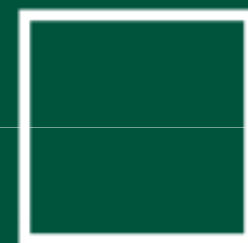


OLD SQUARE  
CHAMBERS





Institute of Employment Rights  
Employment Law Update Conference  
The law and equality: equality legislation  
one year on  
Betsan Criddle  
19 October 2011



## So what's new?

- **Equality Act 2010**
  - No socio-economic duty
  - No protection against dual discrimination
  - Removal of protection against third party harassment?
  - No regulation to introduce equal pay audits?
- **Employment Rights Act 1996**
  - Extension of right to request flexible working for parents of 17 year olds repealed before it even came into force



## So is there any good news?

- Disability
- Maternity and paternity rights
- Equal pay



## Disability and the Equality Act 2010

- **Schedule 1: Disability** - no requirement to establish that an impairment has a substantial and long term adverse effect on a specific capacity (e.g. mobility, manual dexterity)
- **Discrimination arising from disability (s 15)** – reversal of *Malcolm*, discrimination if able to show unfavourable treatment because of something arising in consequence of disability, subject to justification defence.
- **Duty to make adjustments (s 20)** – threshold for duty remains “substantial disadvantage”, but can be triggered because of disadvantage caused by (1) provisions, criteria or practices, (2) physical features of the built environment and (3) auxiliary aids.
  - No replication of s.18 DDA 1995 factors
  - Not a requirement to prove that the adjustment would remove the disadvantage - *Noor v Foreign v Commonwealth Office* [2011] ICR 695



## Disability and the Equality Act 2010

- **Indirect discrimination (s 19)** – what protection does this afford over and above the duty to make reasonable adjustments?
- **Enquiries about disability and health (s 60)** - prohibition (not enforceable by individual employee) against asking questions about health subject to exceptions including
  - Ascertaining whether individual will be able to comply with a requirement to undergo an assessment or whether a duty to make reasonable adjustments is or will be imposed in relation to the assessment
  - Establishing whether individual will be able to carry out a function that is intrinsic to the work concerned



## Maternity/paternity rights and protection

- **Maternity and Parental Leave Regulations 1999**
  - Right for women to take 52 weeks' OML and AML (regulation 4)
- **Paternity and Adoption Leave Regulations 2002**
  - Right of father/partner of mother to take 1-2 weeks' paternity leave within 56 days of birth (regulations 4 and 5)
- **Additional Paternity Leave Regulations 2010**
  - Right to single period of 2-26 weeks of 'transferred' maternity leave in the period between 20 weeks and 12 months of birth (regulation 5)
  - Woman on maternity leave must have returned to work to terminate her entitlement to maternity leave/SMP/MA (regulation 4)



## Maternity/paternity rights and protection

- **Consultation on Modern Workplaces**
  - Government's response (in part) to Parental Leave Directive
  - Proposal to reduce maternity leave to 18 weeks and allow either parent to take remainder of existing maternity leave as parental leave
  - Both parents to be given designated blocks of 4 weeks (unless father opts not to take his share)
  - Prospect of parents being allowed to take leave flexibly e.g. to work part time and take leave part time
  - Proposal for fathers to be allowed unpaid time off to attend two ante-natal appointments
  - Extension of right to request flexible working generally
  - Amending Working Time Regulations 1998 to allow annual leave to be carried over to next leave year
- **Directive on Equal Treatment for Self-Employed/Pregnant Workers'**  
**Directive amendments** – further changes unlikely





## Maternity/paternity rights and protection

- **Direct discrimination and maternity/paternity**
  - Must employers extend the benefit of contractual maternity pay schemes to men on paternity leave?
    - *Eversheds Legal Services Ltd v De Belin* [2011] IRLR 448
  - Does the Equality Act 2010 prohibit associative pregnancy discrimination?
    - *Kulikaoskas v Macduff Shellfish* [2011] ICR 48



## Equal pay and the Equality Act 2010

- **Defence of material factor (s 69)** – removal of the *Armstrong* defence; burden shifts to employer to establish material factor which is not directly/indirectly discriminatory once claimant shows (i) equal work and (ii) the existence of particular disadvantage
- **Hypothetical comparators (s 71)** – insofar as complaint is one of direct discrimination in relation to contractual pay
- **Pay-gagging clauses (s 77)** - employee is not prevented from disclosing information about her pay or seeking to obtain information about a colleague's pay provided that the purpose of doing so is to find out information about any connection between pay and having a protected characteristic.



## Equal pay developments

- Wilkinson/North – no need for purposes of s 1(6) EqPA 1970 (now s 79 EqA 2010) to show a real possibility that comparators would be employed at the same establishment as the claimants
  - But must show that there would not be significant variation to terms and conditions to rely on that comparison
  - Is this the real possibility test in another guise?
- Abdulla/Ashby – is it relevant to take into account why an equal pay claim was not presented in time to an Employment Tribunal in deciding whether to strike out a High Court/county court claim under s 2(3) EqPA 1970 (now s 128 EqA 2010)?
- Prest v Mouchel Business Services Ltd – claimant can maintain claim for arrears six years from date of original claim if comparator added by amendment does same work as comparator originally named

# Contact

London  
10 - 11 Bedford Row  
London WC1R 4BU  
DX 1046 London / Chancery Lane

T +44 (0) 20 7269 0300  
F +44 (0) 20 7405 1387

Bristol  
3 Orchard Court, St Augustines Yard  
Bristol BS1 5DP  
DX 78229 Bristol 1

T +44 (0) 117 930 5100  
F +44 (0) 117 927 3478

E [clerks@oldsquare.co.uk](mailto:clerks@oldsquare.co.uk)  
W [www.oldsquare.co.uk](http://www.oldsquare.co.uk)