SCOTTISH TRADES UNION CONGRESS

Response to the Government Equalities Consultation on The Equality Act 2010 and Repeal of Provisions

Introduction

The STUC is Scotland's trade union centre. Its purpose is to co-ordinate, develop and articulate the views and policies of the trade union movement in Scotland; reflecting the aspirations of trade unionists as workers and citizens.

The STUC represents over 632,000 working people and their families throughout Scotland. It speaks for trade union members in and out of work, in the community and in the workplace. Our affiliated organisations have interests in all sectors of the economy and our representative structures are constructed to take account of the specific views of workers with disabilities, women members, young members, Black/minority ethnic members, LGBT members, as well as retired and unemployed workers.

The STUC is concerned that the Government is planning the Repeal of Provisions in the Equality Act 2010 that gives powers to employment tribunals to make wider recommendations in equality cases and procedures for obtaining information from employers, as this will seriously undermine the impact of the legislation and its effectiveness. We also believe that, through the removal of procedures of obtaining information could, in itself, lead to more costly and lengthy tribunal cases. Our concern would be that these two measures, in conjunction with proposals to charge fees for lodging claims for claimants only, will deter workers from seeking redress for acts of discrimination and, therefore, the Government may be denying access to justice as a result of these proposals.

We also note that the vast majority of the contributors to the Red Tape Challenge website on this issue recommended no change in the role of tribunals in regard to enforcing the Equality Act or its wider powers.

We are concerned that the Government appears to be ignoring the views of individuals who take the time to participate in such public debates, while affording the business community another opportunity to raise concerns addressed, regarding the perceived and, we would argue, overstated burdens of the Equality Act and, in particular, these provisions.

Question 1: 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?

The consultation states that the Government is aware of only one instance where tribunals have acted under the wider recommendations power and cite the example of *Stone v Ramsay Health Care UK Operations Limited*. However, in the same year, 2011, there was a further case heard by the Employment Appeal Tribunal, *Lycee Francais Charles De Gaulle v Delambre*[1].Clearly, in this case, the employer felt justified in challenging the power of the tribunal to make wider recommendations. The EAT upheld the decision of the original tribunal and dismissed the appeal. What is clear from the judgment is that the role of the tribunals in making practicable recommendations has developed over time and not just since the introduction of the Equality Act.

Question 2: 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 Lycee Francais Charles De Gaulle is a large French School based in London that had, at the time of the EAT, 450 employees and some 4000 pupils.

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[1] http://www.employmentappeals.gov.uk/Public/Upload/10_0563fhwwSBRN.doc

It is clearly a large organisation, the size of which the STUC hope would have had adequate policies and procedures in place to prevent discrimination and promote equality. However, the claimant lodged an employment tribunal claim citing age discrimination.

The tribunal subsequently found in favour of the claimant that she had been discriminated against "*on the grounds of age contrary to the Employment Equality Age Regulations 2006 and, further, that she had been victimised, contrary to regulation 4 of those regulations for having done a protected act".*

While this predates the commencement of the Equality Act 2010, we believe this case underlines the importance of the tribunals being able to make recommendations that seek to address significant failings in workplaces and address discrimination.

Question 3: 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.

The original tribunal decision, following the hearing in January 2010, made the following recommendations in respect of the case and the action required by the school

> (a) That both the Tribunal's Full Merits Hearing and Remedy Judgments be circulated to each member of the Respondent's Governing Board and to each member of the senior management team of the Respondent, to be read and digested by them, by the end of March 2010.
> (b) That the Respondent secure the services of an appropriately qualified HR professional, who will conduct a review of their existing equality, disciplinary, grievance and recruitment policies and procedures and amend or redraft the same as necessary, so as to ensure compliance with United Kingdom Employment Law. This HR adviser will have had the opportunity of studying the Tribunal's Full Merits and Remedies Judgments before going about their task, which should be completed by the end of June 2010.

(c) That the Respondent undertake a programme of formal equality and diversity training, including recruitment and selection procedures, beginning at Board of Governors and highest management levels and cascading down through the entire organisation; this training programme to begin at the start of the academic year in September 2010 and to be completed within six months of that date."

The respondent challenged the legality of the above recommendations presumably on the basis that the employer felt they were not just and equitable and disproportionate to the act of discrimination they had committed. The EAT did not accept this and supported the view of the original tribunal that the employers had *"displayed a quite staggering and, the tribunal found, wilful ignorance of UK Employment Law".*

The STUC would not see the recommendations as being disproportionate, as clearly strong action was required, in order to address the culture within this organisation that had allowed the act of discrimination in the first place and ignored its obligation as an employer to respect the employment laws of the United Kingdom.

Question 4: Whatever your answer to Question 1, do you agree or disagree that the wider recommendations power should be repealed? Please explain your answer.

The STUC does not believe that the wider recommendations power should be repealed, as this would allow irresponsible employers to ignore their legal obligations to their workers. We do not share the view of the British Chambers of Commerce that an employer, when faced with an employee, or indeed former employee, claiming discrimination puts in place measures to prevent further discriminatory acts. In the absence of evidence to support this position, this can, at best, be described as speculation and, therefore, there no justification for repealing this provision.

In the case above, the employer tried to claim at the tribunal hearing that processees were being put in place to address the issues in the complaint, a position that the tribunal did not accept, hence the requirement to make the recommendations it subsequently did.

In addition, employers fear that tribunals will make inappropriate or excessive recommendations. The STUC believes that this fear is unfounded, as cases brought under the Equality Act are, at this time, still heard by a Judge sitting with lay members, the latter bringing to the tribunal their experience of the world of work and an understanding of the implications for the workplace of any recommendations they may make.

The evidence presented in the consultation document suggests that only 54% of employers facing a discrimination case made at least one change. The STUC would suggest that this is a disappointing statistic. Slightly more than half of employers facing discrimination cases feeling the need to implement changes to protect their workers is evidence in itself that tribunals should continue to have the powers to make recommendations that are not only proportionate, but also effectively address the problem.

We would share the view of many of the contributors to the Red Tape Challenge website that there is no requirement to change any of the provisions of the Equality Act so shortly after its implementation. We would suggest that the Government need to ensure that the Equality Act and the provisions the Government is proposing to repeal without justification, in our view, should be properly enforced and further direction given to tribunals to improve their use and meet their intended purpose to deliver fairer and more equal working environments.

Question 5: Have you or your organisation been involved in a procedure for obtaining information about a situation involving potential discrimination, harassment or victimisation?

No

Questions 6 & 7: 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.

No

Question 8-10: Please indicate what action was taken by the potential complainant after using the procedure for obtaining information? And provide further details.

Not applicable

Question 11: 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).

Not applicable

Question 12: 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.

The STUC does not believe that the procedure for obtaining information under section 138 of the Equality Act should be repealed. We would strongly disagree with the position the Government is taking that the questionnaires have not produced their intended effect. We believe that it is too early to tell if this is the case and there is no requirement to change the Equality Act or any of its provisions at this early stage.

The STUC notes that the only dissenting organisation, from the evidence provided in the consultation document, appears to be the British Chambers of Commerce. The document states that the survey reflects the concerns of business regarding the use of these forms. We believe the consultation is misleading in that it refers to survey of microbusinesses, where workers are less likely to have access to representation and advice, in order to assess the validity of any claim. We would not support the employers' view that this is a fishing exercise by disgruntled employees and would suggest that this is more likely to be the case of someone making a genuine attempt to exercise their rights, a process that would be far harder for unrepresented workers to exercise should section 138 of the Equality Act be repealed.

The STUC also takes exception to the costs of employers seeking legal advice once again being used as a justification to remove workers' rights.

Employers can avoid such costs, if they put in place policies and procedures to ensure discrimination does not take place in the first place. We do not agree that the forms are over burdensome and would question if employers do genuinely have concerns regarding the regulatory burden.

The respondents section of the Discrimination and Other Prohibited Conduct Questionnaire amounts to five pages, one of which relates to personal details of the complainer and respondent. The last contains only guidance, leaving only four sections requiring a response.

We are also concerned that the Government appears to be proceeding on the basis that there are high volumes of discrimination claims and we do not believe that this is necessarily the case. Leaving aside equal pay claims, where the level of pre-single status compensation paid demonstrates that questionnaires would not have resolved the complaint, it is still wrong to assume this process does not work. The purpose of the questionnaire was not to resolve every case of discrimination and we cannot be certain how many additional discrimination cases might have been lodged, if this process was not available. Equally, the flawed logic put forward in the consultation to support removal of the questionnaires does not reflect the fact that some of the complainers may proceed to a tribunal application, due to a lack of, or an ambiguous response from the employer. We further believe that the questionnaires are useful in narrowing the issues in litigation ultimately saving costs in case management time.

As an organisation, the STUC believes that these questionnaires are vital in helping unrepresented claimants assess the validity of a potential complaint before proceeding further. To remove this process would result in unrepresented individuals having to resort to lodging tribunal claims, or some other costly porcedure, in order to assess the validity of their complaint. Furthermore, if the Government proceeds with proposals to charge fees for lodging claims, our concern would be that individuals with legitimate discrimination cases would be deterred from proceeding on the grounds of cost and we believe this is a denial of access to justice and potentially the right to a fair hearing.

Question 13: 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.

The STUC is not in a position to respond to this question.

Question 14: Do you have any comments on the assumptions, approach or estimates we have used in the wider recommendations provision impact assessment?

The STUC notes from the impact assessment that the Government claims they are unaware of any wider recommendations having been made under existing powers since commencement in October 2010. However, in paragraph 3.1 on page 9 of the consultation document, it is stated that the Government is aware of only one case where tribunals have made wider recommendations. Additionally, the impact assessment states that the upper estimate of expected cases per annum should be 17. Our view is that the disparity between the upper estimate and the reality is an indication that wider recommendations are not being made, not because the powers are ineffective, but as a result of a lack of awareness of the still relatively new powers.

Question 15: Does the impact assessment for the wider recommendations provision properly assess the implications for equality? Please give details.

Our concerns would be that, in the absence of powers to make wider recommendations, the opportunity will be lost to provide fairer and more equal working environments through the findings of our respected tribunal process. There appears to be little consideration given as to how the Government could make these powers more effective through enforcement, including a statutory duty to implement wider recommendations or face financial sanctions. This is a failing of the wider tribunal system, as respondents can fail to follow orders made by a tribunal with impunity, as successful claimants have no other recourse, other than costly court action, in order to receive sums awarded in the judgment.

The impact assessment does not appear to accept that there is the possibility that this deregulatory proposal may result in employers doing less to ensure that they are meeting their equality duties, safe in the knowledge that the powers of the employment tribunals have been diluted to the extent that, even if they are found to be in breach of the regulations, there will be no obligations placed on them to take appropriate action to prevent reoccurrence of discrimination in their workplace.

The impact assessment should have also considered the costs of improving the effectiveness of the use of wider recommendations and the benefits for workplace equality.

Questions for you to consider – (b) obtaining information provisions

Question 16: 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?

There is no information provided in relation to the costs of employers and complainers seeking legal advice to complete questionnaires, other than that provided by the Equalities Office. We do not see these costs being overly excessive on either party. The impact assessment does not take into account that for complainers these costs may well be met by trade unions or the service may be provided by other organisations, such as Citizens Advice Bureaux. Equally, for some businesses including the micro-businesses, the only population that appear to have an issue with these provisions, free legal advice may be available through their business associations. Not all parties will be incurring costs for seeking advice and this should be reflected in the impact assessment.

Question 17: Do you have any comments on the assumptions, approach or estimates we have used in the obtaining information provisions impact assessment?

We see no benefits at all from repealing this provision; the only justification for this proposal appears to be based on the views of the British Chambers of Commerce and their membership.

No information is given on response rates of their workplace survey other than it came from 56 individual chambers.

Question 18: Does the impact assessment for the obtaining information provisions properly assess the implications for equality? Please give details.

We believe that the proposals will have an adverse impact on workplace equality and dispute the view that this does not impact on an individual's access to justice. The completion of these questionnaires may well be the start of a judicial process where redress may be sought at tribunal or through the Courts. The questionnaires were introduced long before the Equality Act and were designed to ensure equality of arms, providing a low cost and effective method for the claimant or their advisers to access information held by employers that would allow them to assess the validity of their claim.

In the absence of this procedure, the employer will now be in a stronger position and individuals considering taking complaints of discrimination, as the consultation states, will have to find other methods of obtaining this information. This will undoubtedly involve costly legal processes and will mean that individuals may not be able to afford to fight cases. This would not only be a sad reflection on our society but, we believe, it also to be a denial of natural justice.

STUC
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