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Consultation on the Equality Act 2010, removing: (a) employment tribunals' power to make wider recommendations in discrimination cases; and (b) the procedure for obtaining information

Response from the Employment Lawyers Association

7 August 2012

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The Employment Lawyers Association ("ELA") is a non-political group of specialists in the field of employment law and includes those who represent Claimants and Respondents in the Courts and Employment Tribunals. It is therefore not ELA's role to comment on the political merits or policy aims of proposed legislation, rather to make observations from a legal standpoint. ELA's Legislative & Policy Committee is made up of both Advocates and Solicitors who meet regularly for a number of purposes including to consider and respond to proposed new legislation.

A sub-committee was set up by the Legislative & Policy committee of ELA under the chairmanship of Sarah Gregory (Baker & McKenzie LLP) to consider and comment on the consultation document "Consultation on the Equality Act 2010, removing: (a) employment tribunals' power to make wider recommendations in discrimination cases; and (b) the procedure for obtaining information". Its comments are set out below. A full list of the members of the sub-committee is annexed to the report.

ELA Response

The Consultation Document seeks replies to a number of questions, several of which, given the nature of our organisation, are not applicable to us. We set out our response to those questions that are relevant below, divided by topic.

Wider recommendations

Questions 5/6

Do you know of any discrimination-related case in which the wider recommendations power under section 123(3)(b) of the Equality Act 2010 has been used since October 2010? It would be helpful to understand more about the case(s). Please provide further details, such as nature of the claim, type of organisation involved in the case, whether the organisation is a large, small or medium sized enterprise or other.

Response

ELA is aware of the following four employment tribunal decisions on wider recommendations:

Stone v Ramsay Health Care UK Operations Ltd [2012]: claims for discrimination because of maternity/pregnancy and harassment. The Respondent owns and operates about 23 hospitals in the UK and has a turnover of about £350m per annum. The recommendations made were to (i) appoint external consultants to implement a programme of training for all members of the HR team, and (ii) to redraft the equal opportunities policy.

Crisp v Iceland Foods [2012]: claims for direct disability discrimination, harassment and constructive unfair dismissal. The Respondent is a large retail organisation. The recommendations made were for all managers over a certain level and all those in the HR function who provide advice on disciplinary and grievance processes to undergo training in disability discrimination matters relating specifically to the issue of mental health disability.

Austin v Samuel Grant (North East) Ltd [2012]: claims for harassment (because of sexual orientation and religion or belief) and victimisation. The Respondent is part of a larger group of Companies, but it only employed 12 people at the relevant time. The recommendations made were to (i) update

policies on discrimination and (ii) provide diversity training (from a reputable provider) to all directors and managers of the Group.

Why v Enfield Grammar School [2012]: claims for discrimination because of maternity/pregnancy and constructive unfair dismissal. The recommendation made was for all the senior management team and Heads of Department to have equal opportunities training.

Question 19

Please use the space below to provide any comments you have on the assumptions, approach or estimates we have used in the wider recommendations provision impact assessment (e.g. do you agree with the estimates, assumptions/approach, such as our assumptions that employers may settle a case in order to avoid a wider recommendation; or that wider recommendations would avoid a future case against the same employer for the same discriminatory practice; or the likelihood of wider recommendations being used in the future? Or are there any estimates or assumptions we have missed out which you think should be included?

<u>Response</u>

Section 124(3)(b) of the Equality Act 2010 only came into force on 1 October 2010 and applied only to claims that were issued on or after that date. Bearing in mind that it can take over a year in many cases for a claim to reach a full tribunal hearing, it is the Working Party's view that it is too early to determine the impact of the wider recommendations power and the proportion of cases in which it is being used by the tribunals. It is our experience that claimants are increasingly asking for wider recommendations to be made, and we believe it would be sensible to postpone this review until there are further examples of wider recommendations being made in practice. This could take place in 2015 when the GEO is committed to conducting a Post Implementation Review of the Equality Act as a whole.

We do not know if the statement in the Full Economic Assessment (p 49) that "10% of wider recommendations would require staff within an organisation to undergo training" is accurate. In the cases that we are aware of in which wider recommendations have been made since October 2010, all have required employers to put in place training (see response to question 6 above).

We consider that there is a benefit to capturing learning points from discrimination-related cases, as it could prevent further claims. Although it may be correct that some employers will take remedial action of their own accord in response to a finding of discrimination, not all employers will do so and wider recommendations are likely to be helpful in such cases. The wider recommendation power was introduced to enable the tribunal to consider making a recommendation in all cases, including those where the claimant is no longer employed at the time of the hearing and therefore a recommendation about the claimant is not possible.

There is no evidence from the case law to date that wider recommendations have been excessive or inappropriate. Based on a review of the cases listed in response to question 6 above, the recommendations that have been made to date have been limited in scope and appear to be proportionate, aimed at addressing the issues giving rise to discrimination. A recommendation does not impose an absolute obligation on an employer and is not intended to be punitive. However, the Working Party appreciates that some employers' fears about this may be genuinely held. We are aware of at least one case where an employer has reached a settlement with the claimant in order to avoid a wider recommendation being made.

It is the case that where a recommendation is made by the tribunal, there is no enforcement mechanism save that the recommendation can be referred to in other tribunal cases. However, it is not clear how subsequent claimants would be able to find out about previous cases as there is not a central searchable database of tribunal decisions to which a claimant could have access. However,

recommendations can nonetheless assist employers to avoid future claims for discrimination from other employees, by correcting systemic problems with practices and procedures.

Procedure for obtaining information

Question 16
How far do you agree or disagree that the procedure for obtaining information in section 138 of the Equality Act 2010 should be repealed. Please use the space below to explain your answer, for instance, if you disagree, explain to what extent you think that retaining the provisions would benefit employees.

Response

The Working Party considers that overall there are benefits to retaining the procedure for obtaining information, though certain changes could be made to improve the procedure and to minimise the burden on employers.

Question and Answer forms ("questionnaires") play a key role in enabling individuals to determine the reasonable prospects of success of their claim at an early stage. The response is also used to inform a third party which may be funding any tribunal proceedings (e.g. a trade union or insurance company) whether the claim has a reasonable prospect of success. This is important given the particular difficulties, acknowledged in case law, of establishing discrimination claims, particularly indirect discrimination claims where statistical evidence of an employer's practices is required. The absence of any formal information request procedure could prevent claimants with genuine claims from obtaining evidence crucial to the success of their cases. It could therefore result in more speculative claims being brought, and lead to more satellite litigation, as claimants seek alternative ways to try to obtain information after a claim has been submitted (e.g. requests for further information).

With the proposed introduction in 2013 of fees for issuing a claim, it will be increasingly important for individuals to be able to evaluate their prospects of success prior to issuing a claim. In view of the three month time limit for bringing many tribunal claims, it is often necessary for a claimant to submit a claim to the tribunal before the response to a questionnaire has been received. However, the information provided in response to a questionnaire can still play an important role in determining whether a claimant continues to pursue his/her tribunal claim.

Questionnaires can also be helpful in focusing the parties' minds on the relative merits of the case and they can therefore help to promote early settlement of claims. Without the questionnaire procedure, there will be no pre-action mechanism to assist the parties in resolving the dispute without recourse to litigation. This would be counter to the situation under the Civil Procedure Rules and the increased focus in recent years on pre-action protocol in High Court cases.

We considered the question of whether questionnaires could be replaced by pre-action disclosure mechanisms in the tribunal (there is currently provision for pre-action disclosure under the Tribunal Rules). However, we do not think that this is a practical solution. The Civil Procedure Rules allow for pre-action disclosure to be ordered, if it is "desirable in order to: (i) dispose fairly of the anticipated proceedings; (ii) assist the dispute to be resolved without proceedings; or (iii) save costs".[1] As can be seen from point (ii), the aim is to dispose of or avoid the need for proceedings (and not simply to obtain information). Although the level of scrutiny that applies to pre-action disclosure applications could help to prevent any abuse of the system (e.g. fishing expeditions), the short time limit for bringing many tribunal claims means that it would simply not be practical.

[1] Civil Procedure Rule 31.16

There is a need to balance the benefits of questionnaires against the burden on employers. The Working Party's experience is that, faced with the risk of adverse inferences being drawn, many employers will seek legal advice to respond to questionnaires. It also accepts that the potential for misuse exists, for example, questionnaires are sometimes used as a tactical 'fishing expedition". The time and cost involved in responding to questionnaires can therefore be burdensome, although some employers are increasingly taking a strict approach and not responding to irrelevant or overly burdensome questions. Relatively recent EAT decisions in D'Silva v NATFHE and Deer v (1) Walford and (2) The University of Oxford suggest that the EAT is reluctant to draw adverse inferences.

It is not clear, however, that repealing section 138 would in fact reduce the burden on employers. The Consultation Document states that "*potential Claimants will still be free to ask questions or otherwise seek information from an employer or service provider if they think they have been discriminated against and will still be able to bring a case to a court or tribunal"*. European case law (in relation to the burden of proof rules) suggests that although employers do not need to disclose information to an individual, domestic courts may take a refusal to do so into account as part of the wider factual matrix.[2] Therefore, the fact that the questions are not set out in a statutory questionnaire form may make little difference to the burden on employers which the Government is trying to address.

We consider that the burden on employers could be reduced by introducing easily accessible guidance for employers and employees, which could cover the following: (i) the purpose of questionnaires; (ii) examples of the sorts of questions that are/are not relevant; (iii) guidance on the interaction between the ET1 and the questionnaire; and (iv) guidance to employers as to how to respond to irrelevant or onerous questions. Consideration could be given to introducing penalties for any failure to comply with the guidance (e.g. as with the ACAS Code).

The Working Party is aware of existing guidance on the EHRC's website (**link**), but note that this is largely aimed at employees' advisers. In relation to employers, although there is guidance on the Home Office website (**link**), this is in quite general terms and does not deal with how to respond to irrelevant/onerous questions. We are not aware of any guidance on either the Department for Business, Innovation and Skills or the Business Link websites. We would recommend combining and expanding on the existing guidance to develop comprehensive guidance applicable to both employees and employers. This could be along the lines of the Practice Direction to Part 18 of the Civil Procedure Rules, which emphasises reasonableness, proportionality and the avoidance of disproportionate expense.

Question 23

Please use the space below to provide any comments you have on the assumptions, approach or estimates we have used in the obtaining information provision impact assessment (e.g. do you agree with the estimates, assumptions/approach, are there we have missed out which you think should be included? Can you identify any benefits to individual claimants receive in using the forms?

Response

The Working Party consider that the costs to an employer of taking legal advice in response to a questionnaire are significantly higher than the £156.70 estimated. Legal advisers' average hourly rates are significantly higher than the suggested £28.27.

As set out in the response to Question 16 above, we also consider that the primary intention behind the use of questionnaires is to enable individuals to assess the potential merits of their claim(s). The wording of the Sex Discrimination Act 1975 and the Race Relations Act 1976 (sections 74 and 65 respectively) provides that forms shall be prescribed to help a person who thinks he has been discriminated against "to decide whether to institute proceedings and, if he does so, to formulate and

[2] Meister v Speech Design Carrier Systems GmbH (C-415/10)

present his case in the most effective manner". It is therefore not clear on what basis the Government asserts that questionnaires were "originally intended to help employees and employers set out the issues surrounding a complaint, and encourage a dialogue and resolution without a formal claim being made to tribunal".

It is not clear that there has been "no evidence" to suggest that Q&A forms have been effective in preventing claims proceeding to tribunal. Inevitably, there will be fewer records of instances where employees have decided not to litigate, or where potential claims have been settled before litigation is commenced. However, this does not mean that this does not happen in practice.

Working Party

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Emma Bartlett - Speechly Bircham LLP
Simon Cheetham - Old Square Chambers
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