



Response to the Department of Justice's discussion paper on Tribunal Reform

6 January 2012

Introduction

1. The Equality Commission for Northern Ireland welcomes the opportunity to respond to this consultation on tribunal reform by the Department of Justice. Further details on the scope of the Commission's remit, duties and expertise is contained in Annex 1.
2. Clearly the discussion paper raises a wide range of significant issues which have implications in terms of access to justice for tribunal users. Due to the Commission's remit, our views focus on the impact of the reform proposals on the Special Educational Needs and Disability Tribunal (SENDTIST), and the Fair Employment Tribunal and Industrial Tribunals to the degree to which they deal with discrimination complaints.
3. The Commission has submitted a limited response to the Department's discussion paper. It has only responded to those questions most relevant to its remit and experience. In addition, there are also a number of questions that it wishes to give further consideration to. We will submit a more detailed response to the Department's proposals when it undertakes a formal consultation later this year.

Comments

Current landscape (Question 1)

4. The Department has sought views on the advantages and disadvantages of the current tribunal system.

Advantages

5. The Commission considers, in light of its experience in assisting individuals to bring discrimination cases to both Industrial Tribunals and the Fair Employment Tribunal, that the current tribunal system has the following advantages.
 - Whilst recognising that difficulties still exist, in general, tribunals are more accessible, affordable, and 'user-friendly' than courts. In addition, many tribunals, such as SENDIST, specialise in a particular area of law and have developed experience and expertise in a particular area. Generally, disputes are resolved at a faster rate at tribunals than through the courts; though we have highlighted below concerns in relation to the length of tribunal hearings.
 - In order to ensure that tribunals are accessible and affordable, complainants are able to represent themselves at tribunals; however, we have highlighted below the difficulties facing unrepresented complainants in discrimination cases.
 - Unlike in the courts, currently there are no fees for tribunal users as regards lodging a complaint to a tribunal. We have set out in more detail below our views on the potential impact of introducing fees for tribunal users lodging discrimination complaints.
 - Steps either have or will be taken by the Department for Employment and Learning (DEL) in order to improve the range of alternative dispute resolution services available to tribunal

users; this will encourage the prevention or early resolution of disputes.

Disadvantages

6. The Commission considers that the current tribunal system has the following disadvantages.

- Discrimination cases can often involve complex areas of law making it difficult for complainants to represent themselves at tribunals. The difficulties for unrepresented tribunal users are compounded by complex tribunal rules and procedures.

In addition, complainants in discrimination cases will have to keep pace with, and understand, the increasing inconsistencies and differences between employment equality legislation and case law in Northern Ireland and Great Britain (GB); following the introduction of the Equality Act 2010 in GB.

For example, complainants (and respondents) will not be able to rely in tribunals on emerging case law in GB under the Equality Act 2010, as regards legislative provisions which do not apply to Northern Ireland. This is likely to add to the complexity of discrimination cases and act as a further barrier to unrepresented complainants.

- The Commission is of the view that the three month time limit which applies to employment complaints, including discrimination complaints, poses particular difficulties for complainants alleging unlawful discrimination. Due to the complex nature of the law and difficulties in obtaining sufficient information, it is difficult for complainants to establish within a three month time limit whether or not they have been subjected to unlawful discrimination. The Commission has called for an extension of the time limit to six months, in line with the time limit in the Republic of Ireland and the time limits in the County Court.
- There is only limited funding available towards obtaining legal advice and assistance in connection with a claim to a tribunal

and the preparation of a case. In general, legal aid does not cover representation at a tribunal hearing. This can have a particular impact on individuals alleging unlawful discrimination, who have to grapple with complex equality law and tribunal rules and procedures. In addition, difficulties may be compounded due to an applicant's personal circumstances (such as inadequate knowledge of English or a disability). The costs of progressing a discrimination case at a tribunal can also be substantial. Costs can include Solicitor's fees, Counsel's fees as well as medical, accountant or other expenses. In addition, as set out below in more detail, the Commission is not a legal aid body and is only able to provide assistance (including representation at hearings) to complainants in discrimination cases in certain circumstances.

We are concerned that the recent Access to Justice Review Report has not recommended publicly funded representation in discrimination and other tribunal cases.¹ However, we welcome the recommendation in the Review Report relating to the provision of enhanced advice and advocacy services at SENDIST hearings.

- We also note that the recent Access to Justice Review report has highlighted concerns in relations to SENDIST; in particular, as regards equality of arms. We support the recommendation that further research is undertaken into the assessment of the legal needs of children and young people; with particular attention to accessibility of advice and assistance, the way in which it is delivered and their experience of the justice system as it affects them.
- We would also refer the Department to the findings and recommendations of independent research commissioned by the Equality Commission in 2007 into the barriers experienced by lesbian, gay and bisexual people in accessing their rights

¹ <http://www.dojni.gov.uk/index/publications/publication-categories/pubs-criminal-justice/access-to-justice-review-final-report.pdf>

under equality law, including barriers within the Tribunal system in Northern Ireland.²

- Whist improved CMD processes and procedures have led to the early identification of issues in discrimination cases before tribunals, the Commission is concerned at the protracted time taken to hear some discrimination cases; in some cases, tribunal hearings have taken between one to six weeks. This adds not only to the length of time taken to resolve the case, but also to cost of taking a case and the stress experienced by both parties to the proceedings.
- The Commission is of the view that there is a need for current industrial tribunal powers and duties to be extended and strengthened as follows.
 1. A duty (as oppose to a power) is placed on tribunals to require employers who have breached the sex discrimination law (in the area of equal pay) to conduct equal pay audits. We note that the Department of Business Innovation and Skills (BIS) has consulted on introducing this change in Great Britain.
 2. Increased powers for tribunals to make recommendations for wider workplace change in discrimination cases. This change has already been introduced in Great Britain under the Equality Act 2010. In Great Britain, tribunals are permitted to make recommendations in discrimination cases, even where this might not benefit the Claimant in the case at issue; for example, because the Claimant is no longer employed by the Respondent. This power only currently exists in Northern Ireland in relation to the Fair Employment Tribunal; it does not extend to other forms of discrimination cases.

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Enabling LGB individuals to access their rights under equality law, commissioned by ECNI, 2007, [http://www.equalityni.org/archive/pdf/RES050603SOSummaryReportFinal080108\(S\).pdf](http://www.equalityni.org/archive/pdf/RES050603SOSummaryReportFinal080108(S).pdf)

Jurisdiction and structure (Question 2)

7. The Department has sought views on the optimal structure for the tribunal system.
8. The Commission will give further consideration to the Department's proposals in relation to the jurisdiction and structure of tribunals; with a particular focus on the impact of the proposals on SENDIST and Industrial Tribunals and the Fair Employment Tribunal.
9. However, when undertaking a formal consultation on these issues, we would ask the Department to clarify in what circumstances it envisages that Tribunals will be able to review their own decisions under revised procedures, as referred to in paragraph 3.19 of the discussion paper. Industrial Tribunals can currently in limited circumstances review their own decisions. It is not clear from the discussion paper whether it is proposed to extend the circumstances in which a Tribunal can review its own decision.

Process and Procedure (Question 3)

10. The Department has sought views on changes which could be made to process and procedure in the tribunal system for the benefit of users.
 - **Information, advice and support**
11. In general, we support the recommendations set out in the Nuffield Research³ aimed at improving the information, advice and support needs of users prior to their tribunal hearing.
12. The Equality Commission has adopted a range of measures aimed at improving tribunal users' awareness of tribunal processes and procedures. For example, we developed a web

³ Supporting Tribunal Users, Access to Pre-Hearing Information, Advice and Support in Northern Ireland, G.McKeever, 2001, www.lawcentreni.org

based guide *Taking a Discrimination Case*, aimed at improving understanding of the procedures and processes of taking a discrimination case.⁴ In addition, through an out-reach programme, we have taken steps to raise awareness of discrimination rights, as well as tribunal processes and procedures, with Citizen's Advice Bureaux (CAB) advisors and trade unions.

13. The Commission recommends that tribunal rules are revised to include an over-riding objective to deal with cases fairly and justly, as recommended in the Nuffield Research. In general we support steps taken to harmonise tribunal rules provided, as highlighted by the Department, that the specific needs of individual tribunal jurisdictions are accommodated.
14. The Equality Commission supports the adoption of greater partnership working and a more 'joined up' approach to the provision of information and guidance on employment law and rights and the resolution of workplace disputes. The Equality Commission continues to participate with the Labour Relations Agency, the Confederation of British Industry and the Federation of Small Businesses in a Department of Employment and Learning led working group on dispute resolution.
15. In taking forward recommendations to improve awareness and advice, we recommend that particular attention is given to the needs of specific groups covered by Section 75 of the Northern Ireland Act 1998; for example, children and young people, older people, black minority ethnic individuals whose first language is not English, and disabled people who may require alternative formats.
16. In addition, we support the recommendation of the Access to Justice Review that the Government Advice and Information Group, which it recommends the Department is a member, prepares guidance on the availability of sources of generalist and specialist advice; for use by advice organisations and

⁴ Taking a Discrimination Case – A Lay Persons Guide to Taking a Case of Discrimination in Employment

Solicitors in considering whether to refer or signpost clients to other providers appropriate to their needs.

- **Fees**

17. In general, the Equality Commission is opposed to the application of fees to complaints of discrimination to either Industrial Tribunals or the Fair Employment Tribunal.
18. We are aware that in Great Britain, it is proposed to bring in a fee structure in tribunals and the Employment Appeals Tribunal. As regards proposed levels of fees, we note that the UK Government is considering 2 options for fees for employment tribunals; option 1 proposes an initial fee in the region of £150-£250 with a hearing fee of £250-£1250; and option 2 proposes a fee in the region of £200-£1750. It is also proposes fees for the Employment Appeal Tribunal; an initial fee of £400 and a hearing fee of £1200.
19. We are of the view that tribunals should remain accessible and affordable. Whilst we recognise that in the current economic climate a small administration fee to cover the running cost of tribunals may be justifiable, an excessive fee has the potential to significantly restrict the number of individuals seeking redress at tribunals in relation to their discrimination cases. In addition, it is likely to have a disproportionate impact on individuals on low income or those unemployed; such as disabled people or older people who are less likely to be in employment and more likely to be living in poverty.
20. It is important to note that restricting access to justice impacts not only on the individual but also has wider societal implications. For example, discrimination cases can highlight systematic and institutional discrimination that have ramifications beyond the circumstances of an individual complainant.
21. In addition, such fees can particularly deter tribunal applications in the current economic climate in which jobs are being lost and

benefits reduced; factors which already have a significant impact on the most vulnerable members of our society.

22. Whilst the Equality Commission can and does provide assistance to individuals to bring a discrimination case to a tribunal, it is not a legal aid body and is only able to provide assistance in certain circumstances, in line with its policy for the provision of legal advice and assistance.⁵
23. Whilst the degree to which a potential discrimination case has a reasonable prospect of success is an important consideration by the Commission in deciding whether or not to grant assistance, it is not the only consideration. For example, the Commission will consider the extent to which the case meets the overall strategic objectives of the Commission, the extent to which the case may raise an issue of legal uncertainty or is likely to have a significant impact, either in terms of bringing about changes in discriminatory practices and procedures or otherwise. Currently, the Commission supports approximately one third of all applications for assistance from individuals alleging unlawful discrimination.
24. We note that it is also proposed in Great Britain that fees will be initially payable by the Claimant at the time of lodging the claim with the Employment Tribunal or an appeal with the Employment Appeal Tribunal.
25. It should be noted that due to the short time limit which applies to tribunals (i.e. three months), as opposed to the longer six month time limit in the County Court, many Claimants alleging unlawful discrimination have limited time to collect sufficient information. As a result, they are unsure at the time of the initial application whether or not they have been discriminated against. If substantial fees are imposed, they are therefore asked to pay a significant amount in circumstances where it is not clear whether or not they have been discriminated against.

⁵ ECNI Policy for the Provision of Legal Advice and Assistance, www.equalityni.org

26. In addition, a range of important safeguards already exist under tribunal rules and procedures to prevent an abuse of the tribunal process and to encourage individuals to consider whether lodging a tribunal complaint is the most appropriate form of action in their particular circumstances . For example, both parties to proceedings have the power to seek a substantial deposit in advance of a full hearing; though it is of note that this power is not frequently invoked. In addition, there is a power for a tribunal to award costs against a party if that party is deemed to have acted in a vexatious, abusive or unreasonable manner, or the bringing or conducting of the proceedings has been misconceived.

6 January 2012

Annex 1: The Equality Commission for Northern Ireland – Remit

1. The Equality Commission for Northern Ireland (the Commission) is an independent public body established under the Northern Ireland Act 1998. The Commission is responsible for implementing the legislation on fair employment, sex discrimination and equal pay, race relations, sexual orientation, disability and age.
2. The Commission's remit also includes overseeing the statutory duties on public authorities to promote equality of opportunity and good relations under Section 75 of the Northern Ireland Act 1998 (Section 75) and to promote positive attitudes towards disabled people and encourage participation by disabled people in public life under the Disability Discrimination Act 1995.
3. The Commission's general duties include:
 - working towards the elimination of discrimination;
 - promoting equality of opportunity and encouraging good practice;
 - promoting positive / affirmative action
 - promoting good relations between people of different racial groups;
 - overseeing the implementation and effectiveness of the statutory duty on relevant public authorities;
 - keeping the legislation under review;
 - promoting good relations between people of different religious belief and / or political opinion.
4. The Commission, with the Northern Ireland Human Rights Commission, has been designated under the United Nations Convention on the rights of Persons with Disabilities (UNCRPD) as the independent mechanism tasked with

promoting, protecting and monitoring implementation of
UNCRRPD in Northern Ireland.