



CIPD Law at Work



newsletter

Equality Bill – Government publishes details about the socio-economic duty

The Government has published details about how the socio-economic duty, a key part of the Equality Bill, will aim to transform the way public bodies work to narrow the gaps between rich and poor and make society fairer.

The socio-economic duty – contained in clause one of the Equality Bill – sets out a new legal duty on key public bodies, including central government and local authorities, to ensure they consider the impact that their strategic decisions will have on narrowing socio-economic inequalities. The duty was debated during the Equality Bill's committee stage in the House of Lords in January.

According to a Government Equalities Office press release, with the average life expectancy in the poorest areas of the country up to 13 years shorter than in the most affluent areas, the new socio-economic duty 'will require public bodies to consider how they will reduce the barriers that hold people back, block aspirations and prevent people fulfilling their potential'.

Ms Harman said:

'A person's socio-economic background is still a key factor in determining their life chances – how they get on at school, the chances of continuing with their education, their employment prospects and their health. This new legal duty will fall on every strategic body that affects these life chances and will be a catalyst for change so that more people have a better chance to enjoy a higher standard of living. Improving opportunities for everyone will be at the core of all key public services, and is a crucial part of the Equality Bill.'

Socio-economic factors affect how well people do throughout their lives. The Government Equalities Office notes that the socio-economic duty is needed because:

- poorer children (who get free school meals between the ages of 7 and 14) are less likely to go onto higher education
- less academically able but better off children overtake more able, but poorer children by the age of six
- the income gap between those in work continues into retirement as those in

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higher paid jobs are more likely to have company pension schemes, giving them financial security in retirement

- women generally live longer than men, but since the early 1980s poorer women have been living less long than rich men.

Formal guidance on the socio-economic duty will be published by the Government Equalities Office in the summer of 2010.

CIPD launches pre-election 'manifesto for work'

According to the Chartered Institute of Personnel and Development (CIPD), the National Minimum Wage for younger workers should be frozen in absolute terms in 2010 to ensure efforts by the Government to combat

rising youth unemployment are not fatally undermined just as the economy is beginning to recover. The call is contained in 'Platform 2010 – A Recovery That Works', the CIPD's pre-election 'manifesto for work' which was launched on 5 January 2010.

Other calls made by the CIPD include the following:

- delay fiscal deficit reduction measures, but freeze public sector pay bill and conduct efficiency review of all quangos

- abandon the increase in employers' NI Contributions planned for 2011
- remove the default retirement age and extend the right to request flexible working to all employees from 2013
- extend the job guarantee scheme to the long-term unemployed aged over 50
- lead a national awareness campaign on the importance of good people management skills among line managers.



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In the Courts

Dress Codes

The EAT decision in *Dansie v Metropolitan Police*, is authority for the proposition that requiring a male employee to cut his shoulder-length hair did not amount to discrimination or harassment under the Sex Discrimination Act 1975 simply because a female employee would not, in similar circumstances, have been required to cut her hair, provided that the overall dress code was equally balanced between the sexes.

In upholding the Tribunal's decision, the EAT confirmed that the correct legal test is whether, applying contemporary standards and conventions, as well as the specific needs of the profession in question, the employer's dress code

as a whole was asking its employees to display an equivalent level of smartness between the sexes: as in *Smith v Safeway Plc* [1996] ICR 868 and *DWP v Thompson* [2004] IRLR 348. Accordingly, as the dress code of the Metropolitan Police was, overall, equally balanced between the sexes, they had not discriminated against Mr. Dansie, a trainee, by requiring him to cut his hair.

The EAT was satisfied that the Tribunal had been entitled to find on the evidence that a female recruit who failed to comply with the gender neutral dress/appearance code necessary for the service would have been treated in the same way.

Risk assessments for pregnant women

In *O'Neill v Buckinghamshire County Council*, the EAT has held that, for an employer to fall under a duty to conduct a risk assessment for a pregnant worker, these preconditions must be met:

- (a) the employee must notify the employer in writing that she is pregnant
- (b) the work must be of a kind which could involve a risk of harm or danger to the health and safety of the expectant mother or her baby
- (c) the risk must arise from either processes, working conditions or physical, chemical or biological agents in the workplace.

There is no more general obligation to carry out a risk assessment for a pregnant worker. In discharging its risk assessment obligations, where they arise, there is nothing in either the Pregnant Workers Directive or the Management of Health and Safety at Work

Regulations 1999 to indicate that a meeting with the worker is required before the obligation to carry out a risk assessment is satisfied. But an employer must provide her with comprehensive and relevant information on the identified risks to her health and safety.

The EAT also provides tentative support for the proposition first adopted by the EAT in *Hardman v Mallon* [2002] IRLR 516 and considered in *Madarassy v Nomura* [2007] IRLR 246, that, if an obligation to carry out a risk assessment, and a failure to carry out that risk assessment is established, then discrimination results.

Proof of detriment is not necessary. Employers, accordingly, need to be astute to carrying out risk assessments where the preconditions are met.

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John Philpott, CIPD Chief Economic Adviser, said:

'Freezing the National Minimum Wage for younger workers is necessary to ensure that all this good work is not fatally undermined just as the economy begins to recover. Pay restraint is likely to be a feature of the year ahead as employers and employees continue to work together to minimise job losses. It is right that

younger workers lucky enough to have jobs should play their collective part in helping maximise the chances for those who do not. Platform 2010 sets out the CIPD's policy priorities for work in a year which is likely to see economic recovery – but in a slow and faltering form. Our priorities combine the macro-economic steps needed to create a platform for job creation and policies aimed at improving the quality and availability of work for all.'

Focus on

Equalities Minister signals wish to scrap default retirement age

In the autumn, the High Court in the *Heyday* case upheld the validity of the default retirement age of 65 when the legislation was introduced but hinted strongly that if its validity was being considered now a different result might have been the case.

A news item on the BBC News website has reported that Harriet Harman, Minister for Women and Equality, called the default retirement age 'arbitrary' and suggested a 'massive policy change' was in the offing. The Department for Business, Innovation and Skills (BIS) is currently carrying out a review

European Court rules on justifying age discrimination

The ECJ has handed down judgment in two cases concerning the justification of difference of treatment on grounds of age:

- *Wolf v Stadt Frankfurt am Main*, on the interpretation of Article 4 (Occupational Requirements) of the Equal Treatment Framework Directive
- *Petersen v Berufungsausschuss fuer Zahnaerzte fuer den Bezirk Westfalen-Lippe* on the interpretation of Article 6 (Justification of differences of treatment on grounds of age).

Genuine Occupational Requirements

Mr Wolf applied to work as a fireman in the Federal State of Hesse, Germany. However his application was not considered because local regulations provided that recruitment to intermediate career posts in the fire-service (which involved fire-fighting on the

age discrimination

of the default retirement age of 65 and the deadline for comments was 1 February 2010. It will either be abolished or phased out with the first stage being a change to a default retirement age of 67.

A press release issued by the Government Equalities Office notes that Ms Harman has stated that discrimination against older people is a serious problem that must be tackled at the highest levels.

Speaking at an Age Concern/Help the Aged conference in central London, Ms Harman said:

'We still have to challenge the old-fashioned notion that defines you through your importance to the world of work, and that when you no longer work sees you as 'past it'. We still have more to do to tackle the attitude that once you reach 60 you are just treading water until you become frail and dependent ... We have to banish the ageism in the workplace that costs an estimated cost to the economy up to £31 billion per year due to lost GDP ... Older people are the last

remaining group that society deems it acceptable to discriminate against. This is a problem that we are determined to tackle at the highest level, which is why our Equality Bill reinforces this Government's commitment to ending age discrimination wherever it arises.'

The Government Equalities Office press release notes that the Equality Bill, which has entered its committee stage in the House of Lords, will aim to strengthen the law when it comes to older people in the following ways:

- by providing new legal protection from discrimination to those at work because they are caring for an older member of their family
- by placing a legal obligation on public bodies, such as planning authorities, to protect and promote the needs of older people when planning their services; and
- by banning age discrimination in the provision of goods and services so that older people are not unfairly disadvantaged in things such as travel insurance and loans.

ground and rescuing people) was not open to anyone over 30.

The ECJ held that the German Government's objective of ensuring the operational capacity and proper functioning of the professional fire service was a legitimate objective within Article 4(1).

The ECJ held that the maximum recruitment age was proportionate to its aims. The ECJ took into consideration that fire-fighters had to complete a two year training programme, and that an individual recruited before the age of 30 would ordinarily be able to complete the physically demanding role of a fire-fighter for at least 15 or 20 years. However, if the fire-service recruited older applicants, then the fire-service might be short of officials who could complete the most physically demanding duties or who could complete these duties for a sufficiently long period.

As the ECJ found that the difference in treatment on the grounds of age was justified under Article 4(1), it did not go on to consider justification under Article 6(1).

Justification under Article 6

In *Petersen*, the ECJ was asked to determine whether German legislation which introduced a maximum age of 68 for doctors and dentists practising on panels within the German national health system (which covers 90% of patients) could be justified. This rule was said to protect the health of patients, since it was thought that the performance of doctors and dentists declined from age 68 onwards. The ECJ held that, because dentists who practised outside the panel system were not bound by the rule, it was not necessary to achieve the protection of public health and could not be justified under either Article 2(5) or Article 6(1).

However, the ECJ held that the distribution of employment opportunities among the generations could be a legitimate objective within Article 6(1). The ECJ held that the question of whether the measure was appropriate and necessary would depend on the local labour market, and whether there was in fact an excessive number of panel dentists or a latent risk that this would occur.

Legislation watch

Annual compensation limits reduced

The Employment Rights (Revision of Limits) Order 2009 SI 2009/3274 was laid before Parliament on 14 December 2009 and for the first time ever, has resulted in a reduction to the maximum compensatory award. The revisions apply where the event giving rise to the entitlement to compensation or other payment occurred on or after 1 February 2010.

Under s.34 of the Employment Relations Act 1999, if the retail prices index for September of a year is higher or lower than the index for the previous September, the Secretary of State is required to change the limits, by the amounts of the increase or decrease. The revised amounts reflect the decrease of 1.4 per cent in the index from September 2008 to September 2009.

Under the Order:

- the maximum amount of the compensatory award for unfair dismissal **decreased** from £66,200 to £65,300
- the minimum amount of compensation where an individual is excluded or expelled from a union and not admitted or re-admitted by the date of a tribunal application **fell** from £7,300 to £7,200
- the maximum rate of guaranteed pay **decreased** from £21.50 to £21.20 a day

In determining the calculation required by s.34, the figures are rounded up which has resulted in certain limits remaining the same and therefore not included in the Order.

- the limit on the amount of an award for unlawful inducement relating to trade union membership or activities, or for unlawful inducement relating to collective bargaining remains at £3,100
- the minimum basic award in cases where dismissal was unfair by virtue of Health and Safety, Working Time, employee representatives, trade union or occupational pension trustee reasons remains at £4,700.
- a week's pay (for basic award and redundancy pay purposes) remains the same at £380.

Employee Relations

The Employment Protection Code of Practice (Time Off for Trade Union Duties and Activities) Order 2009 SI 2009/3223 brought the revised Acas Code of Practice on Time Off for Trade Union Duties and Activities into force on 1 January 2010. Employees who are union representatives or members of an independent trade union recognised by their employer, are permitted reasonable time off during working hours to carry out certain trade union duties or to take part in trade union activities. The Code of Practice, which includes guidance on time off for union learning representatives, has been issued by Acas and replaces the code which came into effect on 27 April 2003.

The aim of the revised Code is to improve the effectiveness of relationships between employers and trade unions by giving practical guidance on how the statutory provisions on time off for trade union duties and activities should work.

Acas notes that the Code has been revised, after substantial consultation, to reflect the changing nature of the British workplace and the effect this has had on time off arrangements for trade union representatives.

To complement the revised Code, Acas has produced two new guides. The first of the guides deals with managing time off for union representatives, the second with time off for non-union representatives.

Working hours – TUC analysis of average unpaid overtime

According to a TUC analysis of official statistics, more than five million people worked unpaid overtime in 2009, bringing its total value across the UK to £27.4 billion. The TUC study shows that 5.07 million people regularly worked unpaid overtime in 2009, a decline of 168,000 since 2008.

The TUC has calculated the value of unpaid overtime using unpublished data from the National Statistics Labour Force Survey (April to June 2009 data) and Annual Survey of Hours and Earnings.

Staff who did unpaid overtime worked an average of 7 hours 12 minutes a week, worth £5,402 a year – the highest amount since records began in the late 1990s – and an increase of £263 since 2008. The biggest rises in the value of unpaid overtime have taken place in London (plus £498), the North West (plus £492) and the North East (plus £474). Wales is the only area in which the value of unpaid overtime fell (minus £392).

Of the five million employees who worked unpaid overtime, nearly 900,000 regularly worked more than ten hours a week for free. Workers in Northern Ireland (23.1 per cent of those who worked unpaid overtime), the East Midlands (21.3 per cent) and London (20.6 per cent) were the most likely to do more than ten hours of unpaid overtime a week.

The TUC says that with many employers and staff agreeing to reduce hours in order to avoid job losses, the reduction in working time has had a knock on effect on the number of people working paid and unpaid overtime.

According to the TUC, if everyone who worked unpaid overtime did it from the start of the year, they would start getting paid on Friday 26 February 2010. The TUC has declared this day 'Work Your Proper Hours Day' and will call on employers to thank staff for the extra work they are putting in to help businesses through the recession.

Agency workers

Last year the Department for Business, Innovation and Skills (BIS) published a consultation paper on draft regulations to implement the EU Agency Workers Directive. As agreed in May 2008 by the TUC and CBI, the changes will give agency workers the right to the same pay, holidays and basic conditions as permanent staff after 12 weeks on a given job. The BIS consultation paper on the draft regulations set out detailed proposals for implementation in the UK of the Agency Workers Directive. The deadline for comments was 11 December 2009 and the proposed implementation date for the Agency Workers Regulations is 1 October 2011.

The TUC published its response to the BIS

consultation paper, calling on the Government to give agency workers 'real protection from exploitation and genuine equal treatment on pay, holiday and hours'. The TUC notes that agency workers are particularly vulnerable during times of recession and the new rights should be introduced as a matter of urgency. The TUC wants the Agency Workers Regulations to be strengthened to guarantee that every agency worker receives the same rights on pay, holiday and working time as directly employed staff doing the same work, following a 12-week qualifying period.

The TUC believes that the new regulations must include more effective anti-avoidance measures to prevent unscrupulous employers

and agencies avoiding the new rights by moving agency workers between jobs within the same workplace, or by rotating agency temps on short-term assignments between different employers. The TUC further contends that legal loopholes in the regulations should also be closed 'to ensure that rogue employers and agencies do not use bogus self-employment to avoid equal treatment rights'.

A press release issued by the TUC notes that the TUC believes that agency temps should have the right to equal treatment not only on hourly pay rates and overtime payments, but also on bonuses, performance-related pay, pay relating to maternity, paternity and adoption leave and redundancy pay.