and then an entirely different person can be responsible for other matters, for example for providing facilities for the office-holder to perform his or her functions. Because of this, the section prohibits both the person who makes the appointment and any relevant person from discriminating against, victimising or harassing the office-holder. The relevant person is the person who is responsible for the act complained of in each case.
171. This section places a duty to make reasonable adjustments on a person who makes the appointment and any relevant person in relation to the needs of disabled people who seek or hold personal offices.

Background

172. This section is designed to replicate the effect of provisions in previous legislation.

Examples

- A company board refuses to appoint a candidate as director because she is black. This would be direct discrimination.
- A company terminates the appointment of a director because it is discovered that she is pregnant. This would be direct discrimination.

Section 50: Public offices: appointments, etc.

Effect

173. This section makes it unlawful to discriminate against, harass or victimise people who are or wish to become public office-holders. Like the personal office-holder provisions above, these provisions apply in so far as other work provisions do not. This means that where public office-holders are also employees, they will be protected by the provisions dealing with employment in respect of their employment relationship. In respect of sex or pregnancy and maternity discrimination, a term of an offer of an appointment to office which relates to pay is treated as discriminatory where, if accepted, it would give rise to an equality clause or if that is not the case where the offer of the term constitutes direct or dual discrimination.
174. Public office-holders are people appointed by, on the recommendation of, or with the approval of, a member of the executive branch of Government, such as a Government Minister, or people who are appointed on the recommendation, or subject to the approval of, either of the Houses of Parliament, the National Assembly for Wales, or the Scottish Parliament.
175. A public office-holder can be appointed by one person and then an entirely different person can be responsible for other matters, for example for providing facilities for the office-holder to perform his or her functions. Because of this, the section prohibits both the person with the power to make the appointment and any relevant person from discriminating against, victimising or harassing the office-holder. The relevant person is the person who is responsible for the act complained of in each case (but does not include either of the Houses of Parliament, the National Assembly for Wales or the Scottish Parliament).
176. This section also places on the person who has the power to make an appointment and any relevant person a duty to make reasonable adjustments for disabled people seeking or holding public offices.

Background

177. This section is for the most part designed to replicate the effect of provisions in previous legislation. It also extends protection from discrimination, harassment and victimisation to those appointed on the recommendation or approval of law-making bodies such as the Scottish Parliament and the Welsh Assembly.

Example

- A Government Minister with the power to appoint the non-executive board members of a non-departmental public body fails to appoint a candidate because he is gay. This would be direct discrimination.

Section 51: Public offices: recommendations for appointments, etc.

Effect

178. This section makes it unlawful for a person with power to make recommendations about or approve appointments to public offices to discriminate against, harass or victimise people seeking or being considered as public office- holders in respect of the recommendation or approval process. It also imposes a duty on the person with the power to make a recommendation or approve an appointment to make reasonable adjustments for disabled people who seek or are being considered for appointment to public offices.
179. This section does not apply in respect of all public offices, only those to which the appointment is made on the recommendation or approval of a member of the executive or where the appointment is made by a member of the executive on the recommendation or approval of a relevant body (for example, a non-departmental public body).

Background

180. This section is for the most part designed to replicate the effect of provisions in current legislation. It also extends protection from discrimination, harassment and victimisation to those appointed by a member of the executive on the recommendation or with the approval of a non-departmental public body (in respect of that appointment or recommendation).

Example

- It would be direct discrimination for the Government Minister responsible for approving the appointment of members of the BBC Trust to refuse to approve the appointment of a person because he has a hearing impairment.

Section 52: Interpretation and exceptions

Effect

181. This section explains the meaning of various terms, such as “relevant person”, used in sections 49, 50 and 51. It provides that appointment does not include election, meaning elected offices will not constitute personal or public offices for the purpose of these sections.
182. It also stipulates that termination of an appointment includes the expiration of the appointment period or where unreasonable conduct of the relevant person causes the office-holder to terminate the appointment. But it does not count as termination if after expiry of the appointment the person’s appointment is immediately renewed on the same terms.

Section 53: Qualifications bodies

Effect

183. This section makes it unlawful for a qualifications body (as defined in section 54) to discriminate against, harass or victimise a person when conferring relevant qualifications (which includes renewing or extending a relevant qualification). It provides that applying a competence standard to a disabled person is not disability discrimination, provided the application of the standard is justified. It also imposes a duty on qualifications bodies to make reasonable adjustments for disabled people.

Background

184. This section replaces similar provisions in previous legislation. It also extends the protection to cover discrimination in the arrangements made for determining upon whom a relevant qualification should be conferred.

Examples

- A body which confers diplomas certifying that people are qualified electricians refuses to confer the qualification on a man simply because he is gay. This would be direct discrimination.
- An organisation which maintains a register of professional tradespeople refuses to include a person's details on the register because her name does not sound English. This would be direct discrimination.

Section 54: Interpretation

Effect

185. This section explains the meaning of various terms used in section 53. In particular, it defines a qualifications body as a body which can confer any academic, medical, technical or other standard which is required to carry out a particular trade or profession, or which better enables a person to do so by, for example, determining whether the person has a particular level of competence or ability.
186. It also makes clear that bodies such as schools, institutions of further and higher education and education authorities which confer qualifications such as A Levels and GCSEs are not qualifications bodies for the purposes of section 53.

Background

187. This section is designed to replicate the effect of similar provisions in previous legislation.

Example

- Examples of qualifications bodies are the Public Carriage Office (which licenses cab drivers in London), the British Horseracing Authority and the General Medical Council. Also included is any body which confers a diploma on people pursuing a particular trade (for example, plumbers), even if the diploma is not strictly necessary to pursue a career in that trade but shows that the person has reached a certain standard.

Section 55: Employment service-providers

Effect

188. This section makes it unlawful to discriminate against, harass or victimise a person when providing an employment service. It also places a duty on providers of employment services to make reasonable adjustments for disabled people. The duty is

an anticipatory duty except for providers of a vocational service, so that in relation to the provision of vocational services, employment service-providers do not need to deal in advance with reasonable adjustments for disabled people. Employment services and vocational services are defined in section 56.

Background

189. This section replaces the separate provisions for vocational training, employment agencies and assisting persons to obtain employment in previous legislation with a single provision covering all these aspects.

Examples

- A company which provides courses to train people to be plumbers refuses to enrol women because its directors assume that very few people want to employ female plumbers. This would be direct discrimination.
- An agency which finds employment opportunities for teachers in schools offers placements only to white teachers based on the assumption that this is what parents in a particular area would prefer. This would be direct discrimination.
- An agency advertises job vacancies on its website. It will need to have the website checked for accessibility and make reasonable changes to enable disabled people using a variety of access software to use it.

Section 56: Interpretation

Effect

190. This section explains what the provision of an employment service includes (such as the provision of training for employment or careers guidance), and what it does not include (such as education in schools), for the purposes of section 55.

Example

- Examples of the types of activities covered under this section include providing CV writing classes, English or Maths classes to help adults into work; training in IT/keyboard skills; or providing work placements.

Section 57: Trade organisations

Effect

191. This section makes it unlawful for a trade organisation to discriminate against, harass or victimise a person who is, or is applying to be, a member. It also requires trade organisations to make reasonable adjustments for disabled people.
192. A trade organisation is an organisation of workers (such as a trade union) or employers (such as the Chambers of Commerce); or an organisation whose members carry out a particular trade or profession (such as the British Medical Association, the Institute of Civil Engineers and the Law Society).

Background

193. This section is designed to replicate the effect of similar provisions in previous legislation. It also extends the protection to cover discrimination in the arrangements made for determining to whom membership should be offered.

Examples

- A trade union restricts its membership to men. This would be direct discrimination.

- An organisation of employers varies membership subscriptions or access to conferences because of a person's race. This would be direct discrimination.

Section 58: Official business of members

Effect

194. This section makes it unlawful for local authorities to discriminate against, harass or victimise their members in relation to providing access to facilities such as training which relate to the carrying out of their official business. This does not apply to election or appointment to posts within the local authority. It imposes a duty on local authorities to make reasonable adjustments for disabled members.

Background

195. This section extends protection previously in the Disability Discrimination Act 1995 to all protected characteristics.

Example

- A local authority does not equip meeting rooms with hearing loops for a member who has a hearing impairment, in order to enable her to take full part in the business for which she has been elected. This would be discrimination if provision of hearing loops were considered to be a reasonable adjustment.

Section 59: Interpretation

Effect

196. This section explains the meaning of various terms used in section 58. In particular, it lists the various bodies which are included in the term "local authority" and provides a power for a Minister of the Crown to add to this list of bodies. It also explains what is meant by reference to the carrying-out of official business by members of a local authority.

Example

- A local authority member who is considering an application for planning permission while sitting on a council's Planning Committee would be undertaking "official business".

Section 60: Enquiries about disability and health

Effect

197. Except in the situations specified in this section, an employer must not ask about a job applicant's health until that person has been either offered a job (on a conditional or unconditional basis) or been included in a pool of successful candidates to be offered a job when a suitable position arises. The specified situations where health-related enquiries can be made are for the purposes of:
- finding out whether a job applicant would be able to participate in an assessment to test his or her suitability for the work;
 - making reasonable adjustments to enable the disabled person to participate in the recruitment process;
 - finding out whether a job applicant would be able to undertake a function that is intrinsic to the job, with reasonable adjustments in place as required;
 - monitoring diversity in applications for jobs;

- supporting positive action in employment for disabled people; and
 - enabling an employer to identify suitable candidates for a job where there is an occupational requirement for the person to be disabled.
198. The section also allows questions to be asked where they are needed in the context of national security vetting.
199. Where an employer makes a health or disability-related enquiry which falls outside the specified situations, he or she would be acting unlawfully under the Equality Act 2006. Together with Schedule 26, this section gives the Equality and Human Rights Commission (EHRC) an enforcement role. (Section 120(8) ensures that only the EHRC can enforce a breach of this provision.). This means, for example, that the EHRC would be able to conduct an investigation if there was evidence that a large employer might be routinely asking prohibited questions when recruiting.
200. Where the employer asks a question not allowed by this section and rejects the applicant, if the applicant then makes a claim to the employment tribunal for direct disability discrimination, it will be for the employer to show that it had not discriminated against the candidate.
201. As well as applying to recruitment to employment, the section also applies to the other areas covered by Part 5 of the Act, such as contract work, business partnerships, office-holders, barristers and advocates.

Background

202. This is a new provision. The Disability Discrimination Act 1995 did not prevent an employer from making health- or disability- related enquiries of applicants for a job, although it did make it unlawful to use the result of such enquiries to discriminate against a candidate because of his or her disability. This provision will limit the making of enquiries and therefore help to tackle the disincentive effect that an employer making such enquiries can have on some disabled people making applications for work.

Examples

- Applicants are asked on an application form whether they have a disability that requires the employer to make a reasonable adjustment to the recruitment process. This is to allow, for example, people with a speech impairment more time for interview. This enquiry would be permitted.
- An applicant applies for a job in a warehouse, which requires the manual lifting and handling of heavy items. As manual handling is a function which is intrinsic to the job, the employer is permitted to ask the applicant questions about his health to establish whether he is able to do the job (with reasonable adjustments for a disabled applicant, if required). The employer would not be permitted to ask the applicant other health questions until he or she offered the candidate a job.