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Equality Bill: Assessing the impact of a multiple discrimination provision

Response to the United Kingdom Government Equalities Office Consultation by The Equal Rights Trust

5 June 2009

The Equal Rights Trust (ERT) is an independent international organisation whose purpose is to combat discrimination and promote equality as a fundamental human right and a basic principle of social justice. Established as an advocacy organisation, resource centre and a think tank, it focuses on the complex and complementary relationship between different types of discrimination, developing strategies for translating the principles of equality into practice. ERT is the only international human rights organisation which is entirely focused on the right to equality as such.

In order to identify gaps and inconsistencies in the multiple discrimination provision set out in this consultation ERT has benefitted from *Declaration of Principles on Equality* which was adopted and signed by 128 global human rights and equality experts, including many prominent experts from the United Kingdom.

Question A:

Do you agree with the conclusions set out in our Impact Assessment on the impact of multiple discrimination claims brought alongside single strands claims? If not, please explain why.

Yes.

Question B:

To what extent would you agree that the process for identifying a comparator in a multiple discrimination case would be no more onerous than in a single strand case?

ERT believes that there is no more difficulty in identifying a comparator in a multiple discrimination case than in a single strand case. We observe that your assessment concludes that it is more difficult to find an actual comparator within a multiple discrimination claim where there are more than two grounds of discrimination alleged. This is correct due to the fact that the number of characteristics that the comparator must possess has increased, when compared with a single strand discrimination claim, and therefore the pool of people who actually possess these characteristics is diminished. However, as your assessment points out, where there is no actual comparator, a hypothetical comparator can and has, in many cases of single strand discrimination, been identified by courts. Lord Scott in *Shamoon v Chief Constable of the Royal Ulster Constabulary* [2003] IRLR 285 stated:

"[I]n most cases a suitable actual comparator will not be available and a hypothetical comparator will have to constitute the statutory comparator."

In cases where an actual comparator cannot be identified there is no evidence to suggest that the process of identifying a hypothetical comparator based on a combination of grounds should be any more onerous than in a single strand case. The hypothetical comparator should simply be someone who does not share all the relevant characteristics of the complainant. For example, if the complainant alleges that she has been treated less favourably because she is black, female and elderly, the appropriate comparator would be a person who does not share these three characteristics provided that none of these characteristics are an occupational requirement. Businesses and organisations are already familiar with the use of hypothetical comparators, so any claim that this would be more onerous than the duty already imposed on them is unsupported. In our view a hypothetical comparator (if not an actual comparator) can always be identified in cases of multiple discrimination.

Question C:

Do you agree that the proposed multiple discrimination provision would not require businesses or organisations to do more to avoid the risk of a multiple discrimination claim than they need to do to avoid single-strand claims? If not, please explain why. Please include what additional steps you think they would need to take.

ERT agrees that as long as businesses and organisations treat their employees and service users fairly, make decisions based on relevant considerations and not on the basis of prejudice or discriminatory factors, they can be confident that they will not fall foul of the law. This is true no matter how many grounds of discrimination are allowed in a multiple discrimination claim.

We believe, therefore, that the conclusion reached in your assessment – that allowing more than two grounds of discrimination in a multiple discrimination claim places an “undue burden” on businesses and organisations – is incorrect. The previous legislation operating within Great Britain has legally required businesses and organisations to operate in a non-discriminatory manner and put systems in place to achieve this aim. The incorporation of a multiple discrimination clause into the Equality Bill (on more than one ground) is, therefore, a natural progression of British equality law.

Question D:

Do you agree with our assessment of how businesses and organisations will defend a claim, and the costs which will be incurred when they face a claim of multiple discrimination? If not, please set out how you think the process would differ from that described and how this would impact on the costs incurred.

Yes.

Question E:

Do you agree with our conclusion that multiple discrimination claims should not take significantly longer to consider than single strand claims? Do you agree with our conclusions that cases including a multiple discrimination claim would not take significantly longer to consider than cases only including single strand claims? If not, can you describe how much longer you think these claims and cases would take to consider, and what would be the subsequent cost burden to businesses or organisations from this additional time in courts and tribunals?

Yes.

Question F:

In defending claims of discrimination, do you/does your organisation rely on evidence of the treatment of similar people within your organisation? How would a multiple discrimination provision impact on this? By limiting the combination to 2 characteristics, we consider that this approach will still be feasible. Do you agree?

ERT is responding to this consultation primarily as an expert organisation in the field of equality and discrimination law. No cases of discrimination have been alleged in our organisation. ERT does believe as stated above, that limiting multiple discrimination claims to two characteristics only, because of fears over the application of comparators, is unjustifiable as British equality law has compensatory mechanisms in place through the use of hypothetical comparators to overcome this barrier.

Question N:

How can we work with businesses and organisations to discourage unmeritorious claims of multiple discrimination?

The government must provide clear and instructive guidelines regarding the application of any multiple discrimination provision. Information and guidance must be accessible to all stakeholders including, businesses, organisations, employees, service users as well as those who may be associated stakeholders, including carers.

Moreover, the procedural rules upon which claims may succeed should be made clear to all parties concerned through distribution of information booklets and resources that explain this complex area of law in plain English terms.

Question O:

What can Government do, either through guidance or other means, to help individuals to understand their rights in relation to multiple discrimination?

We believe that Government should:

- Write statutory guidance on this issue for use by individuals right-holders;
- Provide training courses and advice clinics through local government;
- Provide informational leaflets and other resources which set out the rights of individuals in plain English;
- Encourage accurate reporting of the legal requirements of these rights by media.

Question P:

Can you please describe how you think a multiple discrimination provision would affect your business or organisation? Please indicate the size of your business or organisation when answering this question.

ERT is responding to this consultation primarily as an expert organisation in the field of equality and discrimination law. ERT is a small charity consisting of less than 10 employees. We believe that the implementation of a legal multiple discrimination provision would positively impact our organisation.

Question Q:

Do you consider that the proposed provision could have unintended consequences? If so, please explain what they are and how the risk could be reduced.

ERT welcomes the proposal to introduce protections against multiple discrimination. However, we are concerned that the narrow scope of this provision may have the unintended consequence of reducing legal certainty within British equality law by creating hierarchies in terms of characteristics and types of discrimination.

In order to avoid any unintended consequences ERT recommends that the proposed provision should be broadened to: 1. apply to more than two grounds of discrimination; 2. include protection against indirect discrimination; and 3. include protection against harassment. We expand upon this further in response to Question S.

Furthermore, as it stands the provision does not apply to certain characteristics such as pregnancy and maternity or marriage and civil partnership. For example, the provision would not protect a lesbian pregnant woman who is being harassed at work because she is trying to start a family with her civil partner. We believe that by not extending the provisions to these characteristics the law will contain gaps in protection for people who share these characteristics.

Question S:

Do you think the provision we are proposing would fill the gap we have described?

ERT has a number of concerns regarding the proposed provision and therefore believe that as it currently stands it would not fill the existing gaps in respect to three crucial areas.

First, the limitation of multiple discrimination claims to only two grounds undermines the effectiveness of the new provision. As explained above, the reasoning behind this limitation is to reduce the burden on businesses and organisations. This is not legitimate. Businesses and organisations have been subject to equality laws and provisions for over forty years in Britain and a multiple discrimination provision *on more than one ground* is *the only* natural progression for British equality law. Furthermore, the arguments put forward which submit that increasing the number characteristics in which a multiple discrimination claim can be brought will cause difficulties in finding appropriate comparators is unfounded. This use of hypothetical comparators is well established in British equality law and compensates for this concern. Imposing such a limitation sends a negative message to those whose claim is based on more than two grounds and further marginalises the most vulnerable in society. The limitation has the effect of retaining the inconsistency which the provision seeks to address. Knowing that cases of discrimination on three or more grounds exist, in however small a number, and yet dismissing them undermines the spirit and purpose of the new Equality Bill altogether.

Second, failing to apply the new provision to indirect discrimination undermines its comprehensiveness. In our view, concerns over the burden such a provision would place on businesses and organisations should not be given primacy over the issue of combating multiple discrimination in all its forms. Evidence suggests that indirect multiple discrimination is a more frequent occurrence than this provision anticipates. Some notable examples include:

- *Kingston & Richmond AHA v Kaur* [1981] ICR 631. The claimant, a Sikh woman, argued that the respondent's dress code was indirectly racially discriminatory as it prevented her

wearing trousers, without which she would feel improper. She did not allege sex discrimination but could have done so if a claim of indirect multiple discrimination existed.

- *Malik v Bertram Personnel Group* (1991) 7 EOR 5. A Muslim woman who was refused employment because she wished to wear trousers at work was found to have been unlawfully discriminated against on the basis of her race. Again, she did not plead sex discrimination but could have done so if a claim of indirect multiple discrimination existed.

Third, the exclusion of harassment from this provision undermines its comprehensiveness. Cases where people are harassed on intersectional grounds are more than conceivable. Muslim girls who are harassed for dressing differently from others in their peer groups because of their faith and sex, or a gay person belonging to a particular religious group harassed because he/she is considered by other members of that religious group to be at odds with the teachings of that religion are two easily identifiable examples. Indeed, such examples have already come before the British courts. One such case is *Burton v. De Vere Hotels* [1996] IRLR 596 which involved two black waitresses who were subjected to harassment by comedian Bernard Manning because they were 'black women'. This is a clear demonstration harassment because of multiple characteristics.

As stated above, ERT welcomes this move towards creating protection for those suffering multiple discrimination. However, we believe that a failure to address these three inconsistencies runs the risk of undermining the effectiveness of the provision, failing the most vulnerable and creating greater, rather than lesser uncertainty.

We are firm in the view that the duty to act in a non-discriminatory manner, which British businesses and organisations are already subject, means that the extension of protection to include all types of multiple discrimination would not place an undue burden on those who are compliant. We believe that fears for the impact on business and organisation – which are largely unfounded – should not stand in the way of extending the law in this area.