

The Equality Act 2010 – where are we now?

The Equality Act 2010 (“the Act”) has been heralded by the Equality Human Rights Commission as a “once in a generation chance to rationalise and strengthen... equality legislation”.

This is because discrimination law has become increasingly complex and added to incrementally since its introduction nearly 40 years ago. It is now contained in 116 different Acts, regulations, codes of practice and guidance notes and it has become increasingly difficult to navigate. The Act, however, is intended to harmonise and strengthen the law to support progress in equality.

The main aim of the Act is to ensure a single approach to the law so that all “protected characteristics” (that is age, disability, sex, race, sexual orientation, religion or belief, gender reassignment and pregnancy and maternity) have common concepts. However, it also introduces a number of new concepts.

The main changes can be summarised as follows:

- harmonising the definition of indirect discrimination across all protected characteristics. This has largely been done in the employment field but currently there is no protection on the basis of gender reassignment and for disability;
- standardising the concept of justification in discrimination cases so that employers can defend indirect discrimination and direct age claims if their conduct can be



shown to be a “proportionate means of achieving a legitimate aim”;

- there will be no need for a claimant to have a comparator in victimisation cases. He will simply have to prove that he suffered a “detriment” as a result of undertaking a protected act;
- direct discrimination will cover “associative” and “perceptive” cases by replacing the words “on grounds of” with the word “because”. This means that there will be protection, for example, for those affected by discriminatory conduct where the person is associated to someone with a protected characteristic e.g. a carer for a disabled person as was the case in *Coleman -v- Attridge Law*;
- broadening the definition of harassment to cover “associative” and “perceptive” cases and to make employers liable for harassment by third parties (that is, those who are not employees of the employer);
- permit claims of “combined discrimination” where the basis of the discrimination is the interaction of two protected characteristics for example age

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employment

Spring 2010

Fit notes: How will they work and will they help?

From 6 April 2010 Statements of Fitness for Work, colloquially known as "fit notes", are going to replace sick notes, with the laudable aim that doctors' notes will focus on what employees can do, rather than on what they cannot do.

Under the sick note system, doctors could only advise a patient on whether a particular health condition meant that the patient should or should not work. As a result, many people remained absent from work, even though they could potentially have returned if minor adjustments had been made to their roles. The new fit note system is therefore being introduced with the intention of helping people return to work more quickly.

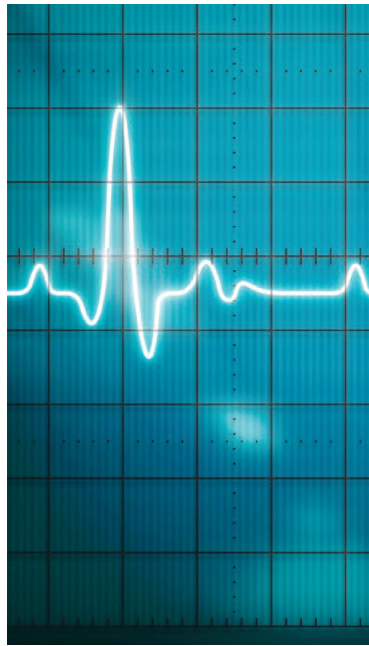
What will fit notes look like?

Fit notes will be in printed form, to enable employers to read GPs' advice without having to decipher GPs' handwriting.

The fit note form will contain tick boxes, which the GP will use to certify that an employee is either "not fit for work" or "may be fit for work taking account of the following advice". The form will then list a number of specific options i.e. "a phased return to work", "amended duties", "altered hours" and "workplace adaptations". There will also be additional space on the form for the GP to make specific comments about the employee's health and the adjustments the GP has suggested.

How long will fit notes last?

Where an employee is certified as not fit for work, the GP will state the period of incapacity and whether or



not the employee will need to be assessed again at the end of that period. This means that provided the employee feels fit to return to work at the end of the certified period, he or she will not need to return to their GP before returning to work.

If the employee is certified as "may be fit for work" the GP will give an indication of how long the suggested adjustments will need to remain in place. When discussing the employee's return to work, the employer should be clear about the period during which any amended duties or support will remain in effect, as it should only be temporary (although there may be a need to make reasonable adjustments permanently in disability cases).

The maximum duration of a "fit note" issued in the first six months of a medical condition will be three months (under the sick note scheme it was six months).

What stays the same?

The form can still be used by employers as evidence as to why an

employee cannot work due to an illness or injury.

A fit note is not required for Statutory Sick Pay purposes until after the seventh calendar day of sickness.

Are the GP recommendations binding?

No. Employers have more information than GPs as to their employees' duties and should be aware of any health and safety concerns that are specific to their employees' roles. A GP's recommendations are therefore not intended to be prescriptive, but to facilitate discussions between employee and employer about what the employee can do and what temporary adjustments the employer could make to enable the employee to return to work. Accordingly, if a GP indicates that an employee "may be fit for work", the employer should still carry out its own risk assessment before allowing an employee to return to work. If an employer is unsure whether or not to implement a GP's suggestions, or how to put those suggestions into practice, it might be useful for employers to seek advice from occupational health advisers.

If it is not possible for an employer to provide the support required for an employee to return to work, the fit note should be used as if the GP had advised "not fit for work". Employers should be particularly careful about not making recommended adjustments if the employee is covered by the Disability Discrimination Act 1995, as the fit note system does not remove the obligation on employers to make reasonable adjustments in disability cases, and the suggestions made on fit notes are likely to be cited as evidence by disgruntled employees in any future litigation.

What should an employer do if it offers to make adjustments, but the employee refuses to return to work?

If, having considered the advice from the GP and the employee's specific role, an employer believes the employee could return to work, but the employee refuses, the employer should discuss the reason for the refusal with the employee. There may be an aspect of the employee's condition or work that the employer has not considered, or for which a slight adjustment could be made in order to gain the employee's agreement.

If it is not possible to reach agreement with the employee, the employer could consult an occupational health adviser for confirmation that the employee could return to work if the proposed adjustments were made. If the occupational health advice supports the employer's view and the employee still refuses to return to work, the employer could consider taking disciplinary action.

What should employers pay if an employee returns to work on reduced hours?

If the employee would be entitled to receive full pay if they did not return to work, they should be paid full pay for returning to work on reduced hours, until their entitlement to company sick pay is exhausted. Otherwise, employees would suffer financially for returning to work and it would be far more difficult for employers to gain their agreement.

Where company sick pay has been exhausted, it is for employers to decide how to approach the issue of payment. It would be prudent for employers only to pay employees

who return to work on reduced hours pro rata for the hours worked, or, if they wish to be generous, to pay full pay initially, but limit the period for which full pay is paid, otherwise employees will have no incentive to return to their full hours. However, employees should not suffer financially from returning to work, or they are unlikely to agree to do so. The pay employees receive for working reduced hours should therefore at least equal the Statutory Sick Pay or other benefits they would otherwise have received had they remained absent from work.

What should employers be doing?

Employers should review their sickness absence policies and consider whether they need to be amended in light of the new regime. For example, it may be prudent to include a policy on payment for reduced hours where company sick pay has been exhausted.

Employers should also ensure that their line managers are trained in working under the new regime, so that a consistent approach is adopted.

Will fit notes work?

The Government hopes that fit notes will reduce sickness absence, both by discouraging short-term absences and enabling people with longer-term absences to return to work more quickly. However, GPs will only have the employees' description of their role to assist them in suggesting adjustments. It therefore remains to be seen whether GPs will be cautious of making recommendations, particularly where employees are themselves not keen to return to work.

Where employees do wish to return to work (in order to maintain their

skills, or because their entitlement to sick pay has been exhausted, for example) fit notes may reduce sickness absence by encouraging employers to consider making adjustments to assist those employees to return. However, given that such cases often occur where sickness absence is long-term, employers may have considered making adjustments under the old system in any case, in accordance with their responsibilities under the Disability Discrimination Act 1995. In addition, fit notes will not assist where employees cannot return to work because they are too ill to undertake any duties, or where their illnesses are infectious. There may therefore be a limited number of cases upon which the new system will have a substantial impact.

The fit note system clearly has the potential to increase conflict between employers and employees regarding sickness absence, by adding a new area for disagreement, i.e. whether or not adjustments should be made in particular cases. Despite this, there are likely to be some benefits for employers, as the new system will put pressure on employees who could return to work if minor adjustments were made, to agree to do so. This is particularly the case in the current economic climate, as employees will be conscious that their sickness absence could be taken into account in any subsequent redundancy exercise.

The Government has stated that the fit note system will be evaluated and that it will publish the results of that evaluation in 2012/13. It will be interesting to see what affect the new system has on sickness absence in practice.

Team Moves – Practicalities

Introduction

Team moves is the phrase often used to refer to two or more employees leaving their employer together to join a competitor. Typically, the departure involves some degree of co-ordinated planning amongst the members of the departing team which are often led by a senior member of the team and/or by the new employer.

A recent, highly publicised, High Court case of *Tullett Prebon -v- BGC [2010] EWHC 484* considered in some detail the legal obligations owed by members of a team in a team move situation. The case received a lot of publicity due in part to some of the more salacious aspects of the case, e.g. lots of expensive dining at some very fine restaurants and blackberries and mobiles being conveniently lost. However, notwithstanding these aspects of the case, the High Court ruling in favour of the former employer will be of assistance to employers of a departing team. It is also a useful reminder of the obligations owed by the senior members of a team who may be actively seeking to recruit their more junior colleagues.

Facts

In February 2009, ten brokers resigned from Tulletts to join BGC. They resigned as a result of a co-ordinated attempt by Mr Verrier, the former COO at Tulletts to recruit them soon after he joined one of Tulletts key competitors, BGC a month previously. Mr Verrier's split from Tulletts had been very acrimonious.

Whilst the brokers were working their notice out, they all resigned immediately claiming constructive dismissal, as a result they said, of an alleged misconduct by Tulletts. All of the constructive dismissal claims

failed. The desk heads were held to be in breach of their employment duties owed to Tulletts as they had assisted in the recruitment of the members of their desks.

Garden leave periods of up to twelve months were upheld in respect of all but one of the brokers and Tulletts' claims for repayment of signing, retention and loyalty bonuses due on resignation in the initial fixed term of employment succeeded. In addition it was found that Mr Lynn the President and Senior Officer in Europe of BGC had conspired with Mr Verrier to enter into an unlawful conspiracy to 'poach the brokers' and to have induced them to breach their employment contracts. A separate hearing is scheduled later this year to consider the level of damages and if press speculation is to be believed, the amount of the damages awarded could be extremely large.

The decision contains a useful summary of the desk heads' obligations (substitute 'manager' in other industries) when approached by a competitor to assist in recruiting both themselves and their colleagues. What can be distilled from the case in respect of desk heads' obligations includes;

- There is nothing wrong in a desk head responding to an approach to recruit. However, if his contract obliges him to report that approach to his employer he is obliged to do so. This is not a restraint of trade.
- Where attempts are made to recruit a desk as a whole, or the greater part of the desk, the desk head's duty in law is to act in the interests of his employer and not that of the desk. His employer's interest is to prevent the recruitment of the desk and

therefore the desk head is obliged to inform his employer that the rival company is seeking to recruit the desk and he will be obliged to follow his employer's instructions to prevent that happening.

- The desk head must not do anything to assist the recruitment of his desk. Whilst information may or may not be confidential, if he provides information which he knows is requested for the purpose of furthering of the recruitment this will be a breach of his duty owed to his employer.

Practical Tips

In light of the above, it will be almost impossible to use a manager to assist in the recruitment of teams without the manager being found guilty of unlawful conduct. For employers therefore seeking to recruit teams practical tips would include:-

1. Appointing headhunters to assist in the recruitment of employees rather than involving other team members.
2. Ensuring that those leaving are recruited separately and individually by the new employer without the assistance of senior members of the moving team.
3. Ensuring so far as possible that senior individuals within the team are unaware of attempts to recruit a colleague or have revealed that to the employer.
4. Senior individuals should not pass on whilst still employed, details of other individuals who should be approached or details of their salaries or other information that would be useful to the competitor to the detriment of the existing employer.
5. Reminding team members of their responsibilities. This should help to ensure that the plan does not

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Team Moves – Practicalities

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- become unlawful and that if a team member does overstep the mark the new employer is not liable for inducing a breach of contract.
6. Be careful when communicating internally and with prospective employees as any written communication with the employees can provide powerful evidence of wrongdoing and be the subject of disclosure orders if proceedings are brought. As was the case with Tulletts, telephone calls, their frequency and the use of IT systems can be monitored and emails and even texts recovered.
 7. Document all steps that have been taken to acquire team members by lawful means e.g. ascertaining individual telephone numbers, contact details, instructions to head hunters etc. This will help

demonstrate that the recruitment was legitimate and dispel any suspicion of wrongdoing.

8. Consider carefully team members' contracts of employment to ensure the new employer can evaluate what steps team members can lawfully take to prepare to work for the new employer without breaching obligations owed to their existing employer.
9. Whilst a senior employer himself may be unable to publicise his departure without potentially being in breach of duties owed to his employer, this duty does not extend to the new employer. Therefore, publicity can be given by the new employer to the fact that the said individual is joining them.

Conversely for an employer facing the possible defection of a team of

employees, the key focus must remain on the retention of the employees. Employers should talk to employees who are suspected to be part of the team, as those employees who owe fiduciary duties to their employer should answer questions truthfully and accurately. Consider detailed analysis of emails, telephone records, electronic diaries and such like if there are grounds for suspicion of breach of duties. Consider also further questioning of employees once resignations have commenced, as to their intentions and their knowledge of others.

Often a successful tool in the armoury of an employer is to gain evidence from employees who are persuaded to remain and who may be more frank in their disclosure of potential wrongdoing by their colleagues who are leaving.

The Equality Act 2010

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and sex. This will only apply to direct discrimination claims;

- introducing an "occupational requirement" defence across the board replacing the current "genuine occupational requirement" (GOR) and "genuine occupational qualifications" (GOQs) defences;
- introducing positive discrimination to allow employers to recruit or promote those from under-represented groups where they have a choice between two or more equally qualified candidates;
- reversing the effects of the House of Lords decision in *London Borough of Lewisham -v- Malcolm* so that employees will have broader cover in disability related discrimination cases;
- prohibiting asking pre-employment health questions apart from in limited circumstances, for example, to establish whether the candidate can do the job or in order to make reasonable adjustments;
- limiting the enforceability of clauses which prevent employees from revealing their pay to colleagues or former colleagues and protecting them against victimisation after having made such a disclosure;
- the introduction of a power to require employers with

250 or more employees (but not certain public authorities) to publish information about the differences in pay between the sexes;

- removing the requirement that a person must be under medical supervision to be protected under the gender reassignment provisions; and
- permitting tribunals to make recommendations in discrimination cases that benefit the wider workforce and not just the claimants.

The Act received Royal Assent shortly prior to the election being called in April and if the Labour Party is re-elected, most of its provisions will come into force in October 2010. It is not clear yet however, if the Conservatives will seek an immediate repeal of the Act should they be elected.

Although the aims of the Act are laudable and will strengthen equality law, it is likely to lead to increased litigation as Claimants will want to explore the intricacies of new concepts such as "combined discrimination" and "associative" claims. From an employer's perspective, there is bound to be further controversy surrounding the extension of positive action and the disclosing of gender pay.

Department News

The Department remains busy; recently acting in a number of whistleblowing cases. In one case we successfully defended on behalf of the employer (a construction company) a whistleblowing claim in which a former employee alleged they were dismissed on the basis of health and safety concerns raised by him. We also acted on behalf of a former Chief Executive of a plc and appeared at an interim relief hearing in the Employment Tribunal as he alleged he had been dismissed as a result of 'blowing the whistle' on the activities of his former colleagues.

The large number of whistleblowing

claims we are dealing with is perhaps not unsurprising, given statistics revealed earlier in March. The Employment Tribunal statistics, which were collated by the charity Public Concern at Work in its report 'Where's whistleblowing now? 10 years of legal protection for whistleblowers', shows that the number of whistleblowing claims has increased from 157 in 1999, to almost 2,000 last year.

Outside of the Employment Tribunals we have acted for a former employee alleging sex discrimination following her return to work from maternity leave. This resulted in a successful

judicial mediation outcome for the client. We also defended a financial services employer in a race discrimination claim, which resulted in a complete withdrawal by the former employee of his claims.

We are also advising on the very topical issue of team moves, which has received much press attention over recent weeks following the High Court's ruling that a former Tullett Prebon employee was guilty of poaching staff for city brokers BGC.

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