



GMB

RESPONSE TO CONSULTATION: EQUALITY ACT 2010

Removing: (a) employment tribunals' power to make wider recommendations in discrimination cases; and (b) the procedure for obtaining information

GMB, Britain's general union, represents over 600,000 members throughout the UK in both the private and the public sectors. We have members working in the following areas of:

Financial, commercial and professional services

Clothing and textiles

Construction

Furniture Manufacturing

Energy and Utilities

Engineering

Food and Leisure

Process Industries

Public Services

Voluntary and Community/Third Sector

Introduction

GMB welcomes the opportunity to respond to the consultation. GMB members in all of these areas have first-hand experience of discrimination. GMB has extensive experience in addressing issues that arise in these circumstances, providing collective and individual support to members affected. GMB is very strongly opposed to both of these proposals.

GMB believes that the powers provided to employment tribunals in the Equality Act 2010 to make wider recommendations is an important mechanism to address discrimination in the workplace. A tribunal which has heard a complaint of discrimination is well placed to make practical recommendations to address the issues so that they do not recur, which is of benefit to all in the workplace. It is a process which should enable employers to improve their practices and to avoid future litigation, again for the benefit of all concerned.

GMB also very strongly believes that the procedure for obtaining information in the Equality Act 2012 should also be retained. The procedure enables employees to obtain information which will allow them to decide whether or not to proceed with a claim. GMB has long believed that such a procedure has benefits to all concerned. For the employee it assists in removing a potential barrier to enforcing statutory rights. For the employer, potential claimants may decide not to proceed with a claim having come in to possession of relevant information. Further, it encourages early

settlement if both parties understand the case, and if a case does proceed it enables the tribunal to consider relevant evidence more easily and in an ordered way.

GMB believes that the removal of these rights will be hugely detrimental to employees seeking to assert their rights and secure access to justice. In any event GMB believes that the proposals will not assist employers, and notes that there is scant evidence of any benefits that might arise if the proposals are implemented.

This response now goes on to consider the specific questions in the consultation paper.

Consultation Questions

Question 1

In what capacity are you responding?

On behalf of an organisation

Question 2

What is your organisation?

A trade union

Question 3

If responding as an employer, how many people do you employ?

Not applicable

Question 4

If responding as an employer, please indicate which sector best describes you.

Not applicable

Employment Tribunal Power to Make Wider Recommendations – s124(3)(B)

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?

Yes

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.

GMB has not thus far had a case where the tribunal has used a power under the Equality Act 2010 to make recommendations. The reason for this is the relatively recent implementation of the Act, and the fact that it takes time for cases to proceed to a hearing, particularly the more complex cases. Further, in many cases a remedy hearing is not reached because the case is settled either before or after the liability hearing (cases are sometimes split between hearing liability and remedy).

GMB notes that the consultation paper refers to the case of *Stone v Ramsay Health Care* in which recommendations were made. As we understand it there has been a further case of *Crisp v Iceland Foods* 1604478/2011, where a tribunal made recommendations that managers and human resources officers undergo training in disability issues.

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 an act of discrimination to which the complaint relates) and/or proportionate (tribunal took account of employer's capacity to implement the recommendation)

GMB is not in a position to respond to this question and notes that it may take some time for an appropriate assessment to be made.

Question 8

How far do you agree or disagree that the wider recommendations powers should be repealed?

GMB strongly disagrees.

GMB notes that in most discrimination cases the employee is likely to have left the employment before the tribunal case is dealt with. This is because they will often have been dismissed as a result of the practices adopted by the employer or may have resigned due to the discrimination. The pre-2010 provisions were limited to the particular employee, and thus in many cases where the employee had left were of little value. In cases where the employee remained in the employment, any recommendations were restricted in scope because they addressed issues relating

to the particular employee. Thus the power to make recommendations may have been under-utilised, and unless employers voluntarily agreed to review their practices other employees remained at risk. Further the employer remained at risk of further litigation.

The tribunal, having heard the evidence, will be well placed to make recommendations, having heard lay witnesses and sometimes expert witnesses giving evidence. The tribunal is an independent body appropriately placed to make recommendations to reduce the risk of further discrimination.

Recommendations can prevent further discrimination, and help all parties learn the lessons from the litigation. This will help avoid further cases and lead to benefits for all concerned, including the tribunal system.

GMB believes that the cases referred to in Question 6 above indicate that tribunals take a very sensible approach to making recommendations. GMB believes that the approach has been proportionate i.e. to suggest training and a review of policies. There is no evidence of oppressive or excessive recommendations being made.

The 2010 Act addressed an anomaly in the legislation in respect of the distinction between where an employee was still employed and where they were not. The 2010 Act is designed to promote equality and it should be noted that the power only arises where the employer has been found to have discriminated. GMB believes that the present provisions should be retained.

Obtaining Information Procedure – s138

Question 9

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

Yes

Question 10

Please provide details of your involvement in a procedure for obtaining information.

As a representative organisation

Question 11

Please indicate whether the procedure for obtaining the information was set in motion under previous equality legislation or under section 138 of the Equality Act 2010?

Previous equality legislation and section 138 of the Equality Act 2010

Question 12

Please indicate what action was taken by the potential complainant after using the procedure for obtaining information.

The potential claimant did not lodge a claim with an employment tribunal

And

A case was lodged with an employment tribunal or court

Question 13

Complainant won the case

And

Complainant lost the case

And

Case was settled

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

Issue was settled with the employer

And

Issue was settled through conciliation or mediation with another organisation

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)

GMB has a wide experience of using the questionnaire procedure under both the old and new procedures. As can be seen from our answers above, GMB has had a wide range of different outcomes and experiences.

The procedure is an important mechanism for allowing an employee to decide whether to pursue a claim or not. It allows GMB and GMB solicitors to advise the member on the merits of a claim and whether it has sufficient prospects of success for the union to provide formal support to a claim.

In some cases, the member has accepted that there may be a non-discriminatory explanation for the actions of the employer and thus decided not proceed with a claim. Without the procedure such cases would have been likely to proceed if only to obtain further information. Discrimination in recruitment or promotion matters depend on the suitability and protected characteristics of other employees within the pool, and the questionnaire procedure is an important process to enable relevant information to be obtained. GMB believes that there is no evidence to suggest that this is a “fishing expedition” as put forward in the consultation.

GMB practice is for questionnaires to be sent before the expiry of the tribunal deadline to enable any response from the employer to be considered before commencing litigation. In other respects the procedure has supported the member and such cases have been pursued to a tribunal. The questionnaire is useful in that it can help clarify the issues and establish the evidence before any hearing, thus encouraging the prospect of settlement.

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?

GMB strongly disagrees.

As the consultation paper indicates the purpose of the procedure is to encourage settlements and/or to encourage efficiency of the claims process for those cases that do proceed. GMB believes that the procedure achieves both objectives. GMB believes that this is in line with the legislation which is to produce a procedure which claimants can use to help them decide whether or not to pursue a claim.

Claimants do not have any other formal procedure, short of litigation, to understand the reasons for an employer's actions in a situation where they believe they have been treated unfairly. It has long been recognised that by its very nature it is difficult for a claimant to prove discrimination. The employer will usually hold information that is not available to the employee. It is easier for witnesses to refer to factual data and for a tribunal to consider information that has been compiled for a specific purpose.

GMB notes that the Impact Assessment suggests that employers are being asked to respond to meritless questionnaires submitted on the "off-chance". GMB believes that there is no evidence to support this and notes that the paper itself seems to suggest that only a small number of tribunal claims have a questionnaire. In our experience questionnaires are submitted in good faith and where genuine concerns arise.

The questionnaire procedure allows an employer to save on resources by comparison with having to deal with the costs of defending a case in litigation. A full response at an early stage provides benefits for all concerned.

GMB notes the questionnaire form already accepts that irrelevant questions do not need to be answered, and, of course, employers are able to resist answering such questions if they are unduly time consuming to respond to. In such a situation a tribunal is unlikely to draw an adverse inference against an employer.

The consultation paper appears to suggest that employees would be able to ask questions to obtain information, but this ignores the advantages of the standard approach set out in the existing procedure. All parties can see how issues are raised in a formal and consistent way, can treat the questions seriously, and in a concise manner.

In the litigation process itself the courts have repeatedly referred to the importance of the questionnaire procedure. Two examples where this has arisen are the cases of *Igen v Wong* in the Court of Appeal 2005 IRLR 258 and in *Madarassy v Nomura International* also in the court of appeal 2007 EWCA Civ 33.

Impact Assessments

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?

Yes, we think there are further costs to include

On the subject of wider recommendations, the Impact Assessment indicates that the number of cases affected is likely to be low, and that there is evidence of “follow on cases” suggesting that some of these may be avoided by allowing tribunals to make wider recommendations. Both of these factors undermine the argument that repeal will benefit either employers or the tribunals.

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?

No, we think all benefits have been included (but GMB does not accept that there are any benefits in repeal)

Question 19

Please use the space below to provide any comments you have on the assumptions approach or estimates we have used in the wider recommendations provision impact assessment (e.g. do you agree with the estimates, assumptions/approach, such as our assumptions that employers may settle a case in order to avoid a wider recommendation; or that wider recommendations would avoid a future case against the same employer for the same discriminatory practice; or the likelihood of wider recommendations being used in the future? Or are there any estimates or assumptions we have missed out which you think should be included)

GMB does not believe that there are any benefits in repeal

Question 20

In your view, does the impact assessment for the wider recommendation provision accurately assess what the implications for equality is?

No.

As indicated above GMB believes that there will be a detrimental impact on equality in the workplace.

Obtaining information provisions

Question 21

Do you think that there are further costs to repealing the obtaining information provisions which have not already been included in the impact assessment?

Yes, we think that there are further costs to include

GMB believes that the questionnaire procedure benefits all parties including employers. The employee can judge whether they should pursue a case. In some instances cases are not pursued and in others there is a significant saving in time and costs in terms of further preparation and time in a hearing.

Question 22

Do you think that there are further benefits to repealing the obtaining information provisions which have not already been included in the impact assessment?

No, we think all benefits have been included

Question 23

Please use the space below to provide any comments you have on the assumptions, approach or estimates we have used in the obtaining information provisions impact assessment (e.g. do you agree with the estimates, assumptions/approach? Are there any we have missed out? Can you identify any benefits to individual claimants in using the forms?

GMB does not believe that there are any benefits to repeal.

Question 24

Does the impact assessment for obtaining information provisions accurately assess what the implications for equality is?

No

As indicated above GMB believes that there will be a detrimental impact on equality in the workplace.

GMB

National Office Legal Department

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