

# EQUALITY ACT 2010

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## EXPLANATORY NOTES

### COMMENTARY ON SECTIONS

#### **Part 8: Prohibited Conduct: Ancillary**

#### *Section 108: Relationships that have ended*

##### **Effect**

349. This section makes it unlawful to discriminate against or harass someone after a relationship covered by the Act has ended.
350. It covers any former relationship in which the Act prohibits one person from discriminating against or harassing another, such as in employment, or in the provision of goods, facilities and services. It is designed to ensure that treatment of the kind made unlawful by the Act which results from, and is closely linked to, the existence of a relationship is still unlawful even though the relationship no longer exists.
351. This provision applies to conduct which takes place after the Act is commenced, whether or not the relationship in question ended before that date. If the conduct occurred before this section was commenced, it would be dealt with under the previous legislation.
352. This section also requires reasonable adjustments to be made for disabled people even after a relationship has ended, if they continue to be at a substantial disadvantage in comparison with people without a disability. A person will be considered to have discriminated against a disabled person if he or she fails to comply with the duty to make reasonable adjustments.
353. A breach of this section triggers the same enforcement procedures as if the treatment had occurred during the relationship. However, if the treatment which is being challenged constitutes victimisation, it will be dealt with under the victimisation provisions and not under this section.

##### **Background**

354. This section replaces similar provisions in previous legislation. It also extends the protection after a relationship has ended to cover discrimination outside the workplace because of religion or belief and sexual orientation. It will provide similar protection against age discrimination and harassment outside the workplace when the age protection provisions are commenced.

##### **Examples**

- A school or employer refuses to give a reference to an ex-pupil or ex-employee because of his or her religion or belief. This would be direct discrimination.
- A builder or plumber addresses abusive and hostile remarks to a previous customer because of her sex after their business relationship has ended. This would be harassment. It would

not be harassment, however, where the reason for the treatment was not the customer's sex but, for example, a dispute over payment.

- A disabled former employee's benefits include life-time use of the company's in-house gym facilities. The employer or owner of the premises must make reasonable adjustments to enable the former employee to continue using the facilities even after she has retired.

### ***Section 109: Liability of employers and principals***

#### **Effect**

355. This section makes employers and principals liable for acts of discrimination, harassment and victimisation carried out by their employees in the course of employment or by their agents acting under their authority. It does not matter whether or not the employer or principal knows about or approves of those acts.
356. However, employers who can show that they took all reasonable steps to prevent their employees from acting unlawfully will not be held liable.
357. Employers and principals cannot be held liable for any criminal offences under the Act that are committed by their employees or agents, except for those in the provisions on transport services for disabled people in Part 12 of the Act.

#### **Background**

358. This section replaces similar provisions in previous legislation. It is designed to ensure that employers and principals are made responsible for the acts of those over whom they have control. The section works together with the provisions on "Liability of employees and agents" (section 110), "Instructing, causing or inducing contraventions" (section 111), and "Aiding contraventions" (section 112) to ensure that both the person carrying out an unlawful act and any person on whose behalf he or she was acting can be held to account where appropriate.

#### **Examples**

- A landlord (the principal) instructs an agent to collect rent at a property. The agent harasses an Asian couple, who bring a claim in which the agent is held to have acted unlawfully. The principal may be held liable for breaching the harassment provisions even if he or she is unaware of the agent's actions.
- A shop owner becomes aware that her employee is refusing to serve disabled customers. The employer tells the employee to treat disabled customers in the same way as other customers and sends the employee on a diversity training course. However, the employee continues to treat disabled customers less favourably. One such customer brings a claim against both the employee and the employer. The employer may avoid liability by showing that she took all reasonable steps to stop the employee from acting in a discriminatory way.

### ***Section 110: Liability of employees and agents***

#### **Effect**

359. This section makes an employee personally liable for unlawful acts committed in the course of employment where, because of section 109, the employer is also liable - or would be but for the defence of having taken all reasonable steps to prevent the employee from doing the relevant thing. An agent would be personally liable under this section for any unlawful acts committed under a principal's authority. However, an employee or agent will not be liable if he or she has been told by the employer or principal that the act is lawful and he or she reasonably believes this to be true.

360. Subsections (4) and (5) make it an offence, punishable by a fine of (currently) up to £5,000, if an employer or principal knowingly or recklessly makes a false statement about the lawfulness of doing something under the Act.
361. This section does not apply to discriminatory acts done by an employee or agent because of disability in relation to schools, because claims for disability discrimination in schools cannot be enforced against individuals.

### **Background**

362. This section incorporates some of the elements in the “Aiding unlawful acts” provisions in previous discrimination legislation. It takes a more direct approach and unlike the previous provisions it is not necessary to show that the employee or agent knew that the act was unlawful.

### **Examples**

- A factory worker racially harasses her colleague. The factory owner would be liable for the worker’s actions, but is able to show that he took all reasonable steps to stop the harassment. The colleague can still bring a claim against the factory worker in an employment tribunal.
- A principal instructs an agent to sell products on her behalf. The agent discriminates against a disabled customer. Both the principal and the agent are liable, but the courts are able to determine that evidence provided by the principal indicate the authority given to the agent did not extend to carrying out an authorised act in a discriminatory manner. The disabled customer can still bring a claim against the agent.

### ***Section 111: Instructing, causing or inducing contraventions***

#### **Effect**

363. This section makes it unlawful for a person to instruct, cause or induce someone to discriminate against, harass or victimise another person, or to attempt to do so.
364. It provides a remedy for both the recipient of the instruction and the intended victim, whether or not the instruction is carried out, provided the recipient or intended victim suffers a detriment as a result.
365. However, the section only applies where the person giving the instruction is in a relationship with the recipient of the instruction in which discrimination, harassment or victimisation is prohibited.
366. The Equality and Human Rights Commission can enforce this section using its statutory powers under the Equality Act 2006. Equally, both the recipient of the instruction and the intended victim can bring individual claims for breach of this section against the person giving the instructions, so long as they have suffered a detriment as a result. A claim brought by the recipient of the instruction will be dealt with in the same forum (employment tribunal or county courts) as a direct claim for discrimination, harassment or victimisation against the person giving the instruction would be. A claim brought by the intended victim against the person giving the instruction will be dealt with in the same forum as a claim for discrimination, harassment or victimisation against the person carrying out the instruction would be.

### **Background**

367. This section replaces provisions in previous legislation in relation to race, sex, gender reassignment, pregnancy and maternity, age (within the workplace) disability (within the workplace), religion or belief (outside the workplace) and sexual orientation (outside the workplace). It extends protection to all protected characteristics in all areas covered by the Act and allows the Equality and Human Rights Commission to bring enforcement proceedings in relation to any action in breach of the section. (Previously,

the Equality and Human Rights Commission's enforcement powers were not uniform even between the protected characteristics and fields where there were provisions on instructions to discriminate.) The provision expressly allowing persons instructed to bring proceedings is new (other than in relation to age within the workplace where such provision already exists), and is designed to codify the current position in common law (see *Weathersfield v Sargent* [1999] IRLR 94). The provision expressly allowing the intended victim to bring proceedings, even where the instruction is not carried out, is also new and is designed to ensure greater clarity about the protection than under previous legislation.

### **Example**

- A GP instructs his receptionist not to register anyone with an Asian name. The receptionist would have a claim against the GP if subjected to a detriment for not doing so. A potential patient would also have a claim against the GP if she discovered the instruction had been given and was put off applying to register. The receptionist's claim against the GP would be brought before the employment tribunal as it relates to employment, while the potential patient's claim would be brought in the county court as it relates to services.

### **Section 112: Aiding contraventions**

#### **Effect**

368. This section makes it unlawful for a person to help someone carry out an act which he or she knows is unlawful under the Act. However, this is not unlawful if the person giving assistance has been told that the act is lawful and he or she reasonably believes this to be true.
369. It makes it an offence, punishable by a fine of (currently) up to £5,000, knowingly or recklessly to make a false statement about the lawfulness of doing something under the Act.
370. For the purposes of enforcement, breaches of the prohibition on aiding contraventions are dealt with under the same procedures in the Act as the contraventions themselves.

#### **Background**

371. This section is designed to replicate the effect of similar provisions in previous legislation. It ensures that a person who helps another to do something which he or she knows to be prohibited by the Act is liable in his or her own right. Taken together with the provisions on "Liability of employers and principals" (section 109), "Liability of employees and agents" (section 110) and "Instructing, causing or inducing contraventions" (section 111) this section is designed to ensure that both the person carrying out an unlawful act and any person on whose behalf or with whose help he or she was acting can be held to account where appropriate.

### **Example**

- On finding out that a new tenant is gay, a landlord discriminates against him by refusing him access to certain facilities, claiming that they are not part of the tenancy agreement. Another tenant knows this to be false but joins in with the landlord in refusing the new tenant access to the facilities in question. The new tenant can bring a discrimination claim against both the landlord and the tenant who helped him.