

**Equality Act 2010: Removing: (a) employment tribunals' power to make wider recommendations in discrimination cases; and the procedure for obtaining information – A consultation**

**QUESTIONS PROFORMA TEMPLATE**

**The consultation closes on 07 August 2012.** Please let us have your response by that date. The consultation can be completed via the online form using the link below (web team to add), or responses can be emailed or posted to the addresses shown below:

Email to: [enforcement@geo.gsi.gov.uk](mailto:enforcement@geo.gsi.gov.uk)

Post to:

Enforcement Consultation Responses  
Government Equalities Office  
Equality Law and Better Regulation Unit  
3rd Floor Fry, North East Quarter  
2 Marsham Street  
London SW1P 4DF

When responding, it would be helpful if you could provide the following information.

Please fill in your contact details below, and that of your organisation if relevant. Providing this information will enable us to contact you for future consultation exercises which may be of interest to you.

Contact details are voluntary and will be treated as personal data by the Home Office in compliance with Government guidance on holding personal information.

**Contact details: (optional)**

Please supply details of who has completed this response.

Response completed by (name):

Position in organisation (if appropriate):

Secretary

Name of organisation (if appropriate):

Scottish Discrimination Law Association

Contact e-mail address:

### Consultation confidentiality information

The information you send us may be passed to colleagues within the Home Office, the government or related agencies.

Information provided in response to this consultation, including personal information, may be subject to publication or disclosure in accordance with the access to information regimes (these are primarily the Freedom of Information Act 2000 (FOIA), the Data Protection Act 1998 (DPA) and the Environmental Information Regulations 2004).

If you want other information that you provide to be treated as confidential, please be aware that, under the FOIA, there is a statutory code of practice with which public authorities must comply and which deals, among other things, with obligations of confidence.

In view of this it would be helpful if you could explain to us why you regard the information you have provided as confidential. If we receive a request for disclosure of the information we will take full account of your explanation, but we cannot give an assurance that confidentiality can be maintained in all circumstances.

If you wish your response to remain confidential, please tick this box and say why.

I would like my response to remain confidential (please tick if appropriate) ☐

Please say why

An automatic confidentiality disclaimer generated by your IT system will not, of itself, be regarded as binding on the department.

The Department will process your personal data in accordance with the DPA and in the majority of circumstances this will mean that your personal data will not be disclosed to third parties.

**Q3 If responding as an employer, how many people do you employ? (select one)**

Between 1 and 5 employees ☐

Between 6 and 14 employees ☐

Between 15 and 49 employees ☐

Between 50 and 249 employees ☐

250 employees or more ☐

**Q4 If responding as an employer, please indicate which sector best describes you. (select one)**

Legal services ☐

Construction and/or building design ☐

Communications ☐

Wholesale and retail trade ☐

Leisure – hotels, restaurants, pubs ☐

Leisure – cinemas, theatres, museums ☐

You or your organisation

**Q1 In what capacity are you responding? (select one)**

As an individual (if so, please go to Q5 in the main comments section)

☐

On behalf of an organisation (if so, please go to Q2 or 3 as appropriate)

☒

Other

☐ (please specify)

**Q2 Is your organisation (select one)**

A local authority (including health authority) or local authority organisation

☐

An equality lobby group or body

☒

A statutory body

☐

An organisation representing employers

☐

A professional organisation

☐

A trade union or staff association

☐

A legal organisation

☐

An employment tribunal or another part of the judiciary

☐

Other ☐ – please specify

Leisure – other ☐

Distribution/transport ☐

Financial and/or business services ☐

Electricity, gas and water supply ☐

Advice and/or information services ☐

Public administration ☐

Education/training ☐

Health and social work ☐

Charity/voluntary work ☐

Other (please tick box and specify) ☐

**Employment tribunal power to make wider recommendations – s124(3)(b) (see Chapter 2 Paragraph 2.1 of the consultation document for a description)**

**Question 5:** Do you know of any 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? (select one)

Yes ☒

No ☐

Don't know ☐

If your answer to Question 5 is "yes", please go to Question 6.

If your answer to Question 6 is "no" or "don't know", please go to 8.

**Question 6:** It would be helpful to understand more about the case(s). Please provide further details, 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.

Other than **Stone v Ramsay Health Care UK Operations Ltd ET/1400762/11** we know of the following cases:

**Crisp v Iceland Foods Ltd (ET/1604478/11 & ET/1600000/12)**

The tribunal found that the respondent had subjected the claimant to disability harassment and had failed to make reasonable adjustments. The tribunal also found that the claimant had been constructively dismissed and she was not employed by the respondent at the time the judgment was made. The tribunal exercised the discretion given under section 124(3)(b) to make recommendations that the respondent was required to train within one year all members of the HR function (who provided guidance to managers on disciplinary and grievance procedures) on disability discrimination matters, specifically issues related to mental health; and to train all managers at the claimant's line manager's level in disability discrimination matters.

**Dixon v Royal Mail (ET/1701855/11)**

The claimant was a delivery officer. The respondent is a large employer responsible for the provision of postal services in the UK and employs around 164,000 employees. The tribunal found that the respondent had subjected the claimant to direct sex discrimination and had unlawfully dismissed her during a period of Additional Maternity Leave because she was exercising or had exercised the right to maternity leave. The claimant was not employed by the respondent at the time of the hearing and will not be employed by the respondent at the time the judgment is issued. The claimant was awarded £58,000 compensation. The case has been adjourned to allow the tribunal to make recommendations which we expect will include the retraining of HR staff and updating of policies.

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

(select one for each statement)

- |                  | Y                                   | N                        | Don't know               |
|------------------|-------------------------------------|--------------------------|--------------------------|
| a) Effective     | <input checked="" type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> |
| b) Proportionate | <input checked="" type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> |

Please use the space below to provide further details

**Question 8:** How far do you agree or disagree that the wider recommendations power should be repealed? (select one)

- Strongly agree ☐
- Tend to agree ☐
- Neither agree nor disagree ☐
- Tend to disagree ☐
- Strongly disagree ☒
- Don't know ☐

**Obtaining information procedure – s138 (see Chapter 2 Paragraph 2.4 of the consultation document for a description)**

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

- Yes ☒
- No ☐
- Prefer not to say ☐

If your answer to Question 9 is "yes", please go to Question 10.

If your answer to Question 9 is "no" or "don't know", please proceed to Question 16.

**Question 10:** Please provide details of your involvement in a procedure for obtaining information. (select one)

Involved as an employee/customer ☐

Involved as an employer/service provider ☐

Involved as a member of the judiciary ☐

Involved as a representative organisation ☐

Involved as a mediator ☐

Involved in any other capacity not listed above please specify:

Experience of SDLA membership, i.e. claimant and respondent representatives, employers and individuals.

Don't know/Prefer not to say ☐

**Question 11:** Please indicate whether the procedure for obtaining information was set in motion under previous equality legislation or under section 138 of the Equality Act 2010. (select one)

Previous equality legislation ☐

Section 138 of the Equality Act 2010 ☒

Don't know ☐

Prefer not to say ☐

**Question 12:** Please indicate what action was taken by the potential complainant after using the procedure for obtaining information. (select one)

- i. The potential complainant did not lodge a claim with an employment tribunal or court

☒ (If you ticked this box, please go to Question 14)



ii. A case was lodged with an employment tribunal or court

☐ (If you ticked this box, please go to Question 13)

iii. Don't know/Prefer not to say ☐

**Question 13:** If a claim was taken to an employment tribunal or court after using the obtaining information procedure, what was the outcome of that case? (select one)

i. Complainant won the case ☐

ii. Complainant lost the case ☐

iii. Case was settled ☐

iv. Case was withdrawn ☐

v. Case was struck out ☐

vi. Case was dismissed ☐

vii. Don't know/Prefer not to say ☐

viii. Other ☐ (please specify)

**Question 14:** If the potential complainant did not lodge a claim with an employment tribunal or court, please indicate the outcome of using the procedure for obtaining information. (select one)

i. Issue was settled direct with the employer/service provider

X

ii. Issue was settled through conciliation or mediation with another organisation

iii. Other (please tick box and specify)

iv. Prefer not to say /don't know

☐

**Question 15:** Please use the space below to 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).

As a committee of experienced practitioners we have all regularly used the procedure and continue to do so. Our members have experience of the process being used to resolve disputes without recourse to tribunal, including in multiple and potentially costly cases. Two of our committee members have acted for employees employed by large organisations where there have been collective questionnaires lodged about inflexible working hours and sex discrimination. As a result of using the procedure the claims were settled pre-claim, avoiding multiple claims.

We consider that removing the procedure will lead to parties lodging claims without first obtaining information about their concerns, which is more litigious and onerous on all parties.

We have found that the procedure assists employees in proving discrimination, which is often reliant on statistical data the employee cannot otherwise access. Our members have found that the procedure has increased the scope for establishing facts about whether discrimination has occurred, as the claimant can obtain statistical data from the employer which allows the claimant to establish whether indirect discrimination had occurred.

Our members have dealt with a number of cases where the questionnaire procedure has helped resolve matters at an early stage. The questionnaire procedure has also helped resolve disputes that arise as a result of misunderstandings or mistakes.

In cases that do not settle pre-claim, we have found that the questionnaire focuses the issues at an early stage, parties are better placed to prepare their cases and therefore the tribunal process is more efficient. Two examples of cases dealt with by the firm of one of our committee members are:

- Representing the claimant in a claim of unfair selection for redundancy on grounds of maternity leave and sex by a media company. The questionnaire procedure helped the respondent recognise that the matter had been dealt unfairly and allowed the employee to obtain information they would not otherwise have been able to access (including the details of the redundancy scores of other employees). The matter was settled without recourse to tribunal for a six figure sum. Due to confidentiality provisions within the COT3 Agreement no further

details can be provided. McGrade + Co Ltd consider that had the case reached tribunal it would have been listed for at least a six day hearing. The use of the process led to substantial savings for both parties and the tribunal system.

- Representing the claimant in a claim of unfair selection for redundancy on grounds of maternity leave and sex by a financial organisation. The procedure helped the respondent recognise the matters had been dealt with unfairly and it allowed the employee to obtain information regarding scoring. The matter was settled for a five figure sum, and McGrade + Co Ltd consider the case would have been fixed for at least a 5 day hearing had it reached tribunal. Due to confidentiality provisions within the COT3 Agreement no further details can be provided. The use of the process led to substantial savings for both parties and the tribunal system.

**Question 16:** How far do you agree or disagree that the procedure for obtaining information in section 138 of the Equality Act 2010 should be repealed? (select one)

Strongly agree ☐

Tend to agree ☐

Neither agree nor disagree ☐

Tend to disagree ☐

Strongly disagree ☒

Don't know ☐

Please use the space below to explain your answer, for instance if you disagree, explain to what extent you think that retaining the provisions would benefit employees.

We strongly disagree that the procedure for obtaining information should be repealed. There are a number of reasons for this, some of which are set out below.

We consider that the questionnaire procedure provides the employer with an opportunity to disprove an allegation of discrimination or rectify inequality before a claim is presented. Our members have experience of the process being used to resolve disputes, including in multiple and potentially costly cases (as specified above at question 15).

Some employers believe the process is used as a 'fishing expedition' by individuals without reasonable cause for complaint. While we recognise that this may occur in some limited cases, discrimination by its very nature is often covert, indirect or even sub-conscious. Proving discrimination is often reliant on statistical data the employee cannot otherwise access. We consider that the questionnaire procedure is equally important for disputes that arise as a result of misunderstandings or simple mistakes – which can often be easily resolved without recourse to the tribunal system.

We do not believe that abolishing the procedure will lead to savings in the long term. We believe the procedure improves the efficiency of the claims process for cases that reach tribunal. The questionnaire focuses the issues at an early stage, parties are better placed to prepare their cases and therefore the process is more efficient. Without the procedure we consider additional interlocutory hearings can be expected, as time is likely to be spent dealing with a rise in the number of applications for questions and documents orders, and individuals and their representatives will undoubtedly think of new ways to request information.

We consider that the removal of the procedure is likely to reduce the scope for establishing facts about whether discrimination has occurred. Without a statutory procedure employers are likely to be less inclined to entertain questions from employees, and employees less inclined to ask.

### Impact assessments

We have produced impact assessments which set out the estimated benefits and costs of repealing sections 124(3)(b) and 138 of the Equality Act 2010. We are looking to refine our impact assessments and would appreciate information to help improve our assessment of cost and benefits (see Annexes D and E of the consultation document for a description of costs and benefits).

### *Wider recommendations*

**Question 17:** Do you think that there are further costs to repealing the **wider recommendations** provision which have not already been included in the impact assessment? (select one)

Yes, I think there are further costs to include

☒

No, I think all costs have been included

☐

Don't know

☐

If yes, please use the space below to provide detail

We do not consider sufficient consideration has been given to the cost of dealing with additional discrimination claims that could have been avoided had changes been made by the employer following previous successful discrimination complaints, including the cost of pursuing and defending the claim for both parties and the cost to the tribunal system – as well as the cost of dealing with internal grievances, including the cost of management time. The cost of implementing any recommendations made is low in comparison to the associated costs of a claim being lodged in the system.

**Question 18:** Do you think that there are further benefits to repealing the **wider recommendations** provision which have not already been included in the impact assessment? (select one)

Yes, I think there are further benefits to include

☐

No, I think all benefits have been included

☐

Don't know

☐

If yes, please use the space below to provide detail

