

Protected characteristics theme

The Equality Act 2010 replaces 9 major pieces of discrimination legislation that had been introduced over the last 40 years to protect people from unfairness and discrimination on certain grounds. These grounds, which are now called 'protected characteristics', are as follows:

- Age
- Disability
- Gender reassignment
- Marriage and civil partnership
- Pregnancy and maternity
- Race
- Religion or belief
- Sex
- Sexual orientation.

Broadly the legislation levels up protection for people discriminated against because they are perceived to have, or are associated with someone who has, a protected characteristic.

The 'protected characteristics' are the same as those protected by previous discrimination legislation such as the Sex Discrimination Act 1975, the Race Relations Act 1976 and the Disability Discrimination Act 1995. However, there are some significant changes in respect of gender reassignment, race and disability.

Similarly, under the existing legislation, discrimination on racial grounds is prohibited. That was on grounds of colour, race, nationality or ethnical national origins. Now there is a non-exhaustive definition of race which expressly covers each aspect protected by the Race Relations Act 1976. Further the new Act introduces a power for the government to provide specifically that the definitions of race shall include caste.

*Article author: Richard Stephens, Vanderpump & Sykes
Member of the UK200Lawyers Group*

Discrimination and disability

Direct discrimination

Direct discrimination is defined as taking place where one person, **A**, discriminates against another, **B**, if, because of a



protected characteristic, **A** treats **B** less favourably than **A** treats or would treat others.

There are provisions in relation to particular protected characteristics. For example, if the protected characteristic is disability and **B** is not a disabled person, then **A** does not discriminate against **B** by treating **B** less favourably than a disabled person.

Indirect discrimination

The definition of indirect discrimination applies to certain protected characteristics, namely age, disability, gender reassignment, marriage and civil partnership, race, religion or belief, sex and sexual orientation.

In this context a person, **A**, discriminates against another person, **B**, if **A** applies to **B** a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of **B**.

A provision, criterion or practice is deemed to be discriminatory in relation to a protected characteristic of **B** if:

- **A** applies it or would apply it to persons with whom **B** does not share the characteristic
- It puts, or would put, persons with whom **B** shares the characteristic at a disadvantage when compared with other persons with whom **B** does not share it
- It puts, or would put, **B** at that disadvantage and
- **A** cannot show it to be a proportionate means of achieving a legitimate aim.

Harassment

Protection is afforded to people subject to harassment because of a perceived or actual protected characteristic or because that person associates with a person who has a protected characteristic. The relevant protected characteristics are age, disability, gender reassignment, race, religion or belief, sex and sexual orientation.

Victimisation

A victimises **B** if **A** subjects **B** to a detriment because **B** does a protected act or **A** believes that **B** has done or may do a protected act. A protected act includes bringing proceedings under the Act, or doing anything for the purpose of or in connection with the Act.

Discrimination arising from disability

Discrimination arising from disability under the Act occurs where **A** treats **B** unfavourably because of something arising in consequence of **B**'s disability. **A** must show that the treatment is a proportionate means of achieving a legitimate aim and in order to demonstrate a legitimate aim the discriminatory act will need to be objectively justified. Defendants would have a clear defence if they can demonstrate that they did not know, and could not reasonably have been expected to know, that the claimant had the disability.

The Act introduces indirect disability discrimination, harmonises existing thresholds and clarifies when the duty to make reasonable adjustment is triggered. Businesses are required to reasonably avoid the physical feature or provide an auxiliary aid if they place a disabled person at a disadvantage. Service providers need to anticipate the needs of disabled persons and make appropriate reasonable adjustments such as modifying their premises to include ramps, lifts, automatic doors, railings etc. Employers must have knowledge of the disability or ought reasonably to be aware of it for the duty to apply.

*Article author: Mark Lewis, Wright Hassall LLP
Chairman of the UK200Lawyers Group*



Extending protection and gender reassignment

One of the key themes of the Equality Act 2010 ("EA10") is modernisation of the legal framework, including extending protection in certain areas. The following additional protection is now in place:

Definition of gender reassignment

Prior to the EA10 regime, an individual was required to be under medical supervision to fall within the scope of the anti-discrimination legislation. This requirement has now been removed. This makes clear that an individual does not need to have undergone surgery, or even to have consulted a doctor, in order to be protected and recognises that some individuals in this situation choose not to seek medical advice.

Private clubs

It is unlawful for private clubs to refuse a member (or an associate or the guest of a member) on one of the protected grounds or to allow membership on less favourable terms (e.g. by applying different conditions or fees). This is subject to an exception whereby membership may be restricted according to race, sexual orientation, gender reassignment, pregnancy and maternity, religion or belief, or sex. However, even if membership is restricted on one (or more) of these grounds, it is still unlawful to discriminate on grounds of any other protected characteristics.

Breastfeeding mothers

For the purposes of a direct discrimination claim, less favourable treatment of a woman now expressly includes "less favourable treatment because she is breastfeeding". However, this provision does not apply to Part 5 of EA10 (which deals with discrimination at work) and therefore in these circumstances a woman would need to consider whether she could frame a claim for indirect discrimination.

*Article author: Gwyneth Williams, Collyer Bristow LLP
Member of the UK200Lawyers Group*

Generic employment themes

Updating Victimisation

The Act protects employees who do or may do a "protected act", for example, alleging discrimination. Employees no longer have to compare their treatment to someone who has not committed a protected act (a comparator) in order to show that they have suffered detriment, although no doubt the treatment of others will have a bearing on assessing whether there has been any discrimination.

Restrictions on Health/Disability Screening

Job applicants should not be asked about their disability or health before they have been offered a job (even conditionally) or short-listed. There are exceptional circumstances where such information may need to be sought which are:

- To determine whether reasonable adjustments need to be made during the recruitment process, e.g. for interview
- The role has a an intrinsic physical requirement
- For equal opportunities monitoring
- If the employer is considering recruiting a candidate with a specific characteristic which is under-represented in the workforce ("positive action")
- If the role requires an employee to have a particular disability
- Or there is a national security requirement.



Pay Secrecy Clauses are unenforceable

"Pay secrecy clauses" or "gagging clauses" are contractual terms designed to stop employees discussing their pay. As one purpose of this legislation is to improve pay transparency and minimise discrimination, such clauses are no longer enforceable. Therefore, an employee is entitled to ask about a colleague's pay or disclose details of his or her own pay and if any action is taken against the employee for doing so this could amount to victimisation.

New Employment Tribunal Powers

Employment Tribunals are empowered to make "appropriate recommendations" to reduce the adverse effect of discrimination not just on the claimant but on any other person. This entitles the Tribunals to make meaningful recommendations to Employers which could assist entire workforces, such as introducing equal opportunities policies or publishing selection criteria for staff promotion.

*Article author: Susanna Fowler, Barlow Robbins LLP
Member of the UK200Lawyers Group*

This e-newsletter has been prepared for general interest and it is important to obtain professional advice on specific issues. We believe the information contained in it to be correct. While all possible care is taken in the preparation of this e-newsletter, no responsibility for loss occasioned by any person acting or refraining from acting as a result of the material contained herein can be accepted by the UK200Group, or its member firms or the author.

UK200Group is an association of separate and independently owned and managed chartered accountants and lawyer firms. UK200Group does not provide client services and it does not accept responsibility or liability for the acts or omissions of its members. Likewise, the members of UK200Group are separate and independent legal entities, and as such each has no responsibility or liability for the acts or omissions of other members.

list of lawyer members & international associate lawyers

lawyer members – UK

ENGLAND

CAMBRIDGESHIRE

WISBECH

Bowser Ollard & Bentley

Brian Bowser
01945 583194
www.bowers.co.uk

CHESHIRE

ALTRINCHAM

Neil Myerson LLP Carl Newton

0161 941 4000
www.neil-myerson.co.uk

CLEVELAND

STOCKTON-ON-TEES

Endeavour Partnership LLP

Simon Wake
01642 610300
www.endeavourpartnership.com

ESSEX

MALDON

Bright & Sons

Christopher Hayward
01621 852323
www.brights.eu.com

LINCOLNSHIRE

GRIMSBY

Wilkin Chapman LLP

Julia Whittaker
01472 262626
www.wilkinchapman.co.uk

LONDON

ENFIELD

Vanderpump & Sykes

Keith Thompson
020 8367 3999
www.vanderpumpandsykes.co.uk

LONDON E1

Hextalls Ltd

Matthew Hennessy-Gibbs
020 7488 1424
www.hextalls.com

LONDON WC1

Collyer Bristow LLP

Stephen Rosen
020 7242 7363
www.collyerbristow.com

LONDON WC2

Postlethwaite & Co

Robert Postlethwaite
020 7470 8805
www.postlethwaiteco.com

SURREY

GUILDFORD

Barlow Robbins LLP

Mark Lucas
01483 562901
www.barlowrobbins.com

WEYBRIDGE

Guillaumes - Solicitors

Robert Guilfoyle
01932 849141
www.guillaumes.com

WARWICKSHIRE

LEAMINGTON SPA

Wright Hassall LLP

Mark Lewis*
01926 886688
www.wrighthassall.co.uk

WEST MIDLANDS

BILSTON

Rees Page

Ian MacPherson
01902 577776
www.reespage.co.uk

SCOTLAND

GLASGOW

Morisons LLP

Peter Duff
0141 332 5666
www.morisonsllp.com

international associates lawyers

France

PARIS

Ichay & Mullenex Associes

Diane Mullenex / Frederic Ichay
(33) 1 42 89 19 80
www.ima-avocats.com

Germany

MANNHEIM

bkb + Collegen GmbH

Holger Kwasny
(49) 621 410 7350
www.bkb-mannheim.de

SPEYER

bkb + Collegen GmbH

Holger Kwasny
(49) 6232 67490
www.bkb-speyer.de

Italy

BOLOGNA

Studio Legale Commerciale BCP

Simon Cartwright
(39) 051 656 9788
www.bcp-lex.com

MILAN

Studio Piazza

Roberto Piazza
(39) 02 76 00 11 39
www.internationalconsult.it

Mauritius

PORT LOUIS

Haines Management Services Ltd

Shakil Fakeermahamod
(230) 217 4744/ 217 3916
www.hainesbpo.com/mgmt.php



3 Wesley Hall, Queens Road, Aldershot, Hampshire, GU11 3NP
Tel: 01252 401050 Fax: 01252 350733 Email: admin@uk200group.co.uk
Website: www.uk200group.co.uk
December 2010