Response to the Consultation - Discrimination Law Review – A Framework for a Fairer Future: Proposals for a Single Equality Bill for Great Britain

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Congress House
Great Russell Street
London
WC1B 3LW

t 020 7290 0000
f 020 7637 0000
dx 35722 BLOOMSBURY
w www.thompsons.law.co.uk

THOMPSONS SOLICITORS

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Thompsons is the UK's largest trade union, employment rights and personal injury law firm. It has a network of 21 offices across the UK, including the separate legal jurisdiction of Scotland and Northern Ireland. Thompsons' specialist Employment Right Unit (ERU) acts only for trade unions, employees and workers and the ERU has acted in many of the leading employment rights cases, advising extensively on UK and European law developments.

Thompsons has been an active participant in government consultation on proposed legislation.

Thompsons has extensive experience of employment tribunal litigation across the UK. We deal with thousands of tribunal cases every year, ranging from individual claims for unlawful deductions or unfair dismissal, through multi-day cases concerning discrimination, to significant major multi-applicant litigation on issues such as equal pay and TUPE. In 2006 we handled over 1,000 discrimination cases. We are currently dealing with 10s of thousands of equal pay cases in the NHS and Local Government.

Whilst we generally represent Claimants, we also have experience or representing unions and other labour movement employers defending claims brought by employees or members. Our extensive experience of Employment tribunal litigation in discrimination and equal pay cases means that we are uniquely placed to comment on the detail of the DLR's proposals as well as their policy implications.

A) INTRODUCTION

We welcome the opportunity to respond to the DLR consultation paper. Our comments relate primarily to the Government's proposals as they relate to employment and the key issues for consideration are summarised below.

We found that the structure of the consultation paper has sometimes made it difficult to answer certain questions. Certain questions requiring a "yes" or "no" answer have been presented in a way that has not always allowed for the required response. In other areas we respectfully suggest that the wrong questions were asked. Accordingly we have not responded to specific questions but given our views on the relevant issues and have followed the outline of the consultation paper.

B) GENERAL COMMENTS

We agree that discrimination/equality law needs to be re-examined and reviewed to make it fit for a 21st Century. The current legislation is more than 30 years old and fragmented and sometimes confusing. We welcome the aims of the DLR to achieve clearer, more streamlined equality legislation and better outcomes for people experiencing disadvantage. However like many commentators we believe that the current proposals if carried through will have missed a once in a lifetime opportunity to make real and effective changes to eradicate discrimination and achieve greater equality. Much of our discrimination legislation is now 30 years old. What was appropriate in the 1970s when society was generally more hostile to anti discrimination measures is not necessarily appropriate in the twenty first century when there is perhaps a greater consensus about equality and diversity if differing views of the ways to achieve it.

In particular the Equal Pay Act which was considered so controversial on its introduction that employers were given 5 years to put their pay structures in order now needs wholesale review. The law of Equal Pay is unnecessarily complex and litigation exceptionally time consuming. The purpose of the Equal Pay Act was to eradicate gender discrimination in pay. The Act has failed in its purpose. A simpler legislative framework is required to outlaw sex discrimination in pay. There is no reason why a Single Equality Act should not outlaw discrimination in pay on the grounds of sex in line with European law by bringing pay into the sex discrimination framework. If a claimant can show that she has been treated less favourably in relation to her pay than a man was treated or would have been treated and that the reason for that treatment was her sex she should be able to succeed in her claim.

The fact that a large volume of case law has been built up around the Equal pay Act should not be a reason for accepting that it has not worked to eradicate the gender pay gap and a new model should be adopted. A timid approach to reform will merely entrench law that has not delivered and is not fit for the current times.

PART 1 – HARMONISING AND SIMPLIFYING THE LAW

CHAPTER 1: PROMOTING COMPLIANCE AND GOOD PRACTICE, SIMPLIFYING DEFINITIONS, TESTS AND EXCEPTIONS

1 Direct Discrimination

1.1 Paragraphs 1.9 to 1.16 of the consultation paper concern the definition of direct discrimination. The DLR considered whether it would be better for the legislation to be amended so that there was no need for a comparator to prove direct discrimination. The conclusion reached by the DLR is that it is better to keep the existing requirement for a comparator in direct discrimination claims because if the requirement for "less favourable treatment" was removed then this would mean that people could bring claims of discrimination on the basis that they have simply been treated badly rather than having to prove that they have been less favourably than someone in the same situation who does not share the protected characteristic. But surely that misses the point. Removing the requirement for a comparator would not remove the requirement that the claimant must show that the bad treatment received was because of the prohibited ground of discrimination. In order to prove discrimination the claimant would still need to show not only that they have suffered bad treatment but also that the bad treatment was on one of the prohibited grounds of discrimination. We believe that the requirement for a comparator unduly focuses the courts' minds on whether there is an appropriate comparator rather than focusing on the nature of the treatment and whether it was discriminatory. That is not to say that the concept of comparators has no place in addressing direct discrimination issues.

Comparators are often useful actual or hypothetical means for tribunals and courts being able to infer or determine that unlawful discrimination has happened. However the failure or inability to find or construct a comparator should not mean that victims of discrimination are denied justice and a remedy for the wrong(s) they have suffered. Rather we think that the current statutory requirement for a comparator be removed so as to reflect the proper function of a comparator that is it can be evidence of unlawful discrimination but it is not absolutely essential to prove discrimination.

2 Definition of Disability Discrimination

2.1 We agree that there should be a single definition of disability discrimination, subject to our later comments about what the single definition should be.

3 Perception and Association

3.1 Currently individuals can claim discrimination on grounds of race, religion/belief and sexual orientation if they are not an actual member of one of the protected groups but the discriminator thinks they are, or if they associate with people who are, and they have been subjected to less favourable treatment on that basis. The Age Regulations also cover discrimination on the basis of perception. The DLR recommends that the current approach in relation to discrimination on the basis of perception should not be changed. We disagree and believe that the approach to perception and association discrimination should be extended to disability discrimination. Individuals sometimes experience discrimination because they are falsely perceived to be disabled. Friends, family and carers also suffer discrimination because of their association with a disabled person. The European Framework Directive extends protection against any discrimination "on the grounds of" disability.

This widens the scope of disability discrimination and we believe that the Government will need to change the law anyway to comply with the Directive. We also strongly believe that it is right that people who are perceived to be disabled or who associate with disabled people and as a result are discriminated against should receive protection.

4 Indirect Discrimination

4.1 Paragraphs 1.26 to 1.35 concern indirect discrimination and disability discrimination and gender reassignment.

4.2 The prohibition on indirect discrimination does not extend to disabled people. The DLR argues that:

> "*In disability discrimination law, while the use of reasonable adjustments provides individual solutions to the barriers encountered by disabled people, changes made as reasonable adjustments for one disabled person may have a positive benefit for others…In this way, the reasonable adjustments requirement can help to address group disadvantage experienced by disabled people in a similar way to indirect discrimination provisions operating in relation to other protected grounds. Reasonable adjustments are designed to remove unnecessary barriers for an individual disabled person in a particular situation. This is because it is not possible to say that one solution will remove the barriers for every disabled person, even those who appear to have the same impairment.*"

4.3 Like the Disability Rights Commission (DRC) we do not agree that a purely individualised approach is adequate to open up equal opportunities to disabled people. There are many barriers which exclude people from the work place including, inflexible work practices; unnecessary medical requirements; training systems which are not equipped for disabled staff; intranets which cannot be accessed by people with a range of disabilities; and buildings not designed to accessible standards.

4.4 The reasonable adjustment approach may give redress to an individual, and it may also have a positive impact on other disabled people, but this is not guaranteed. It is important therefore to introduce the concept of indirect disability discrimination so as to help remove institutional barriers which can exclude groups of disabled people.

4.5 We welcome the extension of indirect discrimination protection to cover gender reassignment.

4.6 We welcome a harmonised objective justification test but believe that the current 'proportionate means of achieving a legitimate aim' test should make it clear that a discriminatory provision, criteria or practice can only be justified where it corresponds with a real need on the part of the employer, which is not itself discriminatory, and where it is (reasonably) necessary and proportionate to achieving that aim.

4.7 Paragraphs 1.46 to 1.53 concern the test for justification for disability-related discrimination. We agree that there should be a single test of objective justification for disability discrimination in employment and vocational training, goods, facilities and services, housing, education, private clubs, public functions and transport. We also welcome the proposal to replace the different justification tests which currently apply in relation to disability discrimination with the one that applies to indirect discrimination in relation to other grounds. The new test of justification would require a higher threshold for employers to meet than the current threshold which makes it comparatively easy for employers to justify discrimination.

4.8 Paragraphs 1.54 to 1.59 concerns the harmonisation of the reasonable adjustments threshold for disability discrimination. We welcome the proposal that there should be a single threshold for the point at which the duty to make adjustments is triggered and that the threshold should be where a disabled person experiences "substantial disadvantage".

4.9 Paragraphs 1.60 to 1.62 concern victimisation and comparators. We agree with the proposal that the comparator requirement for victimisation should be removed to bring it more in line with the victimisation provisions in general employment law.

5 Genuine Occupational Requirement (GOR) test for all grounds

5.1 We agree that a GOR test should be introduced for all grounds of discrimination with the exception of disability where it is not needed.

CHAPTER 3: EQUAL PAY

We welcome the attempt to improve the accessibility of equal pay for women within the workplace. It is regrettable that some 32 years since the introduction of the Equal Pay Act, the gender pay gap still remains at 12.6 % and women continue to dominate low paid part time positions. However, this is not just due to the limitations of the Act itself, but is also due to social perceptions of women's role within society and the workplace. Ultimately, until such time as those perceptions disappear, any attempts to bolster the current narrow equal pay legislation must be viewed as a positive step.

1 Do you agree that the distinction between contractual and non contractual matters should remain?

1.1 At paragraphs 3.12 to 3.20 it is proposed that the current equal pay provisions should be included within a Single Equality Bill, but the difference between contractual claims and non contractual claims should continue to be dealt with separately. The current legislation provides that contractual claims are pursued with reference to the Equal Pay Act, and non contractual claims are pursued under the Sex Discrimination Act.

1.2 Thompsons support the proposal that the equal pay provisions be brought within the context of a Single Equality Act (SEA). However, we do not agree that should that transition occur, the pursuit of contractual and non contractual claims should remain separate and distinct. Thompsons are of the view that equal pay should be incorporated within a SEA, the pursuit of complaints of sex discrimination in pay should be amalgamated in one common approach and we suggest that should be the current contractual framework.

1.3 The definition of pay as defined by European legislation is in our view wider that that provided by our own domestic legislation. If there is no distinction at a European level as to what amounts to pay then why should our domestic framework be different?

1.4 Also, the two different approaches at present have different statutory time limits, different burdens for Claimants, different remedies for employers to utilise, different questionnaire procedures and importantly different remedies. Is it the Commission's intention that these differences should also remain? It seems illogical that if the intention is to streamline the statutory framework, why maintain the contractual/non-contractual distinction.

1.5 The first concern is that if a new approach was adopted this would render redundant our current case law, and new cases would need to be litigated in order to establish new principles. In our view, if the Single Equality Act were to adopt the current contractual approach as provided for by the Equal Pay Act, in respect of both contractual and non contractual claims, our current case law would still remain effective and binding.

1.6 There is also a suggestion that if the non contractual approach was favoured over the contractual approach, equal pay remedies could potentially result in punitive damages being awarded against employers when there may have been no discriminatory intent. As stated above Thompsons favours the incorporation of the current contractual approach within any future SEA. However, we are also in favour of incorporating within that approach the facility for awarding equal pay Claimants injury to feelings compensation as currently provided for in the non contractual approach.

1.7 It is highly notable that equal pay is the only discrimination complaint for which Claimants can not presently recover injury to feelings compensation Again, if the intention is to streamline all our current discrimination provisions in a SEA then the remedies for those complaints must be likewise aligned and this should include equal pay. We have noted the Commissions' suggestion that if this occurred employers may be required to pay damages when there has been no discriminatory intent. However, intent does not presently feature in relation to any of the other direct discrimination provisions and therefore why should the approach to equal pay be any different.

1.8 We do support the inclusion of the equal pay provisions within a SEA but we are against a continued division of contractual and non contractual complaints. We also suggest the inclusion of an injury to feelings remedy within the scope of any new framework for equal pay Claimants.

1.9 In conclusion, we believe the current division between contractual and non contractual complaints may be one of the reasons where the gender pay gap remains as Claimants may be confused as to their rights with reference to the current complex legislative framework. A unified approach to both would also align itself with the new Gender Equality duty which does not permit public service providers to draw a distinction between the promotion of equality in a contractual or non contractual sense.

2 Proposal (b) Do you consider there are further areas of law of equal pay developed by case law which it would be helpful to codify?

2.1 At paragraphs 3.21 and 3.22 we note that the Commission wish to clarify and simplify the approach to equal pay law as far as possible. Three possible areas suggested for codification are comparators, the terms to be compared and finally employers' defences to equal pay claim.

2.2 In the current climate of equal pay litigation most particularly in the public sector case law has been developing rapidly in the past four years. There have been 16 important appellant decisions which have reshaped equal pay law; Bainbridge & Others –v- Redcar & Cleveland Council (1) & (2) (EAT), Surtees & Other –v- Middlesbrough Council (EAT), Allan & Others –v- Newcastle City Council (EAT), Sita –v- Hope (EAT), Villalba –v- Merrill Lynch (EAT), Armstrong & Others –v- Newcastle upon Tyne NHS Trust (CA), Defra –v- Robertson (CA), Dolphin & Others –v- Hartlepool Borough Council (EAT), Anderson & Others –v- South Tyneside Council (CA), Best & Others –v- Tyne & Wear Passenger Transport Authority t/a Nexus (EAT), Cross –v- British Airways (EAT), Wilson & Others –v- St Helens & Derbyshire Council (HOL), Bailey & Others –v- Home Officer (EAT &CA), Sharp –v- Caledonia (EAT), Parliamentary Commissioner –v- Ferdinandez (EAT), HSE –v- Cadman (CA). As a result of these challenges, an inconsistent and haphazard pattern has emerged from the current cases, and the principles decided ultimately have to be tested by our appellant courts to establish further guidance. This inevitably has built delay into the pursuit of any equal pay claims.

2.3 It appears to us that there are five main issues which have been debated at length by the case law but conclusive guidance is still lacking. Therefore, in addition to the three examples cited by the Commission, we believe the following areas also require codification to demystify the present equal pay case law :-

2.4 Pay Protection

2.4.1 When introducing new pay and grading structures, it is often the case that generic pay protection provisions are agreed between employers and Trade Unions to cushion the blow for any employee who may be unfortunate and lose out as a result of his or her new grading. The present case law that exists on this point relates to two Local Authorities namely, Bainbridge & Others –v- Redcar Council and Surtees & Others –v- Middlesbrough Council, and both decisions are conflicting.

2.4.2 The earlier Judgment suggested that where pay protection protected alleged historic discriminatory pay, it was unlawful for Claimants who sought to rely upon comparators who received pay protection, to not receive the same protected rate of pay. However, the second decision casts doubt on that decision. Both cases are due to be heard together by the Court of Appeal in early 2008.

2.4.3 The Court of Appeal's decision may inform whether this is an area prime for codification. In the meantime, Thompsons position is that a codification of when it is, and is not, permissible to provide pay protection would be welcome. Claimants could then be clear as to which terms they can seek to pursue, and this would also assist employers and Trade Unions who negotiate these agreements.

2.5 Single Source

2.5.1 Again, the current case law is conflicting in relation to this issue. The case law has thrown up three important issues; (1) does this test comprise the simple question whether there is a single source responsible for the pay difference regardless of the establishment or the employer?, (2) does it mean that the employer at the time the claim is brought solely must be responsible for the pay differential before the test can be satisfied?, and (3) do Claimants still need to establish a Single Source even if they are employed within the same employment as their Comparators?

2.5.2 These issues are important technical points which are of paramount importance to public sector workers. The introduction of a coherent explanation as to when the need to establish a single source will arise, and a distinct definition as to what amounts to a single source, would go some ways to clarifying this extremely complex area of equal pay law. Without codification there will be further interpretation of the same case law by different Tribunals and appellant courts confusing matters even further.

2.6 TUPE

2.6.1 Issues are now arising in relation to both the transfer of Claimants and Comparators within the context of equal pay litigation. Test cases are currently being pursued in relation to these points but again codification of the inter relationship between the Transfer of Undertaking Regulations and the Equal Pay Act would assist both Claimants and Employers and provide welcome clarity.

2.6.2 For example is it possible to pursue a claim relying upon comparators who continue to be employed by your former employer if you have been transferred to a new employer? If this comparison is possible, does your new employer inherit the liability for an alleged breach of an equality clause? Again if the answer to that question is yes, should there be an exception in relation to the transfer of pension rights in relation to these equal pay "transfer" claims, particularly for Local Authority employers given the lucrative final salary pension scheme? When time start to run in relation to these claims?

2.6.3 These are all important questions, the answers to which will be hopefully be provided by the test cases and codification once those cases have reached a final determination will be of great assistance.

2.7 Limitation

2.7.1 The Equal Pay Act sets out the circumstances when the time limit for the presentation of an equal pay claim is triggered, and it also provides for extremely limited extensions to those provisions. However, the current case law has developed a more advanced approach to time triggers than we believe is provided for by the Act.

2.7.2 The case law has lead to the emergence of what are referred to "Preston Time Points". These are fact sensitive issues relating to circumstances when an employee has changed positions or been granted a promotion which may have altered their original contract of employment.

2.7.3 Thompsons accept that in most circumstances, these issues are fact sensitive and rightly they should be determined by individual Employment Tribunals. However, certain employers are exploiting these points in an attempt to strike out as many claims as possible. In our experience minor and innocuous changes to a Claimant's employment such as a change of hours or a change of shift pattern are being used by employers as amounting to time limit triggers. Therefore, it would assist if there was a codification of what does and does not amount to the trigger of the time limit for the purpose of equal pay claims.

2.7.4 Once codified, the current statutory time limits should remain in force i.e claims must be submitted within 6 months less one day of the contractual change. However, we would also suggest that a just and equitable extension be applied to equal pay claims. Again, this is a distinction which clearly distinguishes equal pay claims and other types of discrimination complaints.

2.8 Disparate Impact

2.8.1 At present there is a conflict as to how a Claimant proves disparate impact and to what extent within the case law. At present there are two approaches which can be categorised as barrier cases and statistical cases. This issue is of extreme importance as it goes towards whether the Employer is required to objectively justify the pay differential.

2.8.2 Barrier cases follow the principles of indirect discrimination as provided for in the Sex Discrimination Act i.e. there are provisions, criteria or practices which although apparently gender neutral disadvantage one sex. However, in multiple equal pay claims where there may be gender based occupational segregation and no obvious provisions, criteria or practices, statistical evidence may be the only evidence available to Claimants. Therefore, which is the correct approach required to establish disparate impact? This point could be an issue for codification.

2.8.3 Also, if the statistical approach is to be favoured rather than the traditional indirect discrimination approach, what are the bench marks Claimants have to meet to establish disparate impact? Do they have to be in a 100% female job category or would a lower threshold suffice? Again, the case law conflicts on that point and statutory guidance would assist.

3 Proposal (c) Any further suggestions to simplify equal pay legislation or make it easier for it to work in practice?

3.1 We have considered paragraphs 3.23 and 3.24 and the suggestion that equal pay moratoriums could be introduced as an alterative to the Tribunal service. We have several concerns about this proposal.

3.2 Although it is not set out specifically, we understand the proposed moratoriums would be triggered only once an employer had carried out an equal pay review, rather than when an equal pay complaint was commenced at an Employment Tribunal. Therefore, we envisage many employers would simply not carry out reviews at all as it may attract legal challenges rather than prevent them.

3.3 Also, there is no mention of what remedy (if any) a Claimant would receive if this proposal was implemented. Currently a Claimant is entitled to 6 years back pay, plus interest, plus pension loss and any loss of earnings whilst the claim was proceeding. Equal Pay compensation can therefore in certain cases give rise to large amounts of compensation. This proposal appears to provide no remedy whatsoever for the Claimant and therefore we consider that this approach would not comply with the European legislation.

3.4 The moratorium proposal also implies that the employer would receive a period of grace in which to get their house in order, and if they do so, they will be free from any potential challenge. However, the Commission will be aware that the Equal Pay Act although passed in 1970, was not implemented until the 1st January 1976 specifically to allow employers to get their houses in order before the introduction of the Equal Pay Act. As we are still litigating equal pay cases in 2007, it appears that time delay did little to stem gender based pay discrimination, and we believe the introduction of equal pay moratoriums would have the same limited success today.

3.5 In terms of the simplification of equal pay law, in addition to the codification points we have identified above, we believe there are other practical solutions that could be made to the current structure to assist Claimants pursue equal pay claims. Our suggestions are as follows :-

3.7 Equal Value Procedure

The Commissions will of course be aware that the Employment Tribunal Rules of Procedure were amended on the 1st October 2004. Schedule 6 of the Tribunal rules provides specific rules for equal value claims. Schedule 6 has also introduced what is know as an "Indicative Timetable". It is our experience that this timetable can not be met in practice, not in relation to multiple claims nor in relation to individual ones.

The current rules are overly pedantic in relation to equal value claims, and set an unrealistic timetable for both Claimants and Employers. The rules are also inflexible and they provide no scope for amendment to tailor the directions required to any specific case. Schedule 6's greatest limitation is that now large multiple claims are shoe horned into a structure that is not appropriate to deal with them leading to even greater numbers of Case Management Discussions and ironically delays.

It is our view that a separate structure needs to be implemented to cope with large multiple claims.

3.8 Collective Equal Pay Claims

Following on for our comments under point (1) above, Thompsons are of the view that a way forward to assist with the large numbers of multiple equal pay claims that are currently swamping the Employment Tribunal service, would be to allow class actions to be brought by Trade Unions in unionised work forces, and Test Claimants in non unionised work forces.

The Equal Pay Act and the recent case law has focused on the rights of individual but we believe that an important way forward to achieve pay equality would be to introduce the collective approach to the litigation structure. It should not be forgotten that Trade Unions have been at the fore front of the fight for equal pay and they have been since the legislation was brought into force. They are also their members' representatives in annual pay rise negotiations and in the implementation of new pay & grading structure. Therefore, it must make sense that Trade Union should be able to pursue class actions on their members' behalf.

This is not a new concept. Trade Unions have been pursuing consultation claims on behalf of their members in respect of mass redundancy situations for many years. We believe the framework for those claims can be used as the blue print for class action equal pay claims.

The benefit of consultation claims being pursued on members behalf by their Trade Union is that the remedy (if the claim is successful) is applicable to an entire category of members without exception. The is no constraint that each individual must present an individual claim thereby increasing the volume of claims. Also, there can be no possibility that a member who has failed to provide individual instructions to a Trade Union will lose out under this approach as all would be protected by the litigation. These claims could also in our view be dealt with more speedily than the current individual approach allows.

3.9 Gender Equality Duty

Thompsons welcomed the introduction of the Gender Equality duty. However, to ensure that all employees reap the benefit of this duty, we would suggest that it be extended to private employers as well as public service providers. Without extending the duty to all types of employers, there is a risk that those employed by public bodies or public service providers have a greater protection from discrimination than those in the private sector.

3.10 Are Employment Tribunals the correct forum for equal pay claims?

As stated at the beginning of our response to Chapter 3, it is clear that the Equal Pay Act has not eliminated the gender pay gap. Therefore, it should be considered whether the Tribunal service is the correct forum at all for resolving equal pay complaints.

As the Commission states, education and the changing of attitudes is equally as important as a strong legislative framework in order to achieve pay equality in the future. Rather than the introduction of a Single Equality Bill might it be more appropriate for equal pay issues, particularly large scale equal pay complaints, to be dealt with by a different public body rather than the Tribunal service.

Clearly, this body would need to possess both investigative and adjudication powers to police and remedy equal pay claims. However, by removing these types of complaint from the Tribunal structure it may enable a greater understanding as to the causes of pay inequality within certain sectors of industry, by allowing a more thorough process of investigation and allow equal pay reviews and job evaluation studies take place to remove the equality at the same time as providing an appropriate remedy for past inequality. A less confrontational adversarial system may succeed where the current system fails.

4 Proposal (d) Would the use of hypothetical comparators be of little benefit in practice?

4.1 Thompsons disagree that the use of hypothetical comparators would be of limited benefit in practice. Thompsons is of the view that by not allowing for a hypothetical comparison, our domestic legislation is again not complaint with the European statutory framework.

4.2 The law has yet to be tested in relation to hypothetical comparators, but we are currently representing Claimants pursuing work rated as equivalent bonus claims against one of the Local Authorities in the North East, and a decision is expected next year. In those circumstances, the Claimants have no comparators to compare themselves who are the same grade. However, the Job Evaluation study which rated the Claimants does provide for a male comparator on their grade, but the Authority in question does not employ those comparators. In these circumstances, we do have a Job Evaluation Study upon which to construct a hypothetical analysis and if this arguments succeeds it will be invaluable.

4.3 Therefore, we see the hypothetical comparison as being the most helpful in relation to work rated as equivalent claims where there is a Job Evaluation Study to rely upon. Although we do believe the use of hypothetical comparators would benefit Claimants, we believe it will be difficult to construct hypothetical comparators in practice, especially in relation to equal value claims as the Commission has also noted.

4.4 However, if the Commission's intention is to streamline all types of discrimination complaints, equal pay claims must allow for hypothetical comparators.

PART 2 – MORE EFFECTIVE LAW

Introduction

We agree with the CRE, DRC and EOC that the SEA should include a purpose clause setting out its principles and purpose. Such a clause would have the effect of setting out a clear declaration of equality principles and public policy; it would also provide guidance to courts and tribunals as to how the Act should be interpreted.

CHAPTER 4: BALANCING MEASURES

1.1 Chapter 4 refers to "Balancing Measures" and concerns positive action. We are glad that the DLR recognises that "*outlawing discrimination will not necessarily be enough by itself to ensure genuine equality in practice for everyone in our society, because not everyone is in the same position from the outset" and that "in some cases, specific balancing measures may be required to achieve full equality in practice*".

1.2 We think the DLR should look at the case for extending the current positive action provisions to redress disadvantages faced by certain groups where it would be proportionate to do so. It is clear that the equal treatment and equality of opportunity approaches are not delivering equality for disadvantaged groups in the labour market. For example a TUC report published in April 2006 found that Black and Asian women are more likely to be out of work, have more problems finding a suitable job, and when they do, often have to settle for work for which they are over-qualified.

1.3 Positive Action

1.3.1 The current positive action provisions are underused because we believe that they are little known and little understood. We agree that the current positive action provisions are very narrow and that there are a number of employers e.g. the police service which believes that the current provisions do not allow them to go far enough in their efforts to recruit and retain under-represented groups.

1.3.2 The DLR should consider how European provisions permitting Member States to adopt 'measures providing for specific advantages in order to make it easier for the under-represented sex (or other ground) to pursue a vocational activity or prevent or compensate for disadvantages in professional careers' can be more effectively implemented to promote equality than is currently permitted in UK law.

CHAPTER 5: PUBLIC SECTOR EQUALITY DUTIES

Chapter 5 concerns the public sector equality duty. We have the following comments:

- Whilst we do not have strong views about whether the existing public sector duties (on race, disability and gender) should be brought together into a single streamlined duty, on balance we believe that this may be helpful. However we are firmly of the view that the the present model needs to be retained and built upon rather than replaced with a new approach.

- We are in favour of the extension of the equality duty to cover religion and belief, age and sexual orientation. Whilst we recognise that each of these raise distinctive issues, we believe that the present model can be applied with equal benefit to these new areas of equality.

- The DLR seems to suggest that the current duties should be narrowed by requiring public bodies to identify priority objectives and take proportionate action towards them instead of the current requirement on public bodies to have "due regard" to promote equality. We believe that it would be a backward step to narrow the requirements on public bodies.

At present underpinning all three equality duties is the requirement that equality needs to be considered by public authorities in all their activities. The clear message is sent that equality is 'core business' for the public sector. In fact we believe that the DLR should go further than the current "due regard" duty and suggest that to encourage public authorities to put equality at the heart of their business, authorities be should be required to "take steps" to promote equality rather than "paying due regard".

- We believe that removing the specific duty to produce equality schemes and replace it with a requirement that public authorities would need to make sure the public are able to 'have ready access to information', will be a mistake. Such an approach would cause confusion and would be much harder to enforce than having a duty to produce a specific document

- The DLR also proposes to replace the current monitoring duties with four 'statutory principles' designed merely to underpin action for meeting a narrow set of equality priorities. Again this would be wrong and a backward strep. Without the specific duties to produce written equality schemes, and the specific monitoring and gathering of evidence duties, it is difficult to see how employees, trade unions, and members of the public can hold the authority to account.

- Currently any interested party can challenge a public authority decision on the basis that it has failed to pay due regard to an equality duty. We believe that this rule should not be changed as proposed by the DLR so that only the CEHR can challenge the decision. This would be disempowering for interested parties and/or victims of discrimination.

- We believe that the equality duty should be extended to all public authorities and should also cover age, sexual orientation and religion and belief.

- We believe that the DLR should consider how the public sector duties can be more effectively monitored. So for example, the SEA could require Government inspection regimes and regulatory bodes to incorporate assessment of what public bodies are doing to discharge their duties.

- The question of public sector procurement and the tools that can be used to promote equality within it are of significant importance to our trade union clients. According to the National Audit Office, in 2003 the procurement market accounted for £109 billion of government spending, with local authorities alone spending £42 billion. Over 800,000 business supply goods and services to the Government, most of which are small and medium sized organisations. However, according to the National Employment Panel's publication Enterprising People, Enterprising Places there is 'little systematic use of public purchasing power to promote good practice in race equality or supplier diversity for ethnic minorities.' Further the DCLG's 'Two Years On' report on the National Procurement Strategy for Local Government identified that only 34% of authorities were specifically addressing equality in their procurement strategies, despite the fact that it is written into all the Codes of Practice on the equality duties.

  We believe that public sector equality duties must apply to the procurement functions of public bodies.

CHAPTER 6: PROMOTING GOOD EQUALITY PRACTICE IN THE PRIVATE SECTOR

1.1 We believe that a positive equality duty should also apply to the private sector. The DLR says that leading private sector employers recognise the business case as well as the moral argument for equality. In that case the private sector should welcome a positive equality duty. In any case the argument for a private sector equality duty is stronger since public services have increasingly been contracted out to be run by private businesses.

CHAPTER 7: EFFECTIVE DISPUTE RESOLUTION

1.1 Thompsons experience in discrimination law is mainly in the field of Employment Tribunals. However we have acted in a number of goods and services claims in the County Courts.

1.2 We agree with the general propositions that there should be early resolution of disputes including through Alternative Dispute Resolution and that the accessibility, efficiency and effectiveness of procedures for resolving discrimination cases.

1.3 We understand that the Dispute Resolution Review is now looking at disputes in the employment arena and have made a separate submission in relation to the review. However, we consider that the experience of employment disputes has general application across the field of discrimination law disputes.

1.4 In our experience, there are relatively low levels of awareness of the details of discrimination law. Many clients are referred to us with a general employment law complaint which on closer examination is a discrimination law matter. Once aware of their rights it takes a brave person to pursue them. Trade union members have access to representation during any internal procedures, the process of submitting a claim and representation in Tribunal. Some Law Centres and CABx can help but they have suffered cuts in funding. The individual then needs to be able to navigate the choppy waters of the statutory grievance procedure and time limits. Its hardly surprising that a relatively small number of discrimination cases (c40,000 in 2005/06) are accepted by Tribunals with a small percentage of that number being successful at Tribunal (c4,000 in 2005/06).

1.5 In addition the process of bringing a discrimination claim is both bruising and unpleasant. In our adversarial system the individual complaining of discrimination is often treated as a pariah and has scorn heaped upon them. How often has the pre discrimination claim "good" employee turned into the worst employee ever by the time the parties walk through the Tribunal door? Whilst a good Tribunal will see through such allegations as being part of the litigation tactics it is rarely so easy for the claimant herself. Even successful Tribunal cases leave the claimant's confidence shattered and her workplace relationships destroyed as co-workers take sides.

1.6 Discrimination claims frequently involve long hearings, often disproportionate to both the amount of money or issues at stake. As a consequence the time taken to reach hearing is extended together with any possibility of early resolution of the underlying complaint as positions harden. Costs spiral, only claimants with the backing of their trade union or very deep pockets can afford representation.

Employers complain bitterly about the numbers of "spurious" complaints and the cost of responding to them. The popular press trumpets their usual "compensation culture" line. The recommendation powers that apply only relate to the individual claimant so there is no opportunity for individual case to have a lasting impact in the workplace through changes in policies and practices. "Successful" outcomes often result in the termination of the previous employment relationship. It is a rare client with a successful discrimination claim who would be prepared to go through the whole gruelling process again.

1.7 Against this background, and particular where there is an ongoing employment relationship we have found ADR and particularly mediation to be a valuable means of resolving disputes. ADR allows for confidential settlements to be achieved in a non adversarial environment. These settlements can include matters that can never be achieved in an Employment Tribunal structure including apologies and action plans involving equality reviews affecting the whole employing organisation not just the claimant. Both parties win and relationships can be maintained.

1.8 We have also been involved in ADR in the County Court using the Court Service mediation service with successful outcomes. Judicial guidance together with negative costs orders have greatly encouraged the use of mediation in the civil courts. We agree that ADR could be used more widely.

1.9 We have little experience of the role of Ombudsmen. Our anecdotal experience has been that the length time taken to achieve an outcome will not mean this is necessarily an appropriate way to resolve discrimination disputes speedily.

1.10 We agree that expert assessors should be used in all County Court claims in discrimination jurisdictions. In our experience they perform a very valuable role in race discrimination complaints and as many have Employment Tribunal experience they bring a wider perspective to such disputes.

1.11 We consider that it would be wise for there to be a specialist group of County Court judges hearing discrimination complaints. We have concerns about only a limited number of County Courts having such expert judges if this is to result in Claimants having excessive distances to travel in order to gain an effective remedy.

1.12 We do not agree that there are not grounds for bringing representative actions in the goods and services field. We do not see representative actions as developing an undesirable litigation culture. To the contrary representative actions would ensure that discrimination law was effectively implemented, and move away from our current claims based model which relies on individuals having an awareness of their rights but also is emotionally bruising and expensive for all concerned. Representative actions enable the issues to be resolved without emotional involvement. The parties are not arguing about the injured feelings of an individual Claimant and time and costs are therefore saved. Remedies can be practical rather than compensatory. For example a pub which has inadequate disabled access could be ordered to remedy the access defects.

1.13 In relation to multiple discrimination, our current complaints based model does not lend itself to claims of multiple discrimination, although much research shows that those who face multiple discrimination are amongst the most vulnerable in our society.

1.14 In the employment field we have pursued many cases of multiple discrimination race and sex discrimination being the most common. Even following the burden of proof regulations the burden is still on the claimant to show a prima facie case that the reason for the less favourable treatment is on one of the prohibited grounds. In our experience Employment Tribunals find difficulty in determining claims of multiple discrimination. The legal framework requires them to say that the less favourable treatment is due to discrimination and which sort. The existence of multiple claims tends to lead to a view that the reason for the treatment is for a non discriminatory reason and that it is the Claimant or her behaviour that is the reason for the treatment not discrimination.

CHAPTER 8: THE GROUNDS OF DISCRIMINATION

1.1 Paragraphs 8.3 to 8.6 concern the definition of "disability". One of the major barriers facing disabled people seeking justice is the narrow and complex definition of disability within the Disability Discrimination Act (DDA). The current definition requires proof that an individual has an impairment which has a long term and substantial impact on their ability to carry out day to day activities. The DLR suggests that the list of "capacities" such as mobility, speech etc.. which must be affected by a day to day activity, ought to be removed. We believe that this would not go far enough to protect many disabled people who deserve protection but who do not come within the current very narrow definition. So, currently there is no protection for people with short term but severe conditions, or those with long term conditions which do not have a substantial adverse impact on day to day activities. The DRC have highlighted a case they dealt with involving a man who tried to commit suicide but who was found not to be disabled.

1.2 Any new definition ought to shift the focus away from the medical condition of an individual to considering whether or not discrimination has occurred and what should be or have been done about it. In our experience Respondents often and automatically focus on the definition of disability by denying that a Claimant is disabled within the DDA in the hope of having the claim struck out at a Pre-Hearing Review (PHR). Sometimes this happens even when the Respondents' own occupational health expert has advised that the Claimant is disabled. The result often is that both parties are forced to obtain costly medical reports with the tribunal, listing a case for a PHR with wastes further time and costs.

We do not believe that a wider definition will necessarily broaden coverage if disability law too widely. Disability discrimination law focuses on the individual and just because one tribunal finds that an individual with, for example, asthma, migraine, or repetitive strain injury, is within the DDA definition, does not mean that other people with this condition will similarly be protected by the law.

1.3 Paragraphs 8.7 to 8.20 concerns the rights of parents and carers. We welcome the introduction of a 'carer' ground into a SEA. The reality is that in the modern world more and more people, both men and women, seek to balance their work and other parts of their life outside work has to be struck between is necessary if it is to be fit for purpose in the 21st century. However we believe that the DLR's suggestion that parents already benefit from protection in the law because "indirect sex discrimination provisions can be used to challenge practices" is misconceived. Carers balancing work with caring commitments have significant problems in doing so. The current laws prohibiting sex discrimination have addressed some of the issues relating to discrimination due to caring responsibilities.

However, indirect discrimination on grounds of sex is not an adequate way for carers to challenge discrimination because establishing "particular disadvantage" can be difficult, particularly for male workers. Usually male carers of children would find it very difficult to establish disproportionate impact and as indirect discrimination claims are subject to justification. As fathers take on more childcare roles and the gender balance between carers (as opposed to parents) is more evenly split, there needs to be a legal underpinning which protects carers from all forms of discrimination and harassment

1.5 Although genetic predisposition may not yet be widespread it may become so as technology and techniques advance and we believe that the SEA should be extended to cover discrimination non such grounds.

CHAPTER 10: GENDER REASSIGNMENT

1.1 The current prohibition of discrimination against transsexual people in the SDA relates to someone who 'intends to undergo, is undergoing or has undergone gender reassignment'. "Gender reassignment" is defined as "a process which is undertaken under medical supervision for the purpose of reassigning a person's sex by changing physiological or other characteristic of sex, and includes any part of such a process". The DLR says that "medical supervision" could be as minimal as counselling. However the DLR fails to clarify that the definition excludes those who have not undergone nor intend to undergo the surgical process, but who nevertheless experience significant discrimination and we therefore recommend that the DLR considers extending protection to those who identify as transsexual.

As we have previously said above we welcome the extension of indirect discrimination protection to transsexuality.

1.2 We also recommend that the single public sector equality duty should be extended to include transsexual people.

CHAPTER 11: PREGNANCY AND MATERNITY

1.1 Current legislation dealing with pregnancy and maternity, is complex, lacks coherence and located in a number of different statutes making the law very difficult to understand. It is often necessary to look at more than one Act or set of regulations to understand fully specific right applicable to pregnant women. Further the protections afforded are sometimes inconsistent. For example, we can see no justification for giving rights to women during Ordinary Maternity Leave different to those afforded during Additional Maternity Leave. Also both the Sex Discrimination Act 1975 (SDA) and the Employment Rights Act ('ERA'). Further the ERA outlaws pregnancy related dismissals but the SDA protects 'workers' more widely defined, whilst the ERA protects only the narrower class of 'employees'.

1.2 We recommend that all rights connected to pregnancy and maternity should be brought under the SEA and the rights should be made more consistent. The advantage of doing so outweighs the concerns that including all the maternity and pregnancy legislation may make the SEA unwieldy.

C) CONCLUSION

This huge opportunity to make equality law that is clear, far reaching and above all effective, should not be missed. We accept that there are some minor improvements suggested in the consultation paper. However in some areas the proposals would lead to a backward step in the fight to eliminate discrimination, e.g. the removal of the specific equality duties. In order to pass an effective SEA which helps achieve genuine equality the following minimum priorities should shape the SEA:

- Stronger enforcement mechanisms: group and representative actions and effective sanctions.

- Strong public sector single equality duties across all grounds. Retain the general duty's application to all functions and the requirement on authorities to produce public equality schemes; explicitly applies to public procurement and requires action by inspection bodies. Retain the monitoring duties.

- Extension of the public sector duty to the private sector

- Permit positive action where required

- A simpler, better definition of disability.

- Protection for those discriminated against because they are associated with or perceived to be a disabled person.

CONTACT DETAILS:

Rakesh Patel
Employment Rights Unit
Direct Tel: 0207 290 0029
Switchboard: 0207 290 0000
Email: Rakeshpatel@thompsons.law.co.uk

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