

Equality and Employment Rights Briefing

Update on equality and employment rights

Summary

This briefing updates branches on changes to equality and employment rights

The Enterprise and Regulatory Reform Act (ERRA) amends the Equality Act 2010. The Government has continued to attempt to change the Public Sector Equality Duty.

Fees have been implemented in employment tribunals and the EAT since Monday 29 July 2013. All tribunal claimants and EAT appellants are now be liable to pay a fee or provide an application for fee remission against that fee.

UCU has responded to all Government consultations, worked with the TUC and kept members informed of developments. UCU has also encouraged members to sign petitions and lobby their MP's.

For further information or to comment please contact the Equality and Participation Unit at eqadmin@ucu.org.uk

Introduction

Since the Equality Act became law in 2010, the current Government has chosen not to introduce

- The duty to reduce socio economic equality
- Dual discrimination provisions
- Gender pay gap information to be published by organisations with over 250 employees

It has also repealed

- Third party harassment
- The equality and equal pay questionnaire procedure

It has reviewed the Public Sector Equality Duty with the intention of making it less effective.

It is on course to repeal the powers of Employment Tribunals to make wider recommendations. Access to employment tribunals has been seriously curtailed by the introduction of fees.

The Equality and Human Rights Commission has had major budget cuts and loss of staff. Changes to its remit include privatisation of the advisory service, repeal of 'communities' duty, repeal of conciliation function and replacement of statutory disability committee by strategic advisory group.

a) Third Party harassment

One of the Government's intentions in introducing the Enterprise and Regulatory Reform Act (ERRA) was to ease the burden of regulations on business.

This included repealing the law from October 2013 that makes employers liable for repeated harassment of their staff by people from outside their organisation where inadequate steps have been taken to prevent the harassment from happening.

The repeal could mean that employers may no longer need to take proactive steps to attempt to control the behaviour of, for example, students, external contractors and suppliers.

There is nothing to stop unions from bargaining with employers to prevent third party harassment. These include:

- A workplace policy on harassment including third party harassment
- Notifying third parties about the policy
- Including terms in contracts with third parties
- Monitoring and encouraging incidents of third party harassment
- Including third party harassment in workplace complaints procedures

Also if the reason for the employer's inaction is related to a protected characteristic such as sex or race this could constitute unlawful harassment.

These measures can help avoid more difficult resolution. Staff who find themselves in an unacceptable position with no support from their employer can still claim constructive and unfair dismissal or even bring a personal injury claim if the impact is particularly severe.

Many institutions do have clear policies on harassment, which will support third party harassment regardless of this repeal.

b) Questionnaires on discrimination and equal pay

ERRA repealed in April 2014 the Equality Act's 'questionnaire procedure'. This procedure enabled people who believe they have been unlawfully discriminated against to seek information and explanations from their employer, if the alleged discriminator does not reply within 8 weeks, or if their response is evasive or equivocal, a tribunal or court could take this into account in deciding whether the alleged discrimination did in fact happen. There is also a questionnaire for equal pay.

This was one of the most established procedures, coming from the Sex Discrimination Act 1975. The burden on business argument was the underlying cause but the Government disliked:

- The statutory questionnaire did not limit the number of questions
- Only 8 weeks to respond
- Tribunal has statutory powers to draw inference from employers' response to the questionnaire.

ACAS has developed guidance in which you can still ask questions. Your employer is not under any legal obligation to answer questions. However a tribunal or county sheriff court can still look at whether a responder has answered them as a contributory factor in making the overall decision on the questioner's discrimination claim. A Tribunal or court may also order a responder to provide such information as part of legal proceedings in any event.

You can also if appropriate obtain value information using the Data Protection Act subject access process (where a £10 fee is payable) and also FOIA requests where statistical or other types of information would assist a possible claim.

c) Wider recommendations

The Equality Act extended the power given to Employment Tribunals to recommend that an employer who has lost a discrimination claim take steps to mitigate the discrimination happening again in the future. This means that even if the claimant is no longer employed which is the case in 72% of cases, the tribunal can recommend that it take steps to improve its approach to equality, such as adopting an equal opportunities policy and arranging training for managers and other staff.

The Government would like to repeal this because of employer fears about inappropriate and excessive recommendations. It is now part of the Deregulation Bill which is currently going through Parliament. The next stage is the Committee stage in the House of Lords in late October 2014. As this has been a new power not many recommendations have been made. This point was made by all trade unions who welcomed this provision in the Equality Act.

d) Equal pay audits

The Government is introducing regulations requiring employers to conduct a pay audit if they lose an equal pay case (or a sex discrimination case related to pay). This element of ERRA takes forward election promises made by both coalition partners to introduce compulsory pay audits in some shape or form.

It takes effect from 1st October 2014. The precise details of what an audit will require, how and to whom the results of an audit must be disclosed, and who will be exempt from conducting an audit is set out in regulations.

UCU responded to the consultation arguing for the minimum approach to be based on current EHRC guidance and cover all protected characteristics. Also the EHRC to drive a proactive approach for pay audits including action to deal with persistent pay gaps which UCU has identified in our sectors.

Given that the requirement to carry out a pay audit will only apply as a consequence of losing a relevant tribunal claim, the impact of any change in the law will be limited. Nevertheless, employers may feel under increased pressure to settle equal pay claims that they might otherwise have defended, to avoid the risk of having to carry out a time consuming analysis of pay and jobs across their organisation.

UCU has secured joint national commitments to equal pay audits in both further and higher education. Guidance is available on UCU website.

e) Caste discrimination

Following much debate in the Houses of Parliament, a provision was included within ERRA that will lead to caste discrimination being outlawed. There will have to be an order amending the Equality Act 2010 to bring caste within the definition of race, alongside ethnic and national origins, colour and nationality. There is no fixed date for implementation, and nothing is likely to happen until 2015 at the earliest, to give time

for further consultation. The Government consulted over the summer and the results of the consultation are expected in autumn.

The Equality and Human Rights Commission has published two new research reports which look into issues surrounding caste in Britain.

Both reports are from the Commission's Caste in Britain project which was undertaken at the request of government to help inform the introduction of a new statutory law. This followed the Enterprise and Regulatory Reform Act 2013 requirement that government introduce a statutory prohibition of caste discrimination into British equality law.

Key findings from the report to help inform this process include:

- Caste is a form of identity that is used as a basis for social differentiation, distinct from class, race or religion.
- Discrimination against an individual because of caste, including perception of caste, in education, employment, housing, business or public services cannot be tolerated and should be included in the protections against discrimination and harassment provided in the Equality Act 2010.
- However, the State should not intervene in cultural or social usages which are a matter of private practice. Therefore, in regulating in this area particular regard should be given to individuals' rights under the European Convention on Human Rights.
- The definition of caste should be neither too precise nor too broad. A minimum definition of caste in terms of endogamy (marriage restricted within a specific group) inherited status and social stratification would be useful.
- Businesses and public authorities will need clear and practical information about how the prohibition of caste discrimination will affect them. The Commission's initial view is that the impact will be small given that the straightforward message remains that employers and service providers must not make decisions on the basis of irrelevant considerations such as caste.

The term 'caste' is not legally defined in either the Equality Act 2010 or in ERRA. However, the explanatory notes to the Equality Act say this: 'The term "caste" denotes a hereditary, endogamous (marrying within the group) community associated with a traditional occupation and ranked accordingly on a perceived scale of ritual purity. It is generally (but not exclusively) associated with South Asia, particularly India, and its diaspora. It can encompass the four classes (varnas) of Hindu tradition (the Brahmin,

Kshatriya, Vaishya and Shudra communities); the thousands of regional Hindu, Sikh, Christian, Muslim or other religious groups known as jatis; and groups amongst South Asian Muslims called biradaris. Some jatis regarded as below the varna hierarchy (once termed “untouchable”) are known as Dalit.’

f) Public Sector Equality Duty

The Government has accepted the findings of the independent steering group who examined the operation of the public sector equality duty (PSED), including the Chair’s recommendation that the specific duties that underpin the general duty should be removed or modified.

The steering group’s report states that it found ‘useless bureaucratic practices which do nothing for equality’ and divert resources away from front-line services ‘in far too many cases’. Although the review did not consider the repeal of the PSED, the Government also accepts its conclusion that a full evaluation should be undertaken in 2016, when the duty will have been in force for five years.

The review group issued its report on 6th September. The report does contain recommendations which we will need to be alert to including:

- Guidance must be clearer on the **minimum** requirements placed on public bodies (the report makes clear that EIA’s are seen as a burden on business and public bodies).
- Public bodies should not collect diversity data unless it is necessary for them to do so.

Public bodies must ensure they adopt a proportionate approach to compliance and not seek to ‘gold plate’. UCU will continue to work with the TUC on monitoring developments as it is clear that the intention to dismantle the PSED is still there.

UCU has produced its own guidance on the PSED which branches should continue to use.

g) The Marriage (Same Sex Couples) Act

The Act passed in July 2013, which applies to England and Wales and came into force in April 2014:

- allows same sex couples to marry in civil ceremonies

- allows same sex couples to marry in religious ceremonies, where the religious organisation has 'opted in' to conduct such ceremonies and the minister of religion agrees
- protects those religious organisations and their representatives who don't wish to conduct marriages of same sex couples from successful legal challenge
- enables civil partners to convert their partnership to a marriage, if they wish
- enables married individuals to change their legal gender without having to end their marriage.

The EHRC is developing guidance notes covering: the law, public authorities, religious organisations, schools, workplace and service delivery. These will be available at the end of this year.

The Government is now reviewing same **sex survivor benefits** in pension schemes. Inequality still exists for same sex couples who are only entitled to a limited period of a partner's benefits in the event of death. UCU with other trade unions has met with the Treasury to push for equality in survivor benefits.

The Government is also reviewing the **Civil Partnership Act** mainly to see if civil partnership is still wanted. UCU has argued with the TUC that the partnership should be extended to heterosexual couples rather than be abolished.

h) Children and Families Act 2014 (see UCU briefing - link below)

http://www.ucu.org.uk/media/pdf/j/p/ucu_flexibleworkingbriefing_jan14.pdf

The Children and Families Act 2014 allows shared parental leave for parents with babies due on or after 5 April 2015. Parents will be able to take time off together or in turns. It means that if a woman chooses to bring her maternity leave to an end early the remainder can be converted to flexible parental leave which is open to either parent to take. The qualifying period is 26 weeks employment before the EWC for both parents. The notice period for sharing is very complex and the TUC will be producing guidance this autumn.

- Fathers/partners now have new right to unpaid leave to attend up to two ante natal appointments.
- There are new rights for adoptive parents with statutory adoption pay (SAP) now equal to Statutory Maternity Pay (SMP). Primary adopter also has the right to paid time off to attend up to 5 adoption appointments up to 6.5 hours each.

- There are also new surrogacy rights. Those who have applied or intend to apply for a parental order under s54 of HEFA 2008 qualify for adoption leave and pay.

Unions have been pushing for rights to time off and better protection for breastfeeding mothers at work but ACAS has produced guidance 'guide on accommodating breastfeeding in the workplace'.

The EHRC is currently undertaking research on pregnancy and maternity discrimination which will report at the end of this year. It is the first large scale survey since one undertaken by the Equal Opportunities Commission 10 years ago.

i) Paid Bereavement Leave

ACAS has been asked by BIS to produce guidance on handling bereavement in the workplace. The guidance is a direct result of campaigning and lobbying around the Children and Families Bill for statutory paid bereavement leave. The campaign was instigated by Lucy Herd whose young son died and found that only 3 days leave was given by most employers to cope with bereavement. Bereavement is often badly handled by employers so this guidance is welcomed not only in terms of ensuring adequate paid time off but in supporting and empathising with a bereaved colleague.

ACAS met with unions including UCU to give feedback and comments on the guidance. The guidance will be issued later this year.

j) Employment Tribunal Fees

UNISON legally challenged the decision to introduce tribunal fees but the challenge was dismissed. UNISON will appeal. The union's case was not dismissed because of its merits but because it was 'premature'. Real evidence of individuals kept out of the tribunal by the introduction of fees was needed. The Government was forced to promise to keep the fee regime under close review.

There has been a 79% drop in the number of ET claims in September – December 2013 compared to the previous year.

77% drop in sex discrimination claims

59% fall in pregnancy discrimination claims

58% fall in disability discrimination claims

57% fall in race discrimination claims

75% fall in sex orientation claims

63% fall in age claims

60% fall in religion and belief claims

This significant fall must be evidence enough.

To further cut the 'burdens' on business, Early Reconciliation through ACAS was launched in April 2014. Anyone thinking of making a tribunal claim will need to notify ACAS first with the aim of resolving the dispute before a claim is submitted to a tribunal. No claim can be presented to the tribunal until ACAS has provided a certificate confirming that conciliation has been attempted. ACAS has one month to achieve settlement. This stage is compulsory but either side can refuse to participate without penalty and a certificate will be issued stating settlement was not possible. Tribunal time limits will change as submitting an Early Reconciliation request will 'stop the clock'. Time limits will only commence once ACAS has supplied the certificate.

Further information

www.ucu.org.uk

www.acas.org.uk

www.tuc.gov.uk

www.equalityhumanrights.com