Equality at work

Introduction

The law relating to equality at work is found for the most part in the Equality Act 2010 (EqA) which made significant improvements to the previous patchwork of primary and secondary legislation. The 2010 Act is generally fit for purpose, though it suffers from the same shortcomings as other provisions as regards the scope of its application, which needs to extend to a broader category of workers than at present including (i) precarious workers, (ii) platform workers and others in the gig economy, (iii) workers with multiple employers, and (iv) self-employed workers.

Also of enormous significance to workers across the UK is the question of enforcement; there is limited purpose in having even the most advanced equality-related rights if workers cannot enforce them in practice. Other proposals in this book go a long way to address both the issue of covering all workers and that of effective enforcement. Other changes required to the EqA are set out below, as are the implications of Brexit, which has been a source of much comment by equality lawyers, in particular in view of the role played by the EU in this field.

Before they are discussed, however, it is important to note that the Act does not apply to Northern Ireland which, further, has no equivalent in terms of a comprehensive piece of legislation regulating discrimination. It is imperative that this be remedied by the enactment of Northern Ireland's own comprehensive Equality Act, which upgrades the current provisions to the standards set in the 2010 Act and reflects the special circumstances of Northern Ireland in how it addresses issues such as fair employment, police recruitment etc.

Brexit

The urgent need for action to improve equality-related rights at work is even greater now than it was at the time of the publication of the *Manifesto for Labour Law* in 2016. This is because the strides that have been taken over past decades to reduce workplace inequality are significantly under threat as a result of the impending withdrawal of the UK from the EU. The EU has, for

many years, provided the substantive underpinning to much (though not all) of the statutory framework regulating discrimination in work.

At present, EU law is binding on the UK Parliament, and can in some cases be enforced directly in UK courts even where it is in conflict with domestic law. After withdrawal there will be no obstacle to the repeal or undermining by Parliament of the provisions of the Equality Act 2010 (in Britain) and other related legislation (including in Northern Ireland) which provide some measure of protection in relation to equality and non-discrimination in the workplace as elsewhere. Importantly, the EU Charter of Fundamental Rights will cease, on withdrawal from the EU, to be part of domestic law.

Of particular concern in this context are the so-called Henry VIII clauses in the European Union (Withdrawal) Act 2018 ('the Withdrawal Act') which will provide the executive with sweeping powers to amend primary legislation without full Parliamentary scrutiny. The survival of the current equality provisions post-withdrawal is far from assured, many on the right having expressed hostility to provisions such as those (i) guaranteeing job-related protection for pregnant women and parents, and (ii) imposing proactive equality-related duties on public authorities. Other likely targets for a right-wing government unconstrained by EU law would be the remedies available to those who succeed in establishing unlawful discrimination.

One possible counter-balance to the likely attacks on equality law post withdrawal from the EU would have been the inclusion in the European Union (Withdrawal) Act 2018 of a non-regression clause to protect employment rights generally and equality guarantees in particular. But a statutory undertaking has been rejected by the government. In addition, it will be vital to ensure that specific provisions be placed in all trade agreements to make adherence to equality standards a requirement of the treaty. This, however, will be a matter for negotiation with other countries, not all of which will be prepared to accept provisions of this kind.

That said, Brexit may provide an opportunity for public authorities to deploy conditions on public procurement more extensively than at present, so allowing public spending to be harnessed in the interests of equality.

Protected characteristics

Economic disadvantage is a key factor in both the cause and consequence of discrimination. We propose that s. 1 of the EqA should require public authorities 'when making decisions of a strategic nature about how to exercise [their]

functions, [to] have due regard to the desirability of exercising them in a way that is designed to reduce the inequalities of outcome which result from socio-economic disadvantage'. Factors such as race and religion cut across socio-economic class such that some groups defined by these and other characteristics are particularly likely to suffer from socio-economic disadvantage.

This being the case, **socio-economic status** should be added to the list of protected characteristics in the EqA. It has become clear both in the UK and elsewhere that socio-economic disadvantage has proven particularly intractable. It has been much easier for individual litigants to win legal victories requiring (for example) the recognition of same-sex partnerships, gender reassignment or formal sex or race equality than it has been to dismantle the patterns of disadvantage (particularly socio-economic disadvantage) associated with membership of discriminated against groups. The prohibitions on discrimination related to gender and race, in particular, have allowed some indirect challenge to this but the relationships between socio-economic status and life chances are such that any serious commitment to a reduction in inequality must involve the taking of measures to prohibit discrimination on grounds of socio-economic class.

The EqA should also be revised to replace the protected characteristics of 'marriage and civil partnership' and 'gender reassignment' with, respectively, **'family status**' and **gender identity**. The former should be protected symmetrically (at present, only those who are married or in a civil partnership, rather than those who are not, are protected from discrimination on the basis of these characteristics). 'Gender identity' is defined by the Yogyakarta Principles,[46] which were adopted in 2007. These apply to an individual's 'deeply felt internal and individual experience of gender, which may or may not correspond with the sex assigned at birth, including the personal sense of the body (which may involve, if freely chosen, modification of bodily appearance or function by medical, surgical or other means) and other expressions of gender, including dress, speech and mannerism'.

The prohibition of discrimination because of gender identity would be a significant improvement. The current approach to protection against discrimination in relation to gender reassignment maintains a binary approach to gender which is without justification, tied as it is to a model of 'transition' which leaves unprotected those who are non-binary or intersex. It is important, however, to stress that protection from gender identity-related discrimination does not require that individuals be recognised as having any particular gender identity (specifically, male or female) simply by virtue of their claiming that identity. In other words, there is a distinction between prohibiting discrimination against

someone who is biologically male but presents as female, and providing that the individual is entitled to be treated as a woman for all purposes.

Further, it should be recalled that the EqA contains exceptions which permit discrimination to be justified, the nature of the justification being subject to scrutiny by the courts. We see no reason to change this aspect of the law, with the result that the defence of justification should remain. These permitted exceptions may have to be extended, however, if the Gender Recognition Act 2004 were to be amended to facilitate self-identification as female (or male). Exceptions permitting justifiable discrimination are necessary in order to maintain the protection of women-only spaces (real and virtual), the purpose of which is to promote gender equality. The legislative tweaking which might have to follow from amendments to the Gender Recognition Act 2004 is not a reason to deny protection under the EqA to those whose identities challenge traditional notions of gender.

Otherwise on the question of protected characteristics, there are three other matters that need urgently to be addressed:

- *Religious discrimination:* The decision of the Court of Justice of the European Union (CJEU) in *Achbita v G4S*[47] indicated that EU law allows a wide scope for discrimination on grounds of religion or belief by employers. That decision was at odds with the general approach of the domestic courts, and consideration should be given to the amendment of the EqA to make it clear that the desire of an employer such as G4S to have a "neutral" workplace should not permit the prohibition of hijab or other religious dress.
- *Disability:* The UN Convention on the Rights of Persons with Disabilities should be fully implemented in the UK, with consideration being given to the changes this would require to the EqA. We propose that disability should be the subject of separate legislation with a distinct enforcement body within the enforcement machinery we propose below.
- *Caste as an aspect of race*: Both the Coalition (2010-2015) and Conservative (2015-) governments have failed to implement s.9 of the EqA, which since 2013 has required an order to be made to include caste as an aspect of race. This Statutory duty needs to be exercised as a matter of urgency, taking into account the fact that the victims of caste-based discrimination are predominantly Dalits, discrimination against whom is well-documented.[48]

Discrimination and equality

Multiple discrimination

The provision made in the EqA for the regulation of 'dual discrimination', which has not been implemented, should be amended to cover multiple discrimination, i.e. discrimination on more than one ground simultaneously (sometimes referred to as intersectional discrimination). This should cover indirect as well as direct discrimination and be brought into force. The absence of legislation regulating this overlapping discrimination creates real difficulties for those who are disadvantaged by reason of more than one protected characteristic (Muslim women, for example, disabled older women, or gay black men), and who would be served better by the law if they could challenge with precision the combined nature of the discrimination they face.

Gender segregation

The EqA currently prohibits race segregation as a form of discrimination. It needs to be strengthened expressly to regulate gender segregation, and to impose positive duties to reduce segregation on this and other protected characteristics, except and to the extent that such segregation is compatible with the promotion of equality. The creation of single sex spaces may be a positive good where it allows 'safe spaces' in the workplace, facilitates network building among the under-represented or less-powerful in particular contexts, or in the meeting of gender-related needs. This must be addressed with care: gender segregation also has the potential to entrench patterns of unequal power, and to reinforce gender stereotypes. Similar arguments apply to segregation on other grounds.

Harassment-free workplaces

The endemic nature of harassment, in particular sexual harassment, has been a particular focus of public attention in recent months. Such harassment creates toxic working environments which are profoundly damaging to women's working lives, and prevents them reaching their full potential. We recommend the imposition of an obligation on employers to create harassment-free workplaces. Such a duty (extending to the processes of recruitment) will not only assist women workers and women seeking work but will help to eliminate the harassment that women especially suffer as customers, clients, freelancers and co-workers. The current model of legal liability for harassment fails to protect many women from harassment by co-workers not employed by the same employer, from clients and from customers. A duty to create and maintain a harassment-free workplace remedies this deficiency.

Positive measures

The Public Sector Equality Duty should be strengthened. This duty requires public authorities to have 'due regard' in the exercise of their functions to the need to eliminate discrimination, advance equality and foster good relations between persons of different groups defined by reference to the various protected characteristics. At present it is a duty of process only. It should be strengthened to require that public authorities provide a reasoned justification for decisions which further disadvantaged groups defined by reference to protected characteristics, or which otherwise damage rather than advance equality. We also consider that public authorities and other bodies should be required to take positive action to ameliorate disadvantage and reduce inequality.

Positive action

At present there is reasonably generous provision for positive action generally, but very limited scope for such action in relation to recruitment and promotion, in which context employers are limited to allowing a protected characteristic to operate as a 'tie break' factor between equally qualified applicants where this favours the candidate from the under-represented group. The fact that individuals disadvantaged by factors such as ethnicity or sex may not be recognised as 'equal' operates significantly to reduce the potential impact of this permission, and employers are understandably reluctant to risk unlawful action by taking a generous approach in determining that candidates are 'equal' in any particular case.

- It is possible to frame legislation so that an employer avoids the risk of a claim by a more advantaged candidate where it has favoured a disadvantaged candidate who fulfils the qualifications for a position where there is significant under-representation within the relevant workforce.
- Better still, if employers were required to take proportionate positive action in cases where there was significant under-representation, this would counter the legal concerns that might otherwise deter such action, and indeed would provide an incentive to do so.

Achieve or explain

It is worth underlining here that positive action provisions could challenge the disadvantage experienced (for example) by white working-class males as well as by other groups defined by reference to protected characteristics. The obligation need not (in fact should not) be a hard-edged requirement for quotas,

rather a requirement to 'achieve or explain'. This self-explanatory obligation could be imposed by legislation on all employers, though thought needs to be given as to the manner of its implementation, and remedies in the event of failure to achieve or explain. The obligation should also be imposed as a condition for the award of public sector contracts, under public procurement rules (which would need to be adapted to permit this). The obligation could also be imposed by the sectoral collective agreements we have proposed in chapter four above.

Equal pay

Equal pay provision needs to be overhauled to move away from a comparator-based model which requires the claimant to point to a man doing (essentially) similar work. The problem is that while the current model allows 'equal value' claims these are very difficult to establish, particularly given the continuing lack of transparency which characterises much pay. The legislation should be overhauled to allow pay claims based on disparities between women and men working for different employers within supply chains, particularly where such men and women are working in the same workplace and/or on similar projects. Much research has shown that the sectoral collective agreements we propose in imposing industry-wide rates for the job will tend to reduce inequalities of pay between men and women (or people from other disadvantaged groups) doing similar work.

The current requirements for the publication of gender-pay information have succeeded in raising awareness of organisational gender pay gaps, and already in some cases have provoked action by women. These transparency requirements do not, however, apply to enough employers and the information required to be published is not sufficiently detailed. On the one hand, the employer's justification that large gender-pay gaps are the result of the concentration of men at more senior levels of the workforce can provoke questions as to why this is the case in the enterprise in question. On the other hand, it is also the case that the published headline figures do not allow an analysis of the relative pay of men and women who do work, which may be categorised as equivalent, or of the proportionality of pay gaps between male and female jobs.

We propose that the pay transparency should be extended to cover employers having 50 or more employees (rather than the current 250). They should also be enhanced to require fuller pay auditing and to oblige employers to devise and implement plans to eradicate pay inequalities tainted by race, sex and/or disability. We have proposed these as mandatory subjects for sectoral collective bargaining, above. Pay auditing and plans to eradicate pay

inequalities should be subject to oversight by trade union representatives in workplaces in which unions are recognised, otherwise by equality officers in the workplaces in question (though we recognise that this will be a challenging role where there is employer hostility). That oversight should not relieve employers of the duties to carry out these processes. There is much to be learned in this area from Canada, in which mandatory auditing has been in place for decades in several provinces.

It may be unrealistic to expect that this type of process would bear much fruit in industries in which sectoral collective bargaining has not yet been implemented or in workplaces where no union is recognised and in which equality officers may neither have the training nor the resources to hold employers to account. But we believe that the process of pay auditing, certainly if it was coupled with an obligation to publish and to include in company accounts, which would themselves be subject to audit, would increase transparency even in unorganised workplaces. Failure to comply with the reporting and auditing procedures should be discouraged by removing the 'material factor' defence from employers in default. This would make it more difficult for employers to resist equal pay claims in litigation.

To emphasise: the sectoral pay bargaining which is proposed in chapters three and four above would also do a great deal to tackle the gender pay gap; all the evidence is that the gap is greatest where pay determination is individualised. In our view structural changes of the kind proposed (underpinned by law) are potentially as important as other more direct statutory interventions designed to deal with pay equity. In addition to pay determination by sectoral bargaining, we propose above that collective agreements should be equality proofed and measures introduced to enable discriminatory collective agreements to be challenged before and if necessary amended by the Central Arbitration Committee (CAC). In these cases, the composition of the CAC panel should be adapted to include a person nominated by the Equality and Human Rights Commission (EHRC) with special expertise in the area of sex discrimination and equal pay in particular.

Maternity, paternity and related rights

Despite government claims to the contrary, the UK currently lags behind much of Europe as regards the generosity of paid provision for time off attendant on the birth of a child, while discrimination against pregnant women and those returning from childbirth is rife. We consider that employers, unless they have obtained prior authorisation from an external authority, must be prohibited from dismissing women who are pregnant or have

recently returned to work. Even with this protection there is every reason not to incentivise employers to discriminate against women on the basis that they may have children. Accordingly, increasing emphasis has to be placed on encouraging non-birth parents to share birth-related leave.

One of the mechanisms by which this can be achieved is an increase in the period of leave on full pay; because many fathers earn more than mothers, the possibility of fully paid leave is likely to encourage the sharing of such leave. So we propose that:

- In addition to existing paid and unpaid maternity leave, workers should be entitled to full pay for a minimum of one month of paternity leave;
- There should be a period of 2-3 months' flexible parental leave on full pay on a "use it or lose it" basis to be taken by the mother or father or partly by both;
- Such leave could be taken when the child is a little older, possibly after a period of lower-paid leave being taken by the main user of the maternity leave.

The effect of these proposals ought to be to encourage fathers to spend time caring for very young children and to discourage employers from equating childbirth-related leave with women as a disincentive to their employment. Flexible working must be further facilitated by substituting the current entitlement to *request* such work by an obligation on employers to *grant* such requests unless they involve disproportionate burden to the employer and/or other workers. We also propose an increase in the limitation period for bringing a claim connected with pregnancy, the current three-month limitation period is a barrier to the effective realisation of rights which has been recognised by the Justice Committee and the Fawcett Society among others.[49]

Workers should be free to bring a pregnancy-related claim at any time up to six months from the time of the alleged event.

Enforcement

Here we foreshadow the proposals in the chapter on enforcement. Successive governments have drawn the teeth of the EqA by scrapping pre-claim

questionnaires,[50] and the power of tribunals to make recommendations extending beyond the individual claimant.[51] The right to serve such questionnaires had proved to be a useful means of obtaining preliminary information in an area where evidence is notoriously hard to find. The power of tribunals to make general recommendations was also a useful and beneficial power (for example, that an employer trains its employees in general on equal opportunities). These changes need to be reversed.

More fundamentally, the almost exclusive reliance of the EqA on individual enforcement through tribunals is profoundly unsatisfactory. Even with the removal (for the present) of tribunal fees, the obstacles this places in the way of effective enjoyment of legal rights are enormous, and very few workers who litigate discrimination cases remain in their jobs throughout or after the litigation. Further, many equality-related issues including gender unequal pay, the longer-term gender pay gap, endemic sexual harassment and occupational and workplace segregation are collective matters which require collective redress.

For this reason, the introduction of a properly-resourced Labour Inspectorate would have profound implications of great importance in this area, as in others, and its role could be facilitated and reinforced by the imposition of a statutory requirement for equality officers elected from amongst the workforce who would be trained to recognise and assist workers facing unlawful discrimination and harassment, as well as to promote equality within workplaces. Equality officers would not have an enforcement role but could, rather, act as an additional resource through which unions could spread good practice in organised workplaces, and who would at least be entitled to statutory protection against victimisation connected with their role in unorganised workplaces.

The EHRC has been starved of funds as a result of the austerity policies of Conservative led governments since 2010. By 2020 it will have lost 70% of its 2010 funding (from £62M to £17.4M p.a.). This has hugely hindered the organisation's ability to carry out any enforcement role at a time when it has come under increasing pressure to take action in relation to gender pay inequality and sexual harassment, for example. The EHRC has recently called for, and should be granted, powers to require employers to provide information about recruitment practices and workforce demographics where complaints have been made. It should also have the power to issue enforcement notices or impose civil sanctions when companies fail to publish their gender pay gaps.

Conclusion

The impact of equality officers, of the Labour Inspectorate, and of extended collective bargaining needs to be complemented by the imposition of statutory duties on employers to monitor their workforces and to carry out rigorous pay audits (see above). The creation of equal opportunities forums within workplaces would facilitate the discussion of equal pay audit information as well as other equality-related issues. These obligations should run in parallel with proposals for the introduction of the National Joint Councils (NJCs) which we propose in chapter four on sectoral collective bargaining, including a power to refer a provision in a relevant agreement to the CAC because of concerns related to discrimination or inequality by reference to any of the protected characteristics.