Discrimination Law Association

Civil Courts Structure Review: Interim Report by Lord Justice Briggs

Discrimination Law Association response

Introduction

1. The Discrimination Law Association ("DLA"), a registered charity, is a membership organisation established to promote good community relations by the advancement of education in the field of anti-discrimination law and practice. It achieves this by, among other things, the promotion and dissemination of advice and information, and the development and co-ordination of contacts with discrimination law practitioners and similar people and organisations in the UK and internationally. The DLA is concerned with achieving an understanding of the needs of victims of discrimination amongst lawyers, law-makers and others and of the necessity for a complainant-centred approach to anti-discrimination law and practice. With this in mind the DLA seeks to secure improvements in discrimination law and practice in the United Kingdom, Europe and at an international level.

2. The DLA is a national association with a wide and diverse membership. The membership currently consists of some 260 members. Membership is open to any lawyer, legal or advice worker or other person substantially engaged or interested in discrimination law and any organisation, firm, company or other body engaged or interested in discrimination law. The membership comprises, in the main, persons concerned with discrimination law from a complainant perspective.

Civil Courts Structure Review ("CCSR")

3. The DLA welcomes the opportunity to comment on the CCSR in advance of the final review being produced in July 2016. We note that the CCSR's remit does not currently include Employment Tribunals ("ET") or the Employment Appeal Tribunal (paragraph 3.63 of the Interim Report), and that further consultation on these topics is proposed (paragraph 12.31 of the Interim Report).

4. The DLA welcomes the Interim Report's focus on access to justice, and echoes Lord Justice Brigg's comments about the causative link between the introduction of fees and the "sharp reduction" in claims (paragraph 3.11 of the Interim Report). The acknowledgement that the "weakness of our civil courts is that they simply do not provide reasonable access to justice for any but the most wealthy individuals" (paragraph 5.23 of the Interim Report) is fast becoming a feature of the ET as well the civil courts. We would also endorse the comment that access to pro bono lawyers is "at best, a palliative" (paragraph 1.18.5 of the Interim Report) and cannot be seen as a solution in itself to the large scale withdrawal of Legal Aid funding. The DLA's experience is that access to pro bono services is harder for those with disabilities.

5. While the DLA welcomes any use of technology that could be used to alleviate these problems, this in itself cannot act as a panacea for lack of access to justice. While some technology provides benefits in relation to accessibility for disabled users (for example, software enabling text to be read to the visually impaired), the DLA has a real concern about the disparate impact on older age groups and other minorities that a wholly (or predominantly) online system would bring. There would be a profound impact on many people with disabilities for example, and we note the lack of reference to any equality impact assessment in the Interim Report. We not the comments about use and ownership of computers amongst litigants in person at paragraph 6.57 of the Interim Report.

6. Similarly, access to computers and the internet is not universal, and those without access often have minority groups disproportionately represented. As not everywhere in the UK has internet access, an online-only court would not be suitable for some people in rural areas (although this is an increasingly small number). For example, the ONS has said that "In Great Britain, 22 million households (84%) had Internet access in 2014, up from 57% in 2006 […] Fixed broadband Internet connections were used by 91% of households."[1]

7. The DLA welcomes the online approach being extended to the pre-action protocols (at paragraph 6.8 – 6.11 of the Interim Report). If the Online Court is to be successful, then it must not treat the pre-action protocols as an optional extra.

8. Perhaps a more fundamental problem is that discrimination claims are inherently unsuited to an online process, which will inevitably be reliant on documents. While this may be appropriate for commercial disputes about contracts and debts, the vast majority of discrimination claims are about competing narratives where the tribunal is being invited to draw a series of inferences about individual behaviour. Such claims are reliant on subtle differences in treatment of individuals, something which is easily lost when described solely in writing. We note the particular nature and complexity of discrimination claims, and are concerned that in most (if not all) claims, the online approach being considered would not be an effective way of delivering justice.

9. In relation to the reform of the ET, the DLA looks forward to any more detailed proposals, but as a preliminary comment would stress that the ET currently has specialist procedural rules to deal with discrimination claims in the workplace (as noted at paragraph 11.18 of the Interim Report in relation to tribunal claims generally), and that this specialism should be preserved should the ETs be brought within the civil court system.

10. The ET's origin as an "industrial tribunal", designed to resolve workplace disputes with input from both legally qualified and lay members, is an

[1] http://www.ons.gov.uk/ons/rel/rdit2/internet-access---households-and-individuals/2014/stb-ia-2014.html

important feature of the jurisdiction, justifying its unique position in relation to both the Tribunal service and the civil courts. While this should not act as a barrier to reform in itself, the features that allow claimants to easily and effectively access justice in employment discrimination claims (including the lack of a costs jurisdiction and lay members) should be retained so far as possible.

11. We also note the ET's expertise in dealing with discrimination claims, including specialist training for judges and tribunal members, another feature that we believe should be protected and retained through a dedicated employment and discrimination court (one dealing with discrimination in employment and non-employment cases). The ET has a unique concentration in terms of workload, and this can be used to enhance how discrimination claims are dealt with. This is because it would enable a concentration of experienced judges (and assessors/lay members) on the complex discrimination concepts that apply universally across all discrimination claims (employment, housing, goods and services, education), and would allow development of specialist procedures suited specifically to equality issues, especially representative ones.

12. As a result, the DLA is very interested in the idea of an Employment and Equality Court. In other words, if the employment tribunal jurisdiction is to become a separate court within the new structure, that it should also have jurisdiction to deal with cases brought under the Equality Act 2010 in non-employment areas. Our initial view is that this proposal has some merit in that a large part of the employment tribunals' current workload comprises discrimination claims. As such, the judges and members have developed an expertise in a particularly legally complex and factually nuanced area.

13. In our view, based on current experience, the expertise that has developed in the employment tribunals and the EAT in this area of work would be harder to develop in a general court, which may see a proportionally tiny number of discrimination claims. We are also attracted to models which utilize the expertise of non-legal members/assessors and would suggest that this expertise should be focused within the one court. There is also the anomaly that some discrimination claims (such as equal pay) have concurrent jurisdiction in both the tribunals and civil courts, whereas others do not.

14. We also underline the benefits of the informality and flexibility of the ET rules, which are well suited to be adapted for all types of discrimination claim.

15. At this very early stage in the consultation, the DLA has had insufficient time to formulate a developed view from its membership, but we are consulting on this matter and strongly recommend the possibility is further explored. The DLA looks forward to the opportunity to respond in more detail once the three options outlined in paragraphs 11.8 - 11.19 of the Interim Report are developed.

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