



CIPD Law at Work



# newsletter

## Equality Bill receives Royal Assent

The Equality Bill has completed the final stage of its passage through Parliament, and received Royal Assent on 8 April.

### Implementation of the measures

The majority of the provisions in the Equality Act 2010 will come into force in October 2010, with the implementation of some provisions being delayed until next year to allow organisations across the public and private sectors time to prepare.

A key feature in the Act is the harmonisation and extension of discrimination law to cover age, disability, sex, gender reassignment, sexual orientation, race, religion or belief and, in many but not all instances, marriage and civil partnerships. 'Disability related' discrimination will be replaced with a prohibition on discriminating against a disabled person by treating them unfavourably where that treatment is not a proportionate means of achieving a legitimate aim.

Another new provision in the Act prohibits employers asking job applicants questions about their health and whether they have a disability, other than in specified circumstances (including whether the applicant will be able to carry out a function that is intrinsic to the work concerned). Employers will still be entitled to screen applicants about health after making a job offer.

The ban on discrimination by association will be extended to all protected characteristics and so will reflect the law developed in recent appeal cases. This should protect spouses, partners, parents and carers who look after a disabled person or older relative from discrimination. They will be protected by virtue of their very close link to that person.

The ban on discrimination based on perception is similarly extended. This will protect employees who experience discrimination because they are wrongly thought to have a protected characteristic – for example, a male job applicant who is rejected because the employer wrongly thinks he is a woman, because he has a name that is commonly used as a woman's name, would be able to claim for sex discrimination.

From April 2011 an employee who claims they have been specifically discriminated against because they are for example female and Asian, rather than just because of their race or gender, will be able to claim for this combination of characteristics.

### Extension of remedies

The Act will also widen tribunals' powers to make recommendations in cases where unlawful discrimination has been proved. At present, a tribunal can recommend that an employer takes steps that will reduce the effect of discrimination on the individual claimant. The Act extends this to enable wide-ranging recommendations to be made across the workplace, such as re-training staff, publishing its selection criteria used for staff transfer or promotion, or setting up a review panel to deal with equal opportunities, harassment and grievances. While not binding, and not creating an enforceable right, failure by an employer to

### IN THIS ISSUE:

- ▶ In the Courts
- ▶ Airline pilots' holiday pay case referred to ECJ
- ▶ 'Fit notes' replace 'sick notes'
- ▶ CIPD survey on workers' caring responsibilities highlights growing demands for flexible working
- ▶ Family Friendly Working Hours Taskforce publishes report
- ▶ New guide on flexible working for fathers
- ▶ Paternity leave

comply could be damaging to the employer's reputation and capable of being used in evidence against the employer in future discrimination claims.

### Positive discrimination

The Act will mean employers can choose someone for a job from an under-represented group when they have the choice between two or more candidates who are 'as qualified' as each other (but must not have a policy of doing that in every case). This has been described as a feature permitting positive discrimination and one that the Conservatives have indicated they may not implement.

From April 2011 the Act will create a new single public sector equality duty that will continue to cover race, gender and disability but will be extended to cover age, sexual orientation, religion or belief, pregnancy and maternity and gender reassignment. Public bodies will be required to consider needs, by reference to these characteristics, when designing and delivering public services.



The ban on age discrimination is going to be extended to the provision of services and public functions. Exceptions will be made and some treatment will be objectively justified – it is envisaged that Regulations will be published possibly in the autumn dealing with the exemptions.

Also, employers with 250 employees or more will be encouraged, on a voluntary basis, to publish their pay statistics to demonstrate how they are tackling the gender pay gap. If perceived necessary, this could become compulsory in 2013 (although the Conservatives are against this). Public bodies with 150 or more employees may have to publish their gender pay gap from April 2011.

## So what will the Act do and how will it affect existing law?

The Equality Act will change the face of equality law and harmonise existing law by:

1. Introducing a new public sector duty to consider **reducing socio-economic inequalities**
2. Putting a new integrated **Equality Duty** on public bodies
3. Using **public procurement** to improve equality
4. Banning **age discrimination** outside the workplace
5. Requiring **gender pay** and employment equality publishing
6. Extending the scope to use **positive action**
7. Strengthening the **powers of employment tribunals**
8. Protecting **carers** from discrimination
9. Clarifying the protection for **breastfeeding mothers**
10. Banning discrimination in **private members' clubs**
11. Strengthening protection from discrimination for **disabled people**
12. Protecting people from **dual discrimination** – direct discrimination because of a combination of two protected characteristics.

## How will it address inequality?

- **Tackling socio-economic disadvantage through an important new duty on key public bodies.** Inequality and disadvantage are not only associated with issues such as gender, age, disability or ethnicity. Overarching and interwoven with these is the persistent inequality that results from someone's family background

or where they were born. The new duty set out in clause one of the Equality Act will require Government departments, local authorities and key health bodies to consider, in all the strategic decisions they make, how they will tackle the disadvantage some people face because of socio-economic disadvantage.

## Women in society

- **Tackling the pay gap between women and men.** Women are on average paid around 22 per cent less than men but few employers would admit to it being an issue in their workplace. Transparency is the way forward, so the Equality Act will:
  - **In the public sector** – require public bodies with 150 or more staff to publish their gender pay gap
  - **In the private sector** – enable government to require private and voluntary sector employers with at least 250 employees to publish details of their gender pay gap. The government will do this from 2013 if insufficient voluntary progress has been made
  - **Ban pay secrecy clauses**, which conceal inequality.
- **Protecting pregnant women and new mothers from discrimination.** The Equality Act makes clear that mothers can breastfeed their children without being asked to leave places like cafes and shops, and ensures that schools cannot discriminate against pupils who are pregnant or new mothers.
- **Increasing the diversity of Parliament.** The Act extends the permission for political parties to use all-women shortlists until 2030, helping to increase the number of women in Parliament.
- **Protecting carers from discrimination.** The Equality Act protects people – often women who are, for example, caring for a disabled child or an older relative. They will be protected by virtue of their link to that person.

## People from ethnic minorities

- **Making the workplace more diverse.** The Equality Act will tackle the employment gap for people from ethnic minority communities by allowing employers to choose to take positive action to appoint a person from an under-represented or disadvantaged group in order to make their workforce better reflect the community they serve. This is a voluntary measure and will only be allowed if two candidates under consideration are as qualified as each other in terms of competence, aptitude, experience and

overall performance during any interview or assessment.

- **The power to ban caste discrimination.** The Act creates a power for the Government to ban discrimination and harassment because of caste, if the available evidence (including research commissioned by the Government Equalities Office (GEO)) shows this is appropriate.
- **Increasing the diversity of Parliament.** Democratic institutions should reflect the people they serve, so the Act allows political parties to do more to increase the diversity of their candidates, for example by reserving a specific number of places on every shortlist for ethnic minority candidates.

## Disabled people

- **Making life easier for disabled people at home.** The Equality Act gives disabled people who live in rented homes the right to have reasonable adjustments made to communal areas like entrances and hallways, provided they meet the cost.
- **Helping disabled children at school.** Schools will have to provide auxiliary aids and services for disabled pupils, for example special equipment and large-print books, where reasonable.
- **Protecting disabled people from discrimination in the recruitment process.** The Act makes it unlawful for employers to ask job applicants questions about disability or health before making a job offer, except in specified circumstances. This will prevent employers screening potential employees to avoid recruiting disabled people.
- **Increasing the number of wheelchair-accessible taxis.** The number of wheelchair-accessible taxis is set to increase, as the Act means a local authority that doesn't have enough wheelchair-accessible taxis in its area cannot refuse a licence to such a vehicle simply because it has a policy of controlling the overall number of taxis.
- **Protecting carers from discrimination.** The Equality Act will protect people who are, for example, caring for a disabled child or relative. They will be protected by virtue of their link to that person.

## People with religious or philosophical beliefs

- **Putting a new duty on public bodies.** The Equality Act puts a duty on public bodies to consider the needs of people with different religious and philosophical beliefs when designing and delivering

services. This could include considering the need to offer halal and kosher meals as part of a meals on wheels service.

- **Protecting people from discrimination.** The Act carries forward existing laws protecting everyone from discrimination because of religion or philosophical belief, or lack of religion or belief. These protections are not just for minority groups – they extend to Christians, Muslims, Jews, Hindus and members of other religions, as well as humanists and atheists.

## People of all ages

- **Outlawing unjustifiable age discrimination.** In 2006 the Government banned age discrimination in the workplace. The Equality Act extends this protection beyond the workplace by outlawing unjustifiable age discrimination against people aged 18 and over where goods are bought and services provided, such as in shops, hospitals, and when buying financial products. Beneficial age-based treatment such as free bus passes for over-60s will still continue, and discounts for pensioners and age-related group holidays will still be allowed.
- **Placing a new duty on public bodies to take account of peoples' age.** The Act places a legal duty on public bodies to consider the needs of people of all ages when designing and delivering services. This will ensure that public bodies consider the needs of children, teenagers and younger and older adults.

## Lesbian, gay and bisexual people

- **Removing the prohibition preventing civil partnership registrations taking place on religious premises.** The Act removes the express prohibition within the Civil Partnership Act 2004 that prevents civil partnerships being registered on religious premises. This means that religious organisations that want to host civil partnership registrations on their premises will not be prevented from doing so, but no religious organisation will be forced to host a civil partnership if it does not want to do so. There will be full public consultation before this is put into effect.
- **Introducing a new duty to take account of the needs of lesbian, gay and bisexual (LGB) people.** The new Equality Duty means that public bodies will need to think about the needs of LGB people when designing and delivering services. This could mean a health centre running a promotional campaign to encourage more lesbians to attend clinics

for cervical smear tests, or a school working with parents to tackle homophobia in their school.

## Transsexual people

- **Extending the Equality Duty on public bodies.** The new Equality Duty will require public bodies to advance equality of opportunity for transsexual people. This could mean a local authority noticing that there are no support groups for people undergoing gender reassignment in their area, and deciding to fund a charity to help reach out to the transsexual community.
- **Revising the definition of 'gender reassignment'** to make it clear that a transsexual person does not have to be under medical supervision to be protected from discrimination and harassment.
- **Protecting people who face discrimination because of their association with transsexual people,** for example, as their partner.
- **Extending protection against gender reassignment discrimination to cover schools.** This ensures that schools will have to be even more sensitive to the needs of children who have gender identity issues.

## Everyone

- **Providing ground-breaking new protection from discrimination because of a combination of two protected characteristics (dual discrimination).** For example, because you are a black woman or a Muslim man.
- **Requiring public bodies to consider using public procurement as a way to improve equality,** for example, by including requirements about apprenticeships or traineeships being offered to people from under-represented groups as part of the contract conditions.
- **Providing new protection if you experience discrimination because you are wrongly thought to have a protected characteristic,** for example, a male job applicant who is rejected because the employer wrongly thinks he is a woman, because he has a name which is commonly used as a woman's name, would be able to claim for sex discrimination.
- **Extending the power of employment tribunals** to make recommendations in discrimination cases that benefit the wider workforce as well as the individual claimant, to help employers improve their equality performance.
- **Making it unlawful for private clubs to discriminate** against their members or guests because of their sex, religion or

belief, because they are pregnant or a new mother, or because they are a transsexual. It is already unlawful for them to discriminate against a person because of their race, sexual orientation or disability. This means that clubs which are open to all will no longer be able to restrict access to, for example, the golf course or a club bar, or apply different conditions and fees for membership because of any of these characteristics.

- **Increasing transparency about the diversity of political candidates.** The Act enables government to require political parties to publish diversity data on parliamentary candidate selections as a way of helping to identify any barriers causing or contributing to under-representation of particular groups, such as women or disabled people.

## Progress towards implementation

The Government Equalities Office will work with the Equality and Human Rights Commission and the public, private and voluntary sectors to provide help, advice, guidance and support so that the Act operates in an effective and proportionate way.

According to the GEO, the provisions in the Equality Act will come into force at different times to allow time for people and organisations that are affected by the new laws to prepare for them. According to the GEO, it is planned that the Act will come into force in accordance with the following timetable:

- October 2010: main provisions
- April 2011: the integrated public sector Equality Duty, the socio-economic duty and dual discrimination protection
- 2012: the ban on age discrimination in provision of goods, facilities, services and public functions
- 2013: private and voluntary sector gender pay transparency regulations (if required) and political parties publishing diversity data.

However, it should be noted that the Conservatives have announced that they intend to drop some aspects of the Act. During the final debate on the Equality Bill in the House of Commons, Mark Harper, on behalf of the Conservatives, confirmed that a Conservative government would not bring into force the socio-economic duty or positive action provisions of the Bill, nor 'the mistaken way in which the Government is tackling equal pay'.

# In the Courts

## Whistleblowing

The EAT (Langstaff J) has handed down its decision in *BP plc v Elstone*, which is authority for the proposition that a worker can claim to have suffered a detriment from his current employer on the ground of a protected disclosure made whilst employed by a previous employer. It was held that there is no reason to suppose that there is any implied restriction of the expression 'worker' and 'employer' in sections 43A and 43B of the *Employment Rights Act 1996* to that which is work under the same contract and for the same employer as that referred to in section 47B. The courts are obliged to take a purposive approach to the statutory provisions and, otherwise, it would lead to practical repercussions where the two employers are part of a group of companies and there is a TUPE transfer between them.

However, it is not correct that a claimant does not need to be a worker of any employer at the time of making the disclosure. The plain

wording of the statutory provisions identifies a worker as making the disclosure, not 'a person', and contemplates that at the time of the disclosure there is someone who is an employer.

## Injury to feelings - discrimination

The EAT (Underhill P) has handed down its decision in *Taylor v XLN Telecom*, which is authority for the proposition that, in a discrimination claim, a claimant is entitled to recover for any injury to feelings and/or personal injury attributable to the discriminatory act (such as a racially-motivated dismissal) without having to prove that the injury resulted from actual knowledge of the discrimination. The decision is likely to have a significant impact on the assessment of injury to feelings and health in indirect discrimination cases.

In this case, the Tribunal had found that the dismissal of the Claimant, who is black, had been unfair and constituted unlawful (racially-

motivated) victimisation. However, they had declined to make an award of injury to feelings or psychiatric injury because his distress arose from the manner of his dismissal rather than any knowledge of the discrimination that he had suffered. The Tribunal therefore found that they were bound by the observation of Lawton LJ in *Skyrail Oceanic Ltd v Coleman* [1981] ICR 864 that 'any injury to feelings must result from the knowledge that it was an act of discrimination which brought about a dismissal...'

On appeal, the EAT held that the observations of Lawton LJ had been misunderstood: there was no requirement to prove knowledge of the act of discrimination whether the claim was for injury to feelings or to health. The Claimant could therefore recover damages for any proven psychiatric injury (or injury to feelings) irrespective of what he knew or did not know about the motivation of his employer's decision to dismiss. The claim has now been remitted to the Tribunal to determine the appropriate level of any such award.

## Airline pilots' holiday pay case referred to ECJ

The Supreme Court has decided to refer the case of *British Airways plc v Williams and ors* to the European Court of Justice. The pilots' argument that they should be paid not only basic pay, as was BA's policy, but also flying allowances when on annual leave was accepted by the employment tribunal and the EAT but rejected by the Court of Appeal. The Supreme Court has taken the view that the issue turns on what is meant by 'paid annual leave' in the Working Time Directive.

The present dispute arises because, while the Working Time Regulations 1998 establish a formula for calculating holiday pay by reference to the average remuneration the worker received over the previous 12 weeks, Reg 18 expressly excludes certain workers in the aviation sector. Aviation workers have a separate entitlement under the Civil Aviation (Working Time) Regulations, implementing the EU Aviation Directive, to a minimum of four weeks' paid annual leave. However, unlike the Working Time Regulations, the Aviation Regulations do not state how the rate of pay for statutory leave should be calculated. The employment tribunal and the EAT decided that the formula adopted by the Working

Time Regulations could apply equally well under the Civil Aviation Regulations, despite their silence on this point. It therefore awarded holiday pay on the basis argued for by the pilots, including flying allowances in the calculation.

On appeal, the Court of Appeal overturned the EAT's decision. It held that the omission of a formula from the Aviation Regulations had to be viewed as a deliberate decision on the draftsman's part, and inferred that Parliament had chosen to leave it to the aviation industry itself to negotiate holiday pay entitlement by way of collective agreement. If, in the absence of such agreement, this left a partial void in the UK's implementation of EU law, then it was a void into which the pilots' claims simply disappeared. Thus, BA's decision to pay only basic pay during holiday could not be said to be a breach of the Regulations. The pilots appealed to the House of Lords, which has since been replaced by the Supreme Court.

The Supreme Court has now decided that the issue raises questions of interpretation of the Aviation Directive and the Working Time

Directive, the relevant provisions of which are in materially the same form. The Court noted that case law on the Working Time Directive has established that payment for annual leave must be calculated in such a way that, during holiday, the worker is, as regards remuneration, put in a position 'comparable' to periods of work. However, it acknowledged that the existing decisions on this point arose in very different contexts to the present. Furthermore, it was by no means clear that 'comparable' should mean 'equivalent'. It might be that 'comparable' remuneration is only the level necessary to ensure that the Directives' health and safety objective is not undermined, which was not suggested to be a risk on the present facts.

The Court therefore decided to make a reference to the ECJ for clarification on the Directives' meaning. In short, the Court is asking to what extent, if any, do the Directives lay down requirements as to the nature and/or level of the payments required to be made in respect of holiday. And specifically, should holiday pay either (a) correspond precisely with or (b) be broadly comparable to the worker's 'normal' pay?



# 'Fit notes' replace 'sick notes'

The *Social Security (Medical Evidence) and Statutory Sick Pay (Medical Evidence) (Amendment) Regulations 2010 SI 2010/137* came into force on 6 April 2010.

The Statement of Fitness for Work, or 'fit note', is a new medical statement that GPs will issue from 6 April 2010 and replaces the old 'sick note'. It aims to focus on what an employee may be able to do at work rather than what they cannot do.

The key changes include:

- The introduction of a new option – 'May be fit for work taking account of the following advice'
- There is no option to confirm that the employee is fit (or 'need not refrain from work' as per the MED3 form)
- Increased space for comments on the functional effects of the patient's

condition with tick boxes to indicate simple adjustments or adaptations that could help their return to work

- Inclusion of telephone consultations as an acceptable form of assessment
- A reduction in the maximum duration of statement during the first six months of illness to three months
- Simplifying the current system by combining the Med3 and Med5 into one form.

Under the new system the statement will list common changes which could be made to an employee's work environment or job role to help facilitate a return to work. Where a doctor considers another option is more appropriate, he or she will have the opportunity to state this in the comments box.

The 'may be fit for some work' option will be replaced with 'you may be fit for work taking

account of the following advice'. This acknowledges that it is not the doctor, but the employer, in consultation with their employee, who is best placed to make the decision as to whether they can accommodate any changes to facilitate a return to work.

## Practical issues

- Will the employer be expected to contact the employee on receipt of a 'may be fit to work' certificate to assess whether the employee is really fit to return?
- Will employers be expected to make reasonable adjustments to working conditions to accommodate the employee's needs?

Acas have published advice on the new fit notes on their website.

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## CIPD survey on workers' caring responsibilities highlights growing demands for flexible working

The results of a recent survey of 2,000 employees by the Chartered Institute of Personnel and Development (CIPD), show that workers are as likely to have caring responsibilities for a partner, relative, and friend as they are for children. 'Focus on Caring at Work' finds a third (34 per cent) of employees have some form of caring responsibilities, with 20 per cent citing children. However, 12 per cent cite relatives, six per cent their partner, and two per cent a friend.

A CIPD press release notes that the survey also shows there is little difference between the sexes in their caring responsibilities, with 36 per cent of women citing caring responsibilities and 33 per cent of men.

Ben Willmott, CIPD senior public policy adviser, said: 'The survey highlights the challenges many employees have in

*managing what is often a range of caring responsibilities. The proportion of people having to balance work while caring for their partner or spouse, parents, and other relatives will increase as life expectancy continues to rise and as people work longer to save for retirement. This is why the CIPD is calling for the right to request flexible working to be extended to all employees, rather than just parents, by 2013. This is not about employers putting the interests of employees before the business, it is just about them seriously considering whether they can accommodate flexible working requests in order to recruit and retain a diverse workforce.'*

Focusing purely on childcare, 72 per cent of mothers and 43 per cent of fathers have changed how or where they work to play a more active role in their children's upbringing. The CIPD notes that of these:

- almost a third of working parents (31 per cent) report they have worked flexibly to become more active parents
- 28 per cent have worked shorter hours and 23 per cent have worked from home
- 16 per cent have gone as far as changing their jobs to become a more active parent.

Willmott continues: 'The survey suggests that the majority of employers are already providing flexible working options to allow working parents to play an active role in the upbringing of their children. Employers that don't provide flexible working options for working parents risk losing valuable employees.'

However, our survey also indicates that employees with other caring responsibilities such as ageing parents or sick parents and partners will increasingly expect the same sort of work-life balance opportunities as working parents.'

## Family Friendly Working Hours Taskforce publishes report

In 2009, the Secretary of State for Work and Pensions established the Family Friendly Working Hours Taskforce to explore the challenges to increasing flexible working opportunities at all levels and provide recommendations for change. The Taskforce aimed to bring together a range of experts from business, organisations that represent businesses, employees and families, non-government bodies and government departments to provide expert perspective on flexible working practices.

The Taskforce believes that in order to achieve true cultural change, where flexible working opportunities have increased at all levels, more needs to be done to promote the business case for flexible working to employers and importantly more support is required to help all businesses to realise the benefits of flexible working in their organisation.

This report looks at this issue from the perspective of employers and sets out recommendations for what more can be done to both encourage and support employers to realise the benefits of flexible working in their organisation.

## New guide on flexible working for fathers

The Department for Children, Schools and Families, the Government Equalities Office, the Department for Work and Pensions and the Department for Business, Innovation and Skills have jointly published a guide *'Think Fathers: How flexible working for Dads can work for your business'*.

The guide highlights the social and economic

benefits to employers and employees of implementing flexible working and other family-friendly policies for fathers. It also:

- sets out a range of case studies of father and family-friendly practices from different sized companies and sectors; and
- provides some tips on implementing family-friendly working practices.

## Paternity leave

The Prime Minister's announcement that the election would take place on 6 May 2010 inevitably placed pressure on Parliament to complete the legislative process in respect of outstanding legislation. The main feature of the outgoing session was completion of the Equality Bill but also the House of Lords has approved various draft regulations pertaining to the new right to paternity leave. The most important is the *Additional Paternity Leave Regulations 2010*, which specify that additional paternity leave will be for a maximum of 26 weeks and a minimum of 2 weeks, that it must not start until at least 20 weeks after the birth or placement for adoption and must end not later than 12 months after the birth or placement for adoption, and that it may only be taken in multiples of complete weeks.

The Regulations came into force on 6 April

2010 but will have effect only in relation to children whose expected week of birth (or matching for adoption) begins on or after 3 April 2011.

Under the Regulations fathers will be entitled to up to six months additional paternity leave provided the mother has returned to work, thus giving parents the option of dividing a period of paid leave entitlement between them. To the extent that additional paternity leave is taken during the mother's 39 week maternity pay period it will be paid leave, paid at the same rate and in the same way as Statutory Maternity Pay (which increased in April 2010 to £124.88 per week). Parents will be required to 'self certify' by providing details of their eligibility to their employer. Employers and HMRC will both be able to carry out further checks of entitlement if necessary.

Issued by CIPD Enterprises Limited, which is wholly owned by the Chartered Institute of Personnel and Development  
Registered in England no. 2921009

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