MONAGHAN ON EQUALITY LAW

SECOND EDITION

KARON MONAGHAN QC

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UNIVERSITY PRESS

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Great Clarendon Street, Oxford, OX2 6DP,
United Kingdom

Oxford University Press is a department of the University of Oxford.
It furthers the University's objective of excellence in research, scholarship,
and education by publishing worldwide. Oxford is a registered trade mark of
Oxford University Press in the UK and in certain other countries

First Edition published in 2007

Second Edition published in 2013

Impression: 1

British Library Cataloguing in Publication Data
Data available

ISBN 978–0–19–960323–7

Printed in Great Britain by
CPI Group (UK) Ltd, Croydon, CR0 4YY

MONAGHAN ON EQUALITY LAW

To Cameron and Elliott

FOREWORD

Equality, wrote Rabinder Singh QC (as he then was) some time ago, is 'the neglected virtue'. But it is not neglected now. At long last, we have the Equality Act 2010, which brings together the many separate laws against discrimination and tries to make them into a coherent whole. This is easier said than done. If equality is indeed a virtue, then it is a very complicated one.

What, after all, do we mean by equality? If all that we mean is the absence of discrimination, that is hard enough for the law to get right. A simple model of non-discrimination says that like cases must be treated alike. But then you have to say that some obvious differences—like race and sex—have to be ignored. It is good that they are ignored, because for most of the time they are indeed irrelevant to the decision being made. But then, so are many other characteristics, but discriminating against red-heads or people over six feet tall is not prohibited. Why are some characteristics picked out for protection and others not?

Then there is the form of protection, which in most cases assumes that people are alike when in fact they are not. Women are to be treated as if they were men, and vice versa. Blacks are to be treated as if they were white, and vice versa. Gays are to be treated as if they were straight, and vice versa. This either/or approach finds it hard to accommodate discrimination which happens because of a combination of protected characteristics: the person who would not be discriminated against just because she is a woman; and would not be discriminated against just because she is black; but is discriminated against because she is a black woman.

The either/or approach also has great difficulty in dealing with historic disadvantage. The traditionally advantaged can complain if they are treated less favourably, just as can the traditionally disadvantaged. So the white male public-schoolboy can (and does) complain if he is less well treated than the state-educated black woman who has had so much more to contend with in her life than he has had. The 2010 Act takes a few tentative steps in the direction of redressing historic disadvantage, but many historically disadvantaged people do not approve. They want a level playing field but they do not want a step up.

Worse still, how do you prioritize among the historically disadvantaged? If you are tie-breaking in otherwise equal situations, how do you evaluate the historic disadvantage of female, of BME, of disabled, of gay people against one another? How do you tie-break between an otherwise equally well-qualified white able-bodied straight man, white able-bodied straight woman, black able-bodied straight man, through all the permutations to black disabled gay woman?

But there is a longer-standing problem than that. Direct discrimination can never be justified, save on some very narrow defined grounds, but a difference in treatment is only discrimination if the circumstances are the same or not materially different. How easy it is to find a difference in the circumstances so as to justify a difference in treatment! So, it could be argued, the black woman consultant was not in the same situation as her white male colleagues because of minor differences between the situations in which they found themselves. But the truth was that when the men found themselves in conflict with the administrative staff they were supported and solutions were found which preserved their status and power, whereas the black woman was undermined and her status was not respected or preserved.

Although that particular woman eventually won her case, I worry about this because it is so easy to see the argument about an objective justification for a difference in treatment being translated into a material difference in the circumstances. It would be much more honest, and much more principled, to translate the argument into an argument about objective justification—is there a legitimate aim, are the means used suitable and appropriate to achieving that aim, and are they proportionate? But at the moment we cannot do that.

The problem is now much more acute because we have so many protected characteristics with the obvious potential for clashes between them. How do you reconcile sincere religious (or other) belief with according equal treatment to people of differing sexual orientations? The approach of European Union law is to outlaw all direct discrimination while allowing some specific exceptions. The approach of European human rights law is to accept that all differences of treatment (in the enjoyment of the convention rights) are potentially justifiable and so to get down to the serious business of balancing rights. Not easy, and no one is suggesting that race and sex discrimination can be justified save in the most exceptional of circumstances. But in other cases, we might welcome the opportunity to balance the importance of the invasion of the right against the importance of the justification.

So it is difficult enough if all we are trying to achieve is equality of treatment. How much harder it would be if we were trying to achieve equality of outcome. Deep down, I suspect that that is what Karon Monaghan would like. But that is a political project whereas equality of treatment can legitimately be seen as a human right and therefore a legal project. Indeed Lord Mance has said that principles of equality of treatment are at the very heart of fundamental rights and the rule of law. This may be a book for the developing army of equality practitioners, but it is also a book which everyone who is interested in and concerned for the project should wish to consult. It will tell you everything you might wish to know, provided that you also have a copy of the Equality Act by your side.

In commending this wonderful and comprehensive book, I am of course not to be taken as endorsing every view of the law which is expressed in it, still less any of the underlying policy arguments. No judge ever knows the answer to any question until it has come up before her in a real case where the arguments on all sides are fully deployed (and not always then, but that's another story). But I welcome its contribution to a serious and difficult area of the law which can be neglected no longer.

Brenda Hale

PREFACE

The first edition of this book anticipated the introduction of a Single Equality Act. By the time of its publication, the Labour Government had committed itself to establishing a new legal framework for addressing discrimination. A Green Paper followed shortly afterwards setting out the Government's aspiration for a harmonized and simplified scheme. The Equality Act 2010 was, in the end, hurriedly passed in the dying days of the outgoing Labour Government, and was then largely brought into force by the Coalition Government. The Equality Act has made accessing anti-discrimination law simpler. The plethora of separate enactments and other instruments it replaced had come to be seen as outdated, cumbersome and difficult to navigate, and the inconsistencies between them increasingly hard to justify. The Equality Act is by no means a perfect replacement. It contains regrettable drafting errors (no doubt symptomatic of the haste with which it was finally passed), unjustified exclusions and incomplete protections in some areas. Nevertheless, it has brought about many improvements. As discussed in this book, many of its more progressive provisions are at risk under the Coalition Government which, in pursuit of its anti-'red-tape' agenda, has in mind less comprehensive protection. In any event, in its present form the Equality Act has not reduced the extent, or scope, of legal regulation relevant to equality, as the size of the second edition of this book illustrates.

The focus of this book is inevitably on the Equality Act 2010 although, as with the first edition, I have covered EU and human rights law and endeavoured to cover some of the historical as well contemporary context for equality law, and to consider some (albeit limited) comparative law.

I have many people to thank. Thank you to Baroness Hale for again writing the Foreword, and for her generous words. Thank you to Ulele Burnham, Barbara Cohen, Claire Darwin, Aidan O'Neill, Laura Prince and Andrew Smith for reviewing draft chapters; and many thanks are due too to Sophie Buckley for her help with the sections in Chapter 6 dealing with direct and indirect discrimination and harassment, and to Sanchita Hosali for her research assistance with the sections on comparative law. I am also indebted to all at OUP for their patience and support and especially to Fiona Sinclair for tolerating all my broken promises on chapter delivery with good humour and encouragement.

I have attempted to state the law as it was at the end of August 2012 although I have been able to include some later developments at proof stage.

Karon Monaghan
December 2012

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