

# Equality Act Briefing Note

## Q & A

## **Equality Act**

### **Briefing and Q&A**

October 2010

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## Q & A

### Introduction

The Equality Act came into force on 1 October 2010. This brings together all previous anti-discrimination legislation under one Act and harmonises the legal tests that apply.

The Act provides protection for those discriminated against because of a protected characteristic.

The protected characteristics are:-

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

While, in the main, the legal tests for bringing claims of discrimination remain the same, the law does improve protection on some grounds. For example, the Act extends the right to claim harassment if a worker has been harassed by a third party (i.e. client or customer).

It also provides protection for those who are victimised because they have sought information from another colleague in order to bring an equal pay claim.

The Act enables those who have a disability to bring a claim of discrimination because of something arising in consequence of their disability.

This briefing addresses some of the common questions which are likely to arise under some of the new provisions. It is not a comprehensive statement of the law and further legal advice should always be sought in individual cases.

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### Part 2: Question & Answer

#### Question 1

I have heard there is a new law which will protect carers from being discrimination against. Is this right?

#### Answer 1

The Equality Act provides protection for those who are discriminated against because of their association with someone who has a protected characteristic. For example, if a man is refused flexible working to look after an elderly parent, when other workers, who do not have to care for an elderly parent, have been allowed to work flexibly, then he may be able to argue that he has been discriminated against because of the protected characteristic of age arising from his association with his elderly parents.

#### Question 2

I am disabled and have an interview coming up. I have heard that new legislation means I cannot be asked questions about my health at interview. Is this correct?

#### Answer 2

Section 60 of the Equality Act provides that an employer may only ask a candidate about health related issues in order to help them decide whether they need to make reasonable adjustments as part of the selection process; to determine whether or not they can carry

out an essential job function; in order to take positive action to assist disabled people and to monitor the diversity of applicants for the job.

The act of asking a question about disability or health (i.e. a prohibited question) is not in itself a form of discrimination. However if the employer relies on answers given in response to a prohibited question this may be good evidence in a discrimination claim. If you are asked a question about your health during a job interview and subsequently find out that you have not been given the post, you should write to the employer and ask for reasons why you were not selected. You can do this by using the questionnaire procedure which is provided for under s.138 of the Equality Act. If it turns out that the reason you were not selected was as a result of an answer to a question in relation to your health, you may be able to argue that you have been discriminated against because of your disability.

However, you cannot pursue a claim of discrimination against your employer simply for being asked a prohibited question. Only the Equality and Human Rights Commission (the EHRC) has the power to investigate the use of prohibited questions and to take action where appropriate

#### Question 3

I am representing a black African care worker in the community. He works on call throughout the night. Over the last six months he has been called out several times by one client and on each

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occasion he is subject to verbal abuse. The last time he was called out, three weeks ago, he was told “*go back to where you come from.*” I lodged a grievance on my member’s behalf but the employer says there is nothing he can do as the abuse is not from one of their employees. Is this right?

### **Answer 3**

Under the Equality Act an employer is now liable for harassment by third parties, i.e. clients or customers, and not just harassment by other employees. However, an employer will only be liable for harassment by third parties if he is aware of at least two previous incidents of harassment and the employer has not taken any reasonable steps to prevent the harassment.

### **Question 4**

I have been asked by a male member if he can bring a claim of harassment because he saw a female colleague being subjected to sexist comments by his boss. He says he found this behaviour offensive and that it created a bad working environment. I am not sure if there is anything he can do?

### **Answer 4**

Under the Equality Act, witnesses to harassment can also bring a claim of harassment provided that they can show that the conduct was related to a protected characteristic, such as sexual harassment, and that the conduct had the purpose or effect of violating his dignity or creating an intimidating, hostile, degrading, humiliating or

offensive environment for him. Your member will also have to be able to satisfy an Employment Tribunal that it was reasonable for him to hold those views.

### **Question 5**

I am representing a member who suffers from a back and neck injury, caused by a road traffic accident two years ago. She works in administration, sitting down all day which aggravates her condition. Following advice from her GP she asked for a new chair but the employer has refused to provide one saying that it does not accept my member has a disability and therefore it does not have to provide one.

### **Answer 5**

The duty on an employer to make a reasonable adjustment applies where a person is disabled as defined in the Equality Act. A person has a disability if they have a physical or mental impairment which has a substantial and long term adverse effect on their ability to carry out normal day to day activities. Whether a person’s disability affects their normal day to day activities will depend on the facts of your member’s case. For acts of discrimination occurring on or after 1<sup>st</sup> October 2010 in order to establish that someone is disabled it is no longer necessary to show that their condition affects one of the eight capacities (e.g. manual dexterity, ability to lift or carry etc). Provided your member can show that they have a disability as defined, then where there is a provision, criterion or practice, which puts a disabled person at a substantial

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disadvantage in comparison to people who are not disabled, the employer is under a duty to take reasonable steps so that the disabled person is not put at a disadvantage.

### **Question 6**

My member has a visual impairment and recently asked for copies of the team meetings in large print. Does the employer have to provide these?

### **Answer 6**

Yes, the employer's obligation to make reasonable adjustments has been extended under the Equality Act. Under s.20, an employer is under a duty to take reasonable steps to provide an auxiliary aid where but for the provision of that aid, the disabled person would be put at a substantial disadvantage in comparison to persons who are not disabled. An auxiliary aid relates to the provision of information in an accessible format. Your member is therefore entitled to be provided with the minutes in a format that is accessible to him, such as large print.

### **Question 7**

I am representing a member who suffers from bi-polar disorder. He is a senior finance officer and has been off sick for the past six months. I have represented him at various welfare meetings and now the employer has called him to a disciplinary hearing. The member has argued on a number of occasions that he could return to work on reduced hours and reduced duties but the employer says it is short staffed and cannot

accommodate reduced hours. How can I prevent my member from being dismissed?

### **Answer 7**

Under section 15 of the Equality Act an employer cannot treat a disabled person unfavourably because of something arising in consequence of their disability where this treatment is not justified.

If the absence is as a consequence of your member's bi-polar disorder, the employer is under an obligation to look at alternative measures. If they do not, your member may succeed in arguing that he has been discriminated against as a consequence of his disability. However, the employer can argue that the reason your member has been dismissed is not because of his disability but because he is unable to work full time. However, an Employment Tribunal will require the employer to provide evidence that it could not accommodate your member working reduced hours. In addition, an Employment Tribunal may find that the employer failed in its obligation to make reasonable adjustments such as working reduced hours and/or having a reduced workload.

### **Question 8**

I am representing a member who is being disciplined for breaking the company's internet policy because she used the intranet during working hours. She says she did this after talking to a colleague about what he earned and to check on the intranet. She thinks she may have a claim for equal pay. Is there

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anything in the Equality Act that will assist my member?

### **Answer 8**

Your member may be able to make a claim for victimisation. Victimisation occurs where an employer subjects a person to a detriment because the person has carried out a protected act. The Equality Act introduced a new protected act. This is where an employee has sought a relevant pay disclosure in order to establish whether or not they would have a claim for equal pay. In order to succeed in a claim for victimisation your member would have to be able to show that she has been disciplined for seeking a relevant pay disclosure and not because she was spending too much time on the intranet. Although she does not need to prove that another employee who used the intranet had not been dismissed, it may be useful to establish the necessary causal connection, if she has evidence that no other employee has been dismissed for searching the intranet.

In addition, s.77 of the Act provides that a contractual term which restricts or prevents a person from disclosing relevant information about the terms of their contract is not enforceable. Therefore if your male colleague has a clause in his contract which prevents him from disclosing pay information where another colleague requests this in order to determine whether or not she has an equal pay claim, then such a clause is unenforceable.

### **Question 9**

My member is currently on maternity leave. However, the employer has carried out a job evaluation exercise which has resulted in everyone receiving pay protection. I am concerned that my member is not receiving this pay protection while she is on maternity leave. Is there anything she can do?

### **Answer 9**

If your member has not received the full benefit of the protected pay, say for example because she returns to work at the end of the pay protection period, she may be able to argue that the employer is in breach of the maternity equality clause which provides that a woman on maternity leave should not be subject to discrimination.

Note that this does not mean that she should receive full pay during maternity leave, only that she has an entitlement to receive the full protection. This means that you can ask for the pay protection period to be extended when she returns to work, so that she obtains the full benefit.

### **Question 10**

Have the time limits for bringing an Employment Tribunal claim under the discrimination legislation changed?

### **Answer 10**

No, the time limit for bringing a claim for discrimination on one of the protected characteristics is three months less one day from the act of discrimination, or,

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where the act is continuing, from the last act.

Where there is a breach of a sex equality clause (equal pay) the time limit for bringing a claim is six months from the end of the contract.

Where there is a TUPE transfer the time limit will run from the date of the transfer.