



CIPD Law at Work



newsletter

Equality Bill is published

The long-awaited Equality Bill was published on 27 April 2009 and applies to England, Scotland and Wales. It is expected to come into force in 2010 and aims to consolidate all of the current legislation on discrimination into one Act. The main proposals include:

- introducing a new public sector duty to consider reducing socio-economic inequalities – applies to England and Wales only
- the placing of a new Equality Duty on public bodies to also cover sexual orientation, gender reassignment, age, and religion or belief
- banning secrecy clauses in employment contracts which prevent people discussing their own pay
- requirements of employers of over 250 people to publish statistics on gender pay gaps from 2013 if not enough progress has been made voluntarily
- allowing positive discrimination during recruitment in favour of disadvantaged groups
- banning age discrimination in the supply of goods and services
- harmonising indirect discrimination across all types of discrimination

- addressing the Malcolm decision by introducing a concept of 'discrimination arising from disability' and 'indirect discrimination', to replace 'disability-related discrimination'
- removing the need for a comparator in victimisation cases
- extending employers' liability for third party harassment beyond sexual harassment to other protected characteristics
- allowing tribunals to make wider recommendations in discrimination cases, taking the case to the wider workforce where the discrimination has taken place.

The Government has also published a White Paper explaining what the Bill hopes to achieve and launched a consultation on the implications of including a provision to protect people from multiple discrimination. Consultation ends in June 2009.

The Equality and Human Rights Commission (EHRC) has published a briefing on the Bill and further information, including the text and explanatory notes, the White Paper and the consultation paper on multiple discrimination, are available on the Office website.

The commission will start consulting with the private sector to develop measures for reporting on the gender pay gap and aims to publish a consultation paper in the summer. The final report will set out the reporting structure to be adopted by all companies with more than 250 employees by 2012.

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Flexible working rights extended

An extra 4.5 million people have the right to request flexible working since 6 April with the extension to parents of children aged 16 and under.

Employment Relations Minister Pat McFadden said: 'This is about balancing work and family life. Both workers and employers have felt the benefits of flexible working since we first introduced the right to request.'

Fewer mothers change jobs when they return to work meaning greater continuity for businesses and more employees have been

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BERR consultation on Conduct of Employment Agencies and Employment Businesses Regulations

The Employment Agencies Act 1973 and the Conduct of Employment Agencies and Employment Businesses Regulations 2003 ('the Conduct Regulations') govern the conduct of the private recruitment industry and set minimum standards for employment agencies and employment businesses operating from premises in Great Britain.

In March, the Department for Business, Enterprise and Regulatory Reform (BERR) published a consultation paper on the Conduct of Employment Agencies and Employment Businesses Regulations 2003. According to BERR, the purpose of the consultation was to gather information and views from interested parties, including those who may be affected by the proposed amendments to the Conduct Regulations, on a package of measures designed to clarify lines of responsibility between agencies and hirers, further reduce regulatory burdens, target abuse and ensure that essential protections remain in place for the most vulnerable agency workers.

The two areas BERR wants to examine are:

- the abuse of upfront fees in the entertainment and modelling sector; and
- the issue of temporary workers employed via umbrella companies.

BERR is seeking views on:

- suitability checks for permanent recruitment;
- requirements to agree terms with work-seekers and hirers; and
- requirements when placing advertisements.

BERR is also planning to exempt deaneries from the employment agency legislation. (Deaneries are responsible for the recruitment and training programme of junior doctors and junior dentists to NHS employers.)

The deadline for responses to the consultation was 11 June 2009.

Revised Acas Code approved

Parliament has approved the revised Acas Code of Practice on Disciplinary and Grievance Procedures. The revised Code came into force on 6 April 2009 with the repeal of the statutory dispute resolution procedures. The revised Code provides broad principles on discipline and grievance handling in the workplace. The Code does not apply to dismissals on grounds of redundancy or the non-renewal of fixed-term contracts on their expiry. Guidance on handling redundancies is contained in the Acas advisory booklet "Redundancy Handling".

According to the Code many potential disciplinary or grievance issues can be

resolved informally. The Code notes that where an issue cannot be resolved informally then it may be pursued formally. It sets out the basic requirements of fairness that will be applicable in most cases and it is intended to provide the standard of reasonable behaviour in most instances.

The changes to workplace dispute resolution will allow employment tribunals the discretion to adjust compensation awards up or down by up to 25% if a party fails unreasonably to comply with any provision of the Code. The Code is complemented by a non-statutory Acas guide providing more detailed good practice advice.

Tribunals facing claims overload?

The Tribunals service has finally published statistics on tribunal claims for the period from April 2007 to 31 March 2008. They are a year out of date and reveal some alarming trends. It remains to be seen what effect, if any, the abolition of the statutory procedures and the economic situation will have. The key figures from the statistics are:

- overall the total number of accepted claims went up from 132,577 for the period 2006-07 to 189,303 in 2007-08
- for the first time ever the total number of unfair dismissal claims did not represent the largest jurisdiction, with a total of 40,941 claims compared with 44,191 and 41,832 in the two previous periods
- there were 62,706 equal pay claims received for this period, an increase of 42% on the previous year and mainly in the public sector, local authorities and the NHS. It is important to emphasise that in the period 2005-06 equal pay claims totalled just 17,258. The claims are likely to feature prominently in the

statistics for years to come and it is only a matter of time before these claims start to feature in the private sector

- disturbingly only 81,587 claims were disposed of compared with 102,597 the previous year. The Tribunals Service is in the process of recruiting large numbers of full and part-time judges but there is inevitably going to be a backlog of cases not helped by the large numbers of equal pay cases in the system
- Working Time Directive cases rose from 21,127 in 2006-07 to 55,712 in 2007-08, a rise of 164%, mainly relating to holiday entitlement not received
- other major growth areas include record levels of age discrimination claims and sex discrimination.

As the recession bites it is likely that there will be an increase in the number of claims under redundancy and consultation jurisdictions. But will the government provide the tribunals with similar resources to those allocated to Acas?

Working Time Directive opt-out secured

According to a press release issued by the Department for Business, Enterprise and Regulatory Reform (BERR), talks in Brussels on the EU Working Time Directive have ended without agreement, spelling the end of the European Parliament's proposal to phase out the opt-out in three years.

Member states, the European Parliament and

the European Commission were unable to resolve their differences on the question of whether to retain the opt-out or not, a proposal that the UK and other countries have consistently opposed.

With the deadline looming and no sign of reconciliation it was agreed that the negotiations would not continue any further.

EHRC calls for radical equal pay reform

The Equality and Human Rights Commission (EHRC) has called for radical reform of the Equal Pay Act 1970, arguing that the system currently in operation 'delivers more conflict than change'.

Ahead of the publication of the Equality Bill, the EHRC published a position paper on equal pay which sets out a range of measures for closing the gender pay gap. They include the following:

- increasing transparency, by ensuring employees are allowed to discuss their pay by banning 'gagging' clauses
- larger companies to have a much more transparent approach to the pay gap by publishing the number of men and women in each pay band, to help identify segregation in workplaces and underlying reasons for the pay gap
- representative actions to allow the EHRC or trade unions to bring claims on behalf of a group of workers, therefore helping to clear the backlog of cases in the tribunal and deliver justice to women faster
- empowering employment tribunals to make wider recommendations to avoid multiple cases from the same employer and ensure the root cause of the original claim is addressed
- hypothetical comparisons to be permitted where no suitable comparators are available.

The EHRC, is also calling for a high-level review to explore further options for radical reform, including the possibility of 'transitional arrangements', where employers and workforce representatives

committed to change have some protection from litigation while they put their house in order.

The EHRC notes that a separate review could explore a practical and fair approach to address the fact that – as the law currently stands – employers are discouraged from complying with the equal pay legislation, because once they have recognised the reality of the gender pay gap in their organisation and committed to eliminating it, they are vulnerable to equal pay claims.

The EHRC believes that 'serious consideration may need to be given to transitional arrangements, whereby employers and workforce representatives who are really committed to implementing equal pay are able to do so without immediately being derailed by litigation'.

In the meantime, the EHRC says that it will continue to encourage employers to take the kinds of active steps to manage their pay systems it hopes will become increasingly commonplace.

The EHRC has published a new guide for employers on 'high risk pay systems' and how to avoid them and has also published a diagnostic toolkit for employers who wish to carry out an equal pay audit.

The results of the first phase of its 'Working Better' programme of work, looking at modern ways of working and parental leave models are also due to be published shortly.

Acas launches new equality and diversity guide

Acas has launched a new equality and diversity guide addressing the vital role monitoring plays in equality and diversity in the workplace. According to Acas, the new publication will help employers review, implement and monitor their equality policy.

The guide shows employers how to approach equality and diversity in areas such as recruitment, pay and training. It also recommends that the policy should be backed up with a constantly monitored action plan.

Acas notes that an action plan represents a promise from a business to treat all employees fairly and considerately. To make sure this promise becomes a reality, the guide advises employers to:

- review existing action plans or write a new policy if one does not exist
- monitor how the policy is working in practice which is, Acas notes, a critical stage in delivering equality in the workplace
- take action when and where it is needed to re-address any inequality.

Legislation Watch

- On 1 February new limits for tribunal awards came into effect, increasing a week's pay from £330 to £350 and the maximum compensatory award for unfair dismissal went up to £66,200 from £63,000
- Holiday pay entitlement for workers increased from 3.8 weeks to 5.6 weeks (capped at 28 days) on 1 April. It will no longer be possible for employers to make a payment in lieu of the additional entitlement.
- On 5 April the standard rate for statutory maternity, paternity and adoption pay increased from £117.18 to £123.06
- The statutory dismissal and grievance procedures were abolished on 6 April 2009. Since that date an employer taking disciplinary action or dismissing an employee is subject to the new Acas Code and the potential uplift of 25% if procedures are not followed.
- The rules in respect of grievances are more complicated but the new regime which will not require employees to raise a grievance before commencing proceedings will apply where the action complained of occurred after 5 April 2009 and the employee had neither raised a grievance nor brought tribunal proceedings before that date
- On 6 April statutory sick pay increased from £75.40 to £79.15
- Agency workers are to get rights comparable to those of permanent staff after 12 weeks employment, but not employment status.

Redundancy payments set to increase

Plans have been announced by Alastair Darling, the Chancellor of the Exchequer, to increase statutory redundancy payment. The maximum of a week's pay will rise from £350 to £380 and the maximum statutory redundancy payment will rise from £10,500 to £11,400. It is not yet known when this change will come into effect.

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Flexible working rights extended

(continued)

able to work hours which help them cope with parental responsibilities.

Firms can still say no if they have legitimate business concerns, but more than 95% of all requests for flexible working from working parents and carers are now accepted, as employers recognise the benefits more and more'.

Flexible working embraces a wide variety of working practices, including compressed hours, working from home, or any pattern of hours other than the standard one in an organisation.

Benefits of flexible working to business include increased productivity and recruitment savings.

The government is boosting the free guidance and tools available to help businesses deal with flexible working requests. Websites Business Link and Direct.gov give firms and individuals all the information they need to comply with the law, including online forms to deal with requests – helping save time and money.

New guidance on managing long-term sickness absence

Earlier this year, the National Institute for Health and Clinical Excellence (NICE) issued guidance on managing long-term sickness absence and incapacity for work.

According to NICE, it is estimated that in Britain the annual cost of sickness absence and worklessness associated with ill-health is over £100 billion. Designed to complement existing initiatives, the new guidance aims to help reduce the number of employees moving to long-term sickness absence and promote return to work.

The recommendations for employers include the following:

- identify someone who is suitably trained and impartial to undertake initial enquiries with the relevant employees experiencing long-term sickness absence or recurring short-term or long-term sickness absence, particularly those with musculoskeletal disorders or mental health problems
- if indicated by the initial enquiries, employers should arrange for a more detailed assessment. Relevant specialist(s) should undertake the assessment in conjunction with the employee. The assessment could be

coordinated by a suitably trained case worker

- co-ordinate and support the delivery of any planned health, occupational or rehabilitation interventions or services and any return-to-work plan developed following initial enquiries or the detailed assessment
- ensure employees are consulted and jointly agree all planned health, occupational or rehabilitation interventions or services and the return-to-work plan (including workplace or work equipment modifications).

The guidance also recommends that the Department for Work and Pensions (DWP), as well as other organisations which commission services for those who are unemployed and claiming incapacity benefit or employment and support allowance, commission and evaluate an integrated programme to discuss help needed to help claimants enter or return to work (paid or unpaid). This recommendation relates to a style of programme similar to DWP's "Pathways to Work", with the shared aim of increasing the number of incapacity benefit recipients back to work.

Employment Act 2008 – new minimum wage and trade union membership provisions

The Employment Act 2008 (Commencement No.2, Transitional Provisions and Savings) Order 2009 SI 2009/603, made on 10 March 2009, brings into force various provisions of the Employment Act 2008 on 6 April 2009 and includes the following provisions:

- a new method of calculating arrears of the national minimum wage
- Section 9 replaces enforcement and penalty notices with a single notice of

underpayment which includes a penalty for failing to pay a worker the national minimum wage

- to make offences under the National Minimum Wage Act 1998 capable of being tried in a Crown court or a Magistrates' court and increase the criminal investigative powers available to officers enforcing the national minimum wage
- to allow officers appointed under the National Minimum Wage Act 1998 and

officers appointed under the Employment Agencies Act 1973 to share information with each other for the purpose of their respective enforcement functions

- amendment of the Trade Union and Labour Relations (Consolidation) Act 1992 to enable trade unions to apply membership rules which prohibit individuals who belong, or have belonged, to a particular political party from membership of the trade union, provided certain conditions are satisfied.