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Enigmas of the Equality Act 2010—“Three uneasy pieces”

Pat Feast¹ and James Hand^{1*}

Abstract: The Equality Act 2010 was designed to simplify as well as unify British discrimination law. While there has been some significant unification, there are a number of areas where it has fallen short with regard to simplification, indeed it has introduced or cemented complexity and confusion. This article examines three such areas concerning two of the protected characteristics (pregnancy/maternity and gender reassignment) and one of the claims (victimisation) within the Equality Act 2010.

Subjects: Employment Law; English Law; Human Rights Law & Civil Liberties

Keywords: discrimination; Equality Act 2010; victimisation; gender reassignment; pregnancy/maternity discrimination

1. Introduction

The Equality Act 2010 had a long gestation period. It was designed primarily to simplify, and strengthen in places, the diverse discrimination law statute book that had emerged over the past 40 years and was the product of independent and governmental reviews in 2000, 2003 and 2007¹ during which time the statute book grew evermore complex. While the Equality Act 2010 has unified much of the legislation—and strengthened it in places—it has also introduced or cemented complexity and confusion. It is over twice the length of the draft Bill sponsored by Lord Lester in 2003 (Hepple, 2011, p. 6) and while it was subject to many hours of scrutiny and proposed amendments (Ibid., p. 5) it has nevertheless been criticised for having many unscrutinised provisions.² This article will consider three areas where further consideration may have clarified the law, better meeting the aim of making convoluted discrimination law more accessible and easier to understand for the ordinary user of the Act.³

ABOUT THE AUTHORS

Pat Feast researches into aspects of discrimination law and clinical legal education. Her publications include “Unification, simplification, amplification? An analysis of aspects of the British Equality Act 2010” 2012 CLB 509 with J. Hand and B. Davis.

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PUBLIC INTEREST STATEMENT

British discrimination law grew in a piecemeal fashion from 1970s when the Sex Discrimination Act 1975 and the Equal Pay Act 1970 were introduced. By 2006 there were nine major pieces of legislation, often using inconsistent words. The Equality Act 2010 was designed to unify and simplify (and to a limited extent strengthen) these disparate pieces creating single Act to regulate discrimination. While it has clearly unified the law, it has not necessarily simplified it and in some cases the Act has created scope for more confusion. This article looks at three areas in particular, namely discrimination because of pregnancy/maternity, discrimination because of gender reassignment and the specific claim of victimisation.

The Equality Act 2010 prohibits discrimination and harassment, related to specific characteristics, during certain activities. It also prohibits victimisation (unfavourable treatment because of, broadly speaking, something done related to a potential claim) and promotes equality through limited positive duties. The three areas considered in this article comprise two of the nine protected characteristics within the Act (gender reassignment and pregnancy/maternity) and the claim of victimisation.

2. The peculiar status of pregnancy/maternity

The Act, as it currently stands, starts with a clear list of protected characteristics in section 4 (the first three sections containing a weak socio-economic duty which has not been brought into force), simply declaring “The following characteristics are protected characteristics—age; disability; gender reassignment; marriage and civil partnership; pregnancy and maternity; race; religion or belief; sex; sexual orientation”. The various definitions and prohibitions then outlaw discrimination or harassment relating to those characteristics or to a “relevant” subset of them. Thus harassment per se treats only seven of the protected characteristics as relevant (excluding pregnancy/maternity and marriage/civil partnership) but when applied, i.e. to the disposal or management of premises a further three characteristics (age, religion or belief and sexual orientation) cease to be relevant protected characteristics.⁴ There are also certain characteristic-specific provisions relating to disability⁵, gender-reassignment⁶ and pregnancy/maternity.⁷

Pregnancy/Maternity is the one protected characteristic excluded from the list of relevant protected characteristics for indirect discrimination,⁸ one of two excluded from the list of relevant protected characteristics for harassment,⁹ and the only protected characteristic not further defined in sections 5–12 of the Act. The exclusion from indirect discrimination has been described by McColgan as an “oddy” although she noted that circumstances which may otherwise have given rise to a claim “may of course however also amount to indirect sex discrimination” (McColgan, 2010). Indeed, in *Commissioner of the Metropolitan Police v Keohane* Mr Justice Langstaff stated “if an allegation arises that there has been indirect discrimination in relation to pregnancy, it cannot be asserted as such. If it is discrimination at all it is sex discrimination, and must fit the criteria for such a claim”.¹⁰ In that case, which concerned the removal of dogs from a police dog-handler during her pregnancy and subsequent non-return of them, the Employment Appeal Tribunal were able to find both direct pregnancy/maternity discrimination and potential indirect sex discrimination.¹¹ However, it is clearly not an inevitability that a sex discrimination claim could provide redress and Newman has posited that it may not be easy, i.e. for a pregnant woman disciplined for taking too many toilet breaks to bring an indirect sex discrimination claim.¹² The exclusion of pregnancy/maternity from the list of relevant protected characteristics was explained by the then Solicitor-General during committee scrutiny of the Bill:

any harassment that a woman is subjected to will be covered by the protection against harassment related to sex. The Government therefore considers that specific protection against harassment because of pregnancy or maternity is unnecessary and would add no value ... [during consultation], the Government made clear that it would only legislate if there was evidence of a real problem. No such evidence was forthcoming in these cases. (House of Lords & House of Commons Human Rights Joint Committee, 2009)

Nonetheless, the Human Rights Joint Committee concluded that pregnancy/maternity (and marriage and civil partnership) could and should have been included as relevant protected characteristics so as to “eliminate confusing distinctions”, “ensure comprehensive protection” against forms of discrimination not revealed in the consultation but which may nonetheless exist and avoid claimants having to take “a roundabout route” attempting to use other protected characteristics (House of Lords & House of Commons Human Rights Joint Committee, 2009, para 108). The singular lack of definition for pregnancy/maternity, in those sections which appear between the list of protected characteristics and the definitions of discrimination (which starts with direct discrimination in section 13), is compensated for by the various definitions in the specific pregnancy/maternity provisions (sections 17 and 18). The existence of specific provisions, however, does not fully explain that

absence as gender-reassignment and disability both have specific provisions and yet also appear alongside the other protected characteristics (being defined in sections 6 and 7).

In the early years of anti-discrimination legislation, pregnancy or maternity was not covered as sex discrimination required a comparison with a man and as Mr Justice Bristow put it “[w]hen she is pregnant a woman is no longer just a woman... [s]he is a woman, as the Authorised Version of the Bible accurately puts it, with child, and there is no masculine equivalent”.¹³ This approach—and any attempt to compare a pregnant woman with a man on sick leave—was, a decade later, disavowed by the ECJ which held that as “only women can be refused employment on the ground of pregnancy ... such a refusal therefore constitutes direct discrimination on the ground of sex”.¹⁴ Statutory provisions were introduced via the Equal Treatment (Amendment) Directive 2002/73/EC leading to section 3A being inserted into the Sex Discrimination Act 1975 in 2005,¹⁵ so as to “improve clarity and transparency in relation to this area of the law” and “and avoid the risk of infraction proceedings” (Department for Trade Industry, 2005). This originally required the complainant to be treated less favourably compared to how she would have been treated had she not become pregnant (or taken a period of maternity leave). Following a judicial review, which held that section 3A “should be recast so as to eliminate the statutory requirement for a comparator who is not pregnant or who is not on maternity leave”,¹⁶ the wording was simply truncated to “a person discriminates against a woman if—(a) at a time in a protected period, and on the ground of the woman’s pregnancy, the person treats her less favourably” (and *mutatis mutandis re maternity leave*).¹⁷ The judicial review also made clear that the government did not intend “that section 1 should remain available in parallel, but that section 3A should be the only route by which a claim for discrimination by reference to pregnancy/maternity leave” should be made.¹⁸ A couple of years later, the Equality Act 2010 replicated the provision in section 18 (for work cases) and section 17 (for non-work cases)¹⁹ but adopted the use of “unfavourably” to reduce the need for comparison. However, it also promoted pregnancy/maternity to a protected characteristic but that status could be said to be something of a mirage.

Section 17 of the Equality Act 2010 provides that a person discriminates against a woman if that person treats her unfavourably because of a pregnancy of hers or she has given birth within the previous 26 weeks. The period is different under section 18, the work cases provision. There, the protected period begins when the pregnancy begins but ends either when her additional maternity leave ends (if she has the right to additional maternity leave—which, in general, employees do—and does not return to work sooner) or at the end of the period of 2 weeks beginning with the end of the pregnancy.²⁰ A separate subsection provides protection should she be treated unfavourably because she is exercising or seeking to exercise, or has exercised or sought to exercise, the right to ordinary or additional maternity leave.²¹ Both sections hold that direct discrimination within section 13, so far as relating to sex discrimination, does not apply to treatment of a woman/anything done in relation to a woman in so far as it is for a reason within that section.²² This unambiguously prevents a parallel claim in both sex discrimination and under those sections (as was also stated to be the case under the old law as mentioned above). A claim in direct sex discrimination could, however, be brought outside the relevant period (in work cases if connected to that pregnancy or an illness suffered as a result of it and in non-work cases if connected to the fact of having given birth, including breastfeeding beyond six months) but could not, in terms, be brought if the treatment was due to exercising the right to maternity leave.

However, section 13 contains no limitation with regard to protected characteristics unlike indirect discrimination which delists pregnancy/maternity. The explanatory notes—as with the actual wording of the section—refer to protected characteristics in general and specifically reference the list in section 4.²³ Furthermore, when explaining associative discrimination—that the direct discrimination provision can encompass unfavourable treatment because of the complainant’s association with someone who has the protected characteristic—the notes solely exclude marriage/civil partnership from such coverage.²⁴ Given its status as a protected characteristic in section 4, its inclusion in the list of relevant protected characteristics for the public sector equality duty in section 149 (which again solely excludes marriage/civil partnership), the application of the positive action provisions

(sections 158 and 159) to all protected characteristics (with one of the examples in the explanatory notes alluding to maternity),²⁵ and the clear lack of indication of exclusion as is freely made elsewhere, pregnancy/maternity could be seen to be included within section 13. This is brought into doubt, however, by section 25 which explicitly set out what is meant by the nine discriminations (i.e. “Age discrimination is—(a) discrimination within section 13 because of age; (b) discrimination within section 19 where the relevant protected characteristic is age” and “Gender reassignment discrimination is—(a) discrimination within section 13 because of gender reassignment; (b) discrimination within section 16; (c) discrimination within section 19 where the relevant protected characteristic is gender reassignment”) and which for maternity/pregnancy solely refers to the special provisions in sections 17 and 18.

From the above it can be seen that, somewhere, something is missing (or erroneously included). Either the summarising section 25 has omitted pregnancy/maternity from the scope of section 13 or section 13 should have followed the example of section 19 in delisting the protected characteristic. Sections 17 and 18 (and their predecessors) were designed to clarify the extant law and so sex discrimination—bar the attempt at clarification—could have covered the ground. In attempting to clarify the law, a time-based division has been introduced which serves only to confuse. Given the inherent overlap with sex, a declaratory provision including pregnancy/maternity within the definition of sex, and thereby removing it from the list of protected characteristics, is one way greater clarity could have been achieved. Alternatively, greater legislative scrutiny could have rendered it not only a protected characteristic but part of a cogent and consistent legislative scheme.

3. The characteristic of gender reassignment—Limited and indeterminate

The Equality Act 2010 broadly replicated previous law regarding gender reassignment although it has slightly extended its coverage (to cover activities such as the provision of services) and its definition. Originally, the Sex Discrimination Act 1975 did not contain any provision for the protection of those who were in process of gender reassignment; the protection under the SDA was purely available to heterosexuals who were able to compare their treatment to someone of the opposite sex.²⁶ This was changed as a result of the ruling in the European Court of Justice which held that dismissal of an employee was contrary to the Equal Treatment Directive where “dismissal of a transsexual for a reason related to a gender reassignment must be regarded as contrary to Article 5(1) of the Directive [which concerned discrimination on the ground of sex].”²⁷ This decision latterly led to section 2A being inserted into the Sex Discrimination Act 1975 which defined gender reassignment as “a process undertaken with medical supervision”.²⁸ It is this aspect of the definition that has been changed but arguably to an ambiguous and yet limited outcome. The requirement for medical supervision has been removed but the Act explicitly ignores non-binary gender among other things.

Transgender is an umbrella term which describes those who feel the need to present themselves in a gender other than the one they were assigned to at birth. Non-binary refers to any gender that is not exclusively male or female. A transvestite is someone who wears clothing of the opposite gender to the one to which they were assigned at birth but may nonetheless identify with their original gender. A person who feels that they should live permanently—or variably—in the gender opposite to the one assigned at birth are transsexual. People who have intersex conditions are born without genitals which clearly identify that they are either male or female and decisions have to be made as to which sex should be attributed to them. Transsexuals will often (although not always and certainly not necessarily) take appropriate steps to change their body to reflect their inner gender. It is the process of moving to one gender from another that is “gender reassignment”. The terms transgender and intersex are often confused by many people as they perceive these groups as wishing to choose their own gender identity. Although it is true that some intersex individuals will go on to change their gender in later life and actually see themselves as transgender, the two groups are distinct. It is also true that those who have intersex conditions face different forms of discrimination from those who are transgender however only some countries, notably Australia, have publicly acknowledged that those with intersex conditions have different needs from those who identify as transsexual (Whittle, Turner, & Al-Alami, 2007).

The Equality Act 2010 explicitly relates to gender reassignment and transsexualism. However, the underlying rationale for the coverage of transsexualism could be taken to apply more widely. Why in the words of the seminal case of *P v S and Cornwall County Council* would toleration of discrimination against those undergoing or have undergone a process of transition “be tantamount, as regards such a person, to a failure to respect the dignity and freedom to which he or she is entitled, and which the Court has a duty to safeguard”²⁹, whereas such discrimination against those who do not wish to live permanently in a changed gender, or who merely wish to wear clothes related to another gender, would not? Why should the former be deemed to be “based, essentially if not exclusively, on the sex of the person concerned”³⁰ any more than the latter? This apparently restrictive approach is in contrast to the removal of the requirement for medical supervision and undermines any proposition that the question of certainty is a reason for the distinction (as regards non-binary gender if not transvestism). The Code of Practice on Employment also states that there is no requirement for the individual to discuss with their employer their gender status.³¹ The removal of any reference for the need of medical intervention and the fact that the employee is not required to discuss his/her plans with his/her employer creates such a situation of uncertainty.

It has been suggested that there are two phases of being transsexual—primary and secondary. The main characteristic of primary transsexualism deals with “a lifelong of gender dysphoria—these are the feelings that a transsexual experiences because of the incongruity of his/her gender, a history of cross-gender identity, and an absence of fetishism associated with cross dressing” (Docter, 1988). Docter goes on to explain that the main characteristic of secondary transsexualism deals with the “history of some sexual arousal to cross dressing, progressively stronger history of gender dysphoria which may be stress related, less ego integration than in transvestites...” (Ibid.). Secondary transsexuals are very different from primary transsexuals in one very different important aspect. Primary transsexuals have a lifelong history of intense gender dysphoria and secondary transsexuals should have an absence of this. Such a summary as this highlights the fact that there is often transition between transvestism and transsexualism. Nangeroni (1997) categorises this as “transgenderism.” She states that “a transgender person is someone whose gender display at least sometimes runs contrary to what other people in the same culture would normally expect.” Obviously this is a very general definition and what is considered “the norm” will depend on the attitudes of society and to some extent the protection available to all of us. In effect, this definition could apply to females who dress in perceived male clothing (we used to call them tom boys). It could also relate to men whose dress could be seen as more feminine or more flamboyant. This brings us back to a key point: at what point does the Equality Act protect transgender?

It would appear that the Sex Discrimination Act 1975 and the Equality Act protect gender reassignment and not non-reassigned transsexuals. The removal of the requirement for medical intervention obscures that line and arguably renders the distinction between being a transvestite (where no protection exists) and being a transgendered person artificial. However, as things currently stand, the question “at which point does protection start”, is still answered—to an unsatisfactory extent—by reference to a pre-2010 case.³² In *Croft v Royal Mail*, the Employment Appeal Tribunal considered that pre-operative male was a man and therefore there was no discrimination in preventing use of a female toilet. The Court of Appeal took a more subtle approach and held that gender reassignment protection covered all stages of the reassignment under medical supervision but that it was correct to prohibit use of the female toilet for a period of time during which Ms Croft could use the unisex (disabled) toilet. This pragmatic approach left open in what circumstances pre-operative male-to-female transsexuals may use female facilities with the Court of Appeal stating that employers should be flexible. With the removal of the medical supervision requirement and with no clear guidance within the Equality Act the issue of at what point does protection begin is still left open to interpretation by employers.

Being a transvestite was not protected under the old law and when the Equality Act was introduced it was not a surprise to find that protection was not there, nor that there was any protection for those who identify as non-binary gender. An individual who is a transvestite may only be protected under the Act if they can frame their claim by reference to one of the nine protected

characteristics. Although it may be seen that transvestites are one stage further removed unless their transvestism is related to transexuality or a protected characteristic, the interpretation of the decision in *P & S v Cornwall Council* does suggest that “dismissal of a transsexual for a reason related to a gender reassignment must be regarded as contrary to Article 5(1) of the Directive” may still offer the opportunity for a non-binary person at least, if not transvestites, to argue that as at some point in the future he/she may opt for permanent gender reassignment, and thus fall within the protection of the Act.

4. Victimisation—An invalid variation

Victimisation, less favourable treatment because of something done in good faith (or something which the defendant thinks may have been, or may be, done) related to a potential claim, had been part of modern British discrimination law since its beginning, with i.e. section 4 of the Sex Discrimination Act 1975 defining “discrimination by way of victimisation”. Similar provisions appeared in the Race Relations Act 1976 (s.2), Disability Discrimination Act 1995 (s.55) and the three Employment Equality Regulations covering religion or belief, sexual orientation and age.³³ While the later extension of the coverage of religion or belief and sexual orientation to goods and services did not use the word “victimisation”, the concept was nonetheless included within sub-provisions of discrimination.³⁴ The main, heralded change during the unification into the Equality Act 2010 was that section 27 dispenses with the old formulation that required “less favourable treatment”, preferring instead to subjecting to a detriment which it is said (together with both the removal of the word “discrimination” and its placing under a heading of “other prohibited contract”) renders it no longer a form of discrimination, as “there is no longer a need to compare treatment of an alleged victim with that of a person who has not made or supported a complaint under the Act”,³⁵ but a separate claim. However, the subjecting to a detriment must still be “because of” something done (or perceived to be done) in connection with the Act. An element of comparison could thus be said to remain—for how else can one determine whether a detriment is because of such a thing or because of an unrelated matter. An actual comparator is clearly not required but some form of hypothetical comparator arguably remains in the picture.

An apparently more significant change wrought by the Equality Act 2010 was that victimisation appeared to be removed from post-employment protection. Section 108 makes it unlawful to discriminate against, or to harass, someone after a relationship covered by the Act has ended. This replicated provisions in the predecessor legislation but with two differences: it expanded the coverage to more fully cover non-employment relationships and it in terms excluded victimisation (subsection (7) holding “But conduct is not a contravention of this section in so far as it also amounts to victimisation of B”). The explanatory notes on the section state that “if the treatment which is being challenged constitutes victimisation, it will be dealt with under the victimisation provisions and not under this section” (353). The victimisation provision, however, no more explicitly covers post-relationship situations than the discrimination and harassment provisions. Failure to cover post-employment victimisation would breach European obligations,³⁶ but that seemed to be the express intention—as set down in legislation—of Parliament. This led to a series of cases in which the EAT and Court of Appeal tussled with the provision.

In *Rowstock v Jessemy*, Mr Recorder Luba QC and two lay members, were “amply satisfied that the effect of the literal words of section 108(7) is to produce a lacuna in the statutory scheme of protection from discrimination, harassment and victimisation which the UK is required by EU legislation to enact”.³⁷ While they were tempted to follow the approach of the Employment Judge in reading “employment” as including post-employment, to do so would both be an incomplete re-casting, as section 108 extends beyond employment relationships and it would leave, i.e. goods and services—and even partnerships—unprotected and impermissibly cross the interpretive Rubicon in “flying directly in the face of what Parliament has actually enacted in section 108 (whether for ‘good’ reason or ‘bad’ reason or through error or inadvertence)”.³⁸ A short while later, the EAT in *Akwivu & Anor v Onu*³⁹ noted the strength in arguing that as express mention was made of victimisation, but only so as to exclude it, in section 108, the draftsman must have had victimisation in mind and the limitation

could thus be seen to be deliberate.⁴⁰ However, this troubling and not “easy to discern”⁴¹ provision, which neither party could satisfactorily explain, could, they thought, best be considered as excluding something from the operation of the section because another provision (within or without the Equality Act 2010) provided recompense (for otherwise there would be no need to restrict the claim if no claim existed).⁴² Accordingly, as a matter of domestic construction they rejected an interpretation which excluded claims for post-employment victimisation.

The Court of Appeal, when considering both cases, in the appeal of *Rowstock*, took yet a different approach.⁴³ A later Court of Appeal judgment, *Deer v University of Oxford*, summarised the case as holding “that this [was] one of those exceptional cases where the court can confidently say that the draftsman has erred and has, by an oversight, failed to reflect Parliament’s clear intention, and is in a position to remedy that error.”⁴⁴ However, the primary method was to rely on the requirement under European Union law to read national law so far as possible as complying with the European obligation⁴⁵ and they found nothing to prevent such a reading in terms of implying in a subsection allowing post-employment victimisation claims. As for the meaning of subsection (7), Underhill LJ commented:

I am not sure that anything needs to be done about sub-section (7). In the unlikely event that anyone seeks to rely on it in future, some other court can cudgel its brains about what real effect, if any, it has: all that matters for present purposes is that it can have no meaning which is inconsistent with post-termination victimisation being unlawful.⁴⁶

Whatever the approach, the result would be a judicial implication of a subsection allowing such claims. If a predominantly national approach was adopted (as in *Akwivu* in the EAT), the disparate treatment of victimisation and discrimination/harassment would create a peculiar mishmash of post-employment claims being within the primary provision for the former but in a dedicated ancillary provision for the latter. However one looks at it, the Act is in an unsatisfactory state regarding victimisation. It may now be clear that post-employment victimisation is covered by the Act; the tangible Act itself is far less clear.⁴⁷

5. Conclusion

Despite its long gestation period, there were a number of clear errors in the Equality Act 2010 as originally passed, such as a reference in schedule 3, para 8(2) originally referring to “section 17 of the Education (Scotland) Act 1982” rather than 1980 or the wording of the compromise agreements provision appearing to exclude any lawyer or official who had previously advised the complainant from advising him/her on the compromise agreement and requiring a further person to provide advice with a likely increase in cost.⁴⁸ The subjects of this article are less clear-cut but are further examples of either a lack of parliamentary scrutiny or of political will or both. The Equality Act 2010 has helped unify the law in the area but as things stand the existence of such enigmatic or merely inadequately transposed provisions are testament to a failure to make the law more accessible and easier to understand for the ordinary user of the Act.

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Notes

1. Respectively, “The Cambridge Review” (Hepple, Coussey, & Choudhury, 2000); The draft Equality Bill 2003 (Odyssey Trust, Public Statement, 9th July 2002 Single Equality Bill <http://www.odysseustrust.org/equality/press.html> later <http://www.publications.parliament.uk/pa/ld200203/ldbills/056/2003056.htm>; and the Equalities Review and the Discrimination Law Review (Department for Communities & Local Government, 2007; The Equalities Review, 2007).
2. See e.g. Dr Evan Harris’s lament at report stage that many amendments will be unscrutinised in the Commons (“It is nothing short of disgraceful that we are in this position now” HC Deb 2 December 2009, vol. 501, col. 1193), Lynne Featherstone’s complaint at Third Reading (“I deplore the lack of time made available for discussion, as it has meant that we have not been able

- to debate many important and serious issues. That abdication of responsibility to democracy makes a farce of any commitment to a different type of politics." HC Deb 2 December 2009, vol. 501, col. 1230). See further Hand, Davis, and Barker (2015).
3. See e.g. The Government's Draft Legislative Programme 2008/09, p. 72, Explanatory Note 61, GEO Factsheet The Equality Bill
<http://www.edf.org.uk/news/Equality%20Bill%20fact%20sheet.pdf>.
 4. Equality Act 2010, ss.32(1)(a), 33(6), 34(4) and 35(4).
 5. Equality Act 2010, ss.15,20–22.
 6. Equality Act 2010, s.16.
 7. Equality Act 2010, ss.17–18.
 8. Equality Act 2010, s.19(3).
 9. Equality Act 2010, s.26(5).
 10. [2014] ICR 1073, [10]; *Harvey on Industrial Relations and Employment Law Bulletin* No 429 April 2014, p. 11 refers to a claim of indirect pregnancy discrimination but, with respect, that is not borne out by the reported EAT judgment.
 11. If the Commissioner successfully appealed the direct discrimination finding, the question of justification would be remitted to the employment tribunal.
 12. Newman (2010). With regard to the pregnancy/maternity specific provisions he says "Although ss.17 and 18 go beyond the bare fact of pregnancy and cover pregnancy-related illness and maternity leave, they fall a long way short of preventing unfavourable treatment because of any reason arising out of pregnancy, such as a weaker bladder."
 13. *Turley v Allders Department Stores Ltd* [1980] ICR 66, 70.
 14. *Dekker v Stichting Vormingscentrum Voor Jong Volwassenen (VJV-Centrum) Plus* (Case 177/88) [1992] ICR 325, [12].
 15. Via reg. 4 of the Employment Equality (Sex Discrimination) Regulations 2005, SI 2005/2467.
 16. *R (Equal Opportunities Commission) v Secretary of State for Trade and Industry* [2007] ICR 1234, [63].
 17. Sex Discrimination Act 1975 (Amendment) Regulations 2008, SI 2008/656, regs. 2(2) and 2(3).
 18. *R (Equal Opportunities Commission) v Secretary of State for Trade and Industry* [2007] ICR 1234, [3].
 19. Protection was extended to cover public functions, education, and associations.
 20. S.18(6) Equality Act 2010.
 21. S.18(4) Equality Act 2010. Ordinary Maternity Leave (OML) and Additional Maternity Leave currently both last for 26 weeks. As OML may be taken up to 11 weeks before the due date the period post birth could run from 15 weeks to 52 weeks. However, as worded, the unfavourable treatment—as opposed to the leave—need not take place in that period. S.18(3) covers compulsory maternity leave (2 weeks or 4 weeks if a factory worker).
 22. Ss. 17(6) and 18(7) Equality Act 2010.
 23. Para 59.
 24. Para 60.
 25. Para 517.
 26. s1 Sex Discrimination Act 1975; and, in a discrete provision, to married persons in the employment field (s.3).
 27. *P v S and Cornwall County Council* Case C-13/94, [1996] IRLR 347.
 28. Via the Sex Discrimination (Gender Reassignment) Regulations 1999, SI 1999/1102.
 29. *P v S and Cornwall County Council* Case C-13/94, [1996] IRLR 347, [22].
 30. *Ibid.* [21].
 31. Statutory Code of Practice—Employment, EHRC para 2.27.
 32. *Croft v Royal Mail* [2003] IRLR 592.
 33. Employment Equality (Religion or Belief) Regulations 2003, SI 2003/1660, Employment Equality (Sexual Orientation) Regulations 2003, SI 2003/1661, Employment Equality (Age) Regulations 2006, SI 2006/1031.
 34. S.46(4) Equality Act 2006 and reg. 3(5) Equality Act (Sexual Orientation) Regulations 2007, SI 2007/1263.
 35. Explanatory Notes to the Equality Act 2010, para 103.
 36. E.g. Equal Treatment Framework Directive (2000/78/EC), the Race Directive (2000/43/EC) and *Cote v Granada Hospitality Ltd* (C-185/95) [1998] ECR I-5199.
 37. [2013] IRLR 439, [29].
 38. [2013] IRLR 439, [38].
 39. [2013] ICR 1039.
 40. [2013] ICR 1039, [71].
 41. [2013] ICR 1039, [73]. [75].
 42. [2013] ICR 1039, [76].
 43. *Jessemey v Rowstock Ltd & Anor* [2014] ICR 550.
 44. [2015] IRLR 481, [30]. Following the House of Lords' criteria in *Inco Europe v First Choice Distribution* [2000] 1 WLR 586 (it being legitimate to correct an inadvertent drafting failure if the court was both sure of the intended purpose and confident as to what was the intended substance of the provision that bar the error would have been enacted).
 45. The case summarily refers to this as the *Ghaidan* approach (at [38] et seq) but cites *Pickstone v Freemans plc* [1989] AC 66, *Litster v Forth Dry Dock and Engineering Co Ltd* [1990] 1 AC 546 and *Vodafone 2 v Her Majesty's Commissioners of Revenue and Customs* [2009] EWCA Civ 446 as well as *Ghaidan v Godin-Mendoza* [2004] 2 AC 557.
 46. *Jessemey v Rowstock Ltd & Anor* [2014] ICR 550, [49].
 47. Such lack of clarity or confusion was noted in *Jessemey* at [46]: "...This error [a rogue inclusion of s.108 as defining discrimination in the Index of Defined Expressions in schedule 28] is not directly material to the problem before us, but it reinforces the impression that the draftsman may rather have lost his way in his treatment of section 108."
 48. Which led to an amendment via the Equality Act 2010 (Amendment) Order 2012/334 to make it clear that the existing advisers can continue to advise (by inserting "to the complainant" after "independent adviser" and then inserting "(other than the complainant)" so that section 147(5)(a) reads "a person (other than the complainant) who is a party to the contract or the complaint").

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