POLICE FEDERATION
EQUALITY LIAISON OFFICERS' SEMINAR
LEGAL UPDATE – 22 NOVEMBER 2010

LEGISLATIVE DEVELOPMENTS

Update on the Equality Act

1. The main provisions of the Equality Act 2010 came into force on 1 October 2010. There is a summary of the changes to the law as a result in Issue 8 of Equality Matters – the Equality Act special issue.

2. The general equality duty provided for in the Equality Act is not yet in force. On 19 August 2010, the Government Equalities Office published a consultation on its proposals for:

    - Regulations on the specific duties designed to help public bodies meet the requirements of the general equality duty.
    - The public bodies that will be subject to the general and specific duties.

    The consultation closed on 10 November 2010. The responses and outcome of the consultation is not yet known.

3. On 17 November 2010 the coalition government confirmed that it will scrap the socio-economic duty. Home Secretary and Minister for Women and Equality, Theresa May, said that the government will not be bringing section 1 of the Equality Act 2010 into force.

4. Section 1 would have placed a duty on certain public bodies, when making decisions of a strategic nature about how to exercise their functions, to have due regard to the desirability of exercising them in a way that is designed to reduce the inequalities of outcome, which result from socio-economic disadvantage. Announcing that the duty was to be scrapped, the Minister commented, "You can't solve a problem as complex as inequality in one legal clause."

Other legislative changes in the pipeline

5. On 8 March 2010 the EU Council of Ministers adopted a new Parental Leave Directive (2010/18/EU). The new directive, which replaces the current Parental

Leave Directive (96/34/EC), increases parental leave entitlement from three to four months. Member states have two years to implement it.

6. The government has commenced a major review of the vetting and barring scheme. On 22 October 2010, a thorough review of the vetting and barring scheme (VBS) was announced. The review will examine whether the scheme is the most appropriate mechanism to protect children and vulnerable people and, if so, how many roles should be covered by it.

7. The VBS was put on hold by the government in June 2010 pending the review. Recommendations following the review are expected in early 2011.

8. A review of the criminal records regime will also take place, reporting on the employment vetting systems which involve the Criminal Records Bureau followed by a report on the broader regime. The review will examine whether the current regime strikes the right balance between respecting civil liberties and protecting the public. The government expects the review to propose a scaling back of the use of systems involving criminal records.

9. In November 2010 in a case brought by the RCN, the High Court held that automatic inclusion on the VBS barred list was a breach of Article 6. Changes may well be expected.

CODES, GUIDANCE AND REPORTS

10. **Equality:** The final draft versions of the EHRC employment and equal pay codes under the Equality Act 2010 were laid before Parliament on 12 October 2010. If they are not disapproved by Parliament within 40 days, the codes will be issued and brought into effect by Order.

11. The EHRC has also published How Fair is Britain?, the first in a series of reports that will be laid before Parliament every three years in accordance with its Equality Act 2006 mandate. The reports are intended, amongst other things, to provide an evidence base to properly target action to tackle inequality and to set objective benchmarks to assess fairness in public policy. The report suggests that, while some equality gaps have closed over the past generation, other long-standing inequalities remain and that new ones are emerging as Britain becomes older and more ethnically and religiously diverse. It identifies five critical 'gateways to opportunity' which can make the difference between success and failure in life: Health and Well-being: Education and Inclusion; Work and Wealth; Safety and Security; and Autonomy and Voice.

12. The report is described as the most comprehensive compilation of evidence on discrimination and disadvantage ever compiled in Britain and its findings cover all seven areas of formal discrimination set out in law: age, disability, gender, race, religion or belief, sexual orientation and transgender status. The report can be seen at:

    http://www.equalityhumanrights.com/key-projects/triennial-review/full-report-and-evidence-downloads/#How_fair_is_Britain_Equality_Human_Rights_and_Good_Relations_in_2010_The_First_Triennial_Review

13. **Childcare vouchers:** HMRC has published guidance for employers and employees on the changes to employer-supported childcare (which includes childcare vouchers) from April 2011 which will mean the scheme is less tax advantageous for individuals. The changes will only affect certain individuals joining a relevant scheme from April 2011. Any individual already in a scheme by 5 April 2011 will not be affected by these changes as long as they remain within the scheme. Further, the changes will affect only higher and additional rate tax payers who join these schemes on or after 6 April 2011. There is no change to the tax relief entitlement for employees taxed at the basic rate; they will continue to be entitled to tax relief on £55 exempt income for each qualifying week.

14. Members considering joining should do so before 1 April 2011. More information:

    http://www.hmrc.gov.uk/thelibrary/employee-qa.pdf

15. **Flexible working:** The European Commission has produced a report on Flexible working time arrangements and gender equality on 26 October 2010. The report has concluded that both employers and employees benefit from flexible working arrangements. Providing an overview of the current working practices of 27 countries, the report also found large differences between member states in their working time flexibility.

16. **Stress at work:** This autumn saw the publication of two reports highlighting workplace stress. The first by the CIPD, in conjunction with the HSE and Acas, is called “Work-related stress: what the law says” It sets out employers' legal obligations in identifying and managing stress at work, discusses the potential legal ramifications of ignoring these responsibilities, and advises on tackling stress through good management. The report is available on the ACAS website.

17. The second, the TUC's safety representatives' survey, found that stress is the most common health and safety issue in the workplace. 62% of those surveyed named stress as one of the top five problems in their workplace, with bullying and harassment being the second most common concern. The report is available on the TUC website.

A ROUND UP OF RECENT CASES

Disability discrimination

18. **Definition of disability:** In *J v DLA Piper UK LLP* the EAT gave guidance to tribunals on how to determine whether a mental illness is a protected disability under the Disability Discrimination Act 1995. This will continue to be relevant for cases under the Equality Act. The EAT held that in cases where it is disputed whether an impairment exists, it will make sense for the tribunal to start by examining the effect of the condition on the claimant. This should make it unnecessary for the tribunal to try to resolve the medical issues which may otherwise arise in connection with the definition of "mental impairment".

19. **Reasonable adjustments**: In September in the case of *Secretary of State for Work & Pensions v Wakefield* the EAT endorsed the guidelines set out in Environment Agency v Rowan on how tribunals should assess whether employers have failed to make reasonable adjustments. Although the case was decided under the Disability Discrimination Act 1995, it will continue to be relevant under the Equality Act 2010.

20. The EAT found that the tribunal had adopted too broad-brush an approach to the question of reasonableness, accepting the medical report uncritically and failing to make findings on what a reasonable timescale would have been for any adjustments. The tribunal should have determined whether there has been a failure by the employer to comply with a duty to make reasonable adjustments by identifying:

    - The provision, criterion or practice applied by the employer (and/or the physical feature of the premises occupied by the employer);
    - The identity of non-disabled comparators (where appropriate);
    - The nature and extent of the substantial disadvantage suffered by the claimant.

21. The tribunal needs to explain why the proposed adjustments would alleviate the disadvantage in question and cannot do so unless it has identified the substantial

disadvantage at the outset.

22. In *Chief Constable of South Yorkshire Police v Jelic* the EAT upheld an employment tribunal's finding that it would have been a reasonable adjustment for the purposes of the Disability Discrimination Act 1995 to swap the roles of a non-disabled police officer and a disabled police officer.

23. The special nature of service in the police force (in particular, the general duty of employees to obey lawful orders) was an important factor in the case. The decision suggests that in the particular context of police service, the duty to make reasonable adjustments extends to include consideration of occupied posts as well as vacant posts.

Sex discrimination

24. In *Munchkins Restaurant Ltd and another v Karmazyn and others* in May 2010, the EAT considered a claim for sexual harassment and constructive dismissal. One of the striking features of the case was the considerable length of time (between one and five years) that the claimants had put up with the "intolerable" conduct. The EAT held that the fact that the claimants put up with the conduct for lengthy periods of time, and even initiated talk of a sexual nature as a coping strategy, did not mean that it was not "unwanted".

Maternity rights

25. In *Nixon v Ross Coates Solicitors and another* the EAT held that a tribunal had been wrong not to characterize gossip about an employee's pregnancy as discrimination and harassment under the Sex Discrimination Act 1975. The gossip was triggered by events at a Christmas party, when Ms Nixon was seen kissing another employee and then going to a hotel room with him. Some weeks later, Ms Nixon discovered she was pregnant and informed the managing partner of this fact. Within an hour of her doing so, the HR manager knew of the pregnancy and began speculating with other employees about who the child's father might be. The tribunal had also been wrong to reduce compensation by 90% for contributory conduct because it thought she had "irresponsibly" caused the gossip.

26. In *De Belin v Eversheds Legal Services Lt*d an employment tribunal held that the employer had discriminated against a male lawyer on grounds of sex when, in a redundancy scoring exercise, it inflated the score of his female colleague to take account of the fact that she was on maternity leave. This discriminatory

application of the selection criteria also rendered his dismissal unfair. Although the context in which this took place is not relevant to police officers, this is an interesting example of a 'reverse pregnancy discrimination' case, which might be an area to watch in future.

27. In July 2010 the ECJ handed down two decisions dealing with the payments that must be made to women who, for reasons connected with health and safety during pregnancy, have their working conditions altered or are temporarily suspended. The cases concerned women whose jobs entitled them to supplementary allowances in addition to their basic salary and the decision is likely to have relevance in relation to entitlement to SPP for officers who are moved to restricted duties because of pregnancy.

28. In *Gassmayr v Bundesminister fur Wissenschaft und Forschung* a pregnant nurse lost her on-call duty allowance when she was suspended on health grounds. In *Parviainen v Finnair Oyj* a pregnant air stewardess moved to ground duties lost part of her flight allowances but was still paid more than ground crew. The ECJ held that the Pregnant Workers Directive (92/85/EC) did not require the maintenance of previous levels of remuneration, and set down some fairly broad guidance as to how national courts should assess whether the payments or allowances granted to pregnant employees in such circumstances under national law are adequate.

29. The courts in both cases made references to the ECJ asking (among other things) whether Article 11 of the PWD requires pay during maternity suspension or alternative duties to be maintained at the employee's previous average level of earnings. The ECJ held that a pregnant worker temporarily transferred to another job, whose pay before the transfer is made up of a basic salary and supplementary allowances the payment of which depends on the performance of specific functions is ***not*** entitled to continue to receive all the remuneration she received before the transfer. Article 11(1) refers to maintaing "a" payment to, not "the" pay of the worker concerned and gives member states some discretion over the rules for calculating that payment.

30. The ECJ's conclusion was that the employee must not be paid less than employees performing the job to which she is temporarily assigned. Neither should she lose any pay components or supplementary allowances that relate to her professional status, such as seniority, length of service or professional qualifications. However, member states are not required by the PWD to ensure that she continues to receive pay components or allowances that depend on "the performance of specific functions in particular circumstances and which are intended essentially to compensate for the disadvantages related to that performance".

Paternity rights

31. The EAT decided in *Kulikaoskas v MacDuff Shellfish* and another that a man was dismissed because of his association with his pregnant partner could not pursue a pregnancy discrimination claim under the Sex Discrimination Act 1975. The EAT held that it was clear that neither the Pregnant Workers Directive nor the Equal Treatment Directive requires protection against "associative" pregnancy discrimination, and declined to refer the matter to the ECJ.

32. The EAT was not required to consider the provisions of the Equality Act 2010, which replaced the SDA 1975 on 1 October 2010. However, the EAT commented that it was "not entirely clear" whether the EqA 2010 could be read as rendering associative pregnancy discrimination unlawful.

33. In *Alvarez v Sesa Start Espana ETT SA*, a Spanish case about fathers' rights, the ECJ has ruled that Spanish legislation permitting employees to take time off to feed a baby breaches the Equal Treatment Directive. While a mother could take the time off provided she was an employee, a father could only take the time off if both he and the mother were employees. Although the law was introduced in 1980 to promote breastfeeding, it had since been amended to include bottle-feeding. As such, the differential treatment of men and women in this regard could no longer be justified as a means of protecting new mothers or of reducing any inequality suffered by women in the workplace, and in fact was liable to perpetuate traditional gender roles by keeping the father's caring role subsidiary to that of the mother. Commentators have already speculated as to whether this case may affect additional paternity leave rights in the UK.

Discrimination on grounds of religion/belief

34. Definition of belief: In *Greater Manchester Police Authority v Power* the EAT has upheld a tribunal's decision that a belief in spiritualism, life after death and the ability of mediums to contact the dead was capable of amounting to either a religious belief or a philosophical belief under the Employment Equality (Religion or Belief) Regulations 2003. The EAT took into account when reaching its decision that spiritualism is thought to be the eighth largest faith group in Britain at present.

35. The decision of the Court of Appeal in the *Ladele* case, reported in our last update, has been followed in the case of *McFarlane v Relate Avon Ltd.* Mr

McFarlane was refused permission to appeal to the Court of Appeal against the decision that Relate did not indirectly discriminate against him on grounds of his religious belief when it dismissed him for refusing to counsel same-sex couples. The court was bound to refuse the application by virtue of its earlier decision in *Ladele*, from which this case was indistinguishable.

36. The court issued a lengthy judgment dealing with a number of issues raised in a witness statement that the former Archbishop of Canterbury, Lord Carey, had submitted in support of the appeal by Mr McFarlane. It dismissed outright Lord Carey's call for a specialist panel of judges with "a proven sensibility to religious issues" as being "deeply inimical to the public interest", and rejected his suggestion that rulings in earlier discrimination cases had in effect equated Christian views on same-sex unions with those of a "homophobe" or "bigot". Most importantly, while the court recognised the protection that must be given to an individual's right to hold and express religious beliefs, it dismissed any argument that special legal protection should be given to the content of that belief, merely because it is religious in nature.

Age discrimination

37. In *Ayodele v Compass Group plc* an employment tribunal has held that the duty to consider requests to work beyond retirement in Schedule 6 of the Employment Equality (Age) Regulations 2006 requires the employer to genuinely consider the employee's request to work beyond retirement. The employer's failure to do so in this case therefore made the dismissal unfair. The tribunal held that any statutory obligation must be performed in good faith and genuinely.

Annual leave entitlement during sick leave

38. In *Khan v Martin McColl* an employment tribunal dismissed a claim for holiday pay by a worker who had been on long-term sick leave on the basis that he had not requested holiday, and so had not been "denied" it. It also held that the employer's payment on termination in lieu of holiday accrued during the last year of employment "broke" the series of deductions and so rendered the claims for earlier accrued but unused holiday out of time. Although this is only a first instance decision, it is a good example of how tribunals are straining to find against claimants seeking to recover annual leave in these situations. One lesson from this case is that members should be advised to ‘request’ their annual leaving during each leave year when they are on long term sick leave.

TRIBUNALS, PRACTICE AND PROCEDURE

39. **Questionnaires:** The new Equality Act statutory questionnaire is available online. A questionnaire can now be served without the leave of the tribunal anytime before the issue of a claim, or within 28 days after the issue of a claim.

    http://www.equalities.gov.uk/docs/NEW FORMS discrimination and other prohibited conduct JB.doc

40. **Postponement of hearing on medical grounds:** In the case of *Chang-Tave v Haydon School and another* the EAT has held that a tribunal was wrong to refuse a claimant's request for the postponement of a hearing where a doctor advised against his attendance. The employee sought a postponement of a hearing on medical grounds, submitting a letter from his doctor which indicated that "he is psychologically in a very vulnerable situation, therefore I do not advise him to attend." The tribunal declined a postponement application, concluding that the doctor had not actually said that the claimant was unfit to attend and neither had he given a prognosis that he was likely to be better at any time in future. This decision was overturned by the EAT.

41. **Mediation:** In March 2010 the Ministry of Justice produced a report evaluating the effectiveness of the judicial mediation service, which was piloted in Newcastle, Central London and Birmingham tribunals. Overall, the report has found that judicial mediation was an expensive process to administer and was not offset by the estimated benefits. It did not have a significant effect on the timing of settlements, rate of resolution or sense of satisfaction by claimants and employers. In its current form therefore, judicial mediation will not be recommended for roll-out to other areas of the Employment Tribunal Service.

42. In the cases we see however, our experience suggests that mediation is effective and is becoming a more frequent route for resolution of complaints. There has been some useful guidance on mediation for trade union represented published recently by ACAS and the TUC. These can be accessed at:

    http://www.acas.org.uk/CHttpHandler.ashx?id=2879&p=0

    In addition, the Law Society has published practice notes on judicial mediation which can be seen at:

http://www.lawsociety.org.uk/productsandservices/practicenotes/judicialmediation/4548.article

43. Tribunal Statistics: The employment tribunal service produced a report of statistics for 2008/09. The statistics in relation to average awards of compensation always make interesting reading, and can be useful in managing members' expectations about the tribunal process and likely benefits. The median is generally felt to be a more representative average measure in this context as it evens out the effect of very large awards which can make the mean average unrepresentative.

Mean, median and maximum awards of compensation

Types of claim	**Mean (average)**	**Median**	**Maximum**
Unfair dismissal	£9,120	£4,903	£234,549
Race discrimination	£18,584	£5,392	£374,922
Sex discrimination	£19,499	£6,275	£442,366
Disability discrimination	£52,087	£8,553	£729,347
Religious discrimination	£4,886	£5,000	£9,500
Sexual orientation discrimination	£20,384	£5,000	£163,725
Age discrimination	£10,931	£5,868	£48,710

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