

Coalition promises culture change

Helena Laughrin and Robin Wolfenden review the key employment-related recommendations in the government's Equality Strategy



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On 2 December 2010 the UK coalition government published *The Equality Strategy: Building a Fairer Britain*. The Strategy is designed to encompass more than just new legislation; it also serves the wider aim of promoting equality 'through transparency and behaviour change'. The government intends to work with businesses, local communities, public services and others to promote social mobility, develop a fairer and more flexible labour market, encourage greater participation in public life and change culture and attitudes. A Ministerial Group on Equalities will oversee implementation and report annually on progress.

In a recent speech, the Minister for Equalities, Lynne Featherstone, criticised the last government's approach as 'a damaging one', where:

... bucket loads of regulations were being dumped on businesses already struggling to keep their heads above water to the point where equality measures were seen as a punishment.

Despite these criticisms, many aspects of the Strategy do not differ significantly from the former Labour government's proposed approach, particularly positive action, gender pay reporting and the abolition of the default retirement age.

This article looks at some of the Strategy's key employment-related proposals.

Private sector pay reporting

The Strategy cites a study by the Office of National Statistics showing that, 40 years since the introduction of equal pay legislation, women are

still paid over 12% less than men across a range of sectors (increasing to 22% when part-time workers are included).

The government views making pay transparent as the first step to reducing the gender pay gap. It intends to work with businesses and others to develop a voluntary scheme for gender pay reporting in the private sector. This will be available to all private businesses, but is aimed at those with 150 or more employees. The number of companies releasing information, and the quality of that information, will be reviewed annually.

The voluntary scheme will be kept under review and the government could decide to introduce mandatory gender pay reporting under s78 of the Equality Act 2010 (the Act). S78 has not yet been brought into force, but would allow the government to pass regulations making it compulsory for employers with 250-plus employees to publish gender pay gap information from 2013.

Given the burden of conducting equal pay audits, and the risk that any information disclosed might damage an organisation's reputation or be used against it (for example, by a claimant in a sex discrimination or equal pay claim), there is unlikely to be an enthusiastic response to the introduction of a voluntary reporting scheme. As a result, s78 may well come back into the picture after the government's first review of voluntary disclosures.

For the time being, however, the aim seems to be to avoid burdening companies with further regulation. This will no doubt come as a welcome relief to the many businesses still struggling to recover from the effects of the recession.

Public sector equality duty

In contrast, the government has decided to use the power under s153 of the Act to impose specific equality duties on public sector bodies. Following the close of consultation in November 2010, the government has published the draft Equality Act (Statutory Duties) Regulations 2011, which set out the new specific duties and identify the public bodies to which they will apply. The draft regulations were due to be debated in parliament in late January and are expected to come into force on 6 April 2011.

- Public bodies with 150 or more employees will be required to publish 'sufficient information' on the equality of their workforce by 31 July 2011 (and by 31 December 2011 for schools), and at least annually thereafter. This is expected to include information about: the race, disability, gender and age breakdown, and distribution of their workforce;
- likely sexual orientation and religion or belief representation, provided that no individuals can be identified;
- issues for transsexual staff; and
- the gender pay gap.

The information to be published must include:

- information on the effect of policies and practices on people from the protected groups;
- evidence of the analysis undertaken to establish whether the policies and practices will further (or have furthered) the equality aims in the general equality duty; and
- details of the information used in that analysis and details of the engagement undertaken.

Public bodies falling within the ambit of the Regulations will also be required to publish equality objectives (which are specific and measurable) and details of how they are meeting these objectives. However, they will have an extra

year after the Regulations have come into force before they have to publish this information.

or more candidates of equal merit, to address under-representation in the workforce.

Employers are likely to be wary of taking positive action even when the conditions set out in s159 appear to have been satisfied.

Positive action

The Strategy quotes a number of studies that suggest certain ethnic groups and disabled people continue to be under-represented in the UK workforce. According to the Strategy, some ethnic groups have unemployment rates that are three times higher than white men, and the employment rate of disabled people is far lower than the overall working-age population (48.4% compared to 72.2%).

In response to these statistics, from 6 April 2011, under s159 of the Act, employers will be able to:

... apply voluntary positive action in recruitment and promotion processes when faced with two

Positive action will only be permitted where:

- A is 'as qualified' as B to be recruited or promoted; and
- the employer does not have a policy of treating people who share the protected characteristic more favourably, in connection with recruitment or promotion, than people who do not share it.

Neither quotas nor positive discrimination will be lawful.

The government has published non-statutory guidance on s159 of the Act, which explains how positive action will work and includes some examples

Parental leave and flexible working

The government will consult in early 2011 on a new system of flexible parental leave, under which parents will be able to share leave between them. The proposals focus on creating a flexible system of parental leave rather than enhancing maternity benefits. This is in line with developments at European level (the EU Employment Council recently rejected the European Parliament's proposal to legislate for 20 weeks' maternity leave at full pay).

As a preliminary step towards encouraging shared parenting, the Additional Paternity Leave Regulations 2010 (APL Regulations), which apply to parents of children due on or after 3 April 2011, will remain in force. These allow eligible employees to take a maximum of 26 weeks' additional paternity leave before a child's first birthday where the employee's spouse, civil partner or partner has returned to work with some of their statutory maternity or adoption leave untaken.

This gives rise to the difficult question of whether employers who provide enhanced maternity or adoption pay and benefits should consider offering corresponding pay and benefits to spouses, civil partners or partners during additional paternity leave. The Equality Act 2010 does permit employers to give special treatment to women on account of pregnancy or childbirth (ie enhanced maternity pay). However, refusing to match contractual maternity or adoption pay or benefits for spouses, civil partners or partners will create a clear discrepancy of treatment in parental leave cases and may disincentivise parents from taking advantage of the APL Regulations.

The Equality Strategy also confirms the government's existing proposal to extend the right to request flexible working to all employees. It intends to consult with businesses and the public to develop this proposal during the first quarter of 2011. The government had previously announced that from April 2011 the right would be extended to parents with children under 18.

(although the examples are simplistic and do not illustrate more than the basic principles).

Applying s159 will be legally and practically problematic. It will be difficult for an employer safely to determine that two candidates are of equal merit without risking a claim from the unsuccessful one. Rather unhelpfully, s159 does not define 'as qualified as'. The Explanatory Notes to the Act state that the employer should consider academic qualifications and also subjective matters such as 'suitability, competence and professional performance'.

The government's non-statutory guidance does not cast any further light on this issue and simply suggests that

the conditions set out in s159 appear to have been satisfied.

Default retirement age

Currently, compulsory retirement of employees at the age of 65 is neither discriminatory nor unfair provided an employer follows a mandatory statutory procedure. This 'default' retirement age has come under attack in the UK and EU courts and the government has confirmed that it will be phased out. Industry bodies appear to support the government's proposal. Indeed, many employers already choose to operate without fixed retirement ages.

Following the close of consultation in October 2010, the government has

therefore be faced with the increased legal burden of ensuring that they can objectively justify all retirement decisions to avoid a claim of unlawful age discrimination.

Retirement will no longer be one of the six 'fair reasons' for dismissal under the Employment Rights Act 1996. However, the Acas guidance states that retiring someone where a retirement age is objectively justified may amount to dismissal for 'some other substantial reason'.

Abolishing the default retirement age will also involve removing the current rule that allows employers to refuse to employ an applicant who is aged 64 years and 6 months or more.

The government has introduced an exemption for the provision of insurance benefits (such as death-in-service and private medical insurance) in response to concern about the potential increased cost of providing such benefits indefinitely. The exemption (which is detailed in the Acas guidance) will permit such insurance benefits to be withdrawn from employees aged 65 or over (rising in line with the state pension age). Further details are expected to be issued once the draft legislation has been published.

The government has confirmed that it will not make any legislative changes affecting share schemes; it will be for the employer to determine whether someone is a 'good leaver' or a 'bad leaver' in accordance with scheme rules. The government has also stated that the abolition of the default retirement age will not affect the setting of a 'normal retirement age' or 'normal pension age' for the purposes of occupational pension schemes.

The future

The Strategy purports to set out a 'new approach to tackling inequality' that avoids using legislation as the sole route to achieving equality. It will be interesting to see how the government responds to the ongoing consultations and how its proposals are implemented.

It is clear that additional guidance will be necessary and further legislation seems inevitable. As Lynne Featherstone recognises, the complex causes of workplace inequality in the UK will mean that the government has a 'mountain to climb' if it wishes to achieve real and long-lasting change. ■

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employers should establish a set of criteria against which candidates will be assessed when applying for a job.

These criteria should include factors such as: a candidate's overall ability, competence and professional experience together with any relevant formal or academic qualifications and any other qualities required.

Ultimately, whether two candidates are 'as qualified' as each other will be a question for the tribunal to determine.

There is also uncertainty as to what constitutes a 'policy of treating persons who share the protected characteristic more favourably'; does treating an applicant, who shares the protected characteristic, more favourably on one or two occasions count as a policy? As a result, employers are likely to be wary of taking positive action even when

confirmed that the default retirement age and statutory procedure will be abolished with effect from 1 October 2011. The Acas guidance for employers, 'Working without the default retirement age' outlines the changes and provides advice on how employers and employees can manage both the transition stages and new procedures. Draft regulations are expected shortly.

Employers will be unable to issue notice of retirement to employees in reliance on the default retirement age after 6 April 2011. After 1 October 2011, employers will only be able to operate a compulsory retirement policy if it can be objectively justified (for example in certain limited cases where retirement is an essential part of succession planning or necessary for health and safety reasons). Employers will

Reference point

The government's 'Equality Strategy – Building a Fairer Britain' is available at: http://www.legalease.co.uk/equality_strategy

Guidance on the public sector equality duty can be downloaded from: http://www.legalease.co.uk/public_sector_equality

To read Working without a default retirement age, go to: http://www.legalease.co.uk/guidance_employers