

Employment law is an ever growing minefield and it is important to keep up-to-date with developments as they occur. Edward Macey-Dare and Philip Sergeant discuss below some of those most important changes, plus a recent case which is of topical relevance to the education sector.

A. THE EQUALITY ACT 2010

The Equality Act came into force on 1st October 2010 and applies to acts of discrimination that occur on or after that date. Acts complained of before that date are covered by the old law. So what does the Act do? It has two main objectives, namely:

- It harmonises the previous disparate discrimination legislation;
- It strengthens and extends discrimination legislation.

Dealing with each in turn:

1. Harmonisation:

The Act distils 9 different Acts of Parliament and Regulations into 1. Those 9 were:

1. The Sex Discrimination Act 1975
3. The Race Relations Act 1976
4. The Disability Discrimination Act 1995
5. The Employment Equality (Religion or Belief) Regulations 2003
6. The Employment Equality (Sexual Orientation) Regulations 2003
7. The Employment Equality (Age) Regulations 2006 (but see below)
8. The Equality Act 2006
9. The Employment and Equality (Sexual Orientation) Regulations 2007
10. The Equal Pay Act 1970

The new Act essentially harmonises the definitions and exceptions.

2. The Act Strengthens and Extends discrimination legislation by:

- Banning age discrimination;
- Banning dual discrimination (e.g. discrimination against a “disabled woman”);
- Strengthening protection for disabled people (by prohibiting discrimination “arising from” a disability, which requires no comparator);

- Strengthening equal pay provisions (by requiring larger employers to publish details of gender pay differences);
- Strengthening protection from indirect discrimination (by impacting on absenteeism and sick pay procedures, and recruitment and promotion policies);
- Providing for discrimination by association (e.g. if an employee is caring for a disabled relative and is away from work for long periods because of this) and perception (e.g. an employee can be discriminated against because there is a perception that he is gay, but in circumstances where he is not gay and the person discriminating actually knows he is not gay);
- Providing protection from harassment by third parties (e.g. by customers or suppliers);
- Empowering Employment Tribunals to make recommendations to employers (with the power to impose sanctions if a further claim arises and those recommendations have not been adopted);
- Permitting claims on the grounds of a combination of two relevant protected characteristics.

Protected Characteristics

The relevant protected characteristics are as follows:

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

This means that it is unlawful to discriminate against a person on any of these grounds.

Types of Discrimination

The Act prohibits the following conduct:

- Direct discrimination (i.e. where a person is treated less favourably because of one of the protected characteristics e.g. race or sexual orientation). Note that it is now only possible to objectively justify *direct* discrimination in relation to age;
- Combined discrimination (i.e. discrimination on the grounds of two or more of the protected characteristics e.g. sex and race);
- Indirect discrimination (where an apparently neutral provision, criterion or practice would put a substantially higher proportion of people with a protected characteristic at a particular disadvantage compared with other persons – e.g. by advertising for a “*youthful, energetic assistant*” - unless that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary);
- Harassment (i.e. unwanted conduct related to any protected characteristic with the purpose or effect of violating the dignity of a person and of creating an intimidating, hostile, degrading, humiliating or offensive environment. This can involve physical acts, verbal and non-verbal communications and gestures.);
- Victimisation (i.e. where someone is treated less favourably than others, for example because he or she has taken action against the School claiming discrimination – and note, there is no longer any need for a comparator);
- A failure to comply with a duty to make a reasonable adjustment (in the case of disability).

Note that, from April 2011, positive action during recruitment will become lawful for the first time. This means that employers will be able to choose to hire candidates from under-represented groups, provided that they are as qualified for the role as other applicants.

B: DISCRIMINATION IN THE WORKPLACE

The Equality Act applies to all employers (to include schools!) and employees alike, so everyone needs to be on their guard. Office banter (to include email and website banter) is one particular area where employers need to be particularly careful, given that it may give rise to offence, may be discriminatory and, as such, unlawful. Where possible, therefore, dirty or risqué jokes should not be disseminated around the school, whether verbally or using email.

Why tackle discrimination?

If you do not tackle discrimination, not only does it create a culture of discrimination within the School, but it can lead to an oppressed, distressed and inefficient workforce. It also leaves the employer exposed to the threat of legal action.

How to identify discrimination?

Some acts will be overt (the so called “smoking gun”) but generally things are more subtle. Employers therefore need to be on guard and should look out for latent signs of discrimination, by interfacing with staff and staff groups.

It is important to try and identify - and take steps to eradicate - discrimination from before the employment relationship has even started (i.e. at the recruitment stage) right the way through the employment, all the way to termination. This is important for the following reasons:

- It is good practice;
- There is reputational value in getting it right (and unquantifiable reputational damage if you get it wrong);
- It minimises the risk of litigation;
- Employment Tribunal claims are on the increase;
- Compensation awards are uncapped in discrimination claims;
- There are additional costs in getting it wrong (particularly in terms of legal fees - which are generally not recoverable – and in terms of lost management time);
- It is good for staff morale (conversely, getting it wrong can be very bad for staff morale);
- It avoids adverse publicity (an employment tribunal is a public forum and the media are able to attend and report on cases; accordingly, there is the potential for enormous reputational damage to the employer and its business).

The Equality Act applies from the recruitment stage onwards. As far as identifying discrimination at the recruitment stage is concerned, great care has to be taken with:

- The Job description itself;
- The Skills and experience required;
- Job titles;
- Person specification;

- The Application process (in particular, having a standardised process);
- Making reasonable adjustments in the event of candidates with disabilities;
- Monitoring;
- Selection (in particular, ensuring a fair and consistent selection process), short-listing and interviewing;
- Arrangements for tests, interviews or assessment centres;
- Avoiding potential discriminatory questions.

Pre-employment questions:

An employer can no longer ask about a prospective employee's health and disability issues, save for the purposes of:

- Ascertaining whether the applicant is able to undergo the interview process or whether the employer will need to make reasonable adjustments;
- Ascertaining whether the applicant will be able to perform a particular function that is intrinsic to the work;
- Monitoring diversity;
- Implementing positive action measures in favour of disabled people;
- National Security;
- Where there is an occupational requirement for a disability, which requires the employer to establish whether the employee has the particular impairment.

During Employment

It is important to try and identify discrimination during employment, with reference to:

- Working hours and flexible working;
- Childcare and other caring responsibilities;
- Disabled employees;
- Absences (to include Sickness Absence);
- Dress codes;
- Religion or belief;
- Sex;
- Language and Language skills.

Employers should also be alive to discrimination outside workplace, given that they can be vicariously liable if the acts are deemed to have taken place "in the course of employment". The employer must take all reasonable steps to prevent employees from committing discriminatory acts in the course of employment. Employers can rely on a number of factors to prove this, including:

- they issued and drew to their employees' attention an equal opportunities policy;
- they trained employees in recognising and preventing discrimination;
- they enforced any such policies;
- they provided a proper complaints procedure.

End of Employment/Default Retirement Age

The Government's proposals to abolish the Default Retirement Age will go ahead and the new regulations have been published in draft form under the title "The Employment Equality (Repeal of Retirement Age Provisions) Regulations 2011. They are expected to be passed on 6 April. The effect of these regulations is that retirement as a fair reason for dismissal will be abolished. The natural consequence is that it will lead to a greater uncertainty about when it is possible to retire an individual no matter what his age is.

ACAS have also now published guidelines entitled "Working Without the Default Retirement Age".

The ACAS guidance sets out what is intended by these draft Regulations in particular the transitional provisions. Accordingly during the transitional period retirements that were already known can continue through to completion provided that:-

- a notification of intended retirement was issued by the employer prior to 6 April 2011;
- late notification can be issued between 30 March 2011 and 5 April 2011;
- the date of retirement is required to fall before 1 October 2011;
- the default retirement age procedure currently set out in the Employment Equality (Age) Regulations 2006 is followed correctly;
- the other requirements of the former default retirement age procedures are met. In other words a person of 65 or the employee has reached the employer's normal retirement age if it is higher than 65;

- retirements using the default retirement age will cease completely on 1 October 2011;
- the provision allowing (2 weeks) short notice of retirement will also be repealed on 6 April so that such short notice notifications which are currently allowed under the Employment Equality (Age) Regulations will not be permitted after 5 April 2011.

ACAS have also coined in their guidance notes the expression Employer Justified Retirement Age (EJRA). This effectively provides that employees can be retired where the decision to do so can be objectively justified. Objective justification will be difficult to demonstrate albeit it may be able to be justified under health and safety reasons or workforce planning. The ACAS guidance itself is not particularly forthcoming in advising employers how to deal with pending retirement other than to hold workplace discussions with employees. The inference is that it will be necessary to deal with issues arising with older employees as if they were similar issues as with employees of any age other than where it can be shown that retirement is necessary and can be objectively justified.

It is therefore important for Employers to review their workforce well before 5 April 2011 to make sure that no one falls through the net. In particular, consideration should be given to employees who are or will attain the age of 65 before 1 October 2011. Where Employers do not wish to retire such an employee at that moment in time but may do later there is a good case for serving the maximum length of notice – 12 months – to allow the employer flexibility. Again where the Employer has a normal retirement age of less than 65 the position needs to be considered carefully with a view to ascertaining whether it would be possible to serve a notice of intended retirement.

The ACAS Guidelines also give suggestions as to what the workplace discussions should involve. They include the Employer's plans, the employee's past performance and the employee's aims and aspirations for the future. Nevertheless it is true to say that those guidelines do not get to the problem facing employers namely what does the employer do if it wishes to retire an employee and that employee does not want to retire after 30 September. Notwithstanding those problems at the very least steps should be taken now which steps are identified under Managing Discrimination Allegations and Claims set out below together with the checklist. In addition an employer should put on paper:-

1. their preferred retirement age if they have one, and
2. identify whether workforce planning militates in favour of having an EJRA, and
3. liaise with employee's representatives to see whether agreement can be reached on an EJRA, and

4. identify what evidence there is available to justify the chosen date by carrying out an audit of the workforce ages.
5. Completely separately see whether there is any positive action that can be followed to balance the age profile of the workforce such as in recruitment and promotion.

How to manage discrimination allegations

Discrimination Allegations should be managed by:

- Creating proper paper trails;
- Maintaining records;
- Informal resolution;
- Grievances/disciplinary;
- The Duty to make adjustments.

How to manage discrimination claims

Discrimination Claims should be managed with reference to:

- Discrimination Questionnaire time limits (8 weeks) and gathering information.

If Tribunal claims follow, they should be managed with reference to:

- Time limits;
- Witnesses;
- Case preparation;
- Judicial Mediation - is it appropriate?
- Settlement considerations.

Checklist – tackling discrimination in the workplace

- Revisit the application and recruitment process;
- Review policies and procedures;
- Roll out comprehensive training to staff;
- Carry out an Equality Act Audit;
- Ensure that the necessary paper trails are in place;
- Monitor future developments.

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Confidentiality in schools: the Great Tey Dinner Lady case

The case which has been reported widely in the media as concerning a “dinner lady” who worked and was dismissed from her employment at Great Tey Primary School in Great Tey, near Colchester, Essex, in fact concerned a lady who worked as a mid-day assistant. She assisted in the supervision of the children of the school at lunchtimes: she did not assist in the preparation of meals. She was dismissed for two things: (1) breaching confidentiality and (2) by speaking to the local newspaper bringing the school into disrepute. Unfortunately, the reality of the situation was not reflected in the media reports of the case.

The mid-day assistant's name was Mrs Carol Hill. The Great Tey Primary School had at the time a total of about 70 pupils. It was a maintained (voluntary controlled) church school, the employer of the staff of which was the local education authority, Essex County Council (“ECC”). During the lunchtime of 24 June 2009, a pupil approached Mrs Hill and said that Chloe, a pupil at the school, had been tied to the fence around the playing field and whipped with skipping rope. Mrs Hill went up to the fence and saw Chloe tied with a skipping rope to it, and 4 other pupils in the vicinity. Two had skipping ropes in their hands, and two were acting as look-outs. Mrs Hill untied Chloe and brought her to the school building, where Chloe was seen by a first-aider (a classroom assistant), who applied cold compresses to Chloe's arm and leg, around which the skipping rope had been tied. All four boys involved were brought to the head teacher, Mrs Crabb. By now it was the end of lunchtime. Mrs Hill went home, having finished her duties for the day.

Mrs Crabb spoke to all of the children involved and discovered that they had been playing a game of prisoners and guards. Guards of course have dogs, and dogs are tied up and whipped (so the children said). Chloe was the dog. Mrs Crabb, who was herself a trained first-aider, saw that Chloe's arm and leg were now fine (the skin had not been broken), and let Chloe go to her lesson. Chloe skipped off.

The first aid book was completed in respect of the incident with an entry which was in these terms: “Chloe had been tied up and then hit with a skipping rope - red marks on right leg and right wrist”. On an “Accident Notification” form used by the school only for serious injuries (and therefore used unusually here to communicate a minor injury), the first-aider wrote this: “You may wish to know that Chloe had a minor accident today. She was hurt on the right leg and right wrist with a skipping rope at lunchtime.” In addition, Mrs Crabb wrote this on the form:

“Mrs David, Chloe was hurt by some other children (she will tell you I am sure) so to reassure you that they have all missed part of their lunchtime today and their parents have been informed.”

After picking Chloe up from school, Mrs David asked Chloe what had happened, and Chloe told her mother the whole story. Mrs Hill, in the meantime, saw Chloe and her mother that evening, at Beavers. Mrs Hill, wanting thanks, spoke to Mrs David, asking how Chloe was. Mrs David said nothing in reply, at which Mrs Hill launched into a description of what she had seen, implying that she had saved Chloe from bullying. Mrs Hill's later justification for doing so was that she thought that Mrs Crabb must have covered up the matter, seeking, as it was later asserted in the newspapers and other media coverage, to hide the extent of bullying at the school from a parent. Mrs Hill later claimed that speaking to Chloe's mother in this way was not a breach of confidence, since she was only telling the mother of a little girl what had happened to the little girl.

In fact, as one would expect, there was a clear protocol for the feeding of information to parents about their children. If a member of staff was concerned about a child protection matter, then the member of staff was required to approach the head teacher first, so that the matter could be dealt with by the head teacher. Mrs Hill was aware of this protocol.

Subsequently, over the weekend, Chloe's father persuaded Mrs Hill to write a statement about the incident, supposedly to give to the police. On the Monday, the police saw Mrs Crabb and concluded that no police action was necessary: that it was a school matter which had been dealt with sufficiently at school. The police did not approach Mrs Hill for a statement. Mrs Hill, however, on the following day gave all of the governors a copy of the statement which she had written for Mr David. Mrs Crabb, by now seriously concerned, asked ECC's Human Resources team for advice. The advice was to suspend Mrs Hill. A day or so later Mrs Hill was suspended by Mrs Crabb. Less than an hour later, Mrs Hill had telephoned the local press, saying that she had been suspended because of something that had happened to a child, and inviting the newspaper to contact Chloe's parents. The newspaper did the latter, and came back to Mrs Hill for corroboration. She provided it. The story was then published and it was soon picked up by the national and international media. A hate campaign was soon after waged against the school in all sorts of ways including by email, mail, and telephone calls.

Mrs Hill was subsequently dismissed for misconduct. Telling Chloe's parents about the matter was a breach of confidence, said the school, but she would not have been dismissed if that had been her only misconduct. She had then contacted the media and that was in the circumstances the matter for which she was dismissed.

Mrs Hill claimed that she had been dismissed for whistleblowing and in any event unfairly. She claimed too that her right to freedom of speech, guaranteed by Article 10 of the European Convention on Human Rights, had been breached. The school defended the Article 10 claim on the basis that there had been several breaches of

confidentiality, to which the Article 10 right was subject. The school also claimed that Mrs Hill could not in the circumstances rely on the whistleblowing provisions in the Employment Rights Act 1996, in part because she had acted for personal gain in approaching the press: namely, she wanted to obtain public support for her stance.

The claim of unfair dismissal was the only part of the claim which succeeded. It did so on the (dubious) basis that the school's governing body was so unable to be impartial that it should have entered into a formal collaboration (under a statutory instrument) with the governing body of another school so that the governors deciding whether Mrs Hill should be dismissed were impartial. The fact that no such governor living in the region could have been unaware of the circumstances was not taken into account by the employment tribunal in making that decision. Also, it appears that the range of reasonable responses of a reasonable employer test was not applied by the tribunal in this regard.

Thankfully, however, the tribunal rejected the whistleblowing claim, in part because it was decided that

Mrs Hill had acted out of personal gain in approaching the media. In addition, the Article 10 claim was rejected, on the basis that Mrs Hill had indeed breached confidentiality in telling Chloe's parents (and others) about the lunchtime events of 24 June 2009. This was on the basis that the duty of confidentiality in a school is owed not just to an individual child but to all children, and that there were in the circumstances four other children to whom a duty of confidence was owed. By speaking about Chloe's situation on 24 June, Mrs Hill necessarily spoke about the acts of the four boys involved. The tribunal accepted that the reason for the imposition of a duty of confidentiality in relation to school children is that there is a need to control the flow of information to parents, in part to minimise the risk of parental feelings being inflamed, as, in fact, they were here.

So, some good may have come of the case and the publicity surrounding it.

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