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Class as a protected characteristic?

MARTINA MURPHY and JESSICA FRANKLIN, 12 KBW

The social, economic and cultural effects of the pandemic are likely to cast a long shadow into the future, exacerbating existing inequalities and creating new ones. One impact is that social inequality is set to rise. Could social class be protected under the Equality Act 2010, and what would it mean for employees and employers?

'A prohibition on class discrimination would assist in making the invisible, visible' (Professor Geraldine Van Bueren QC, 'Inclusivity and the Law: Do we need to prohibit class discrimination?')

In the UK, it is lawful for an employer to turn down a job applicant, or offer lesser terms and less money, on the basis that they are working class. Under the Equality Act 2010, social class is not a protected characteristic – it does not share the protection of race, sex, religion or any other of the nine protected characteristics.

The UK has a problem with social inequality in the workplace. Only 39% of people in professional jobs are from working class heritage. And working-class people earn less – £6,000 in 2019 – than middle classes in the same professional jobs.

Two years ago, the TUC called for social class to become the 10th protected characteristic under the Equality Act. Since then, no change has been made. But with the Social Mobility Commission's Report 2021 projecting that social inequality is set to worsen in the wake of the pandemic, the prospect of a legal solution is ripening.

Cyprus and India are among other jurisdictions that have introduced a prohibition against class discrimination in their constitutions. However, such discrimination remains lawful in the UK, and in the vast majority of other jurisdictions and countries across the world.

A contested concept: how could social class be defined?

In *Grainger*, the EAT held that a belief in man-made climate change and the alleged moral imperatives, was capable, if genuinely held, of being a philosophical belief.

As demonstrated by *Grainger*, the courts have provided legal frameworks for concepts tending to escape definition; however, the more nebulous aspects of social class remain hard to formulate into working criteria.

Nevertheless, a basic definition that protects those who come from socioeconomically disadvantaged heritage is possible. Since 2018, Scottish public bodies making strategic decisions have been under a legal obligation to consider how to reduce inequalities of outcome caused by socioeconomic disadvantage (the 'Fairer Scotland Duty', under Part 1 of the Equality Act). Similarly, the socioeconomic duty came into force in Wales on 30 March 2021.

The position remains that England has not enacted the power to put in place a public sector duty regarding socioeconomic inequalities, whereas both Scotland and Wales have done so. While this would not actually prohibit discrimination on socioeconomic grounds, the introduction of this duty was seen as a potential first step towards addressing class discrimination.

In respect of that socioeconomic duty, socioeconomic disadvantage is treated as low income, low wealth, material deprivation and area deprivation. Those are measurable categories and could form the starting point for protecting social class under the Equality Act. Another common approach is by measuring class origins by the occupations of our parents when we were teenagers.

Could a working class but wealthy individual be protected too? In *Taylor*, the protected characteristic of gender reassignment was held to be 'a spectrum', with individuals along that spectrum coming under its protection. Likewise, individuals who were socioeconomically disadvantaged but are no longer so could also qualify for protection. This

'defining class for the purposes of the Equality Act is a hurdle – but not an insurmountable one'

approach could enable the legislation to encompass facets of class that make an individual vulnerable to discrimination, but which don't bear direct correlation to financial means.

A definition, as above, that is premised on socioeconomic disadvantage alone would not protect a person from discrimination based on social privilege. The applicant turned down for sounding 'too posh' would still be without a remedy. In other words, to restrict a definition to socioeconomic disadvantage may be too narrow. To extend protection to *all* kinds of social class, the characteristic would need to be framed more broadly – perhaps 'any trait that is commonly associated with either socioeconomic advantage or disadvantage'. Admittedly this is hazardously vague and would require judges to fill in major definitional gaps in order to guard the floodgates. Professor Geraldine Van Bueren QC argues that another added value in prohibiting class discrimination is that it would achieve a change in culture so that insulting terms such as 'chav', 'toff' and more indirectly, 'bog-standard comprehensive' and 'Essex girl' in England, would no longer be acceptable. The fact remains that defining class for the purposes of the Equality Act is a hurdle – but not an insurmountable one.

What would it mean for employers?

If class were made a protected characteristic, employers would have to look particularly carefully at their recruitment criteria. Requiring unpaid internships could indirectly discriminate against underprivileged candidates. Employers targeting university graduates at careers fairs may need to equally engage Russell group and non-Russell group universities. Certain qualities in job descriptions that are implicitly associated with privilege ('gravitas', 'polish') would need to be removed.

However, many employers have already gone some way to addressing social inequality in the workplace. This is also apparent in the widespread introduction of unconscious bias training, objective assessment criteria, and the increasingly common practice of removing school and university names from CVs. Exhaustive anti-bullying policies should prohibit discrimination in all its forms, including social class. In other words, employers who are already actively committed to improving diversity may find that a change in the law won't entail making many changes of their own.

The Social Mobility Commission has published a toolkit to encourage socioeconomic diversity and inclusion in the creative industries. Further, KPMG has recently set a target for the proportion of working-class staff and other major companies are likely to follow.

What would it mean for employees?

Some job applicants or employees may be reluctant to share information regarding, for example, their parents' jobs or where they grew up. However, if questionnaires are anonymised and explain the purpose of the information gathering exercise and how it will be used, that should minimise the barriers to gathering data. Tackling social class inequality is ultimately likely to strengthen existing prohibitions of other types of discrimination and diversity strategies.

Conclusion

The perceived challenge of defining social class and perhaps a reluctance to define who we are and where we come from have both to date contributed to the absence of protection in law from discrimination based on class. The courts have not yet read into existing law a prohibition on class discrimination. However, as demonstrated by *Grainger*, the courts have provided legal frameworks for concepts that are difficult to define. There is mounting pressure to tackle social class inequality and an express prohibition against class discrimination in the Equality Act is overdue.

KEY:

'Inclusivity and the Law'	(2021) 3 European Human Rights Law Review 274-284
<i>Grainger</i>	<i>Grainger Plc v Nicholson</i> [2010] IRLR 4
<i>Taylor</i>	<i>Taylor v Jaguar Land Rover Ltd</i> (1304471/2018)