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Focus on equality

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Equal to the Equality Bill?

Jo Seery provides an overview of the main changes that are being proposed to the Equality Bill, although further changes may be introduced as the Bill goes through its various parliamentary stages

THE EQUALITY BILL, which the government published earlier this year, is expected to become law in England, Scotland and Wales by the end of 2010. It has two main purposes:

- to simplify and harmonise current discrimination law
- to extend the duties on certain public authorities.

Protected characteristics: Clause 4

The Bill protects applicants, employees, the self-employed and contract workers who have a "protected characteristic" from being subject to less favourable treatment. The characteristics are: sex, gender reassignment, marriage and civil partnership, pregnancy and maternity, race, disability, religion or belief, sexual orientation and age.

For the first time, the Bill also provides protection from direct discrimination on combined grounds to enable workers to bring a claim of "dual discrimination" (Clause 14). For instance, a black woman who is turned down for promotion in favour of a white man could bring dual as well as separate claims for sex and race discrimination. Marriage and civil partnership and pregnancy and maternity are not covered by this provision. Neither are claims for harassment and indirect discrimination.

A person is discriminated against if they are treated less favourably because of a protected characteristic

Direct discrimination: Clause 13

The Bill also introduces a new definition of direct discrimination which states that a person is discriminated against if they are treated less favourably "because of" a protected characteristic than someone without that characteristic.

Tribunals will still need to take into account how others who do not have the protected characteristic have actually been treated (or would be treated), but it is not clear whether the change of wording from "on grounds of" to "because of" will affect the way they decide whether someone has been subjected to less favourable treatment.

Although the Bill is intended to harmonise the different discrimination provisions, employers will still be able to justify direct age discrimination.

Associative direct discrimination

The new definition of direct discrimination also provides protection for people who are discriminated against because they are associated with a person who has a protected characteristic.

For example, this will generally provide protection for those who are discriminated against because they have caring responsibilities for, say, a disabled child. However, this does not give carers an automatic right not to be discriminated against. A carer making a claim of associative discrimination will still have to compare themselves with someone else in the same or similar circumstances. In this instance, someone who has caring responsibilities for a non-disabled child.

Perceived direct discrimination

The definition of direct discrimination is also wide enough to cover situations where someone is discriminated against because they are "perceived" to have a protected characteristic. The most obvious example is when someone is discriminated against because they are perceived to be of a certain age – for instance, too young to be promoted to a senior position. Or it could be because they are perceived to hold a particular religious view.

Indirect discrimination: Clause 19

The Bill harmonises the definition of indirect discrimination bringing indirect race and sex discrimination into line with the other strands. This occurs when an employer applies a provision, criterion or practice (commonly know as the PCP) which puts someone with a protected characteristic (except for pregnancy or maternity) at a particular disadvantage when compared with someone without that ?

Photo: Jess Hurd (reportdigital.co.uk)

Anyone subjected to harassment will not need to prove the reason for the harassment

characteristic and it cannot be justified. The Bill proposes that the concept of indirect discrimination should also apply to disability.

Although the test of indirect discrimination has been harmonised, the government has failed to use the opportunity to bring the test of objective justification into line with EU law. In particular, the Bill does not require employers to show that the means of achieving the legitimate aim are "appropriate and necessary". Instead, employers just have to show that the PCP is a proportionate means of achieving a legitimate aim.

Arguably, the objective justification test is more stringent under European law.

Victimisation: Clause 26

The Bill introduces a new definition of victimisation which says that a person is victimised if they are subjected to a detriment for doing a protected act.

This should make it easier to bring a claim because tribunals will no longer have to consider how someone who had not done a protected act would have been treated.

Harassment: Clause 25

The new definition of harassment states that a person harasses someone else if they engage in unwanted conduct related to a relevant protected characteristic (pregnancy, maternity, marriage and civil partnerships are excluded), which has the purpose or effect of violating that person's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for them.

This means that anyone subjected to harassment will not need to prove the reason for the harassment. It also means that anyone who witnesses harassment and anyone harassed because of their association with a person who has a protected characteristic (for example because their partner is disabled or their child is gay) will be protected.

That is, as long as they can show that their dignity has been violated or that it creates an offensive environment etc.

Tribunals will also have to take into account the person's perception as well as the circumstances of the case and whether it is reasonable for the conduct to have the effect it does.

Clause 38 extends the controversial provisions of protection from harassment by a third party that apply to claims of sex harassment and harassment related to other protected characteristics (with the exception of pregnancy, maternity, marriage and civil partnerships). Under these provisions, employers are not liable unless they know that the harassment by the third party occurred on at least two other occasions. This means that an employee who complains of being subject to racist abuse by a client on one occasion, for example, will still be without protection.

Pregnancy: Clause 18

The proposal set out in the Bill that a woman would have to show that she had been treated less favorably "than was reasonable" on grounds of pregnancy or maternity, has now been amended so that a pregnant woman, or a woman on maternity leave, just has to show that she had been treated unfavourably because of her pregnancy or illness suffered as a result of it.

However, as with the current legislation, this protection will only apply during the protected period (that is, from pregnancy until she returns from maternity leave) and those who suffer a pregnancy-related illness following their return to work, such as in the case of those who have post-natal depression, will still not be protected.

Public authority duties: Clauses 1 and 145

The general public sector statutory duty to promote equality of opportunity and have due regard to the need to eliminate unlawful discrimination on the grounds of sex, race and disability has been extended to apply to religion or belief, sexual orientation and age. Clause 1 also introduces a new duty on public authorities to consider the socio-economic disadvantages of those with a particular characteristic when taking strategic decisions in the exercise of their functions.

Positive action: Clause 155

The Bill introduces provisions allowing employers to positively discriminate in recruitment and promotion in favour of anyone from an under-represented group. However, the effect of these provisions is likely to be very limited because they will only apply when an employer reasonably thinks that someone with a protected characteristic suffers a disadvantage or whose participation in the workforce is disproportionately low.

Furthermore, employers can only choose an under-represented candidate if they are "as qualified" (which is not defined) as the other candidate and they do not have a policy of treating those with a protected characteristic more favourably in recruitment and promotion. There is, though, no sanction against employers who do not select an under-represented group even when they may be "as qualified", as the provision is entirely voluntary.

Remedy: Clause 120

New provisions under the Bill will allow tribunals to make recommendations that would apply to the workforce as a whole (as opposed to an individual employee), such as a recommendation that all managers are given race awareness training. However, as there is no sanction against employers who fail to comply with such a recommendation, this is again unlikely to have much effect.

A woman has to show that she has been treated unfavourably because of her pregnancy

Photo: Jess Hurd/reportdigital.co.uk

Protecting the disabled

Rakesh Patel provides an overview of the changes the government proposes to make to disability discrimination in the employment field

Photo: Howard Davies/reportdigital.co.uk

THE EQUALITY BILL introduced the concept of eight different protected characteristics: sex, gender reassignment, marriage and civil partnership, pregnancy and maternity, race, disability, religion or belief, sexual orientation and age.

Already a complicated area of the law, the proposed changes in the Bill to disability discrimination in the employment field are unlikely to do much to resolve those complexities.

Meaning of "disability": Clause 6

The definition of disability in the Bill is more or less the same as the definition in the current legislation, focusing on the "physical or mental impairments" of individuals.

However, the requirement to show that this affects their ability to carry out normal day-to-day activities is no longer dependent on proving that it affects one of eight specified functions: mobility; manual dexterity; physical co-ordination; continence; ability to lift or carry everyday objects; speech, hearing or eyesight; memory or ability to concentrate, learn or understand; or perception of the risk of physical danger.

While this should make it slightly easier to establish that a person has a disability, it is a pity that the government did not take this opportunity to extend protection to a much wider group of disabled people by adopting a more "social" model of disability (as opposed to this very "medical" model).

The social model would have extended protection from discrimination in direct discrimination or disability-related discrimination cases to everyone who has (or has had) an impairment without requiring the effects of that impairment to be "substantial or long-term".

It would also have focused on whether or not the treatment of an individual was justified, or whether it was on the grounds of their impairment, and recognised that it was inequitable to protect some disabled people from discrimination but not others because their impairment was less significant.

Direct discrimination: Clauses 13 and 24

The new definitions of "direct discrimination" and "harassment" are intended to include protection for those who are "associated with" someone who is disabled, or those who are "perceived" to be disabled, as covered in the preceding article.

Discrimination arising from disability: Clause 15

The government has also used the Bill as an opportunity to resolve the difficulties caused by the decision of the House of Lords in **Mayor and Burgesses of the London Borough of Lewisham -v- Malcolm** (see weekly LELR 81).

In this case, the Lords said that the comparator for a disabled person should be a non-disabled person, but one who was in the same circumstances as them.

This overruled previous case law which did not require a disabled person to show they were in the "same or similar circumstances" as a non-disabled person. In other words, the treatment of a disabled person was compared to someone to whom the disability-related reason did not apply.

For example, if a disabled person who had been absent for a year due to sickness was dismissed, the reason for the dismissal would be related to their disability. Under previous case law the disabled person could show less favourable treatment because the comparator was someone to whom the reason did not apply. In other words, someone who has not been absent.

After **Malcolm**, the comparator would have to be someone who was not disabled and who had also been off work with sickness for a year. In that situation it would be unlikely that the non-disabled person would not also be dismissed. That has made cases for disability-related discrimination very difficult to pursue.

The Bill has got round this problem by creating two new heads of discrimination: discrimination arising from disability (an entirely new concept); and indirect discrimination.

Clause 15 of the Bill sets out the new definition of discrimination arising from disability as follows:

"(1) A person (A) discriminates against a disabled person (B) if –

(a) A treats B in a particular way,

(b) because of B's disability, the treatment amounts to a detriment, and

(c) A cannot show that the treatment is a proportionate means of achieving a legitimate aim."

Because there is no need for a comparator under the new definition, the problems raised by **Malcolm** will no longer be an issue. The new definition also says that the discriminator has to know about the disability in order to be liable for discrimination.

However, the new definition has thrown up other issues as it is not clear if it remedies all the problems caused by **Malcolm**.

The wording "because of B's disability" rather than "related to B's disability" (as in the current legislation) may mean the protection is narrower than that available before the **Malcolm** decision. The wording "because of" suggests intent or motive to discriminate, which is not currently required.

Thompsons understands that the government intends to further revise the wording of clause 15 to make sure its intention to remedy the effect of **Malcolm** is successful.

Indirect discrimination: Clause 18

In addition to discrimination arising from disability, the government proposes that the concept of indirect discrimination should also cover disability as a further mechanism to remedy the problems caused by **Malcolm**.

The definition is the same as that found under the other strands of discrimination. In other words, it is indirectly discriminatory for an employer to operate a "provision, criterion or practice" which, on the face of it, seems neutral in relation to disability, but in practice, works to the disadvantage of one (or more) disabled group.

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> The Lords said that the comparator for a disabled person should be a non-disabled person, but one who was in the same circumstances

However, given that definition, it is difficult to see how disability can be treated as a "group" or "class" as the types and degrees of disability are infinite. Even the way in which the same disability affects one individual compared to another will vary.

Justification

The government also proposes to introduce a new "justification" test, so that employers have to meet a higher threshold to justify their actions. For example, if an employer dismisses someone for a reason that relates to the person's disability, they would need to show that their conduct was a "proportionate means of achieving a legitimate aim."

The current "justification" test, whether the employer's reason for less favourable treatment is material to the circumstances and substantial, is quite a low threshold to meet. The justification defence does not apply to direct discrimination. However, the Equality Bill does allow the new defence to be used to justify discrimination arising from disability and indirect discrimination.

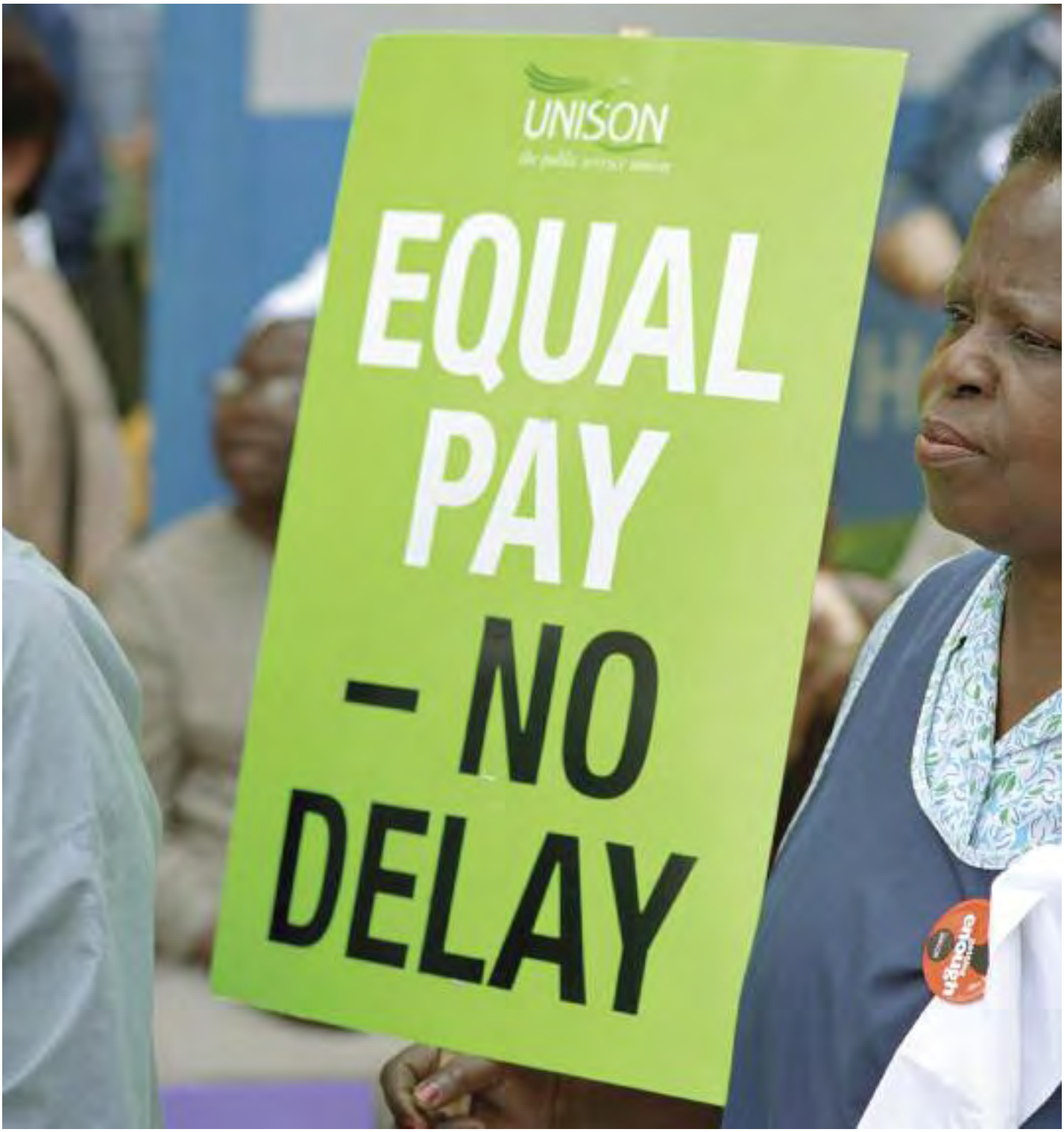
The justification provision does not use the language of binding EU law, which states that an indirectly discriminatory provision, criterion or practice will be prohibited unless it "is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary".

The government has refused to incorporate the term "necessary", which means that the justification formulation will (compared to other discrimination strands) provide weaker protection than envisaged by EU law.

The government has refused to incorporate the term 'necessary', which means the justification formulation will provide weaker protection than envisaged

The Equality Bill and equal pay

Caroline Underhill explains that, should the Bill become law, it will make little difference to the confusion over equal pay



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WHEN THE government announced its intention to introduce a law to simplify current discrimination legislation, the equal pay provisions should have been at the top of its list.

Unfortunately, the changes it has proposed will do little to help claimants who want to pursue a case as, in essence, the Bill maintains the current provisions which are complex and difficult to understand.

Direct discrimination: Clause 66

One of the reasons for this complexity is the requirement for claimants to identify a comparator who works for the same employer at the same establishment or on common terms and conditions. This requirement has historically led to endless legal arguments in tribunals about what constitutes an "establishment" and what are "common terms and conditions". This has not been changed.

There is, however, one new provision in the Bill which proposes that workers should be able to use sex discrimination law (as opposed to equal pay law) to claim equal pay. The new provision can only be used if the following conditions are met:

- the reason for the lower pay is direct sex discrimination
- the usual route of equal pay cannot be used
- the reason that the usual route cannot be used is something other than the justification that the employer put forward for the difference in pay

This should help claimants because the sex discrimination provisions do not require an actual contemporaneous comparator. Tribunals would therefore be able to infer discrimination from the available evidence, even if there was no comparator. For instance, if a tribunal found that the employer recruited women generally on lower rates than men, it could infer direct discrimination on the basis of that evidence alone.

Three gateways

The three "gateways" to an equal pay claim also stay the same. These are: work that is broadly similar; work rated as equal by a valid job evaluation scheme in which the scoring system does not indirectly discriminate on gender grounds and is suitable to be relied on; work that is of equal value when analysed according to factors that measure the demands of, say, skill, effort and decision making.

Defence of material factor: Clause 64

The genuine material factor defence in the Equal Pay Act 1970 has been renamed and is now called "defence of material factor". Although the word "genuine" has disappeared, employers still have to show that the difference in pay is due to a material factor that is not a difference of sex. So it will still have to be genuine and not a sham.

The material factor must also be a difference between the woman's case and the man's. This represents a slight change in wording in the Bill from the original legislation which said that, in like work and work rated as equal cases, it must be a difference but in equal value cases it may be a difference between the man's case and the woman's case. In practice, this was never particularly important.

Take as an example a situation where an employer could obtain productivity improvements from both the man's job and the woman's job, that employer could not then point to a material factor of productivity as the reason for the man receiving a bonus that had not been paid to the woman.

The main change that the Bill has introduced is an express clause allowing employers to defend a difference in pay by either showing that the difference is for a reason other than the person's sex or, where there is indirect sex discrimination, that the reason for the pay difference is a proportionate means of achieving a legitimate aim.

Achieving future pay equality is also expressly stated to be a legitimate aim in the Bill. But what is proportionate? The new wording is an attempt to reflect the complex and sometimes almost incomprehensible case law. That case law is still under challenge. The complexities of this aspect of equal pay law remain.

Pensions: Clauses 62, 63 and127

The Bill now reflects the law created by a case known as the **Preston** litigation under Article 141 of the Treaty of Rome. This gives rights of access to pension schemes that excluded part-time workers. The Bill requires occupational pension schemes to have a "sex equality rule" read into their terms if there is no express provision.

This states that men and woman have to be treated equally to comparable members of the opposite sex in relation to the terms on which they can join the scheme and the terms that apply once they become members.

Under the Bill, employment tribunals have jurisdiction to hear complaints about breaches of the gender equality rule under domestic legislation and Article 141 of the Treaty of Rome. Trustees will also be able to apply to a tribunal to determine their obligations under the scheme. Employers will have the right to be named as a party in such proceedings and make representations.

Maternity equality clause: Clauses 67 to 71

The Bill reflects case law and European law in relation to maternity pay by introducing the concept of a "maternity equality clause". This acts in much the same way as the "sex equality clause" in that it modifies the woman's contract so that her maternity related pay is increased in line with any actual increase in pay, or any increase that she would have been paid had she not been on maternity leave.

As a result, women on maternity leave must receive any increases in pay due to them at the time they would have received them, had they not been on leave and their pay, when they return, must reflect the increases they would have had, had they not been absent.

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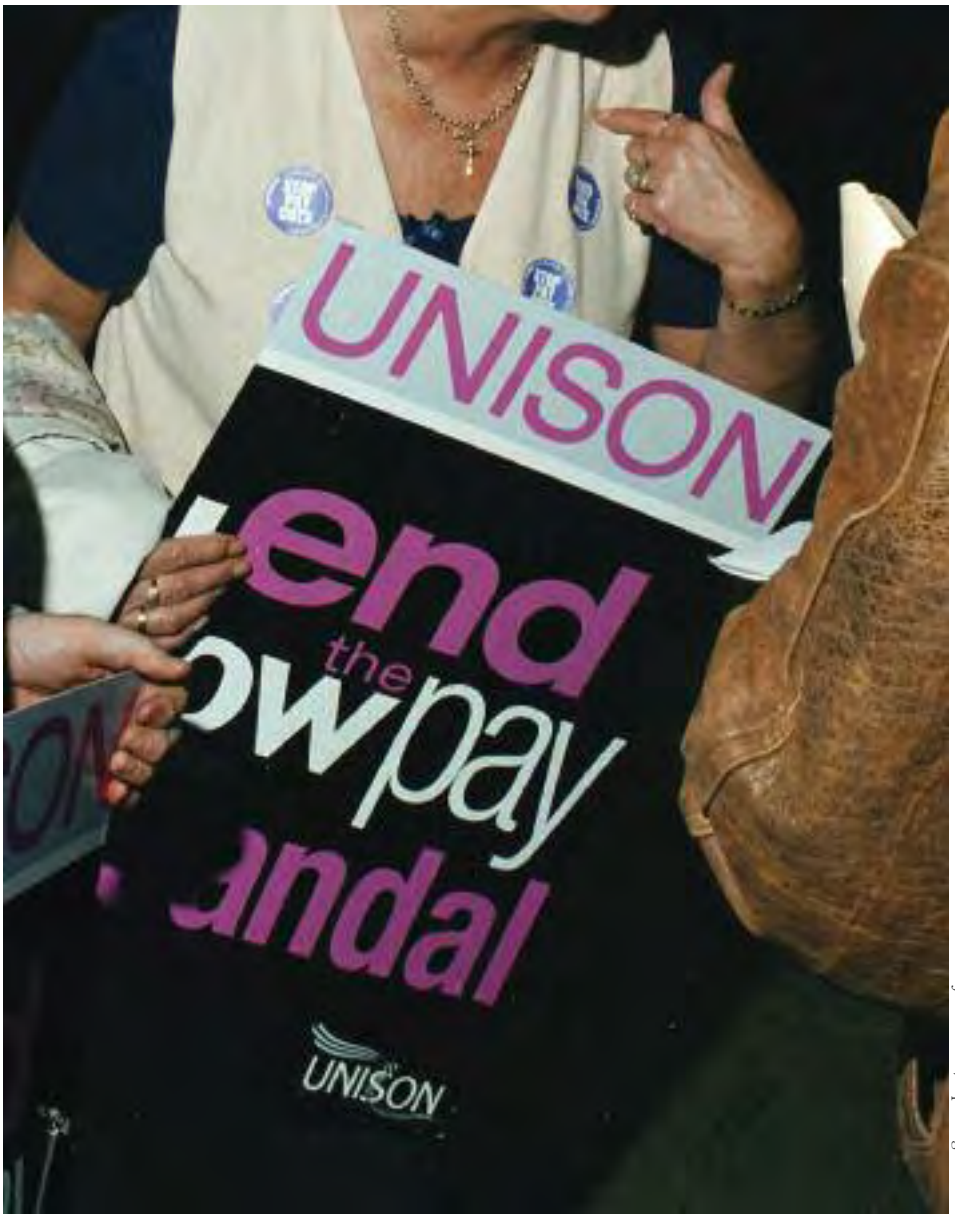
Modernising a law that has been more or less unchanged since 1970 is clearly a 'good thing' and was obviously much needed



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Occupational pension schemes are also deemed to have a maternity equality rule if they do not expressly contain one. This operates so that the scheme treats time when the woman is on maternity leave in the same way as time when she is not. This relates to membership of the scheme, accrual of scheme rights and also the determination of benefits that are payable to her.

This brings the disparate provisions on maternity leave and pensions into one place.

Gagging clause: Clause 72

The Bill introduces new protection for employees who talk about their pay. The aim is to prevent employers covering up unequal pay by penalizing employees who tell each other what they are paid.

Under the Bill, employers will not be able to enforce contract terms that try to stop employees from discussing pay terms with their colleagues. The provisions cover requests for information about a colleague's pay terms as well as receipt of information from colleagues about their pay.

Discussions about pay in the context of discrimination on gender grounds or any of the other protected characteristics (race, disability, sexual orientation, religion and so on) will be treated as a protected act for the purposes of a victimisation claim. This brings new protection against detrimental treatment such as disciplinary action or dismissal as a result of discussions between colleagues about pay terms but only in these specific circumstances.

Gender pay gap information: Clause 73

The Bill gives the power for statutory regulations to be made to require particular employers to publish data relating to men and women's pay for the purposes of establishing the existence or extent of any gender pay gap, once every 12 months. The power only covers employers who employ more than 250 people. Failure to comply could create criminal liability and a fine.

Gender pay gaps are an indicator of pay inequality. We can only hope that this prods employers to take action to deal with the continuing and persistent difference in pay between men and women. It is that action rather than individual litigation even by large numbers that will make the biggest difference in the long run.

Conclusion

Modernising a law that has been more or less unchanged since 1970 (apart from the equal value provisions that were introduced in 1986 and increasing the remedy period from two years to six years in 2002) is clearly a "good thing" and was obviously much needed.

However, the provisions in the Bill fall badly short of what was needed and, in many ways, amount to an opportunity that has been squandered.

LELR aims to give news and views on employment law developments as they affect trade unions and their members.

This publication is not intended as legal advice on particular cases.

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Contributors to this edition:
Rakesh Patel, Jo Seery, Caroline Underhill

Editor: Alison Clarke
Design & production: www.rexclusive.co.uk
Print: www.dsigroup.com/talisman
Front cover photo: Jess Hurd/reportdigital.co.uk