

Most of the Summer edition of the bulletin is devoted to setting out highlights of the Equality Act 2010

The Equality Act will become law in October this year.

The Act harmonises and replaces previous anti-discrimination legislation and aims for consistency in what employers need to do to comply.

The Equality Act covers the same groups that were protected by existing equality legislation – age, disability, gender reassignment, race, religion or belief, sex, sexual orientation, marriage and civil partnership and pregnancy and maternity. These are now called 'protected characteristics' and are covered by the new Act in the following ways:

Age (no change)

- Age is the only protected characteristic that allows employers to justify direct discrimination if they can demonstrate that it is a proportionate means of meeting a legitimate aim.
- The Act continues to allow employers to have a default retirement age of 65.

Pregnancy and maternity (no change)

- A woman is protected against discrimination on the grounds of pregnancy and maternity during the period of her pregnancy and any statutory maternity leave to which she is entitled. During this period, pregnancy and maternity discrimination cannot be treated as sex discrimination.

Marriage and civil partnership (no change)

- The Act protects employees who are married or in a civil partnership against discrimination. Single people are not protected.

Race (no change)

- 'Race' includes colour, nationality and ethnic or national origins. A racial group can be made up of two or more different racial groups (eg Black Britons).

Religion or belief (no change)

- 'Religion' includes any religion. It also includes a lack of religion, in other words employees or jobseekers are protected if they do not follow a certain religion or have no religion at all. Additionally, a religion must have a clear structure and belief system.
- Belief means any religious or philosophical belief or a lack of such belief. A belief must satisfy various criteria, including that it is a weighty and substantial aspect of human life and behaviour. Denominations or sects within a religion can be considered a protected religion or religious belief.

- Humanism is a protected philosophical belief but political beliefs would not be protected.
- Discrimination because of religion or belief can occur even where both the discriminator and recipient are of the same religion or belief.

Sex (no change)

- Both men and women are protected under the Act.

Sexual orientation (no change)

- The Act protects bisexual, gay, heterosexual and lesbian people

Disability – a new definition

- The new Act has made it easier for a person to show that they are disabled and protected from disability discrimination. A person is disabled if they have a physical or mental impairment which has a substantial and long-term adverse effect on their ability to carry out normal day-to-day activities, which would include things like using a telephone, reading a book or using public transport.

Disability – some changes

- As before, the Act puts a duty on the employer to make reasonable adjustments for disabled staff to help them overcome disadvantage resulting from an impairment.
- The Act includes a new protection from discrimination arising from disability: it will be discrimination to treat a disabled person unfavourably because of something connected with their disability (eg a tendency to make spelling mistakes arising from dyslexia). This type of discrimination is unlawful where the employer or other person acting for the employer knows, or could reasonably be expected to know, that the person has a disability. This type of discrimination is only justifiable if an employer can show that it is a proportionate means of achieving a legitimate aim.
- Additionally, indirect discrimination now covers disabled people. This means that a job applicant or employee could claim that a particular rule or requirement disadvantages people with the same disability.
- Another new provision makes it unlawful, except in certain circumstances, for employers to ask about a candidate's health before offering them work.

Gender reassignment – a new definition

- A transsexual person is someone who proposes to, starts or has completed a process to change his or her gender. The Act no longer requires a person to be under medical supervision to be protected.
- It is discrimination to treat transsexual people less favourably for being absent from work because they propose to undergo, are undergoing or

have undergone gender reassignment than they would be treated if they were absent because they were ill or injured.

- Transgender people, such as cross-dressers, are not protected by the Act.

Positive action

The new Act allows an employer to take positive action where employees or job applicants who share a particular protected characteristic suffer a disadvantage connected to that characteristic, or if their participation in an activity is disproportionately low.

Pre-employment health-related checks

The Equality Act limits the circumstances when employers can ask health-related questions before offering a job. The only health-related questions permitted are those which help the employer to:

- decide whether to make any reasonable adjustments for the person to the selection process
- decide whether an applicant can carry out a function that is essential ('*intrinsic*') to the job
- monitor diversity among people making applications for jobs
- take positive action to assist disabled people
- seek assurance that a candidate has the disability where the job genuinely requires the jobholder to have a disability

Extension of employment tribunal powers

The Act extends the powers of the employment tribunal so that it will be able to make recommendations that an organisation takes steps to eliminate or reduce the effect of discrimination on other employees, not only on the claimant. This power does not apply to equal pay cases.

Equal pay – direct sex discrimination

The Equality Act retains the framework that was previously in place i.e. in most circumstances, a challenge to pay inequality and other contractual terms and conditions still has to be made by comparison with a real person of the opposite sex in the same employment.

Under the new Act a claimant can bring evidence that they would have received better remuneration from their employer if they were of a different sex, even if there is no-one of the opposite sex doing equal work in the organisation.

Pay secrecy

The new Act makes it unlawful for an employer to prevent or restrict your employees from having a discussion to establish if differences in pay exist that are related to protected characteristics. Any terms of the contract of employment that require pay secrecy are unenforceable.

Forms of Discrimination

Direct discrimination

Direct discrimination occurs when someone is treated less favourably than another person because of a protected characteristic they have or are thought to have (see perceptive discrimination below), or because they associate with someone who has a protected characteristic (see associative discrimination below).

Associative discrimination

Protection against this form of discrimination already applies to **race, religion or belief** and **sexual orientation** and is now extended to cover **age, disability, gender reassignment** and **sex**. This is direct discrimination against someone because they associate with another person who possesses a protected characteristic.

Perceptive discrimination

Protection against this form of discrimination already applies to **age, race, religion or belief** and **sexual orientation** and now is extended to cover **disability, gender reassignment** and **sex**. This is direct discrimination against an individual because others think they possess a particular protected characteristic. It applies even if the person does not actually possess that characteristic.

Indirect discrimination

Protection against this form of discrimination already applies to **age, race, religion or belief, sex, sexual orientation** and **marriage and civil partnership** and is now extended to cover **disability and gender reassignment**.

Indirect discrimination can occur when the employer has a condition, rule, policy or even a practice that applies to everyone but particularly disadvantages people who share a protected characteristic. It can be justified if the employer can show that the condition, rule, policy or practice was reasonable to manage the business, ie as 'a proportionate means of achieving a legitimate aim'.

Harassment

Harassment is *"unwanted conduct related to a relevant protected characteristic, which has the purpose or effect of violating an individual's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for that individual"*.

Harassment applies to all protected characteristics except for pregnancy and maternity and marriage and civil partnership.

Employees will now be able to complain of behaviour that they find offensive even if it is not directed at them, and the complainant need not possess the relevant characteristic themselves.

Employees are also protected from harassment because of perception and association

Third party harassment

This protection already applies to **sex** and is now extended to cover **age, disability, gender reassignment, race, religion or belief** and **sexual orientation**.

An employer will now be potentially liable for harassment of employees by people (third parties) who are not employed by the company, such as customers or clients. Employers will only be liable when harassment has occurred on at least two previous occasions, they are aware that it has taken place, and have not taken reasonable steps to prevent it from happening again.

Victimisation

Victimisation occurs when an employee is treated badly because they have made or supported a complaint or raised a grievance under the Equality Act; or because they are suspected of doing so. An employee is not protected from victimisation if they have maliciously made or supported an untrue complaint. There is no longer a need to compare treatment of a complainant with that of a person who has not made or supported a complaint under the Act.

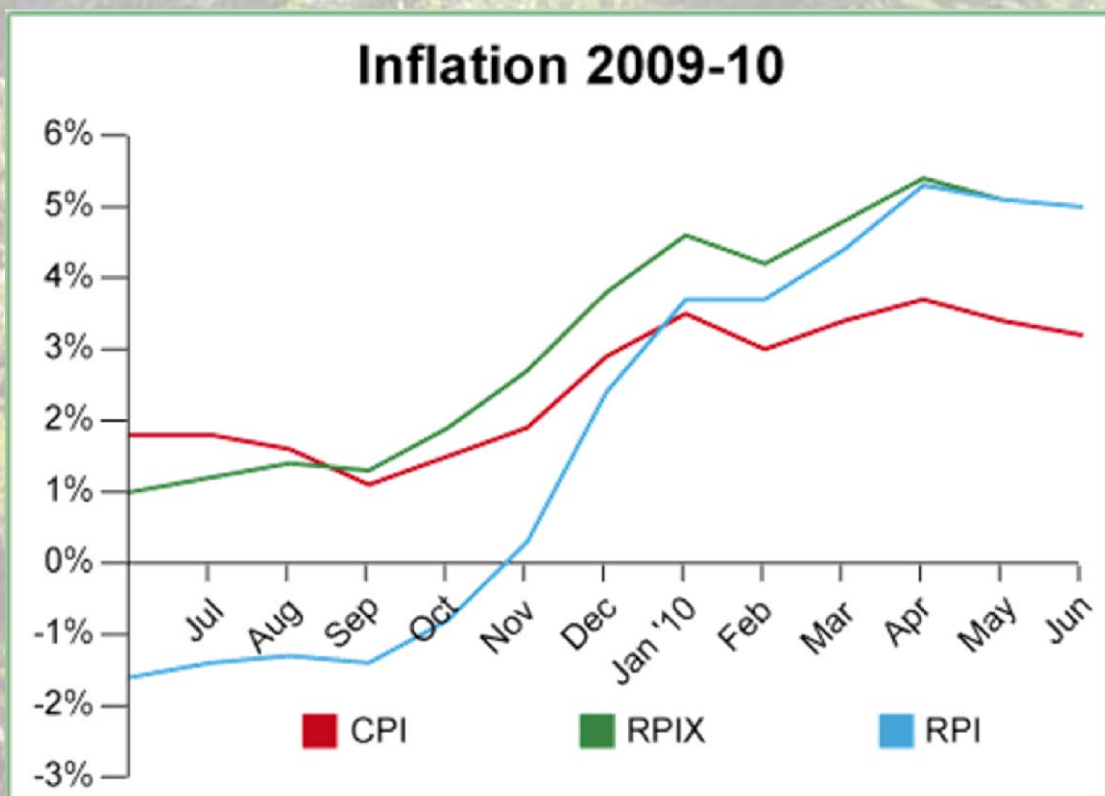
CPI v RPI on Pensions Steve Webb, pensions minister, announced plans to legislate so that private occupational pensions would be up-rated by the consumer price index (CPI) rather than the retail price index (RPI). Some analysts estimate that around five million people with private occupational pensions may lose up to 10% of their pension's value over its lifetime.

“Headline inflation” is otherwise known as the Retail Prices Index (RPI): 5% (June 2010)

“Underlying inflation” is the Retail Prices Index excluding mortgage interest payments (RPIX): 5% (June 2010)

The Consumer Prices Index (cpi) excludes a number of the price movements measured by the RPI relating to housing costs, including mortgage interest payments, house depreciation and buildings insurance: 3.2% (June 2010)

Source: Xperthr, 13 July 2010



Mr Charlton was a sales manager at a call centre. He had nine years' service and an unblemished disciplinary record. Mr Laws joined his team but stayed only a few months before he moved to another department.

At a later work-related social event, Mr Laws (a former rugby player) accused Mr Charlton of being a bully. After talking the issue through, they parted amicably but at another social event, they argued and had to be separated by a colleague.

Some months later, Mr Laws raised a grievance making various accusations against Mr Charlton, including that he had "*attempted to touch Mr Laws' testicles and bottom*". After an investigation, a disciplinary hearing was called in relation to this allegation. Although Mr Charlton denied this, he did admit that he liked "pranks" and could not rule out that he had made a "rugby gesture". He also argued that Mr Laws had a grudge against him.

In the company's employment policies harassment was defined as "*unwanted behaviour which affects a person's dignity or creates an intimidating, hostile or degrading environment. Sexual harassment can include unwanted or unnecessary*

physical contact". Bullying was defined as "*any persistent behaviour, directed against an individual, which is intimidating, offensive or malicious and can undermine the confidence and self-esteem of the recipient. Bullying is largely identified by the effect it has on the individual rather than what has actually been done.*"

Further, the company policy stated that

"Harassment and bullying at work is unlawful and they result in both the company and the harasser being liable to civil and/or criminal proceedings. We will not tolerate or condone any action that is detrimental to working relationships and therefore infringement of the policy will be treated as a serious matter and will be dealt with under the disciplinary procedure."

Mr Charlton, cognisant as a manager of these policies, was summarily dismissed for gross misconduct. The disciplinary panel found that the information gathered in witness statements suggested that, even if he had not actually touched Mr Laws, his actions had "*put colleagues in fear of apprehension of unwanted touching*". Mr Charlton appealed against the decision; his appeal was not upheld.

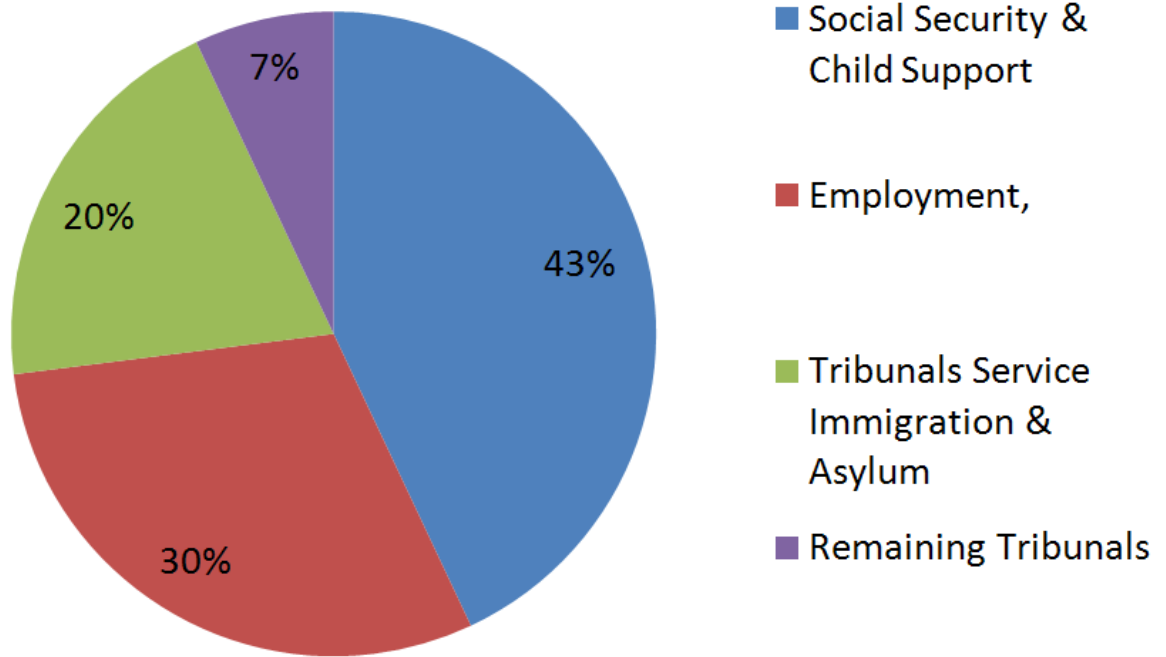
The employment tribunal found (in a majority judgment) that the employer:

- had a genuine belief that Mr Charlton was guilty of the alleged misconduct;
- had reasonable grounds for that belief;
- had carried out a reasonable investigation;
- carried out a procedurally fair dismissal; and
- took a decision to dismiss Mr Charlton that was within the range of reasonable responses.

In 2009/10, the Tribunals Service as a whole had 793,900 receipts, an increase of 26% over the previous year. There was a 15% increase in the number of cases disposed. At 31 March 2010, multiple claims to the Employment Tribunals accounted for 3/5ths of the caseload outstanding.

Receipts by jurisdiction, 2009-10 source: TS reconciled quarterly returns

Breakdown of Receipts (of appeals and claims) by jurisdiction



The number of claims received by employment tribunals rose by 56% from 2008/09. There was an increase in the number of claims for redundancy pay (up 76%), unfair dismissal (up 9%), and breach of contract (up 29%).

Sex discrimination remains the most common type of discrimination complaint, although the number of those cases brought was down by 2% on the previous year. There were increases in the number of all other discrimination cases brought. Disability discrimination is the second most common discrimination claim (up 14% on the previous year); race claims come in third highest (up 14%), whilst age claims are up 37%, religion or belief up 20% and sexual orientation up 18% to 710).

Disclaimer

These briefing notes are for guidance purposes only and should not be regarded as a substitute for taking legal advice.

Further details in each case are necessary for a complete understanding of the subjects covered by the commentary.

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