The Equality Act abroad:
Implications for higher education institutions

Equality Challenge Unit

Contents

The Equality Act 2010, unlike the legislation it replaces, makes no express provision for its territorial scope so it is not clear which activities conducted overseas are covered by the legislation and which are not. This briefing has been developed to support the increasing number of higher education institutions (HEIs) operating overseas activities by exploring the likely impact of the Equality Act. It focuses mainly on employment and student issues, and assesses the risks of discrimination claims brought under the Equality Act originating from abroad.

HEIs operating abroad will also need to consider the application of the local law of the jurisdictions in which they are operating, both in the equality field and elsewhere. Consideration of these issues is outside the scope of this briefing. This briefing provides an outline of the main issues, but does not constitute legal advice. An HEI should seek legal advice if it has concerns about its overseas activities.

The Equality Act covers England and Wales, and Scotland with minor exceptions. The Act does not apply in Northern Ireland, with minor exceptions.

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Background

Predecessors to the Equality Act

The Equality Act consolidates and strengthens legislation into one Act; most of which came into force on 1 October 2010.

With regard to legislation pre-dating the Equality Act 2010, employment-related provisions were limited to employment 'at an establishment in Great Britain'. For most purposes, this would apply where the potential claimant worked 'wholly or partly in Great Britain'. If the claimant worked wholly outside Great Britain, the alleged acts of discrimination were also protected (subject to minor exceptions) if three additional conditions were satisfied:

- the employer had a place of business at an establishment in Great Britain
- the work was for the purposes of the business carried on at that establishment
- the employee was ordinarily resident in Great Britain at the time of the job application or job offer, or at any time during the course of the employment

The corresponding educational provisions also had territorial limits which were defined solely by the location of the institution providing the education or related services, rather than the location of the student. Accordingly, there was no reason in principle why a student studying abroad couldn't bring a claim in Britain, provided that the act of discrimination could be brought within the wording of the relevant statutory provision.

Working wholly or partly in Great Britain

The test for the scope of the pre-Equality Act employment discrimination legislation was relatively easy to apply, but that did not prevent litigation around the margins.

Three notable cases are worth mentioning, as they could affect the way the courts approach the scope of the Act.

The Court of Appeal's decision in *Saggar v Ministry of Defence* (MoD) points out that the whole period of employment must be considered when deciding whether the employee worked wholly or partly in Great Britain. In that case Mr Saggar was able to bring a race discrimination claim against the MoD despite the fact that the discrimination occurred in Cyprus, where he had been posted after many years in the UK.

Williams v University of Nottingham concerned an academic who was resident in Britain but was recruited to work on a campus

in Malaysia, run by a joint venture in which the University of Nottingham had a 10% stake. Because he worked in Malaysia throughout his contract, he could only bring a discrimination claim under the Disability Discrimination Act if he could establish that his work for the Malaysian joint venture amounted to work for the purposes of the university's establishment in Great Britain. The Employment Appeal Tribunal upheld the employment tribunal's decision that this was not the case. This was however a factual decision, based on the way the joint venture was set up and administered, and the decision might have been different if other arrangements had been adopted.

The most recent case, *MoD v Wallis*, concerned sex discrimination and unfair dismissal claims brought by British service men's wives who had worked wholly outside Great Britain, and had not been resident in Britain when they applied for their jobs. On the face of it, therefore, they were outside the scope of the Sex Discrimination Act (SDA). However, because they were pursuing a claim underpinned by the EU equal treatment directive the Court of Appeal held that the express wording of the SDA needed to be modified (how exactly it did not state) so that their claims could be brought against the MoD in Britain.

These cases, and a number of other recent decisions that are still emerging, demonstrate that the old provisions on territorial scope were in the main generously and flexibly interpreted in the claimant's favour. It is in that context that the scope of the Equality Act needs to be considered.

Jurisdictional issues

Even if an act of discrimination is within the scope of British discrimination legislation (whether before or after the Equality Act came into force), it does not necessarily follow that British courts or tribunals have jurisdiction to hear the claim. That depends on the separate rules governing the extent of their jurisdiction, which do not necessarily correspond with the legal tests for the scope of that legislation.

However, for the purposes of this briefing, since it addresses the position of HEIs based in Britain, it can be assumed that once an alleged act of discrimination is found to be within the scope of the Act, a claim can be brought in Britain, even if there is a possibility that a similar claim could also be brought overseas.

Scope of the Equality Act: employment issues

Employment provisions

Unlike its predecessors, the employment provisions of the Act contain no explicit reference to where either the employer or the employee needs to be based for an act of discrimination in the employment field to be within the scope of the Act. Sections 39 and 40 lay out the provisions outlawing discrimination at the point of recruitment and subsequently in the employment relationship, simply using the terms 'employer', 'employee' and 'employment' with no explicit geographical limitation.

However that does not imply an unlimited territorial reach. Some connection with Britain is required; the following explores how this connection might be determined.

Analogies from unfair dismissal

The closest analogy comes from the law of unfair dismissal. The Employment Rights Act 1996 had an explicit provision about its territorial scope, which excluded employees who ordinarily worked outside Great Britain. This was repealed by the Employment Relations Act 1999, and since then the courts have had to devise a set of rules to replace it.

In 2006, the House of Lords provided authoritative guidance, in *Lawson v Serco*. In that case it ruled that it would only be in exceptional circumstances that employees working outside Great Britain could bring a claim for unfair dismissal. To do so, they would have to establish that their employment relationship had a closer relationship with Britain than with the foreign country where they worked. Two examples were given by the House of Lords in that case: an employee like a foreign correspondent who had been posted abroad, and an employee working in what amounted to an 'extra-territorial British enclave'.

Most recently, the Serco test has been revisited by the Supreme Court in *Duncombe v Secretary of State for Children, Schools and Families*. This case concerned a group of British teachers seconded by the government to work in European schools established under an international treaty rather than the law of any particular jurisdiction. The Supreme Court decided that these facts amounted to another example of those exceptional cases where the employment relationship had an overwhelmingly closer connection with Britain and British employment law than with the host country. Parliament must therefore have intended the employees to enjoy protection from unfair dismissal. Two

factors of particular relevance were that the teachers were engaged under English law contracts, and that their employment had no particular connection with the countries in which they happened to be situated.

EU law

While in many cases applying the Serco test may give the right answer, it is unlikely to be a definitive test for the purposes of the Equality Act because, unlike unfair dismissal rights, the Act's employment provisions are underpinned by EU law. That has a number of consequences.

Firstly, the principle of non-regression means that EU directives must not be implemented in a way that dilutes existing rights under domestic law. So where the old provisions on territorial scope would have given a different answer – for example in the case of an employee recruited in Britain to work abroad, but whose employment has no other close connection with Britain – the previous rules on territorial scope are likely to be applied.

Secondly, at least where the employee is working in the EU, the courts are likely to invoke a number of overlapping principles to ignore the rules on territorial scope where the employee would otherwise be without a remedy. Two options are the principle of direct effect and the interpretative obligation. Direct effect applies where directly effective provisions of EU treaties or legislation are applied to an employer which is an 'emanation of the state'. It is unclear whether HEIs are emanations of the state for these purposes. The interpretative obligation requires domestic law to be interpreted, as far as possible, to ensure its compatibility with EU law, and applies regardless of whether the employer is an emanation of the state.

In *Wallis* the interpretive obligation allowed the employment tribunal to override the express provisions on territorial scope in the Sex Discrimination Act, but it is hard to see how it can be applied to the Equality Act, which is entirely silent about its territorial scope. To fill this gap the courts have recently invoked the *Bleuse* principle, named after a German lorry driver who successfully brought a claim under the working time regulations 1998 against his British employer, although he had never worked in the UK.

The *Bleuse* principle was recently considered by the Supreme Court in the *Duncombe* case, which as well as an unfair dismissal involved a claim under the fixed-term employees (prevention of less favourable treatment) regulations 2002. The fixed-term regulations, like the working time regulations, both implemented an EU directive and contained no express provision on territorial scope. So it was thought that *Duncombe* provided the ideal opportunity for the Supreme Court to establish a test which could also be used for the purposes of the Equality Act. But because it decided that the fixed-term regulations were not engaged, it did not need to make a decision on the point. It however indicated that the question of the scope of the regulations was not clear. Had it needed to make a decision on the scope of the regulations, it thought a reference to the Court of Justice of the European Union would probably have been necessary, in order to decide the limits of the *Bleuse* principle and to set a uniform test that applied across the EU.

One of many unanswered questions concerned the territorial reach of EU law. As the Supreme Court put it, would a person employed to work in China, for example, be able to claim the benefit of all domestic law which emanates from the European Union?

Applying the general principles

Even though the Supreme Court has said that the law is not clear, we believe it is possible to define the extent of the grey areas.

The following employment claimants working abroad for British universities and employed under English law contracts are likely to be able to bring themselves within the scope of the Equality Act:

- claimants resident in Britain at the time they are recruited and posted abroad
- claimants resident overseas, but recruited to work in the EU, particularly if they are unlikely to be able to bring a claim in another EU state
- claimants of any description who although working mainly abroad, have performed some duties in Britain, however minor
- claimants who are able to establish some other close connection between their employment and Britain

Claimants who are not employed directly by a British HEI and are engaged under local law contracts are unlikely to be able to bring claims in Britain under the Equality Act even if the British HEI has close ties with the employing organisation (for example because it is one participant in a joint venture).

Where a member of staff has a dual role, or where the HEI does not operate abroad through a separate legal entity that ambiguities are likely to arise. Two examples to illustrate this:

A local academic is employed in Malaysia under a local law contract by a joint venture vehicle in which a British HEI has a major, but not majority stake. Once a year the academic visits Britain as part of her job to contribute to a conference run by that HEI. This might give her employment a sufficient connection with Britain to bring a claim against the HEI under the Equality Act, even if the incidents about which she is complaining took place during her time on the overseas campus.

A British HEI operates a summer school in South Africa. It engages a British-born academic who has been resident in South Africa and is currently working at a South African HEI to run a series of courses. No formal contract is drawn up, but it is clear that the academic has been engaged directly by the British HEI. It may be possible for this academic to bring a claim connected with his work at the summer school. He has some connection with Britain, particularly since he could argue that his engagement was governed by English law, and as there is no local partner it would probably be difficult to bring a claim in South Africa.

Scope of the Equality Act: education issues

The educational provisions of previous legislation were largely carried through unchanged by the Equality Act, despite some differences in terminology.

Section 91 of the Equality Act, which sets out the provisions on admission and treatment of students, is largely unchanged from previous legislation. Section 91(10) makes it clear that those provisions apply to universities and 'any other institution in the higher education sector' in England and Wales, while, for Scotland section 91(11) covers universities and designated institutions under Section 44 of the Further and Higher Education (Scotland) Act 1992.

That means that the implicit territorial scope of the predecessor provisions has been carried through to the corresponding provisions in the Act.

In assessing the scope of these provisions it is important to note that as well as purely educational matters, the Act extends to the way students are given access to benefits, facilities or services, no matter where they are provided. There has been no reported case law on the scope and extent of these provisions.

An important element of the education provisions as they apply to HEIs is the definition of 'student', which 'is a reference to a person for whom education is provided *by the institution*' (emphasis added). This suggests that the application of the Equality Act depends on the nature of the relationship with the student:

- **British student studying abroad for a year as part of his/her programme of study.** The British HEI will usually not be providing the teaching and learning but will recognise (or validate) the overseas institution's awards. The British HEI may be liable for discrimination in the way it 'sends' its students overseas but will have grounds to argue that it is not liable for the actions of the overseas HEI.
- **Overseas student studying on a British HEI programme by distributed learning.** The British HEI will usually have created and distributed the teaching and learning material, decided who should be admitted to the programme, be providing the pedagogic material required to complete the programme and will assess the work submitted by the student. It is likely that the British HEI will be liable for discrimination that might arise in connection with the programme.

- **Overseas student studying a franchised British HEI programme at an overseas institution.** The teaching and learning materials will have been created by the British HEI and it will usually retain the admission decision. Teaching will be delivered by the overseas HEI, but the assessment will usually be undertaken by the British HEI. It is likely that the British HEI will be liable for discrimination that may arise in connection with education services. The extent to which other student services could give rise to liability will be determined by the relationship between the British HEI, the student and the overseas partner.
- **Overseas student studying an overseas HEI programme validated by British HEI.** Typically, the teaching and learning material will have been developed by the overseas HEI. The recruitment of students will be undertaken by the overseas HEI as will the delivery of teaching and learning. As the British HEI's involvement is to award its degree, recognising the validity of the overseas HEI's standards, it is likely that the students are not being provided with education by the British HEI, thus there is good argument that the British HEI's activities will not fall within the education provisions of the Equality Act.
- **Joint venture between British HEI and overseas body.** Typically there will be an overseas corporate body owned in part by the British HEI and in part by others. It is suggested that mere part ownership of the overseas corporate body will not be sufficient for the students enrolled at that body to be receiving education provided by the British HEI and the nature of the programme will need to be considered.

  Although the law in this area is less well-developed than the equivalent employment provisions, the majority of the Act's education provisions are also underpinned by EU law. This means that developments in the employment field, where there is far more case law, are likely to continue influence their interpretation.

Other relevant Equality Act considerations

British HEIs are subject to the public sector duty set out in section 149 of the Equality Act.

The public sector equality duty requires HEIs when carrying out their functions to have due regard to the need to eliminate unlawful discrimination, promote equality of opportunity and foster good relations between people sharing particular protected characteristics. In operating overseas, whether employing staff or being engaged in education activities, HEIs will need to have in mind these obligations at each stage of the process, from the planning, through contractual negotiations, to delivery and to (eventual) withdrawal from the activity.

HEIs will also need to be aware of the Equality Act's provisions which impose secondary liability or create secondary offences. As well as imposing liability on employers for the actions of their employees, section 109 imposes liability on principals for actions of their agents, which widens the exposure of HEIs to claims outside Britain. In addition section 111 creates a separate offence of instructing, causing or inducing another person to do an action which amounts to a contravention of the Act, which could in principle open the way to more creative claims from overseas students or employees who have no direct link with the HEI concerned. Detailed consideration of these provisions is outside the scope of this briefing.

Conclusions

Many HEIs will wish to ensure that staff or students based overseas receive the same protection from discrimination as their counterparts who are based in Britain.

In an ideal world, protection from discrimination should not depend on geographical location. In practice however, there will be overlapping liabilities in multiple jurisdictions.

As well as ensuring that, as far as possible, HEIs' overseas partners operate to the same equality standards, risks can be minimised by making sure that there is clarity about the legal relationships involved. To provide clarity, staff working abroad could be engaged by a separate legal entity under local law contracts. Any work they do for the partner British HEI could then be covered by a separate contract. The contracts through which they deliver programmes overseas should contain robust equality clauses and when sending their own students to study abroad, it should be made clear to students where the home institution's responsibilities end and those of the host institution begin. Ultimately, HEIs will also wish to consider wider reputational and ethical issues in determining whether to work in countries with differing standards regarding equality and diversity.

Equality Challenge Unit works to further and support equality and diversity for staff and students in higher education across all four nations of the UK, and in further education in Scotland.

ECU works closely with colleges and universities to seek to ensure that staff and students are not unfairly excluded, marginalised or disadvantaged because of age, disability, gender identity, marital or civil partnership status, pregnancy or maternity status, race, religion or belief, sex, sexual orientation, or through any combination of these characteristics or other unfair treatment.

Providing a central source of expertise, research, advice and leadership, we support institutions in building a culture that provides equality of both opportunity and outcome, promotes good relations, values the benefits of diversity and provides a model of equality for the wider UK society.

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