Government Equalities Office

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

Response from Thompsons Solicitors

August 2012

About Thompsons (questions 1-4)

Thompsons is the most experienced trade union, employment rights and personal injury law firm in the country with 28 offices across the UK. On employment and industrial relations issues, it acts only for trade unions and their members.

Thompsons represents the majority of UK trade unions and advises on the full range of employment rights issues through its specialist employment rights department.

Question 5: Do you know of any other discrimination-related case in which the wider recommendations power under section 124(3)(b) of the Equality Act 2010 has been used since October 2010?

Yes.

Question 6: If yes, please provide details of the case(s) concerned, such as nature of the claim, type of organisation involved in the case, whether the organisation is a large, small or medium sized enterprise or other.

The consultation refers to the case of **Stone v Ramsay Health Care UK Operations Ltd** ET/1400762/1, so we will not repeat the details here.

In **Crisp v Iceland Foods** ET/1604478/11 & ET/1600000/12, the employment tribunal asked the employer to provide equal opportunities training for sections of its HR function and senior management in mental health issues.

The claimant worked on the tills for Iceland. She suffered from panic attacks and was disabled for the purposes of the Equality Act and the company had been informed of this at her interview.

Her condition became very serious about 18 months into her post. She sent sick notes to her employer but they did not reach the appropriate manager. Iceland also did not have her up to date address in its personnel files, so could not contact her. It was assumed that she was absent without leave.

The employer dismissed Ms Crisp for unauthorised absences but she was unaware of this until her husband contacted them to find out why she had not been paid. She was subsequently sent a letter explaining the reason for her dismissal.

Ms Crisp appealed against her dismissal on the basis that she had been genuinely ill, had provided sick notes and that her employer had not provided her with any information about the disciplinary process.

The catalogue of events that followed including a refusal by Iceland to allow Ms Crisp to be accompanied at the disciplinary appeal hearing by anyone other than a colleague or a union representative. The area manager and area HR manager also, accidentally, left a message on her answer phone which made light of her condition and was offensive.

The tribunal noted that the area manager had not undergone any equality training, while the HR manager's understanding of disability issues was "no less than woeful". Although Ms Crisp's appeal was upheld and she

was given the opportunity to move to another store, she informed the firm that she did not want to return to work there and would be pursuing a claim.

The ET upheld her claim for constructive dismissal, disability harassment and direct disability discrimination and failure to make reasonable adjustments by refusing to allow her to be accompanied by a relative.

The employment tribunal took the unusual step of recommending that, by 23 May 2013, the employer:

- require all members of the HR function who provide guidance to managers on disciplinary and grievance procedures to undergo training in disability discrimination matters, specifically issues related to mental health; and
- require all managers at the area manager's level of management to undergo training in disability discrimination matters.

In **Why v Enfield Grammar School** ET/ 3303944/2011the employment tribunal upheld a claim for discrimination on grounds of pregnancy and made a recommendation that the senior management team and all heads of department had training on equal opportunities employment law within six months, including the position on women returning from maternity leave. The head teacher was invited to write to the tribunal and claimant when the training had taken place.

The tribunal also made a wider recommendation in **Austin v Samuel Grant (North East) Ltd** [2012] EqLR 617 under s.124(2)(c) of the Equality Act 2010, that the respondent updated its policies on discrimination taking account of the Equality Act 2010 and that the directors and managers of the Samuel Grant Group received diversity training from a reputable provider. Both recommendations were to be complied with no later than six months from the date of the judgment.

In **Burke v (1) Clinton Cards plc (2) Walker [2010]** ET 2900622/09 an employer that failed to make reasonable adjustments for an employee who had cancer was ordered to pay more than £100,000 in compensation. The tribunal also set out the recommendations that it would have made, had the Equality Act 2010 been in force at the time.

When the claimant, Mrs Burke, an area sales manager, was diagnosed with breast cancer, adjustments were made by reducing the number of stores for which she was responsible. However, when a new regional manager, John Walker, took over, he increased her workload and was critical of her performance on a number of occasions, paying no regard to the effect of a heavier workload on her health, and showing no interest in the effect on her work of the treatment for cancer that she was undergoing. She resigned and claimed unfair constructive dismissal and disability discrimination.

The tribunal concluded its judgment by observing that had the Equality Act 2010 been in force - allowing it to make recommendations that would help achieve equality at the workplace - it would have made a number of recommendations relating to:

- the method of recording meetings with employees – commenting that "the respondent's approach is lamentable, particularly where a disabled employee is to change line managers";
- the training of individuals - commenting that the training was "inadequate", it would have recommended "significant equal opportunities training for all senior managers"; and
- training in respect of disability discrimination - for a company of its size and geographical spread, it would have expected it to be doing more than "paying 'lip service' to equal opportunities policy".

Question 7: Please say whether you consider the use of the power in this case or cases has been effective (closely linked to the act of discrimination to which complaint relates) and/or proportionate (tribunal took account of employer's capacity to implement the recommendation). Please provide further details.

We consider the use of the power in the cases above have been effective and proportionate. Any recommendation that individuals undergo training must be beneficial for that employee and for the business.

Question 8: How far do you agree or disagree that the wider recommendations power should be repealed? Please explain your answer.

We strongly disagree.

If the government is serious in tackling discrimination at work it would not repeal this provision.

Even if the wider recommendations power has not been widely used it does provide a useful tool for tackling discrimination at the workplace. We believe that employers will benefit if the tribunal exercises this power more often. The employer will be able to learn from its mistakes and make improvements or change policies/procedures/practices or identify training needs with a view to avoiding breaching the Equality Act in the future. This benefits not just the employer but wider society.

The government's proposal to repeal this provision is contradictory. On one hand the consultation states that the wider recommendations power is hardly used by tribunals, but this is contradicted by the statement that repealing the provision will lessen the burden on employers.

The use of the provision has been confined to the rare cases where the employer appears to have failed to comply with, or be aware of, their legal obligations. How is this a burden on business if it helps an organisation deal with employees who are failing in their role? Surely most reasonable and responsible employers would regard anything to assist them to avoid being liable in the future would be a good thing.

The provisions are in their infancy. It is too early to know if they are failing or not. But if the provision is not widely used than we do not understand how the government can suggest that the impact on employers is likely to be disproportionate. The government has no means of measuring/testing whether this is/will be the case.

Question 9: Have you or your organisation been involved in a procedure for obtaining information about a situation involving potential discrimination, harassment or victimisation?

Yes.

Prior to the Equality Act 2010, statutory questionnaires under previous equality legislation was often used before lodging a discrimination claim to help inform the employee whether to pursue or to continue a claim (if the questionnaire was served on the employer after the claim was lodged).

The statutory questionnaire procedure has simply been incorporated into the Equality Act 2010. Nothing has changed since the mid 1970's with regards to this provision.

Questions 10 & 11: Please provide details of your involvement in a procedure for obtaining information and indicate whether the procedure for obtaining information was set in motion under previous equality legislation or under section 138 of the Equality Act 2010.

As lawyers we use the procedure to obtain information on specific issues to assist us in assessing the reasonable prospects of success of a claim. This ensures that we do not pursue unmeritorious claims. We would expect employers to welcome this.

In our experience the vast majority of requests is to obtain comparative evidence. The disclosure process in ET claims relates only to the disclosure of documents. Therefore, this is a useful tool to assist the parties and the tribunal in establishing the whole picture.

We have set in motion the procedure for obtaining information under previous equality legislation and under s138 of the Equality Act.

Question 12: Please indicate what action was taken by the potential complainant after using the procedure for obtaining information? And provide further details.

The employee may decide not to lodge a claim for discrimination on the basis of the response or seek to withdraw an existing claim. However, in some cases the employer will not respond to the request for information or will respond inadequately. The employer is not compelled to respond to a request for information but the tribunal can draw a negative inference from the failure to respond or if the response is evasive or inadequate. In our experience employment tribunals rarely draw a negative inference when reaching a decision due to an employer's failure to respond to a request for information.

We currently act for an employee of a national charity who accuses his employer of race discrimination. The merits of his claim are as yet unclear and we have told our client that we may need to advise him to drop his claim if the replies to the questionnaire provide a non-discriminatory explanation.

The questions the charity has been asked include information about employees' job titles, length of employment and ethnic/racial origins; the ethnic/racial origins of all employees subjected to disciplinary warnings or dismissals in the last five years and details of the ethnic/racial origins of those who investigated the claimant's alleged misconduct and took the decision to suspend him.

This demonstrates the value of the questionnaire to claimants and employers alike. It is a fact that claimants represented by lawyers are more likely to use questionnaires to investigate discrimination claims in order to obtain statistics on which they can make an objective decision about pursuing or discontinuing a case.

Unrepresented claimants are unlikely to use questionnaires and are more likely to pursue unmeritorious claims. The advantage to employers of questionnaires could hardly be more apparent.

Question 13: If a claim was taken to an employment tribunal or court after using the obtaining information procedure, what was the outcome?

Questionnaires have been very important in the pursuit of equal pay claims. They enable is to drill down a claim in the early stages. Without questionnaires, we are forced to use post issue devices such as requests for written answers to questions, requests for further and better particulars and requests for disclosure. With a questionnaire, we get the information promptly and up front, meaning that we can take informed decisions on which claims to run, which minimises the costs of the litigation for all sides, and reduces hearing time.

Removing questionnaires not only prejudices the claimant's case, but also means that decisions about litigation are delayed until very late in the day. That is in no one's interests.

Question 14. If the potential complainant did not lodge a claim with an employment tribunal or court, please indicate the outcome of using the procedures for obtaining information.

We were asked to advise in relation to a claimant who had been absent on maternity leave during a restructuring exercise. She was not aware of what jobs had been made available and assumed that as she had been offered a lower graded post that she had been discriminated against by not being offered the higher graded post.

Although she requested the information from the employer about who had been appointed, the employer did not provide this information. We were instructed to advise on the merits of the claim but were unable to give a proper assessment without details of the post. This was requested using the questionnaire procedure. The employer responded and the information revealed that the post was not a suitable alternative. The claim was not pursued.

Question 15: Please provide any additional details about your experience of the procedure for obtaining information (e.g. details of time/costs involved, whether the forms assisted with the efficiency of the claims process in a tribunal or court etc.

Please see our response to Question 10-12.

Question 16: Whatever your answer to question 5, do you agree or disagree that the procedure for obtaining information in section 138 of the Equality Act 2010 should be repealed? We would welcome reasons for your answer.

We strongly disagree with the proposal to repeal Section 138 of the Equality Act 2010. Discrimination claims are fact sensitive and given the burden of proof is on the employee we believe that it would put him/her at an even greater disadvantage than is already the case in bringing a discrimination claim. Therefore, we believe that the proposal to repeal this provision will have the impact of denying employees justice with regards to their discrimination claims.

We believe the procedure for obtaining information is useful for an employee and his/her representative to fully assess the merits of a discrimination claim. Surely, this is in the interests of the parties and a means for reducing the number of claims lodged or claims proceeding to a full hearing.

We reject the government's assertion that the provision has been used by employees in a vexatious manner or is a 'fishing' exercise. Please see our response in questions 8-10.

If this was the case then the employer is not required to respond and an employment tribunal will not draw a negative inference from the failure to respond to the request for information.

Further and better particulars are no substitute for a questionnaire which is all about gathering evidence. Further and better particulars expressly are not. In particular the purpose was summarised by Wood J in **Byrne v Financial Times Ltd** [1991] IRLR 417 at 419:

> *General principles affecting the ordering of further and better particulars include that the parties should not be taken by surprise at the last minute; that particulars should only be ordered when necessary in order to do justice in the case or to prevent adjournment; that the order should not be oppressive; that particulars are for the purpose of identifying the issues,* ***not for the production of the evidence****; and that complicated pleadings battles should not be encouraged'.*

As stated in response to question 14 above, a well timed and proportionate questionnaire reduces time and costs in pursuing unnecessary litigation. Often employers have the information requested as part of their normal HR functions including payroll for small business.

Wider recommendations

Question 17 & 18: Do you think that there are further benefits and/or costs to repealing the wider recommendations provision which have not already been included in the impact assessment? If so, please give details.

Please see our response to Question 8. In addition there is a clear potential benefit and saving of costs, because where an employer acts on wider recommendations, it is likely to have the benefit of avoiding the type of discrimination for which the employer has been held liable. It would also mean a saving of legal costs as it may prevent further similar claims being brought against the employer.

Question 19: Do you have any comments on the assumptions, approach or estimates we have used in the wider recommendations provision impact assessment?

If there are so few cases in England & Wales where an employment tribunal has exercised its wider recommendations power then we do not understand how the government can draw any conclusions on the benefits to the employer by repealing this provision. This simply does not make any sense and can only have

been based on anecdote and assumptions about burdens on business rather than evidence.

Question 20: Does the impact assessment for the wider recommendations provision properly assess the implications for equality? Please give details.

No

The Impact Assessment is inadequate. There is no attempt to measure the impact these proposals are likely to have on employees with a protected characteristic.

Race discrimination claims are more likely to be brought by black and ethnic minority claimants and sex discrimination claims by women. Only disabled people can pursue disability discrimination claims.

So there is likely to be a body of individuals sharing a protected characteristic who will be disproportionately affected by the withdrawal of the questionnaire procedure, and in particular the express ability that it gives for inferences to be drawn against their employer.

Obtaining information provisions

Question 21 & 22: Do you think that there are further benefits and/or costs to repealing the obtaining information provisions which have not already been included in the impact assessment?

Please see our previous responses. We do not believe that repeal will provide real benefits to employers and any identified in the impact assessment are based on inaccurate assumptions and so should not be relied on.

We believe that there are costs to repealing the obtaining information provisions which have not been considered. Without the questionnaire there will be no mechanism for assessing the reasonable prospects of success of a case and so more cases are likely to be pursued. This will inevitably increase costs for employers who will have to prepare for and attend hearings that might otherwise not have proceeded.

Question 23: Do you have any comments on the assumptions, approach or estimates we have used in the obtaining information provisions impact assessment?

The estimates are calculated in a speculative manner and cannot be relied on for measuring the benefit to employers of repealing both provisions. There has been no attempt to gather accurate statistics about the impact of this proposal. The Government Equalities Office is presenting data based on a series of assumptions, which are always dangerous, in relation to the costs incurred by employers.

The questionnaire procedure benefits individual claimants by enabling them to prove genuine discrimination, and to employers by providing a mechanism to prevent unmeritorious claims being pursued. The procedure represents structure and safety.

Question 24: Does the impact assessment for the obtaining information provisions properly assess the implications for equality? Please give details.

No.

The Impact Assessment is inadequate. There is no attempt to measure the impact these proposals are likely to have on employees with a protected characteristic.

We also note that the Government Equalities Office will not carry out a ‘dedicated’ review of the proposal to repeal the provision in relation to obtaining information (page 71). We believe that the government has no intention of properly assessing the impact on employees who have a protected characteristic or complying with its own statutory duty (the Equality Duty) to eliminate discrimination under the Equality Act 2010.

Further information:

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