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Insight

Equality bill – will it survive?

The Equality Bill received its second reading in the House of Commons this month and has proven to be no less controversial than other recent employment legislation. The Bill goes beyond employment law and aims to improve equality generally. It encompasses all aspects of unlawful discrimination and is extensive, but for employers the main changes are to the definition of what constitutes unlawful discrimination and, more interestingly, transparency in pay provisions.

Timetable

The Bill is expected to reach the House of Lords for approval in Autumn 2009, and subject to their approval, would be put forward for Royal assent in Spring 2010. If it gets through, the earliest commencement date for any provisions would be Autumn 2010. It is anticipated that the Bill will survive, although perhaps with some material changes, notwithstanding the degree of opposition to date.

Main provisions

The Bill has two main purposes: to harmonise discrimination law and to strengthen it. Domestic discrimination legislation has evolved in a piecemeal fashion over the last 40 years, driven by various EU directives. This has generated a great deal of inconsistency in the definitions of unlawful discrimination, which tests employment tribunals should apply to determining the burden of proof in establishing discrimination and the scope of unlawful discrimination in certain circumstances. It is without question that a unified approach would be helpful, although as ever the principle devil is in the detail.

Defining discrimination

The Bill proposes significant changes including

- new forms of disability discrimination;
- a new claim for gender pay discrimination based on hypothetical comparators;
- a widening of the scope of claims for direct discrimination and harassment to cover claims based on “association” and “perception” and to make employers explicitly liable for third party harassment in the workplace; and
- removing the requirement for a comparator in victimisation cases.

Some of these changes simply reflect recent judicial decisions including the House of Lords decision in Lewisham –v- Malcolm (2008) regarding disability discrimination and the ECJ ruling in Coleman –v- EBR Attridge Law LLP and Another. Current law does not expressly prohibit sex, marital status, pregnancy, disability and gender reassignment discrimination based on perceived (rather than actual) status or association (discrimination based on the status of a person with whom the claimant associates). The ECJ ruling in the Coleman case was relied on by the Employment Tribunal in that case to interpret the DDA so as to cover association with a disabled person.

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More controversial aspects: Positive discrimination

Other aspects of the Bill having implications for employers are more controversial. One is the proposal to broaden the scope of permitted positive action to allow employers to choose between two equally qualified candidates by selecting one from an under represented minority. Recent public debate has questioned whether employers ever really receive two equally qualified candidates and therefore whether this revision is likely to have any effect.

While it may be true that employers would never be faced with identical candidates, the argument is that the two candidates might be equally qualified for the position. The proposal gives employers the right, but not an obligation, to select in this event a candidate from an under represented group.

The question, however, of how to determine whether one candidate is as qualified as another needs to be resolved to avoid litigation in this area. Recruitment or promotion decisions are often based on an employee's experience and subjective qualities as much as their qualifications and other strengths and weaknesses. The view expressed that "candidates are never equal" holds some merit. There is a real possibility of employers facing litigation from the disappointed candidate claiming that they were better (as opposed to equally) qualified than the successful candidate (so that the opportunity to favour the under represented group never arose) and putting employers to proof on their decision. Employers therefore may prefer to avoid positive discrimination and the associated risk of claims.

Transparency in pay

Another controversial provision relates to transparency of earnings. The objective of closing the gender pay gap is laudable.

Despite almost 40 years of equal pay legislation, in the UK, women still earn on average 23% less per hour than men. This statistic is not necessarily, however, entirely due to gender discrimination in the workplace.

One proposal in the Bill is for larger employers to report on their gender pay gap; that is voluntary disclosure of average hourly rates for men and women by 2013 by firms employing at least 250 staff.

Further, the Bill seeks to prohibit secrecy clauses which prevent employees discussing pay arrangements with each other.

Commentators are at odds as to whether this will waste more money than ordering equal pay audits on employers of a certain size. What is certain is that non-transparent pay schemes have perpetuated and protected historical gender discrimination in relation to pay. Further, there has been a substantial increase in equal pay claims in recent years, making equal pay the second most popular claim. Recent judicial comment that secrecy of the city bonus culture is pivotal to the operation of these schemes was disapproved in Barton v Investec Henderson Crosthwaite Securities. The bonus system will not collapse by the introduction of transparency in pay.

Transparency in pay will form part of the final Equality Bill, although possibly watered down. The onus will be on allowing (although not obliging) employees to talk to each other about what they are paid. It may still be permissible for an employer to prevent them talking to third parties about their pay. In the financial services sector this ties in neatly with some of the changes the FSA has been proposing to remuneration systems. As well as looking to tie performance based pay to the longer term performance of the business as a whole, increase share based remuneration, increase base salary as a proportion of overall pay and provide for clawback in certain circumstances, the FSA is also promoting a greater degree of transparency in how bonuses are calculated.

One can also see evidence of the move to transparency in the increasing willingness of shareholders to challenge executive remuneration reports. There is growing pressure to extend the current disclosure obligations to cover the remuneration of executives beyond the board, to reflect the fact that often the highest paid executives (and those therefore whose pay would be of most interest to shareholders) are not actually board members.

For guidance as to the dramatic effects of greater transparency, one need look no further than recent events in the House of Commons. Centuries of tradition have been brought to an end, along with the career of the Speaker, simply by the detail of MP expenses being published in the press.

Like it or not, and there are of course some good commercial reasons behind the tradition of secrecy around pay, the Equality Bill is coming and employers (and particularly those operating discretionary bonus arrangements) would be well advised to start planning now on what they are going to do to prepare for the brave new world of transparency.

Contact

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