



Response to DEL Discussion Paper on Employment Law

July 2012

Introduction

1. The Equality Commission for Northern Ireland has set out below its response to the Department of Employment and Learning's ('the Department') discussion paper on employment law. Further details on the scope of the Commission's remit, duties and expertise is contained in Annex 1.
2. We welcomed the opportunity to meet with the Department in June 2012 in order to discuss our response to the discussion paper in more detail.

Executive Summary

3. In summary, the Commission:-

Overarching comments

- is of the view that it is helpful to consider developments in Great Britain (GB) as regards changes to employment law and tribunal powers and processes. However, it is important to ensure that any local proposals reflect the particular circumstances in Northern Ireland and consideration is given to differences between Great Britain and Northern Ireland in relation to the number and nature of tribunal cases, existing levels of support for both complainants and

respondents, and differing legislative employment frameworks (including as regards equality laws).

- recommends that the Department liaises with OFMDFM with a view to ensuring greater harmonisation and simplification of employment equality law and to ensure that individuals in Northern Ireland do not have less protection as regards employment equality rights than their counterparts in GB;
- has concerns that some of the proposed changes, in combination, may have a disproportionate impact on complainants on low incomes or unemployed, such as disabled people or older people who are less likely to be in employment and more likely to be living in poverty, as well as unrepresented complainants. It is important that the Department, in line with its obligations under Section 75 of the Northern Ireland Act and its commitments in its equality scheme, considers the impact of each of the proposals across the nine Section 75 groups.
- recommends that the Department gives consideration to a range of alternative proposals; particularly as regards increased powers for tribunals as regards wider recommendations, and the carrying out of equal pay audits.

Specific comments on GB proposals

4. The Commission:-

- supports measures which encourage the early resolution of workplace disputes and raise a number of considerations in relation to a potential requirement to notify ACAS in advance of lodging a complaint. We recommend that the Department reviews and evaluates on an ongoing basis the effectiveness of the conciliation process in Northern Ireland (including pre-claim conciliation);
- welcomes the establishment of a professional ADR network and proposes that it is underpinned by a code of ethics, continuous professional development and a professional register for

appropriately qualified practitioners. We raise a number of issues which require further consideration.

- supports the establishment of an expert user group, drawn from key stakeholder organisations to provide advice and direction to the rules committee;
- agrees with the approach that witness statements before tribunals should be ‘taken as read’;
- recommends, as regards the discretion to allow judges to hear cases alone, that the Department awaits the findings of the pending research report in Great Britain on the role of *The Role of Lay/Non-Legal Members in Employment Rights Cases* and considers commissioning additional research as regards the role of lay members in tribunals in Northern Ireland;
- opposes a proposal to empower tribunals and employment judges to direct parties to bear costs of witness attendance, with the losing party reimbursing the successful party for any such costs already paid out;
- opposes the application of fees to complaints of discrimination to either industrial tribunals or the Fair Employment Tribunal and recommends the Department undertakes a consultation on the fundamental issue of whether or not fees should be introduced;
- has concerns in relation to the proposal to increase the maximum level of the pre-hearing deposit to £1,000;
- has concerns that the increase in the current cap on the level of costs may have a disproportionate impact on claimants;
- supports the introduction of a power for tribunals to levy, at their discretion, a financial penalty on employers found to have breached employment rights;
- has concerns in relation to a proposed extension of the qualifying period in unfair dismissal cases and we recommend that the

Department considers whether or not extending the qualifying period will have a disproportionate impact on certain Section 75 equality groups;

- has concerns relating to the introduction of a system of “protected conversations”;
- recommends that, rather than restricting existing protections under Northern Ireland equality law, changes are introduced to ensure that equality law in Northern Ireland keeps pace with developments in GB;
- has concerns about any changes to the Conduct Regulations which diminish protection for agency workers, and recommend that, rather than reducing requirements, that the current Conduct Regulations are more rigorously applied.

Comments

5. We have set out below a series of overarching comments as well as specific comments on the individual GB proposals.

Overarching comments

6. Firstly, we welcome the work the Department has already done in terms of early resolution of workplace disputes and ensuring efficient employment tribunals; following on from its extensive review of resolving workplace disputes.
7. However, it would appear that there are a number of areas still outstanding following on from that review which require consideration by the Department¹, and we **seek clarification** as to how these will be progressed alongside the proposals, if introduced, raised in the discussion paper.

¹ For example, exploring legislative and non-legislative measures which encourage/require employers to operate equitable pay policies.

8. In addition, a number of recommendations for change to tribunal structures and processes were highlighted in *Redressing Users' Disadvantage: Proposals for Tribunal Reform in Northern Ireland*² and which require consideration by the Department.
9. In its introduction, the Department has sought views on whether there is merit in considering each of the individual GB proposals for introduction in Northern Ireland.
10. In the Commission's view, it is helpful to consider developments in Great Britain as regards changes to employment law and tribunal powers and processes. However, when considering their potential application to Northern Ireland, it is important to ensure that the proposals reflect the particular circumstances in Northern Ireland, and where proposals have been introduced in Great Britain, to learn from both the successes and deficiencies of implementing new proposals. Where possible, we recommend the introduction of pilot schemes in order to evaluate on a small scale the effectiveness of the intervention.
11. In particular, consideration should be given to differences between Great Britain and Northern Ireland in relation to the number and nature of tribunal cases, existing levels of support for both complainants and respondents, and differing legislative employment frameworks (including as regards equality laws).

Employment equality law-reform

12. As regards employment equality legislation, the Department will be aware that the legislative framework in Great Britain is now very different to that in Northern Ireland, as a result of the introduction of the Equality Act 2010.
13. The Equality Commission is of the view that employers in Northern Ireland would benefit from greater harmonisation and simplification of the equality legislation. For example, our proposals for legislative

² 2010, www.lawcentreni.org

reform in relation to disability³ make it clear that one of the benefits of harmonising the disability legislation would mean that the legislation is both easier to understand and to comply with.

14. We are aware that many employers, particularly SMEs, struggle to understand the complexities of equality law. The Department's review of resolving workplace disputes⁴ recognised the need to support small businesses to understand and comply with their employer responsibilities. We are of the view that our recommendation is in keeping with this approach.
15. In addition to the existing complexities, the situation will now be compounded by the significant differences between GB and Northern Ireland equality law which have now developed due to the implementation of the Equality Act 2010.
16. This will present difficulties for not only for UK wide employers but also for Northern Ireland employers; who have previously relied on Great Britain case law to help them interpret similar Northern Ireland disability equality provisions.
17. In addition to employers, it also presents difficulties for legal advisers and tribunal chairs. For example, last year, the Employment Lawyers Group in Northern Ireland issued a statement warning that 'the current mismatch in the legislation is making it confusing and increasingly more difficult for tribunal chairmen and judges in Northern Ireland to apply the case law that has been developed by the courts in GB.'⁵
18. Finally, the changes in GB also mean that individuals in Northern Ireland have weaker protection as regards employment equality rights than their counterparts in GB. Whilst we welcome the proactive work of the Department in ensuring that employment law in Northern

³ *Strengthening protection for disabled people: Proposals for reform*, ECNI, March 2010 www.equalityni.org

⁴ *Disputes in the Workplace: A systems review: Policy response*, www.delni.gov.uk

⁵ *Employment Lawyers Group, November 2011*

Ireland in other areas keeps pace with developments in GB, clearly equality law is a key area that the gap in protection remains.

19. It is also of note that Equality Commission's recent awareness survey, *Equality Awareness Survey 2011*⁶ highlighted that more than three quarters of respondents (77%) agreed that Northern Ireland equality law should be strengthened to match those in Great Britain.
20. Whilst we recognise that the introduction of changes to the equality legislation (both employment and non-employment) are the responsibility of OFMDFM, the Department has primary responsibility in relation to ensuring an effective employment law framework, as well as the efficient and effective running of tribunals. We **recommend** that the Department liaises with OFMDFM with a view to addressing this issue.

Impact on complainants

21. The Commission is concerned that some of the proposals will, in combination, deter complainants from bringing discrimination cases and restrict access to justice.
22. In particular, the following proposals, if introduced, are likely to have a deterrent effect on complainants alleging discrimination:-
 - having, if they lose a case, to reimburse the successful party for any witness costs;
 - the introduction of fees for using an industrial tribunal;
 - doubling the maximum level of the pre-hearing deposit to £1,000.
23. As set out in more detail below, such changes, in combination, may have a disproportionate impact on complainants on low incomes or unemployed; such as disabled people or older people who are less likely to be in employment and more likely to be living in poverty.
24. It is important that that the Department, in line with its obligations under Section 75 of the Northern Ireland Act 1998 and its

⁶ *Equality Awareness Survey 2011*, ECNI, June 2012, www.equalityni.org

commitments in its equality scheme, considers the impact of the proposals across the nine Section 75 groups.

25. The proposals are also likely to have a disproportionate impact on complainants who are unrepresented and do not have access to expert legal advice. We note, for example, that the majority of claimants to both the Industrial Tribunal and the Fair Employment Tribunal are unrepresented; in particular, in 2010/11, 66% of claimants to the Industrial Tribunal and 62% to the Fair Employment Tribunal were unrepresented.
26. In bringing forward these proposals, some of which are likely to deter complainants from bringing complaints to a tribunal, it is important to bear in mind that there are a number of **existing** barriers which make it difficult, particularly in discrimination cases, for individuals to either lodge proceedings or pursue their cases. These are set out in paragraph 6 of our attached response to the Department of Justice's discussion paper on tribunal reform (see Annex 2) dated January 2012.
27. Further, in taking forward its proposals, we **recommend** the Department's considers the overriding objectives set out in the Industrial Tribunals (Constitution and Rules of Procedure) Regulations (Northern Ireland) 2005 which aimed at enabling tribunals and chairmen to deal with cases justly.
28. In particular, it is important to recognise that these overriding objectives include, so far as practical, not only considerations such as saving expense, dealing with the case expediently and fairly and in ways which are proportionate to the complexity and importance of the issues, but also ensuring that the parties are on **equal footing**. It is important that the Department's proposals do not undermine this important overriding objective.
29. Finally, in light of the potential impact of such proposals (if introduced), we stress the need for the Department to ensure complainants have robust advice and support so as help them understand the implications of these changes. This measure is also in keeping with the recommendation set out in *Redressing Users' Disadvantage: Proposals for Tribunal Reform in Northern Ireland* that

“Tribunal users are given access to independent, good quality advice, support and representation, and the documentation and processes for claiming such advice and support must not be complex.”

Alternative proposals

30. The Department has sought views in its introduction to the discussion paper on whether or not there are alternative proposals that merit consideration. We recommend that the Department gives consideration to the following:-

- the introduction of a power for tribunals to impose pay audits on employers who are found to have discriminated because of sex in contractual or non-contractual pay matters. We note that the UK Government has recently announced its commitment to bring forward this new power which is described as an ‘important power that will contribute to government commitment to promote equal pay and to act against discrimination in the workplace’.⁷
- increased powers for tribunals to make recommendations for wider workplace change in discrimination cases. We recognise that the UK Government is currently consulting on proposals to repeal this measure in the Equality Act 2010 following a review under the red tape challenge. However, the Commission remains of the view that this is an important power, which already exists in Northern Ireland in relation to the Fair Employment Tribunal and which has been shown to have a beneficial effect;
- increased training on equality and diversity for tribunal members; following on from the finding in the research report *Redressing Users’ Disadvantage: Proposals for Tribunal Reform in Northern Ireland* that “there appears to be a gap in training for Tribunal members on diversity and equality issues”.

⁷ GEO Modern Workplaces Government Response Consultation on Equal Pay, June 2012, www.homeoffice.gov.uk

31. In addition, in its response to its consultation on *Disputes in the Workplace: A Systems Review*⁸ the Department indicated that it was of the view that 'it would be helpful to expressly empower tribunals to make discretionary orders to restrict publicity in sensitive cases and that legislation would be taken forward to this effect.'
32. As raised at our recent meeting with the Department, we **seek clarification** from the Department in terms of its progress as regards this measure.
33. Further, we wrote to the Department in January 2012 and raised a number of issues relating to the Agency Workers Directive and the Agency Workers Regulations (NI) 2011. We welcome the fact that the Department is proposing to review the implementation of the Directive and to assess the impact of the Agency Workers Regulations (NI) 2011 in Northern Ireland.
34. We would welcome further liaison with the Department in relation to this review, and as highlighted in our letter, we recommend the Department considers the issues we have raised therein when conducting its review.

Specific comments on GB proposals

Early conciliation

35. The discussion paper highlights the fact that in Great Britain, the UK Government is proposing that individuals alleging a breach of their employment rights would have to submit their dispute to ACAS rather than the Employment Tribunal in the first instance. Under GB proposals parties to the dispute will not be obliged to engage with the ACAS conciliation service and they may ultimately decide to lodge a complaint with the tribunal.
36. As noted in the Department's discussion paper, tribunal claims are currently copied by OITFET to the Labour Relations Agency (LRA)

⁸ *Disputes in the Workplace: A Systems Review. A policy response*, www.delni.gov.uk

and there are already opportunities to encourage resolution at a similar stage. The Department has made it clear that it is not proposing mandatory alternative dispute resolution (ADR). The Department has sought views on the merits of the GB proposals.

37. As made clear in our previous response to the DEL consultation on disputes in the workplace, in general, the Equality Commission is committed to the early resolution of workplace disputes and is of the view that ADR, if applied effectively in discrimination disputes, can ensure an early, less costly and more informal resolution of complaints with meaningful outcomes.
38. However whilst the Commission supports the early resolution of discrimination complaints, it is important to recognise that the Commission will continue to support the bringing of strategic cases before tribunals, where appropriate; as discrimination cases can highlight systemic and institutional discrimination that have ramifications beyond the circumstances of an individual complainant and can lead to wider societal change.
39. As regards the GB proposal to introduce a potential requirement to notify ACAS in advance of lodging a complaint, it is vital that this does not place an undue burden on the complainant. In particular, the process must be accessible and easy to use.
40. In addition, the Commission recommends an extension of the time limits in circumstances where a complainant decides to use the Labour Relations Agency (LRA) conciliation service. It will be noted that under the disability legislation, as regards non-employment complaints, the deadline for lodging a complaint to the county court is extended by two months where an individual avails of a conciliation service.
41. It should also be noted that in some cases a complainant may have served an equality questionnaire on a respondent prior to lodging proceedings. There are also specific timelimits on a respondent associated with responding to the questionnaire. Consideration needs to be given as to whether or not such timelimits are extended should a complainant engage with an LRA conciliation service.

42. Further, it is important that the LRA have sufficient resources, in the event of a greater uptake of additional conciliation services, in order to meet the demand.
43. In addition, we **recommend** that the Department reviews and evaluates on an ongoing basis the effectiveness of the whole conciliation process (including pre-claim conciliation) and, in particular, the outcomes it achieves for claimants in discrimination cases.
44. One potential consequence of imposing fees for using an Industrial Tribunal or potentially having to pay witness costs (if introduced), is that an increased number of complainants will opt for conciliation (including pre-claim conciliation) rather than incur costs or run the risks of future costs. This emphasises the need for the Department to review and evaluate the effectiveness and efficiency of the conciliation processes (including pre-claim conciliation) and the outcomes it achieves for individual complainants.
45. As made clear in our previous response to the Department's consultation on resolving disputes in the workplace, it is crucial that discrimination rights are not diluted during conciliation or other ADR processes.
46. As regards discrimination cases, it is essential that the settlement award reflects the nature and seriousness of the complaint, and the impact of the respondent's action on the complainant.
47. In addition, it is important that the conciliation process reflects the fact that in many instances, complainants in discrimination cases seek remedies beyond financial compensation. In particular, they seek action which involves the respondent improving its workplace practices and procedures so as to reduce the risk of further discrimination by the employer.
48. It will be noted that when settling discrimination cases, in addition to obtaining compensation, the Equality Commission seeks to ensure that the respondent undertakes a series of measures in order to better promote equality of opportunity in the workplace.

49. It is also important that the conciliation process (particularly in pre-conciliation) recognises that often complainants in discrimination cases, particularly in circumstances where they are not in receipt of replies to a questionnaire, have limited information about the circumstances of the complaint. They may therefore not be in an informed position to ascertain the strengths or weaknesses of their complaint, as much of the information is held by the respondent; for example, in recruitment and selection cases.

Mediation

50. In principle, the Commission welcomes the establishment of a professional ADR network and welcomes proposals that it is underpinned by a code of ethics, continuous professional development and a professional register for appropriately qualified practitioners.

51. There are a number of issues which require further consideration; in particular, who pays for the network, whether or not tribunal time limits will be extended if a complainant avails of mediation. It is also important that mediators have expert knowledge of equality law if dealing with discrimination complaints. We await the outcome of the pilot exercises undertaken by the Department for Business Innovation and Skills (BIS) in this area.

Rules of procedure

52. The Commission supports the establishment of an expert user group, drawn from key stakeholder organisations to provide advice and direction to the rules committee. Clearly, there already exists in Northern Ireland a tribunal expert user group comprised of a range of individuals with expert knowledge and skills in this area. A expert user group specifically relating to the rules committee is likely to be beneficial.

Witness statements

53. In general, the Commission agrees with the approach that witness statements before tribunals should be ‘taken as read’. We recognise that such an approach reduces the time taken by the tribunal to hear the case.
54. However we are of the view that a tribunal judge should still have the discretion to ask a claimant or witness to read the statement in exceptional circumstances, if it is required. In addition, we recommend that there is a clear protocol on how witness statements are made public in order to increase their transparency and accessibility; in particular, whether or not it is the responsibility of the tribunal or the parties to make statements available to the public.

Chairs sitting alone

55. The Department has sought views on GB proposals to grant a discretionary power to allow employment judges to hear unfair dismissal cases alone, without the need to be accompanied by lay panel members.
56. We recommend that the Department awaits the findings of the pending research report in Great Britain on *The Role of Lay/Non-Legal Members in Employment Rights Cases* funded by the Economic and Social Research Council⁹.
57. We note that initial survey findings of that report show that ‘discrimination is another jurisdiction where a particularly high proportion of the various ET and EAT respondents see lay members as adding value.’
58. As regards discrimination cases in Northern Ireland, whilst we recognise the particular legal expertise of Tribunal Chairs, we also recognise the contribution that lay members can make in terms of providing workplace experience and employer/employee

⁹ Research project into the *Role of Lay/Non-Legal Members in Employment Rights Cases*, University of Greenwich and Swansea University, Economic and Social Research Council.

perspectives. It is clear that the proposal has the potential to save costs to the taxpayer; particularly in light of the fact that some discrimination tribunal cases can last for one to two weeks; though costs saving should be balanced with the benefits that lay members can bring to the tribunal process.

59. If judges are granted a discretion to hear the case alone, including in relation to discrimination cases, we recommend that there are clear guidelines for judges as to the appropriate use of that discretion.
60. Further, we refer the Department to the recent EAT decision in the case of *McCafferty –v- Royal Mail Group Limited*¹⁰. This case was an example of lay members of an employment tribunal reaching a different conclusion on the facts of the case from that of the Employment Judge. At Tribunal, the lay members had found the dismissal fair whereas the Employment Judge, in the minority, considered that the dismissal was unfair. The EAT upheld the decision of the majority and considered the dismissal fair.
61. The EAT noted that ‘had this case been one to which the new Employment Tribunals Act 1996 (Tribunal Composition) Order 2012¹¹ applied, “it seems likely that it would have been heard and determined by an Employment Judge sitting alone, in which case the result would evidently have been rather different”.
62. The EAT judge indicated that the case underlines ‘the need to give careful consideration to any views expressed by parties as to whether or not proceedings should in fact be heard by an Employment Judge and members’.
63. In addition, we note from the research *Redressing Users’ Disadvantage: Proposals for Tribunal Reform in Northern Ireland*¹² that users of the Tribunal “found the participation of lay panel members as beneficial to the Tribunal in providing a multi-disciplinary perspective and avoiding an overly legalistic approach to cases.” The report also noted that “where lay members did not appear to have an

¹⁰ Appeal number UKEATS/0002/12/BI, 12 June 2012

¹¹ SI2012/988

¹² Law Centre (NI), 2010

equal input into proceedings, their role was perceived as being less valuable”.

64. Following on from the publication of the GB research, we **recommend** the Department considers the value of commissioning additional research as regards the role of lay members in Northern Ireland.

Witness expenses

65. The Department has sought views on UK Government proposals to empower tribunals and employment judges to direct parties to bear costs of witness attendance, where a witness has attended pursuant to a witness order, with the losing party reimbursing the successful party for any such costs already paid out.
66. The Commission is opposed to this proposal. It has concerns that it will disproportionately impact on complainants; particularly those on low incomes or unemployed; such as disabled people or older people who are less likely to be in employment and more likely to be living in poverty. The potential of having to pay both their own witness expenses and the respondent’s witness expense in the event that they lose their case, is likely to significantly deter complainants.
67. From the Commission’s experience in assisting complainants, witness orders are normally sought by complainants in order to secure attendance at tribunals.
68. The proposal is also likely to have a more significant impact on complainants than respondents, as most witnesses called by respondents are their employees and attend tribunal hearings during work time.
69. In addition, it has been the Commission’s experience that in discrimination cases, there are more witnesses called by the respondent; on average four to six witnesses. Considering that some discrimination cases can last up to two weeks, this would have significant cost implications for complainants in the event that they

lose the case in having to pay the expenses of respondent's witnesses.

70. Clarification is also required as regards the payment of expert witnesses expenses. In discrimination cases, a complainant may have to call an expert witness such as a medical expert or forensic accountant in support of their cases. Again, this will have significant cost implications for complainants if they have to cover the costs of expert witnesses.
71. We note that in Great Britain, it is not proposed to introduce a means-tested scheme on the basis that establishing the relevant machinery is predicted to cost more than the Government would save. Again, this means that no allowance is made for those on low incomes or unemployed.
72. Clarification is also required as to whether or not, if this proposal is introduced, there will be a maximum amount that a witness can claim per day for attending a tribunal hearing.

Charging fees to use tribunals

73. As highlighted in our response to the Department of Justice's discussion paper on tribunal reform¹³ attached at Annex 2, in general, the Commission is opposed to the application of fees to complaints of discrimination to either industrial tribunals or the Fair Employment Tribunal.
74. The Department has sought views on whether it should consult on the same basis as the approach adopted in Great Britain or start with the more fundamental question; should fees be introduced at all?
75. The Commission recommends the latter approach; namely a consultation on the fundamental issue of whether or not fees should be introduced. As set out in our response to the DoJ consultation (see Annex 2), we have concerns that an excessive fee has the

¹³ ECNI response to the Department of Justice's discussion paper on tribunal reform, January 2012, www.equalityni.org

potential to significantly restrict the number of individuals seeking redress at tribunals in relation to the discrimination cases.

76. We note that one of the reasons why the UK Government decided to introduce users fees for the employment tribunal was due to the increased volume of claims in the employment tribunal system. It would appear from tribunal statistics ¹⁴ that the number of live cases within the tribunal system in Northern Ireland is reducing. ¹⁵

Pre-hearing deposit

77. The Department has sought views on the use of deposit hearings and the Great Britain proposals to increase the maximum level of the pre-hearing deposit to £1,000 (from the current level of £500).

78. We have concerns in relation to these proposals. We note that the Department has indicated that, although there has been a recent upsurge in applications for deposit hearings, in general, the deposit mechanism has been seldom used and it is difficult to adduce evidence as to its effect.

79. Clearly, an increase in the maximum level of the pre-hearing deposit has the potential to deter claimants from lodging complaints; particularly those unemployed or on low income.

80. We welcome the fact that the Department has indicated that it will, when exploring options, consider an individual's ability to pay. The raising of the cap of deposits to £1,000 is likely to have a more significant impact on complainants than respondents. In addition, it is not clear from the discussion paper that there is a particular issue in Northern Ireland as regards the volume of vexatious or weak cases.

¹⁴ OITFET Annual Report 2010-11 www.employmenttribunalsni.co.uk

¹⁵ In particular it states that as at 31 March 2011, there were 5,504 live claims within the tribunal system and this was the lowest number of live claims recorded since 2001.

Costs

81. The Department has also sought views on whether to increase the cap on costs awards made in tribunals from £10,000 to £20,000 in line with proposals in Great Britain.
82. Costs orders may be made where a complainant has acted vexatiously, abusively, disruptively or otherwise unreasonably, or the bringing or conducting of the proceedings by the paying party have been misconceived.
83. We have concerns that the increase in the current cap on the level of costs may have a disproportionate impact on claimants; particularly unrepresented claimants or those on low income.
84. Again, as noted above, there is no evidence to suggest that there is a large number of vexatious complaints being brought in Northern Ireland. We recognise, however, that this measure can also benefit complainants, as a tribunal can make a costs order against respondents who in conducting the proceedings, act in a vexatious or disruptive manner.

Financial penalties

85. The Department has sought views on giving tribunals the discretion to levy a financial penalty, payable to the Treasury, on employers found to have breached employment rights.
86. We support the introduction of a power for tribunals to levy, at their discretion, a financial penalty on employers found to have breached employment rights.
87. As it is discretionary as opposed to mandatory, it will be open to the judge to decide whether the particular circumstances of the case are such that they warrant an additional penalty. As regards discrimination cases, we consider that a financial penalty, depending on the level of the penalty, has the potential to deter serious discriminatory actions by employers.

88. The proposals are also in keeping with the obligation on Member States under a number of EU equality Directives which require that sanctions in discrimination cases are “effective, proportionate and dissuasive”.

Change in qualifying period for exercising right to claim unfair dismissal

89. We have concerns in relation to a proposed extension of the qualifying period in unfair dismissal cases from one year to two years. In particular, we recommend that the Department considers whether or not extending the qualifying period will have a disproportionate impact on Section 75 equality groups; particularly women, and people with dependents. In the event of a disparity of impact on a Section 75 group, the Department must consider whether or not there is clear evidence to justify its approach.

90. We note that the discussion paper highlights that in Great Britain the assessment has been unable to establish a ‘direct link between the level of unfair dismissal claims and changes in the qualifying period’. Clearly, as regards Northern Ireland, it is important that the Department has a clear evidence base before proceeding with such a proposal.

Introduction of a system of protected conversations

91. The Department has sought views on introducing a system of “protected conversations, which would ‘allow employers to raise issues such as poor performance or retirement plans in an open way, free from the worry that these discussions will be used as evidence in a subsequent tribunal claim’”. We note that the discussion paper highlights that “there appears to be a limited evidence base in this area”.

92. It would appear from the debates during the Committee stage on the *Enterprise and Regulatory Reform Bill* currently being considered by the House of Commons, that Norman Lamb, Parliamentary Under Secretary of State for Business, Innovation and Skills, has indicated

that the clause “will not protect employers who act improperly when making such an offer and it does not protect any employer whose grounds for dismissal are discriminatory.” Importantly, it will not restrict an individual’s ability to take a complaint to a Tribunal and alleging that discrimination was a factor in his or her unfair dismissal.

93. Whilst we take some reassurance from this statement, in general, it is important that such a system, if introduced, does not introduce additional barriers for complainants alleging discrimination. In the Commission’s experience, in a wide range of instances, there is little evidence of overt discrimination and much of the complainant’s evidence relates to conversations between themselves and their employers. Complainants have therefore sought to rely on such conversations in order to show evidence of unlawful discrimination.

The review of employment regulations

94. The Department has indicated its intention to identify three sets of subordinate legislation to be considered as part of a review aimed at reducing the aggravated burden of regulations. It has sought views on specific regulations that would be appropriate for inclusion in this review.

95. We are aware that in Great Britain through the *red tape challenge*, the UK Government has taken steps to amend what it considers to be “unnecessary burdens” in the Equality Act. It is important to note that no decision was taken to remove the Equality Act 2010 in total and to date, only a small number of provisions have been repealed, or it is proposed will be repealed.

96. In addition, the Commission is of the view that legislation that protects individuals against unlawful discrimination and harassment should not be seen as a form of regulation. Such legislation protects an individual’s fundamental human right to equality¹⁶ and differs from regulatory legislation, such as health and safety legislation.

¹⁶ The general principle of equality is a fundamental element of international human rights law.

97. As set out above, the Commission is of the view that, rather than restricting existing protections under Northern Ireland equality law, employers would benefit from greater harmonisation and simplification of the equality legislation.

98. It is also of note that Equality Commission's recent awareness survey, *Equality Awareness Survey 2011*¹⁷ that 91% of respondents agreed with the need for equality laws in Northern Ireland. In addition, as set out above, more than three quarters of respondents (77%) agreed that Northern Ireland equality law should be strengthened to match those in Great Britain.

Reform of the recruitment sector

99. The Department has sought views as to whether a rationalisation of the Conduct Regulations, which govern the private recruitment sector, would be welcomed, or whether or not they are "fit for purpose" in their current form.

100. We are aware of the recommendations relating to the Conduct Regulations outlined in the *Beecroft Report* published in Great Britain. Recommendations include simplifying the Regulations, that they are largely replaced by a non-statutory code of practice, as well as the abolition of the Gangmasters Licensing Authority. We note that the UK Government intends to consult on specific proposals in summer 2012.

101. Whilst we await the publication of the GB consultation in order to assess the specific proposed changes, in general, we have concerns about any changes to the Conduct Regulations which diminish protection for agency workers.

102. The Department will note from the Commission's investigation *The Role of the Recruitment Sector in the Employment of Migrant Workers - a formal investigation*¹⁸ that, rather than reducing

¹⁷ Equality Awareness Survey 2011, ECNI, June 2012, www.equalityni.org

¹⁸ The Role of the Recruitment Sector in the Employment of Migrant Workers - a formal investigation, 2010, ECNI, www.equalityni.org

requirements, the Commission is of the view that the Conduct Regulations should be more rigorously applied.

103. For example, under the Conduct Regulations, recruitment agencies are legally required to agree with the work seeker the terms to apply between it and the work seeker and to provide all terms of that agreement in writing. The Commission has recommended that, to satisfy the legislative requirement of “agreement”, recruitment agencies must take necessary steps to ensure that contracts are clearly understood by employees whose language is not English.

104. The investigation highlighted that there was evidence that migrant workers signed documents they did not fully understand and that this had led to confusion and difficulties. The investigation highlights, in particular, the need for detailed information on payslips.

27 June 2012
Equality Commission

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 UNCRPD in Northern Ireland.

Annex 2: ECNI response to DOJ discussion paper on Tribunal Reform



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.¹⁹ 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 under equality law, including barriers within the Tribunal system in Northern Ireland.²⁰

¹⁹ <http://www.dojni.gov.uk/index/publications/publication-categories/pubs-criminal-justice/access-to-justice-review-final-report.pdf>

²⁰

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)

- 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.

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 Research²¹ 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 based guide *Taking a Discrimination Case*, aimed at improving understanding of the procedures and processes of taking a discrimination case.²² 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

²¹ Supporting Tribunal Users, Access to Pre-Hearing Information, Advice and Support in Northern Ireland, G.McKeever, 2001, www.lawcentreni.org

²² Taking a Discrimination Case – A Lay Persons Guide to Taking a Case of Discrimination in Employment

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 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.²³
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

²³ ECNI Policy for the Provision of Legal Advice and Assistance, www.equalityni.org

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.
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

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