

A CLEAR AND UNAMBIGUOUS RIGHT TO RESPECT



A new judicial policy on equality goes beyond the ambit of the judicial oath and addresses the position of judges as colleagues in the workplace. *Mary Stacey* describes its significance.

OCTOBER 2012 may have seemed an inauspicious month – damp, grey, autumn weather after a good late summer, and the success of the Olympics and Paralympics already a distant memory. But it also marked the publication of a trinity of important documents concerning equality and diversity for the judiciary which directly affect all members of the courts and tribunals judiciary in England and Wales, including fee-paid, non-legal officeholders, magistrates and all other lay officeholders, and reserved tribunals’ judiciary operating in Scotland and Northern Ireland.

In line with good practice recommended in the Equality Act 2010 statutory code of practice on employment, the judiciary now has a ‘dignity at work’ statement, a brief guide to the Equality Act 2010 and a letter from both the Lord Chief Justice and Senior President of Tribunals stressing the importance of equal treatment and the non-discrimination principle. Together they form the Equality and Diversity Policy for the Judiciary.

Oath

Inherent in our oath to judge without fear or favour, affection or ill will is an obligation to treat all parties, representatives and witnesses before us equally and fairly that predates modern concepts of discrimination and equality under international human rights instruments, the Equality Act 2010 and its predecessor legislation.

So you may ask, since the judicial oath governs our judicial functions, why do we need an

Equality and Diversity Policy for the Judiciary? I believe its significance is two-fold. First, it has long been recognised that the formulation and publication of such a statement demonstrates the importance of equality both within the organisation and to the outside world. It is more than merely symbolic as it is an authoritative and transparent assertion of the standard expected.

Comprehensive

Secondly, the new documents go boldly beyond the ambit of the judicial oath and address our position outside the court or tribunal room in the workplace: as colleagues – both towards our fellow judges and staff; in the context of management functions and judicial leadership; committee work; and in the area of training and development. It is comprehensive in its scope:

‘The Lord Chief Justice and the Senior President of Tribunals expect all judicial office-holders to treat their colleagues and

members of staff decently and with respect. They are committed to ensuring that the environment in which judicial office-holders and staff work is free from harassment, victimisation and bullying and that everyone is able to work in an atmosphere in which they can develop professionally and use their abilities to their full potential.’

It goes on to say:

‘...judicial office-holders are expected to treat everyone with the same attention, courtesy, consideration and respect, regardless of age, disability, gender

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reassignment, marital or civil partnership status, pregnancy or maternity, race, religion, sex and/or sexual orientation (known collectively as “protected characteristics”).’

The clear, unambiguous language, free from caveat and not hedged by qualification, asserts the entitlement to dignity and respect for all judges and staff which is especially important in the current climate of uncertainty and change. By setting the minimum standard it articulates the expectation of behaviour.

Equality Act

It is important to note that the Equality Act, which has now largely been in force since 2010, provides comprehensive protection from discrimination and that the exemptions, such as

for judicial functions, are likely to be narrowly construed and be limited to core adjudicative duties. The new policies therefore reflect the scope of our statutory rights, duties and obligations under the Act. The companion ‘Brief Guide to the Equality Act’ is particularly helpful as it provides an outline of the law and a number of examples, all drawn from judicial life, to illustrate the principles in practice (see below).

Equal opportunities policies have been commonplace throughout the private, public and voluntary sectors since anti-discrimination legislation was first introduced in the 1970s and it is refreshing that we now have our own, compliant with the current legislation.

Mary Stacey is an employment judge.

A brief guide to the Equality Act 2010

Most of the Equality Act 2010 is now in force. The Act not only harmonises and consolidates previous anti-discrimination legislation, it also strengthens legal rights to equality and increases the range of unlawful acts of discrimination outside the employment field. In addition it places a new set of statutory equality duties on public authorities. The equality duty (s149) requires public authorities, in the exercise of their public functions, to have due regard to eliminate prohibited discrimination, harassment and victimisation, and advance equality of opportunity and foster good relations between different groups of people.

While the ‘judicial function’ is exempt from the prohibition on discrimination in the exercise of public functions, this exemption is likely to be limited to the core, adjudicative function. Ancillary functions, e.g. training, mentoring, conducting appraisals, managerial or committee functions and conduct towards colleagues or court staff will not be exempt.

The guide is an outline of the major provisions within the Act as they may affect the judiciary and is not intended as a definitive statement of the law. It also includes some examples showing how the Act may affect the judiciary.

Protected characteristics

The Act identifies nine protected characteristics, or specific rounds of discrimination which it treats as suspect grounds, or suspect classifications which are intrinsic to an individual’s dignity and autonomy.

The protected characteristics are:

- age
- disability
- gender reassignment
- marital or civil partnership status
- pregnancy and maternity,
- race
- religion
- sex
- sexual orientation

The Equality Act makes it unlawful, in a variety of ways and contexts, to discriminate against someone by reason of any one of these characteristics.

Types of discrimination as defined in the Act

Direct discrimination (s13) occurs if a person is treated less favourably than another person is or would be treated because of their possession of one of the protected characteristics. In general, direct discrimination cannot be justified.

This form of discrimination also extends to cases where someone is perceived to have the relevant characteristic.

e.g. A judge of Iraqi origin, unlike her colleagues, is not invited to the cathedral court service at the start of the legal year 'because she is Muslim'. In fact she is not Muslim, but is perceived as such and treated less favourably because of this perception.

Discrimination by association occurs if a person is treated less favourably, not because of a protected characteristic that she or he personally has but because they are linked or associated with someone who has a protected characteristic.

e.g. A carer for a disabled person is passed over for advancement because they are perceived as having responsibilities which will not allow them to concentrate fully on their role.

Indirect discrimination (s19) occurs if a rule or practice which applies to everyone across the board has the effect of disadvantaging people possessing a particular protected characteristic and the rule or practice cannot be justified as being a proportionate means of achieving a legitimate aim.

e.g. A rule is made that a particular training session will be held between 6pm and 8pm. Although the rule is applied across the judiciary, it places those with caring responsibilities at a particular disadvantage because they need to be at home before 8pm. The training organisers would be required to demonstrate that the indirectly discriminatory timing of this particular session was a proportionate means of achieving the legitimate aim of judicial training on this topic.

Special provisions now govern the different forms of disability discrimination. The Equality Act 2010 recognises that more than formal equality is required to enable disabled people to participate as fully as possible in society. In addition to protection from direct and indirect discrimination, reasonable adjustments may be required to assist a disabled person who, because of his or her disability, is placed at a substantial disadvantage in comparison to others without that disability (s20). These may be, for example, by adaptations or modification to premises, physical features or different arrangements, such as sitting times.

Making such adjustments may involve the judicial office-holder and/or HMCT and, depending upon the circumstances, this will often require the office-holder and the administration to liaise.

Unlawful discrimination may also occur if a disabled person is treated unfavourably because of something arising in consequence of his or her disability, which cannot be shown to be a proportionate means of achieving a legitimate aim (s15).

e.g. A judge is diagnosed as having a visual impairment and requires adapted IT equipment, but is told that funding is not available for a 'non-standard' kit. The Ministry of Justice may be required to make the necessary adaptations to the equipment for the judge.

Pregnancy and maternity-related discrimination occur if a woman is unfavourably treated because of a current or previous pregnancy, or because she has given birth (ss17 and 18).

e.g. A judge is told she will not be authorised to sit in a particular jurisdiction because she is pregnant and will be unable to sit while on maternity leave.

Finally, harassment and victimisation are specific forms of prohibited conduct defined in the Act. Harassment is unwanted conduct related to the protected characteristic of age, disability, gender reassignment, race, religion or belief, sex or sexual orientation, which has the purpose or effect of violating the other person's dignity or creating an unpleasant environment (s26).

e.g. A member of court staff is repeatedly praised for her sweet nature and when she complains about being patronised, it does not cease. This is likely to be unlawful harassment.

Victimisation occurs when one person subjects another person to a detriment because that other person has brought proceedings under the Equality Act 2010, has given evidence or information in connection with any such proceedings, has made an allegation that someone has contravened the Act, or has done any other thing for the purposes of or in connection with the Act (s27).

e.g. A magistrate supports a fellow magistrate who makes a complaint of discrimination against another magistrate. When she makes enquiries about applying to sit in the Youth Court she is told that her application will probably fail. If this is because of her involvement in the previous case it is likely to constitute unlawful victimisation.