



## EMPLOYMENT TRIBUNALS

Judge D J Latham  
President (E&W)

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7<sup>th</sup> August 2012

Dear Sirs

This response is written on behalf of the President and Regional Employment Judges of the Employment Tribunals in England & Wales to the consultation arising from the review of the Equalities' legislation. It is noted that this review is under the Third Party Harassment Provisions and that specific provisions in the Equality Act 2010 are the subject of this consultation.

The Employment Tribunals in England and Wales would not wish to make any comment on the political decisions that are behind the proposals that are being consulted upon.

### **The present law**

1. There are at present two ways of making an employer liable for third party harassment:

1.1 The employer's behaviour may be unlawful in itself, for example its response to or its inaction in the face of a complaint of third party harassment may itself constitute direct discrimination or victimisation or harassment. The last possibility (that is, inaction on the part of the employer which meets the definition of harassment) - 'method 1'.

1.2 The employer's behaviour does not meet any of those definitions, but the employer is nevertheless liable for what the third party has done because of the employer's failure to have taken reasonable preventive steps when harassment was foreseeable - 'method 2'.

2. Section 40(2) Equality Act 2010 is 'method 2' albeit limited because:

- it must have happened *twice* before
- it must have happened twice before *to the same person* (unless 'a person (B)' can be interpreted as including more than one person, ie people)

3. There is a view that the EOC judicial review in the Administrative Court (Burton J) decision in R (Equal Opportunities Commission) v Secretary of State for Trade and Industry [2007] ICR 1234, especially in this regard paragraphs 36-40, established that under the EU Directive 2002/73EC, employers must be held liable for third party harassment, by the method 2 route. If this is so, and if the proposal to remove Section 40 of the Equality Act 2010 proceeds, then it is likely to leave difficulties by way of direct action against public sector employers and/or "Francovich" actions.

4. EU Directive 2002/73EC is now replaced by Directive 2006/54/EC, the Equal Opportunities and Equal Treatment Directive recast. So far as is relevant, it still uses the terminology which founded the considerations in the 2007 EOC case ('unwanted conduct related to' the protected characteristic).

5. It is still open to argument that even if the provisions here under consideration are repealed, the requirements of EU law mandate a form of protection in third party harassment cases, possibly going beyond the limits imposed by section 40.

### **The Government's reasons for repeal**

6. The reasons given are that:

- it is unfair on employers to be liable for the actions of third parties;
- businesses, especially small businesses, would find it difficult to comply with;
- there is no real need for these provisions and it can find only one example of such a case being ruled upon by ETs. The Government does not know whether any such cases have been brought and settled;
- there are other legal avenues for employees discriminated against in this way, ie under the Equality Act 2010 (the cases mentioned above), under the Employment Rights Act 1996 for constructive dismissal and in the civil courts.

One might think these arguments are internally contradictory – and, if they are not used, that they do not impose a burden.

## **The impact of repeal on the ET system**

7. When third party harassment cases are brought, the Employment Tribunals are likely to be faced by complex arguments on EU law and the method 1/method 2 distinction using s26 Equality Act harassment provisions, together with convoluted efforts to fit the facts into the other definitions of discrimination.

8. In contrast, section 40 provides nice, neat, short issues and clarity for employers and employees.

If you require anything further please let me know.

Yours faithfully

A handwritten signature in black ink that reads "David Latham". The signature is written in a cursive style with a large, looped initial 'D'.

David J Latham  
President