DTI Consultation: Resolving disputes in the workplace March 2007 consultation

Submission of the Discrimination Law Association

Introduction

The Discrimination Law Association ("DLA") 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; 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 the 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.

This submission will respond to the questions posed in the Government Consultation where they are pertinent to UK discrimination law and practice. The numbering follows the numbering of the questions in the Consultation.

Responses

1. The DLA recommends that the statutory dispute resolution procedures are repealed. This is the almost universal recommendation of our previous research of our members (statutory dispute resolution procedures questionnaires).

2. The DLA cannot think of any unintended consequences of repeal, save in respect of unfair dismissal law, which is raised in the consultation paper. The current procedures are confusing to all parties. Clear and concise

publicity and guidance is required if they are repealed.

3. The DLA believes the government may offer new options for resolving disputes which are not currently available. These options should be purely optional and without penalties to ensure the parties take them up in good faith.

4. Parties should be provided with clear, impartial guidance about the pros and cons of the various options. Funding should be available to ensure individual Claimants have access to independent advice. Individuals rarely have the resources available to employers and this 'inequality of arms' needs to be addressed when reviewing the options available. It needs to be acknowledged that legal redress may be the most appropriate option in many cases. It is essential that parties are not misled through over-enthusiasm to guide them away from Employment Tribunals.

5. (a) It is strongly urged that penalties are *not* attached to failure to make attempts to resolve/settle disputes. This would simply bring the statutory dispute resolution procedures back in by the back door. Parties would take advice as to how best to protect their position on this aspect and to *appear* to be attempting to settle disputes. The current statutory procedures have shown that the imposition of penalties and other mandatory requirements do not encourage genuine attempts to reach resolution. Settlements only occur where each party willingly enters into negotiations or discussions. Forcing unwilling parties to talk to each other does not, in our experience, result in a settlement. The approach the government should take, therefore, is to offer more options than currently exist for parties who are genuinely happy/willing to negotiate. This would be the most cost-effective and efficient means of approaching the issue. It must be recognised that whilst the system should support a conciliated resolution to some disputes, there are a significant number of disputes which cannot be

resolved internally, however the system is configured. For instance, where an employee alleges that they were sexually harassed and the employer denies this; forcing parties through conciliation/ mediation just adds to the time, cost and stress to the parties.

(b) The idea at paragraph 2.7 that new statutory guidelines are written which employment tribunals must take into account repeats the mistake of the statutory dispute resolution procedures. Parties will be advised by their legal representatives, as in the case of the current statutory procedure, to follow new procedures merely to avoid penalties. In our experience this approach has often led to inappropriate meetings being held, that neither party wants, in order to ensure compliance.

(c) There is a further point of principle involved. Discrimination cases are almost unique in that they concern matters of social principle and justice. Such cases have a wider positive impact on achieving equality and diversity and social cohesion in particular communities. An individual should be entitled to have his/her complaint of discrimination determined by a tribunal. Discrimination cases also help in securing improved employer behaviour. Employers that do face actual tribunal hearings and decisions and cannot rely on settling (buying) their way out, often attempt to change their behaviour or discriminatory culture. The rule of law must underpin attempts to persuade employers to take action voluntarily. The effect of one discrimination case for one claimant can often have a 'ripple' effect on a particular sector. Thus one case of a person in a wheelchair unreasonably refused work obtains nationwide publicity and can change practices across the sector. A single discrimination case can be, socially-speaking, very cost-effective.

(d) Under the EU Directives, judicial procedures must be made available to those whose rights have been infringed. Facing penalties because a

claimant does not attempt to settle his/her case may be a breach of this.

6. As already explained, the DLA strongly urges that any new dispute resolution options are voluntary and are not underpinned by potential penalties. Regarding the two types of proposed penalty:

(a) It is inherently inequitable that the award for discriminatory actions should be reduced because the claimant did not attempt to settle his/her case out of court. As discussed above there are very good public interest grounds for allowing discrimination cases to proceed without hindrance including the imposition of penalties.

(b) It may also contrary to EU law, which requires the loss and damage caused by discrimination to be made good: *Marshall v Southampton (No 2).*

(c) It will not serve to deter weak cases, as in weak cases the claimant is unlikely to win and will not get an award in the first place. Furthermore the strong merits of a discrimination case are not always clear at the outset and only become evident after the receipt of replies to questionnaires and other evidence. The threat of penalties may dissuade Claimants from pursuing such meritorious claims.

(d) It is inherently inequitable that costs should be awarded against a successful claimant in a discrimination case because s/he did not attempt to settle his/her case out of court.

(e) Since having to pay costs would substantially reduce a tribunal award, it may also be contrary to EU law, which requires the loss and damage caused by discrimination to be made good: *Marshall v Southampton (No 2).*

(f) The fundamental nature of the Employment Tribunal system is that costs are not awarded except in exceptional circumstances. It would substantially impact on potential claimants, as opposed to employers, to change this balance. This would exacerbate the inequality of arms between parties.

(g) There is strong evidence that many employers or employers' solicitors, even under the current regime, routinely write letters to Claimants, declaring their case is weak and threatening them with costs. Where Claimants are unrepresented or represented by inexperienced voluntary sector advisers, this can unjustly deter a good claim. There are numerous examples where discrimination cases have succeeded despite such letters.

(h) The penalty is not even-handed (and will usually tip the balance against the employee and in favour of the employer) because:

(i) employers tend to employ more expensive solicitors and thus incur heavier costs than employees.

(ii) employees on the whole, as individuals, and often unemployed, will be less able to pay costs.

(iii) employees are often represented by voluntary sector agencies, in respect of whom costs cannot be awarded at all for the hearing. To the extent they can be awarded for case preparation (wasted-costs orders) – (I) the rate is extremely low, and (II) cannot be awarded at all if representation is by a solicitor working in the voluntary agency (a loophole in the current rules).

7. This question relates to unfair dismissal.

8. It seems problematic to require external organisations to provide guidelines to alternative procedures which they may not agree with. The government should take responsibility for publicising new opportunities and providing statutory guidelines.

9. It is not entirely clear what the government is proposing. It appears that the government is proposing an advice line purely to advise on the different procedures available for resolving disputes, as opposed to advising on the inherent merits of the dispute. It would be very important to ensure that advisers and the public were made aware of this demarcation. The DLA is concerned that the advice may channel callers to 1 particular option instead of advising callers of the variety of options, including going to an Employment Tribunal. Callers also need to be advised of the need to seek independent legal advice before reaching a decision.

10. This would be undesirable, as it would act as a gatekeeper on access to the Employment Tribunal system. It could lead to all sorts of problems (and claims) if inadequate or misleading advice was given by individual advisers.

11. Not relevant to discrimination claims.

12. Yes, a voluntary option.

13. No

14. No. Discrimination cases are usually complex and multi-faceted. Alternative forms of dispute resolution may be appropriate in some cases whilst in others it would not.

15. As there are no fixed conciliation periods in respect of discrimination claims, this is not relevant to DLA.

16. It is DLA's view that employment tribunal forms should be simplified. They are presently too complicated, which places individuals in considerable difficulty in attempting to complete them. Those claimants who have particular disabilities, for example, learning disabilities, and those whose first language is not English are placed at a considerable disadvantage by having to complete such a complicated form. DLA has examples of the employment tribunal failing to understand the form and rejecting claims incorrectly, or accepting claims which have not been made, even where the form has been drafted correctly by experienced discrimination practitioners. This can be extremely time consuming to sort out and practically impossible for an unrepresented claimants. Where there has been a failure to fill out a box, however irrelevant, this will given a defendant an opportunity to take a procedural point which, although it may not succeed in ending the claim, can lead to considerable delay and cost.
    On the practical side, we would suggest that the boxes are not separated so as to give particulars of various claims. If the claimant is claiming both unfair dismissal and discrimination, for example, it is simplest to write the particulars (story) in one place.

17. DLA does not believe that claimants should be asked to provide an estimate or statement of loss when making a claim in discrimination cases. There are numerous complicating factors in discrimination claims which make it very difficult to state at the outset an accurate figure for compensation. Injury to feelings, for example, may be ongoing, additional evidence may be required, aggravated damages may be claimed; and it may be hard to value loss sustained from non-dismissal discrimination such as a failure to be shortlisted for promotion. This is likely to create particular difficulties for those claimants who are not represented.

18. DLA would agree that simplifying the time limits regime through harmonisation would be a helpful additional reform. This would need to be on the basis that there is no regression and that the “just and equitable” discretion is maintained in respect of discrimination claims.

19. It is DLA’s view that the harmonised time limit should be 6 months. This would particularly assist in the common problem of several acts of discrimination occurring in the previous 6 months, but only one of which in the previous 3 months. It would also give more time to explore settlement options and is not too long to undermine certainty for employers.

20. DLA believes that it is particularly important for the “just and equitable” discretion to be retained for discrimination claims. Discrimination can be a particularly distressing experience and, given in particular the complexity of discrimination legislation, as well as the fact that an individual may often be unaware that discrimination has occurred, it is vital that the “just and equitable” discretion is retained for discrimination claims.

21. As indicated above, DLA believes that the “just and equitable” discretion should be retained for discrimination claims. Any extension of this principle to employment claims more generally should not be at the risk of raising the bar for “just and equitable” claims.

22. DLA has a number of suggestions for improving the employment tribunal procedures and case management.

    (a) The tribunals should be more willing to grant orders for documents and additional information (particulars) to claimants at interim stages. Very frequently tribunals refuse at this stage, but the tribunal at the final hearing sees the necessity for the requested documents/information and makes an order during the hearing. Full open disclosure at earlier stages enhances settlement prospects at earlier stages.

(b) Regarding the reference at paragraph 4.11 of the consultation document of legal officers performing routine tasks, careful consideration needs to be given as to the skills/experience of such officers and their remit. It is dangerous to allow people to make important interim decisions when they do not personally experience the consequences at full hearings. Decisions as to what documents and particulars are ordered, for example, are critical to the outcome of discrimination cases, where it is recognised that the employer has control of the evidence. There is a serious danger that through lack of experience and full understanding of discrimination cases, such legal officers will make routine and inappropriate decisions. It is therefore recommended that any such officers do not make decisions on discrimination cases. If decisions are not made at judicial level, it is likely to lead to further cost and delay as decisions are appealed/reviewed/revisited.

(c) DLA has concerns that employment tribunals can sometimes not distinguish between a CMD and PHR, both of which obviously serve completely different purposes. The reasons for any hearing should be spelled out clearly in advance to allow parties to prepare; it is wasteful and ineffective for both parties to come to a hearing with no idea of why or what they are supposed to do. Evidence cannot be prepared, oral or documentary. The almost-inevitable result is that either both parties prepare a large amount of material which is not used and/or that there is another hearing once the employment tribunal works out what it wants.

(d) Telephone hearings for non-contentious matters, such as CMDs, should be encouraged (and they should be accessible to users of, for example, typetalk).

(e) tribunals should be fully aware of their ability to pay for any medical (or indeed other) experts necessary for the fair determination of a case. This

is particularly pertinent in disability discrimination claims, where medical evidence may be required at various stages of the claim.

23. It is DLA's view that the individual focus of much litigation - whilst essential – can sometimes blunt the effect of indirect discrimination as well as failing to tackle "group discrimination". The Cambridge Report of the Independent Review of the Enforcement of UK Anti-discrimination legislation made a number of helpful recommendations on this point, including that mechanisms for bringing group claims or class actions need to be simplified and extended. They can have a significant impact and can avoid the artificial situation of one claimant after another having to bring a claim for essentially the same thing – taking up the time of tribunals as well as the parties unnecessarily.

24. Whilst, as with any claim, mediation might be appropriate on a voluntary basis in some multiple claimant claims, it is often the case that claims reach a multiple claimant stage because there is a legal point on which the parties cannot agree and it is vital that this is determined by the tribunal. It might be that once a particular legal point is determined, any compensation can be settled upon outside of the tribunal process, but access to the tribunal process would remain vital.

25. It is DLA's view that the existing powers of employment tribunals are sufficient to deal with weak and vexatious claims. The Pre-Hearing Review process gives the tribunal the power to deal with weak claims and this is, in our view, sufficient. The tribunals already have strong powers in this area. If there were to be any increase in the tribunal's powers in relation to such cases, it is our firm view that discrimination claims should be excluded from such powers. It is extremely difficult to determine in advance whether a discrimination claim has merits, as the claim is often based on witness testimony which must be tested in a hearing before any

conclusion can be reached.

26. DLA would strongly oppose Chairs sitting alone to hear discrimination claims, but we understand from the consultation document that it is not proposed that this apply to discrimination claims.

27. Members and Chairs sitting on discrimination cases must already have specific training before they can sit on discrimination claims. It is DLA's view that all those hearing discrimination claims should all have (a) relevant specialist experience (b) specialist training of sufficient length in law, and most particularly, in analysing evidence. In addition, there should be regular refresher training.

    There should also be an up-to-date and efficient list of member interests to ensure that conflict of interest issues do not interfere with tribunal hearings; this will also increase user confidence in the system.

28. It is DLA's view that better advice and guidance is not sufficient to promote employer's compliance with discrimination law. The experience of DLA's members strongly suggests that employers' motivation to voluntarily improve their compliance is often driven by the experience of a real employment tribunal case.

    As you are aware, tribunals are not at present allowed to make policy recommendations to an employer where there is no direct benefit to the complainant. For example, if an applicant establishes that they were sexually harassed and they resign as a consequence, at present a tribunal cannot make a recommendation that the employer adopt an anti-harassment policy because that would bring no benefit to the former employee. Widening the powers of tribunals to make recommendations in discrimination claims would be a powerful tool in improving the practice of employers and would, in the long run, lead to fewer claims. Often a

claimant's motivation is not money but to ensure that no-one else goes through the same experience. Limiting recommendations forces both parties to concentrate on money at the expense of real change. In the context of the equality commissions' powers, for example, it would provide an important bridge between individual and systemic enforcement. In legal terms, it fills the gap between what can be achieved by an individual case and by a formal investigation. Individual cases will in the great majority of cases achieve only a remedy for the individual.

Discrimination Law Association

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