

***Equality Bill:
Assessing the impact of a
multiple discrimination provision***

A response by the University and College Union

June 2009

The University and College Union represents about 118,000 lecturers and academic related staff in higher and further education. Our members are employed in a wide range of institutions from "old universities" to prisons and adult education colleges.

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.

We agree that a prudent Claimant may well decide to issue a multiple grounds discrimination claim alongside two single ground discrimination claims. However, we do not share the view that there may be a 10% increase in the number of cases following the introduction of multiple discrimination. In our experience, where a claimant considers they have suffered discrimination resulting from a combination of protected characteristics they are likely to issue proceedings on the basis that they will succeed on at least one of the grounds.

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?

We would agree that it would be no more onerous to identify a comparator in a multiple discrimination case, and in many cases the Claimant will be able to identify readily the person whom they consider had received more favourable treatment. Indeed, having to identify only one comparator rather than two may make the process easier. The consultation document suggests a problem may arise in smaller workplaces, but we believe that the ability to formulate a hypothetical comparator will resolve any issues arising from the size of the workplace.

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.

Yes. It is difficult to envisage circumstances where the employer would need to take any additional measures.

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. We agree that claims including a multiple discrimination claim will not appreciably add to litigation costs. However, we do not agree with the proposal that there should be no provision for aggravated damages; we see no reason why multiple discrimination claims should be subject to a different regime when it comes to the assessment of damages. The analysis we would apply is that a claim of multiple discrimination is a separate wrong and should be compensated accordingly.¹ Consequently, the overall costs to employers might be increased in terms of potential compensation awards.

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?

Yes, but we do not consider that being able to identify such an individual with the same protected characteristics who has received different, i.e. more favourable treatment, than the claimant is the correct way to approach such claims. The issue for the tribunal in direct discrimination is whether the treatment complained of was done because of the claimant's protected characteristics. Accordingly, it is the evidence about why the treatment took place which the employer leads, and not facile comparisons which the tribunal must focus

on. Therefore, we do not believe that the size of the employer's workforce will be a significant factor.

Question G:

To what extent does your business or organisation demonstrate good practice in making sure you can point to the non discriminatory reasons for the decisions your business or organisation makes?

UCU endeavours to record decision making at all appropriate times. Staff are trained to apply objective reasons for making decisions and to record them.

Question H:

Do you consider there would be any other costs involved in defending a claim of multiple discrimination which we have not addressed in these questions? Can you please describe what these costs might be?

No.

Question I:

What would guidance need to cover to ensure that businesses and organisations are clear about what they do and do not need to do? What do you consider to be the best way to communicate this guidance? Where would you normally go for guidance on discrimination law?

We consider that in any guidance or Codes of Practice provided by government, ACAS or the EHRC examples of real world multiple discrimination should be included. We were not impressed by the example cited on page 13 of the consultative document which appeared to be a most unlikely scenario. We also consider that a general principle in providing guidance in these sensitive areas is that emphasis should be placed on the positive aspects of valuing all people regardless of their personal characteristics, rather than proposing measures to be seen a defensive. It would be good, for example, if guidance could include testimonies from employers and employees on how employees with one or more protected characteristic has brought benefits to the workplace, rather than a costs burden.

We would normally turn to guidance from BERR, ACAS, the EHRC, relevant statutory Codes of Practice, and sources of best practice found on the internet or previously known to us. Sadly, we record that the ever increasing legalisation of discrimination by lawyers and the courts/tribunals makes it more and more difficult for workers or their employers to feel that they understand their rights and obligations. This incessant development by case law is to be regretted and provides workers and employers with real issues in terms of being

able to know whether they have a good claim/defence, or staying up to date generally. Consequently, any guidance must be dynamic and not static.

Question J:

Do you think our estimation of up to two hours for familiarisation time is correct? If not, how much time do you think would be needed to familiarise your business or organisation with this provision? Can you please describe the size of your business or organisation?

We do not view the introduction of multiple discrimination claims as requiring any significant additional familiarisation time since all employers ought reasonably to be expected have familiarised themselves with their obligation to treat their employees equally. We certainly do not see a case being made out that implementation should be delayed until 2011

Question K:

We think that the large majority of people who have experienced multiple discrimination are already bringing cases relying on single strand claims and if a provision for multiple discrimination were introduced, that approximately 7.5% of the existing caseload would include a claim for multiple discrimination. From your business or organisation's perspective, do you agree with this conclusion? If not, please explain why.

We do not feel able to comment on figures in the absence of any data available to us, this other than to say that in our experience with providing support to our members it is not unusual for the claimant member to have more than one protected characteristic.

Question L:

Were protection from multiple discrimination to be introduced, we estimate that there would be a 10% increase in the number of cases brought. From your business or organisation's perspective, would you agree with this conclusion? If not, please explain why.

We have addressed this above, see reply to question A.

Question M:

We conclude that there is likely to be a 20% increase in the number of cases that include a multiple discrimination claim which businesses or organisations choose to settle. From your business or organisation's perspective, would you agree with this conclusion? If not, please explain why.

Again, we feel unable to contribute a comment in the absence of any data available to us.

Question N:

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

We are slightly troubled by the premise in this question which suggests that there is, or might be, a real issue to address in terms of unmeritorious claims. We would suggest that, whilst there are claims which are brought which are shown to have been without merit, it is more likely that these number far fewer than the very many meritorious cases which are not brought because of the worker's inability (through no fault of their own) to be aware of or understand their rights, or have the resources to bring a claim in the face of an employer with substantial resources assisted by lawyers. As a union, we will never support a claim which we do not consider has merits, though we always recognise that ultimately it is only at a full hearing where all the evidence can be examined that the merits of the case can be fully understood.

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 have addressed this above in reply to question I.

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.

We do not consider a multiple discrimination provision would affect the advice and representation we offer members since we would already provide support in meritorious claims of single discrimination.

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.

No.

Question R:

What benefits could the proposed provision have for you or your organisation?

N/A

Question S:

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

We do not understand the apparent reservations which the government has which have led to this proposal containing significant differences from single strand discrimination. We believe that such differences are more likely to lead to confusion and a proliferation in case law. Irrespective of whether there was evidence presented in the consultation that there was no need for the provision to include indirect discrimination², the scope for raising such claims should not be excluded.

¹ We would rely in this submission on the analysis of the EAT in *Jumard v Clwyd Leisure Ltd* [2008] IRLR 345.

² Paragraph 4.6 of the consultative document refers.