Equality Act 2010 to be amended to reflect EU discrimination law principles.

On 1 January 2024, the Equality Act 2010 will be amended to reflect certain EU discrimination law principles which would otherwise have been lost as a result of Brexit. In this briefing, we explain the current position and how the legislation will change next year.

What's the background?

A large proportion of the UK's legal framework – including its employment law framework – was underpinned by the law of the European Union, primarily a type of law known as a "directive". EU directives had to be implemented into UK law, either as an Act of Parliament or a statutory instrument. Certain other forms of EU law were directly applicable in the UK without the need for any implementing laws – for example, the rights set out in EU Treaties had what is known as "direct effect". Decisions of the Court of Justice of the European Union were also binding on the UK.

Brexit required changes to be made to this legal framework. Acts of Parliament implementing EU directives remained in place. However, all the relevant statutory instruments were due to automatically fall away once the European Communities Act 1972 was repealed. To avoid legal chaos when Brexit

happened, the Government decided to retain these statutory instruments and transfer them into UK law. It also chose to retain directly applicable EU law and decisions of the Court of Justice of the European Union made on or before 31 December 2020. Together, these laws and decisions were referred to as "Retained EU Law".

However, the Government decided that the time was right to look again at whether Retained EU Law should be kept or repealed, and the Retained EU Law (Revocation and Reform) Act 2023 was passed this year to implement further change. The Act provides that Retained EU Law contained in around 600 statutory instruments and all directly applicable Retained EU Law will expire on 31 December 2023. On top of this, the Act makes a number of other provisions which are aimed at downgrading the continued impact of EU law on UK law, for example, by making it easier for the Court of Appeal and Supreme Court to depart from previous ECJ decisions and domestic decisions that have been influenced by ECJ decisions.

What does this mean for discrimination law in the UK?

UK discrimination law was not affected by the loss of Retained EU Law contained in certain statutory instruments. In fact, as far as employment law is concerned, only a handful of somewhat niche statutory instruments will be lost (you can read more about this in our briefing here). However, the loss of directly applicable rights and case law principles *would* have an impact on discrimination law.

To avoid uncertainty, the Government has taken action to

ensure that existing EU discrimination law rights and principles are reflected in the Equality Act 2010 from 1 January 2024. Therefore, it is the form rather than the substance of the law that will change. Having these principles written down in the Equality Act 2010 should provide clarity to both employers and employees.

However, it is important to remember that EU law principles on discrimination law will continue to develop after 1 January 2024 and those new principles will *not* apply in the UK, nor be reflected in the Equality Act 2010. Therefore, a point will come where UK discrimination law begins to diverge from the position in EU member states.

What changes will be made to the Equality Act 2010?

The table below summarises the changes that will be made to the Equality Act 2010 on 1 January 2024:

Area	EU discrimination law principles to written into the Equality Act 2010
Pregnancy, childbirth and maternity – special treatment (s. 13(6)(b))	Currently, the Equality Act 2010 provides that special treatment may be afforded to women in connection with pregnancy and childbirth and this will not amount to discrimination against men. This will be amended so that special treatment may be afforded to women in connection with pregnancy, childbirth and maternity.

Pregnancy, childbirth and maternity – unfavourable treatment after the protected period (s.18(2))	Currently, the Equality Act 2010 provides that protection from pregnancy and maternity discrimination extends beyond the end of the "protected period" only where the treatment relates to the implementation of a decision taken *during* the protected period. It does not extend to protection from unfavourable treatment which occurs after the protected period, but which is because of the pregnancy or pregnancy-related illness and relates to the protected period. This will be amended so that women are also protected from unfavourable treatment after they return from maternity leave where that treatment is related to the pregnancy or a pregnancy-related illness occurring before their return.

Pregnancy, childbirth and maternity – protection during maternity leave under equivalent schemes (s.18(6) and new 18(6A))	Currently, where a woman who does not have a statutory entitlement to maternity leave but has an entitlement to maternity leave which is equivalent to compulsory, ordinary and/or additional maternity leave arising in law, the protected period during which she is protected from pregnancy and maternity discrimination is limited to two weeks (e.g. an LLP member who is entitled to 52 weeks' maternity leave under the LLP Members' Agreement). This will be amended so that the protected period covers the whole of the equivalent maternity leave period.
Breastfeeding mothers (deletion of s.13(7))	Currently, the Equality Act 2010 does not protect breastfeeding women from less favourable treatment at work (and, in fact, expressly excludes it). This will be amended so that less favourable treatment at work because a woman is breastfeeding may constitute direct sex discrimination.

Indirect discrimination – same disadvantage (new s.19A)	Currently, the Equality Act 2010 states that a claimant wishing to bring an indirect discrimination claim must possess the relevant protected characteristic. This will be amended so that a claimant wishing to bring an indirect discrimination claim does not need to possess the protected characteristic, provided they can show that they suffered the same disadvantage arising from a discriminatory provision, criterion or practice as a person who has the protected characteristic.
Discriminatory statements (new s.60A)	Currently, the Equality Act 2010 does not make provision for discrimination to occur outside an active recruitment process and requires there to be an identifiable victim. This will be amended so that a statement about not wanting to recruit people with certain protected characteristics may give rise to a direct discrimination claim, even if there is no active recruitment process ongoing. The new section also provides that an employer may be vicariously liable for statements made by someone who is not its employee or agent where there are reasonable grounds for the public to believe that they are capable of influencing the making of a recruitment decision by the employer.

Equal pay claims (new s.79(4A) and s.79(4B))	Currently, the Equality Act 2010 allows for comparisons with someone employed by the same or an associated employer either at the same establishment or at a different establishment where common terms apply.This will be amended so that an employee may compare their pay with an employee working for a different employer, where their terms of employment are attributable to a “single source” responsible for setting or continuing the pay inequality and which can restore equal treatment (or where the terms are governed by the same collective agreement).

Definition of "disability" (Schedule 1, new paragraph 5A)	When evaluating "normal day-to-day activities", the Equality Act 2010 definition of disability refers only to work-related activities which are general, common and frequent (e.g. sending emails, interacting with colleagues). This will be amended so that a person's ability to participate fully and effectively in working life on an equal basis with other workers must be considered when deciding what is a "normal day-to-day activity". This will encompass activities which are infrequent (e.g. applying for a job or sitting an examination for promotion) as well as activities which are not common to the majority of jobs, but which are common across different types of employment (e.g. heavy lifting or night working).

The Equality Act 2010 (Amendment) Regulations 2023

BDBF is a law firm based at Bank in the City of London specialising in employment law. If you would like to discuss any issues relating to the content of this article, please contact Principal Knowledge Lawyer Amanda Steadman (amandasteadman@bdbf.co.uk) or your usual BDBF contact.