Response to DEL consultation on Employment Law Review
November 2013

Introduction

1. The Equality Commission for Northern Ireland has set out below its response to the Department of Employment and Learning's (the Department's) consultation on Employment Law Review. 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 September 2013 in order to discuss this matter in more detail.

3. The Commission's initial views on a number of the proposals outlined in this consultation document have been previously raised in our response to the Department's earlier discussion paper on employment law in July 2012[1]. The Commission has only responded to those questions most relevant to its remit and experience.

Executive summary

4. In summary, we raise the following key points.

Overarching comments

- The Commission is, in general, committed to the early resolution of workplace disputes. However, it is important to recognise that the Commission will continue to support the bringing of strategic cases before Tribunals, where appropriate.

[1] ECNI *Response to DEL discussion paper on Employment Law* July 2012, www.equalityni.org

- We recommend that the Department's response is proportionate to the problem under consideration and there is a robust examination of how potential changes will impact specifically on discrimination complaints. It must also reflect 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. We recommend the introduction of pilot schemes, were feasible.

Tribunal powers

- We recommend the introduction of legislation so that tribunals in Northern Ireland, in line with the powers of tribunals in Great Britain, have the power to order, where appropriate, employers who are found to have breached equal pay laws, to carry out equal pay audits.

- We recommend that tribunals in discrimination cases across all equality grounds have the power to make recommendations that benefit the whole workforce and not simply the complainant.

Responses to specific questions

Early conciliation

- We recommend the inclusion of provisions that 'stop the clock' and the suspension of time limits for lodging tribunal claims if early conciliation (EC) is implemented.

- We recommend, in the event that EC is introduced, in order to facilitate conciliation in complex discrimination cases that consideration is given to extend the time limits beyond six weeks.

- It is vital that the EC process does not place an undue burden on the complainant and the process must be accessible and easy to use.

- If a claimant is required to give a brief description of the issue in dispute, then it is important that there are no negative consequences for the claimant if they fail to adequately represent in the form all

aspects of their complaint, for example, because they do not understand the full nature of their complaint.

- We recommend that the EC form also asks additional information relating to the prospective claimant's age and whether or not the prospective claimant already has a representative.

- In the absence of detailed information, it is difficult for the Commission to assess the degree to which the current pre-conciliation system is appropriate for dealing with discrimination complaints. We recommend that the LRA reviews its current pre-claim conciliation process specifically in relation to discrimination complaints.

- We recognise that if discrimination complaints were excluded from the EC process, a sizeable proportion of complaints would not be covered by the EC process. This in turn would reduce the overall impact of the proposed change. If discrimination cases are to be subject to the EC process, we highlight a number of issues that it is important to address.

- We do not support the proposal that the LRA will not issue an acknowledgement of hard copy EC forms received. We recommend an acknowledgement is issued.

- We recommend that potential claimants are given clear, accessible and concise information outlining any changes to the process, and the different roles and responsibilities of the various organisations that can be involved in resolving a workplace dispute.

Neutral assessment

- We are of the view that neutral assessment is unlikely to be appropriate in complex discrimination cases. It is also not clear what the 'added value' of the process and we raise a number of issues that require both consideration and clarification.

Unfair dismissal qualifying period

- We have concerns in relation to a proposed extension of the qualifying period in unfair dismissal cases from one year to two years.

- We had previously recommended 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, we recommended that the Department must consider whether or not there is clear evidence to justify its approach. We recommend that the Department adopts a similar approach to that adopted in Great Britain and sets out the statistical evidence underpinning its equality assessment.

Protected conversations

- The Commission is not clear that the introduction of such protected conversations will significantly "add value", and we raise a number of concerns and highlight a number of important safeguards that must be included within the process.

Overarching comments

5. As set out in our earlier response, the Commission is, in general, committed to the early resolution of workplace disputes and is of the view that alternative dispute resolutions (ADR), if applied effectively in discrimination disputes can ensure an early, less costly and more informal resolution of complaints with meaningful outcomes.

6. However, we make it clear that it is important to recognise that the Commission will continue to support the bringing of strategic cases before Tribunals, where appropriate; as such discrimination cases can highlight systemic and institutional discrimination and have ramifications beyond the circumstances of an individual complainant and can lead to wider societal change.

7. We also recognise and support the valuable work carried out by the Labour Relations Agency (LRA), whose dispute resolution services, as noted in the consultation document, are highly valued by both employers and employees.

8. In general, it is important that the Department's response is proportionate to the problem under consideration and there is a robust examination of how potential changes will impact specifically on discrimination complaints; which can be different to other types of tribunal complaints. It is important that none of the proposals, will, in combination, unfairly deter claimants from bringing discrimination cases and restrict their access to justice.

9. As stated in our earlier response, 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.

10. 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).

11. Clearly the number of tribunal claims in Northern Ireland is significantly lower than in Great Britain where there is, on average, approximately 58,000 employment claims and 106,000 multiple claims. This compares to an average number of single claims received by OITFET of 2,200 claims and 1,523 multiple claims, as noted in the partial regulatory impact assessment.

12. In addition, it is important to note that claims to the Industrial Tribunal in Northern Ireland over the last three years have remained at a relatively constant level and there has not been a significant increase in the number of tribunal claims over this time.[2]

13. In Northern Ireland there have also been significant improvements in terms of the management of discrimination cases by the Tribunal. As a result of these changes, there is a greater identification of issues at an early stage and complaints are heard by the tribunal within a shorter time; with Tribunal hearings in discrimination cases often taking place within 6-8 months of Tribunal proceedings being lodged.[3] Therefore significant delays and barriers which had previously existed have now been addressed.

14. Where possible, we recommend the introduction of pilot schemes in order to evaluate on a small-scale, the effectiveness of the intervention. We particularly recommend the introduction of a pilot scheme as regards the neutral assessment; which is a new scheme and does not exist in other jurisdictions in the UK.

15. Further, it is also important that particular safeguards are put in place at all stages of the pre-claim and post claim process to protect vulnerable complainants, such as those with a disability, or those with limited English.

[2] For example in 2010-11 there were 3,071 IT claims which fell to 2,582 in 2012-13. In addition there were 5,669 IT complaints/jurisdictions in 2010-11 which fell to 5,572 in 2012-13. In 2012-13, 282 claims generated 5,572 complaints as there may be more than one complaint raised by a claimant in a single claim.

[3] OITFET targets indicate that they offer parties in all single discrimination cases a hearing date within 6-9 months from the date that the claim was presented to tribunals.

Tribunal powers

16. Further to the points we raised in our earlier response to the Department's discussion paper in July 2012, whilst we welcome the work the Department has already done in terms of early resolution of workplace disputes and ensuring efficient employment tribunals, we are disappointed that the Department has not used this opportunity to consult on potentially strengthening the powers for tribunals to make recommendations in discrimination cases.

17. The Department had for example, previously indicated that it would, "explore legislative and non-legislative measures which encourage/require employers to operate equitable pay policies."[4]

18. We are not aware that the Department has taken further steps in this area and in particular, are disappointed that it was not raised in either its earlier discussion paper or its most recent consultation on employment law review.

19. The Department will be aware that in Great Britain there is a power under Section 98 of the Enterprise and Regulatory Reform Act 2013, which came into force in April 2013, to enable Ministers to make regulations enabling employment tribunals to order employers who are found to have breached equal pay laws to carry out equal pay audits.

20. We recommend the introduction of similar legislation so that tribunals in Northern Ireland, in line with the powers of tribunals in Great Britain, have the power to order, where appropriate, employers who are found to have breached equal pay laws, to carry out equal pay audits.

21. Secondly, as previously highlighted to the Department, we recommend that tribunals in discrimination cases across all equality grounds have the power to make recommendations that benefit the whole workforce and not simply the complainant; a power which already exists under the fair employment legislation. Complainants in discrimination cases frequently seek remedies beyond financial

[4] Del *Policy Response: Disputes in the workplace: A Systems Review, 2009,* www.delni.gov.uk

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.

22. We are aware that whilst this power was originally introduced in Great Britain under the Equality Act 2010, the UK Government has indicated its intention to repeal this provision.

Responses to specific questions

Question 1 (Pre-claim conciliation)

23. *If early conciliation (EC) is implemented, should it include a provision to 'stop the clock', suspending the limitation period for lodging a tribunal claim? Please give reasons for your answer.*

Response

24. As stated in our previous response, the Commission **recommends** the inclusion of provisions that 'stop the clock' and the suspension of time limits for lodging tribunal claims if early conciliation (EC) is implemented.

25. We note that in general, a Conciliation Officer will have up to one calendar month from the date of receipt of the EC form during which to facilitate a settlement. There is also a possibility of a further extension of two weeks.

26. Clearly many discrimination cases are of a complex nature, for example, equal pay cases, and it is therefore possible that 6 weeks will be insufficient time in which to facilitate a settlement in complex discrimination cases.

27. We note 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.

28. We **recommend**, in the event that EC is introduced, in order to facilitate conciliation in complex discrimination cases that consideration is given to extending the time limits **beyond six weeks.**

29. The Commission has also consistently called for time limits for lodging discrimination complaints to be **extended to 6 months**, in line with the time limits in County court cases and the approach taken in the Republic of Ireland.

30. Our recommendation draws on our experience of dealing with discrimination complaints and the fact that many complainants who contact us face significant difficulties in meeting the current 3 month tribunal time limit. The 3 month time limit also means that there is insufficient time for complainants to lodge pre-lodgement questionnaires and to receive and review any response prior to the deadline for lodgement of proceedings.

31. We are of the view that this 6 month time limit would provide sufficient opportunity for complainants alleging discrimination to avail of LRA pre-claim conciliation.

32. It is also important that safeguards are put in place to protect complainants that seek to lodge complaints very close to the end of their statutory timelimits; as they may have to lodge an ET1 at short notice in the circumstances where they are unable to agree early conciliation.

Question 2 (Pre-claim conciliation)

33. *Your opinions are sought on:*

- *unintended consequences that could arise if prospective claimants are required to give a brief description of the nature of the dispute(s) on the EC form; and*
- *the other proposed contents of the EC form.*

Response

- **Description of dispute**

34. In our earlier response, we also made it clear that if a requirement is introduced that a complainant must notify the LRA in advance of lodging a complaint, it is vital that this does not place an undue burden on the complainant. We also stress that the process must be accessible and easy to use.

35. If a claimant is required to give a brief description of the issue in dispute, then it is important that there are no negative consequences for the claimant if they fail to adequately represent in the form all aspects of their complaint, for example, because they do not understand the full nature of their complaint.

36. In many instances, at an early stage, claimants may be unrepresented and not have sufficient knowledge or information to know that they have a potential discrimination complaint. It is important that safeguards are introduced so that they are not unduly penalized due to this lack of information or knowledge at this early stage. We welcome the fact that the Department has indicated that it is intended that the form will 'have no bearing on any subsequent tribunal proceedings' and this must be made clear in amending legislation and/or guidance.

- **Content of form**

37. We recommend that the form also asks additional information relating to the prospective **claimant's age**. For example, the claimant may be a minor and be particularly vulnerable due to their age. In particular, many 16-18 year olds are in part time employment and may need additional support in understanding their rights and tribunal rules and procedures.

38. We also propose that the form asks whether or not the prospective claimant already has a representative. We do not agree that including a box or representative details on the form may indicate to

prospective claimants that this is the norm, as argued by the UK Government.[5] A claimant, particularly a vulnerable claimant may prefer that the LRA contact their representative, in the first instance, than initially making contact directly with themselves.

Question 3 (Pre-claim conciliation)

39. *Are* there *other jurisdictions in relation to which EC would be inappropriate; in particular categories of claim unlikely to settle in a four week period (e.g. discrimination claims)? Please give reasons for your views.*

Response

40. In our previous response, we had recommended ongoing review and evaluation of the effectiveness of the whole conciliation process, including pre-claim conciliation and, in particular, the outcomes it achieves for claimants in discrimination cases.

41. Whilst there is limited indication in the consultation paper of the current outcomes of the pre-claim conciliation process, we note that there is no indication of what the outcomes are for claimants in discrimination cases, or the experiences of complainants alleging discrimination when they avail of the current pre-claim conciliation process.

42. In the absence of this information, it is therefore difficult for the Commission to assess the degree to which the current pre-conciliation system is appropriate for dealing with discrimination complaints and what steps are needed, if any, to improve the process in the event that they are covered by the proposed EC process.

43. We therefore again recommend that the LRA reviews their current pre-claim conciliation process specifically in relation to discrimination complaints.

[5] See BIS response to consultation on resolving workplace disputes, 2011, www.bis.gov.uk

44. We recognise that almost 20% of total tribunal complaints[6] relate to discrimination matters, and that if discrimination complaints were excluded from the EC process, a sizeable proportion of complaints would not be covered by the EC process. This in turn would reduce the overall impact of the proposed change.

45. If discrimination cases are to be subject to the EC process, we recommend that the following concerns are addressed.

46. It is important that effective safeguards are in place to protect and support vulnerable claimants alleging discrimination. For example, a claimant may be vulnerable because they have a disability or have language difficulties.

47. We note that recent research carried out on the ACAS pre-claim conciliation process in Great Britain, concluded that, whilst it had been shown to be successful, there were a number of service improvements that should be made. These recommendations included a greater diagnosis early on in the process around the type of claimant, their needs and the size of claim and tailoring of service based on this.

48. It also highlighted that this can include understanding whether the claimant has any learning difficulties and or gauging the extent of their needs for emotional support to help design the right conciliation package for their needs and/or to ensure they are referred to a third party to be supported.[7]

49. It also important that there are effective safeguards in place, particularly at the early stages of a dispute, to protect claimants, particularly those who are unrepresented, who may not be aware of the range of issues relevant to his or her discrimination complaint. We note, for example, that the majority of claimants to both the

[6] OITFET statistics in 2012-13 show that there were 1,072 discrimination complaints which represented 19.25% of the total number of complaints.

[7] www.acas.org.uk, *Research paper Why pre-claim conciliation referrals become employment tribunal claims,* 2012

Industrial Tribunal and the Fair Employment Tribunal are unrepresented.[8]

50. Further, a claimant will not at the EC stage, have had sight of the employer's response form (ET3) and may not have had sight of any replies to a questionnaire or seen relevant discoverable documents. At the early stages of a dispute, a claimant claiming discrimination can be at a significant disadvantage as they do not have sufficient information in order to assess whether or not they have been discriminated against.

51. Finally, it is essential that complainants alleging discrimination who avail of pre-claim conciliation are made aware of their right to serve a statutory questionnaire on the respondent in order to obtain both relevant facts and documents relating to their complaint. In addition, respondents must be made aware that even if they are taking part in pre-claim conciliation that replies should be given to the questionnaire if still required by the complainant. Replies to a questionnaire help complainants to assess whether or not they should proceed to lodge proceedings in the event that the complaint is not conciliated.

52. We note that the Department is not proposing to introduce EC in areas where the LRA has no conciliation role. We therefore assume that claims to SENDIST in relation to disability discrimination complaints against schools will not be covered by the provisions.

Question 5 (Pre-claim conciliation)

Should hard copy EC forms receive a written acknowledgement? Please explain.

Response

53. We do not support the proposal that the LRA will not issue an acknowledgement of hard copy EC forms received. We recommend

[8] In particular, in 2010/11, 66% of claimants to the Industrial Tribunal and 62% to the Fair Employment Tribunal were unrepresented.

an acknowledgement is issued, in line with the approach adopted in Great Britain, so as to provide clarity for prospective claimants as to the date that the EC form was received.

Question 10 (Pre-claim conciliation)

54. *Please give your views on the proposed EC process as a whole. If any, what alternatives should the Department consider?*

Response

55. As regards additional general views on the proposed EC process, we recommend that potential claimants are given clear, accessible and concise information outlining any changes to the process, as well as on the different roles and responsibilities of the various organisations that can be involved in resolving a workplace dispute.

56. Further, we recommend that claimants with discrimination complaints who lodge EC forms with the LRA are notified at the earliest possible stage that the Equality Commission can provide free and confidential advice and assistance on discrimination complaints.

57. It is particularly important that prospective claimants are aware of how "the stop the clock" provisions operate, the general rules relating to Tribunal time-limits, that early conciliation is not mandatory and if they decide not to take part in early conciliation they can proceed to a Tribunal.

58. We note that the recent research carried out on the ACAS pre-claim conciliation process, concluded that, there was a need in Great Britain, to provide consistent information about the tribunal process to address gaps in knowledge and perceptions.[9]

59. As stated in our earlier response[10], it is also important that the conciliation process, particularly in pre-conciliation, recognises that often complainants in discrimination cases, particularly in

[9] www.acas.org.uk, research paper *Why pre-claim conciliation referrals become employment tribunal claims*, 2012
[10] ECNI *Response to DEL discussion paper on Employment Law* July 2012, www.equalityni.org

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, harassment, and redundancy cases.

Question 15 (Neutral assessment)

60. *The Department is inviting views on the proposed neutral assessment model which, like the LRA's arbitration arrangements, would be unique to Northern Ireland. What advantages and disadvantages does the proposal have, and how could it be improved?*

Response

61. In general, we are of the view that neutral assessment is unlikely to be appropriate in complex discrimination cases.

62. We are aware that OITFET has commenced a pilot project in non-discrimination cases in relation to early case review. We understand that this pilot has looked at approximately 100 non-discrimination tribunal cases and that early indications are that it is working successfully. We also understand that consideration is being given to rolling out the scheme to a wider range of non-discrimination tribunal cases. We recommend that OITFET undertakes, in due course, a robust evaluation of the pilot scheme which includes a detailed consideration of both complainants' and employers experiences of using the scheme.

63. Consideration therefore needs to be given as to whether there is a need for two processes; namely early case review operated by OITFET and a neutral assessment process delivered by members of the LRA's independent panel of arbitrators. The existence of two schemes, if both are to run concurrently, is likely to cause considerable confusion for both complainants and respondents.

64. Further, whilst we are aware that it is proposed that the service would be delivered by the LRA's panel of arbitrators who are independent of the LRA, there may be a perception that the process is not independent of the LRA.

65. We note that it is envisaged that the assessment process would involve each of the parties presenting the facts of their case and a consideration of supporting documents including expert reports, references to relevant law and case law and key arguments.

66. It is also not clear what the added value of the process will be if it is still open to the dissatisfied party to proceed to a Tribunal. Further, as referred to above, significant improvements in terms of the management of discrimination cases by the Tribunal, including robust case management discussions (CMDs), has already resulted in a greater identification of legal and factual issues at an early stage and a greater earlier focus by both parties on the issues under dispute.

67. We have concerns that the neutral assessment process may result in delays to tribunal case management processes and procedures which are currently operating in an efficient and effective manner.

68. It is also of note that the tribunal system already contains a range of safeguards that guard against frivolous and vexatious complaints; including the use of deposit orders.

69. In addition, it is not clear what the powers of the assessor will be; for example, will they have the power to seek documents from the respondent or seek a witness statement. It is also not clear whether either party is allowed to have legal or other representation at an assessment session.

70. In addition, if discrimination cases are included in neutral assessment model, it is important that the assessors have effective and relevant guidance and training relating to equality legislation and case law.

71. Clearly there are difficulties if, following the process, confidentiality of the process is breached; for example the claimant discloses details of the case to the press. This will deter other respondents or claimants

from entering into the process. It is also unclear as to whether or not evidence obtained during this process can be used in a subsequent Tribunal case.

72. As stated earlier, where possible, we recommend the introduction of pilot schemes in order to evaluate on a small-scale, the effectiveness of the intervention. We particularly recommend the introduction of a pilot scheme as regards the neutral assessment; which is a new scheme and does not exist in other jurisdictions in the UK.

Question 20 (Extension of unfair dismissal qualifying period)

73. *Northern Ireland has, for the most part, maintained the same unfair dismissal qualifying period as Great Britain. Do you consider that retaining parity in this area is desirable, considering that employment law is devolved to the Northern Ireland Assembly? Please give reasons for your answer.*

Response

74. As stated in our earlier response, we have concerns in relation to a proposed extension of the qualifying period in unfair dismissal cases from one year to two years. We recommended 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.

75. The Department has set forward a range of possible options including, for example, that an increase in the qualifying period to two years would only apply to employees starting their first job. It is important that each of the options are assessed in order to ascertain whether or not they would discriminate indirectly against any equality group and if there is disparity of impact, whether or not it can objectively justify that disparity of impact.

76. We note from the Department's screening form on this issue[11] that it has not identified an adverse impact as regards all equality grounds apart from age. It indicates as follows:

"The unfair dismissal qualifying period of one year currently applies to all employees in Northern Ireland, regardless of religious belief, political opinion, racial group, age, marital status, sexual orientation, men and women generally, people with a disability and people with dependants. None of the possible new options under consideration, with the exception of increasing the qualifying period to two years for new-start employees (i.e. employees starting their first job – discussed under 'age' above) will alter this position."

77. As regards 'age' it states:

"Option 4 discusses an increase in the qualifying period to two years for new-start employees (i.e. – employees starting their first job). This might disproportionately affect younger workers and be indirect age discrimination."

78. We note that the Department for Business Innovation and Skills in its equality impact assessment[12] in relation to its proposal in 2011 to increase the qualifying period for unfair dismissal from one to two years, set out in detail the statistical basis underpinning its conclusion that it did not consider that an extension of the qualifying period would cause a considerable disparity of impact on any particular equality group. It drew on statistics from the Labour Force Survey in reaching its conclusions. We recommend that the Department adopts a similar approach and sets out the statistical evidence underpinning its equality assessment.

79. Following on from the principles set out in the House of Lords decision in the case of *R (Seymour-Smith) v Secretary of State for Employment*[13], it is important that an extension of the unfair dismissal qualifying period does not cause a considerable disparity of impact on any particular equality group. If there is such a disparity of impact,

[11] http://www.delni.gov.uk/unfair-dismissal-qualifying-period-equality-screening.pdf
[12] BIS *Resolving Workplace Disputes, Final Impact Assessment*, Nov 2011 www.bis.gov.uk
[13] ECNI *Response to DEL discussion paper on Employment Law* July 2012, www.equalityni.org

this must be capable of objective justification; i.e. extending the qualifying period is a proportionate means of achieving a legitimate aim. The Seymour-Smith decision also highlighted the need for government to monitor over time the impact of policy changes on equality groups.

80. We are aware that the House of Lords, following on from a decision of the European Court of Justice, was of the view that a two year qualifying period did have a disparate impact on women but that the government at the time Ms Seymour-Smith took the case was able to succeed in objective justification of increasing recruitment by employers.

81. It is also important to note that the European Court of Justice was of the view that "mere generalisations concerning the capacity of a specific measure to encourage recruitment are not enough to show that the aim of the disputed rule is unrelated to any discrimination based on sex, nor to provide evidence on the basis of which it could reasonably be considered that the means chosen were suitable for achieving that aim."[14]

82. We note that the analysis produced by the Department in the consultation document has highlighted that there are difficulties in determining any direct link between changes in the unfair dismissal qualifying period and the number of jobs in the economy, employment growth or levels of inward investment.

83. Further, the Department has made it clear that it is very difficult to establish any causal link between the number of unfair dismissal claims to the Tribunal and the unfair dismissal qualifying period.

Question 69 (Protected conversations)

84. *What safeguards should be enacted to ensure that the rights of parties to these negotiations are protected? (An example may include withdrawing inadmissibility on grounds of improper behaviour. Please*

[14] ECJ decision, 1999, http://www.bailii.org/eu/cases/EUECJ/1999/C16797.html

provide suggestions on any definitions required).Issue under consideration

Response

85. As outlined in more detail below, in general, the Commission is not clear that the introduction of such protected conversations will significantly "add value", and we raise a number of important safeguards that must be included within the process.

86. Firstly, as raised in our earlier response, it is important, as is the case proposed in Great Britain, that there are exceptions to the confidentiality principle, for example, claims made on grounds other than unfair dismissal, such as discrimination.

87. We note that in Great Britain that there are restrictions to the inadmissibility principle where there is "improper behaviour by a party". We note that it is for a tribunal to determine what constitutes "improper behaviour" but it is clear from the ACAS Code of Practice on Settlement Agreements[15] that some examples of improper behaviour include discrimination on a wide range of equality grounds including age, sex, race, disability and sexual orientation.

88. As made clear in our earlier response, it is important that if such a system is introduced, it does not create additional barriers for complainants alleging discrimination. As previously stated, in our 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.

89. In addition, the Commission is not clear that the introduction of such protected conversations will significantly "add value". We note, for example, that the UK Government has already stated that if an

[15] ACAS Code of Practice for Settlement Agreements July 2013, www.acas.org.uk

employer wants information about an individual's plans for workforce planning purposes, they are already able to ask in an open and trusting management conversation, without the need of a protected conversation.[16]

90. It is important to stress, as regards workforce planning discussions that employers should not, without justification, discriminate against workers of particular ages, for example, older workers. We consider it good practice to have a formal time, for example, in an annual appraisal, when each worker can discuss their future plans and aspirations and that older workers should not be excluded from that opportunity. We are of the view that an employer can initiate a discussion about a worker's future plans provided it is raised in a neutral way and does not treat anyone less favourably because of their reply.

91. We agree that if protected conversations are introduced, that there should be detailed and clear guidance for both employers and employees so as to mitigate against the risk against an employer inadvertently acting improperly. For example, so as to avoid the situation where an employer wrongly believes that they can make discriminatory comments to an employee with impunity and under the belief that they are inadmissible as part of a "protected conversation".

92. We also agree that there is a risk of satellite litigation against employers on issues, for example, related to whether or not an employer's conduct amounted to "improper behaviour".

93. In addition, as taken forward in the ACAS Code of Practice, it is important to have clarity for employers on when employers can rely on the "without prejudice" principle which covers situations where there is an existing dispute between the parties.

94. We also note that under the without prejudice principle, as regards discrimination claims, discussions are not admissible in evidence unless there has been some "unambiguous impropriety". The ACAS Code states that as the test of "unambiguous impropriety" is a

[16] As quoted in DEL consultation document at paragraph 5.114

narrower test than that of improper behaviour, discussions that take place in the context of an existing dispute will not be admissible unless there has been some “unambiguous impropriety”.

95. The Commission considers that these different standards which apply in relation to discrimination issues have the potential to cause confusion between employers and employees.

96. We also note from the ACAS guide that whilst it is not a legal requirement. employers should allow employees to be accompanied at the meeting by a work colleague, trade union official or trade union representative.

97. It would therefore appear that the complainant has little recourse to redress if an employer decides not to follow good practice and refuses to allow an employee to be accompanied to the meeting.

98. In addition we recommend that employers are made aware, further to their duties under the Disability Discrimination Act 1995 that they may need to make reasonable adjustments in relation to a disabled employee. Further, employers may need to consider that certain employees may be vulnerable due to, for example, their disability or limited knowledge of English.

Equality Commission

November 2013