

Employment Relations Matters

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The CEHR and the challenge ahead

In this issue of Acas' *Employment Relations Matters*

- CEHR and the challenges ahead
- Human rights, the CEHR, and employment relations
- New age legislation.

Employment Relations Matters appears every quarter and is distributed free of charge by post and email. Copies can also be downloaded from www.acas.org.uk. Further reading will be suggested where appropriate, but there will be no notes or references.

Features will mostly be written by members of Acas' Strategy Unit or other Acas colleagues. From time to time, however, they may be especially commissioned externally, as in the case with the first feature in this issue.

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The following article was written by Sarah Veale, Head of the Equality and Employment Rights Department at the TUC and member of the Acas Council.

In October 2003, the government announced its intention to establish a single equality commission. Two a half years on and the Commission for Equality and Human Rights (CEHR) looks set to begin its work in 2007. But what impact will a joint commission have on the day to day lives of employers and employees? Will it improve compliance with equality legislation and embed greater consciousness of equality and diversity than its single predecessors did?

Concerns

A considerable degree of scepticism accompanied the proposal for an integrated commission. The trade union side, for their part, were worried that it was being established before the promised review of discrimination legislation. There were also concerns that integration would lead to:

- an overall reduction in public funding
- less access to assistance for individuals in pursuing discrimination claims in the courts
- less support for organisations such as trade unions in tackling discrimination in the workplace, and

- the potential for the human rights remit to dominate the work of the new commission.

There also remains the question of why the CEHR will have no specific remit in relation to caring responsibilities – an issue affecting a growing proportion of the workforce today. Nor will it have powers to take representative actions on behalf of a group of individuals in respect of unlawful practices.

Take for example, a group of women all adversely affected by a discriminatory pay system in exactly the same way. Under the current system, each woman has to log an individual claim at the employment tribunal. In the *Preston v Wolverhampton NHS Trust* cases, lodged in 1995 (still running), around 140,000 individual claims on behalf of part-time workers had to be submitted to tribunal although the cases all involved the same legal points. The employer then has to respond to each on an individual basis. This is tough on the individual employee, who will usually still be employed by the employer and will fear that her relationship with that employer will be damaged. It is also a considerable administrative burden for the employer. It would be far easier if a trade union, for example, could put

forward a representative claim. The outcome of the claim would apply to all those on that grade, or all those named in an attachment to the application.

Encouragement versus enforcement

The CEHR is faced with a difficult balancing act. It has the potential to be a body that will drive better practice in the workplace and in society more generally, sometimes using the law as a means of achieving this. Employers, however, appear to view the commission's role as one of encouragement and support rather than enforcement.

Although these two views are by no means mutually exclusive in principle, in practice there will inevitably be tensions between these two roles. For example, the commission might find that too few women are achieving senior positions in a particular industry. It could address this problem by encouraging employers to examine their systems of recruitment and staff development. However, if there is no detectable change after a specified period, the CEHR may have to use its statutory powers to investigate and/or support an individual sex discrimination claim. The new commissioners will have to work very hard in the early years of the new body to reconcile these approaches if it is to be effective.

Employers have said that they are wary of seeking assistance or guidance from the three existing equality commissions for fear of exposing practices that trigger an obligation on the part of the commissions to take remedial action under their investigatory or enforcement powers. It is likely that these reservations will continue, as the new body will inherit investigatory and

enforcement powers from the existing bodies under current discrimination legislation. Judging by the approaches to Acas from employers (and employees) seeking "without prejudice" advice on equality/discrimination issues, there will remain a clear role for Acas in offering "soft" advice and guidance to employers and employees. It would be advisable over the coming months for Acas to reassure stakeholders that it remains an advisory body, and that in any partnership with the CEHR its role will remain distinct.

Conflicts and tensions

Further challenges will result from the very nature of discrimination – it takes place in different ways and by different means in the different 'strands'. The common ground is that discrimination is unacceptable and can be tackled in broadly the same way, hence the establishment of one single commission. In addition, an employee or employer will be able to approach the same source for advice on different discrimination grounds and both can be tackled simultaneously.

A disabled woman, for example, could be doubly discriminated against on grounds of her gender and on grounds of her disability. She could be refused promotion because it would involve moving her to another site where there were no disabled toilet facilities and because her employer did not want a part-time worker in a senior position. She could now go to the same source for advice on both. Indeed, while dealing with one issue, the CEHR may uncover the second form of discrimination, which the woman may not have thought constituted different treatment.

However, within that unity of purpose and function, there will have to be room for manoeuvre to accommodate the different manifestations of discrimination and, in particular, the tensions that exist between different groups. Disabled workers, for example, may need physical adjustments to be made so that they can work for a particular employer in a particular job, whereas for black and ethnic minority workers it may be a question of tackling skills needs resulting from inequalities at an earlier stage in their lives.

Those with strongly held religious beliefs may feel unable to work with lesbian, gay, bisexual or transgendered workers and vice versa; the commission will have to guide employers and unions through these differing needs and tensions.

Here lies a clear role for Acas. The CEHR will need to provide interpretations of the legislation and basic guidance on how it might best be applied. It will be for Acas to work with employers to help them embed systems of management that will promote a positive approach to diversity and avoid the pitfalls of potential litigation.

It is never enough for employers to construct employment relations systems that simply seek to avoid litigation. They need to be encouraged to embrace diversity and review their current arrangements, with expert advice where necessary, to create a positively welcoming and inclusive working environment.

Mission statements and company policies are important but simply stating that the organisation is an equal opportunities employer is not good enough if, in practice, no black or minority ethnic women

ever get beyond administrative roles. It is not good for business either.

The forthcoming Discrimination Law Review will also seek to ensure that the different statutes in the proposed single equality act, are, as far as possible, 'joined up'. For example, one universal definition of indirect discrimination across the statute would make the concept easier to understand. It may be that the new legislation will seek to promote alternative dispute resolution. Again, this will provide an ideal opportunity for joint work between Acas and the CEHR.

Conciliation

The Equality Act, which establishes the commission, empowers the CEHR to make available, via a third party provider, an out of court dispute resolution service to deal with certain unlawful acts of discrimination or harassment. This power will be limited to those areas of the anti-discrimination legislation where Acas does not already provide conciliation.

Formal conciliation services for individual cases will not be extended to human rights matters except where those are combined with discrimination issues. The CEHR will be able to administer the service and retain discretion as to which disputes should be referred, but the provisions of the act will preclude any commissioner or CEHR employee from acting as the conciliator.

Although Acas already has a duty to offer conciliation in many areas of anti-discrimination legislation, the powers given to the CEHR could offer Acas an opportunity to

extend its remit. This could only be done within the parameters of the Trade Union and Labour Relations Consolidation Act 1992, which sets out the legal powers and responsibilities of Acas. Broadly, it would restrict Acas to employment related work. However, this would not necessarily preclude conciliation, for example, on the goods and services provisions in anti-discrimination legislation where they had an impact on employment relations.

So, there are obvious ways in which Acas and the CEHR can work together and complement one another's work, whilst maintaining their distinct and separate roles. This is important because there will only be greater compliance and greater consciousness of the integrated approach to diversity and equality if the new commission has the ability to gain the trust of both employers and employees, and can look to non-confrontational means of achieving change.

A new approach

There are those that may question whether the CEHR will bring about fundamental change, or whether it is merely a body created for administrative convenience and a way of keeping costs down.

These might be valid concerns if the new body was to be established in isolation. But the CEHR is being set up with a new unified legislative framework coming into effect and in the context of a major government review of equalities in the UK. There is considerable political will behind the CEHR that will enable it to do what the existing commissions cannot: that is, promote diversity in the round in all its complexity, while

retaining expertise on each strand. It will not, and cannot, be simply an enforcement body. It will have a key role in driving change in the workplace and elsewhere by persuasion and supportive intervention. It will both lead and reflect public opinion on diversity.

Commission for Equality and Human Rights

- The Equality Act 2006 creates the new single equalities commission
- The CEHR will bring together the work of the Equal Opportunities Commission, and the Disability Rights Commission, and the Commission for Racial Equality, CRE (although the CRE will not join until 2009.)
- In addition, the new commission will also cover age, sexual orientation and religion and belief, and be responsible for the promotion and protection of human rights, providing institutional support for the Human Rights Act.

Odd bedfellows? Human rights, equality and employment relations

The Human Rights Act 1998 (HRA), will at last find an institutional home when the Commission for Equality and Human Rights (CEHR) is set up in 2007. There was considerable debate about whether to combine responsibility for human rights and equality under one roof. But are they such odd bedfellows? Or does the inclusion of human rights mean that the CEHR will be able to deliver greater equality and fairness than that currently provided for by anti-discrimination legislation?

One of the primary advantages of including human rights is that there will be an ethical framework that embraces the entirety of the commission's powers and duties. Human rights will bind the equality strands together and will mean that in all its work the CEHR will be able to address broad questions of dignity, respect and equality.

Human rights are often misconstrued as individual rights that can be claimed, sometimes at the expense of the wider society. In fact, the Human Rights Act recognises that individual rights need to be balanced with the rights of others and the needs of society as a whole. Many of the rights in the Act can be limited as is 'necessary and proportionate', to protect the rights of others or the interests of the community.

The aim of the CEHR is to create an equal and fair society. Everything it does must encourage and support the development of a society in which (among other things): people's ability to achieve their potential is not limited by prejudice and discrimination; there is respect for the dignity and worth of each individual; and, each individual has an opportunity to participate in society. In order to achieve this

vision, it is not enough to not discriminate against someone. Neither is it enough not to be treated worse than other people. Everyone needs to be treated with dignity and respect.

The essential difference between human rights law and discrimination law is that discrimination law focuses on removing certain obstacles to equality whereas human rights law seeks to ensure certain outcomes, such as fair and dignified treatment and participation in social and community life.

Human rights duties

The CEHR will have a range of responsibilities in relation to human rights including the duty to:

- promote understanding of the importance of human rights
- encourage good practice in relation to human rights, and
- encourage public authorities to comply with section 6 of the HRA that makes it unlawful for a public authority to act in a way which is incompatible with a right under the European Convention on Human Rights (ECHR), which the HRA has incorporated into UK law.

The CEHR cannot, however, assist individuals in stand-alone human rights cases although it will be able to assist in discrimination cases, including those with a human rights element. If the discrimination element of a case falls away the CEHR can refer the matter to the Secretary of State who may allow the CEHR's assistance of the case to continue. The decision not to include a power

to support stand-alone human rights cases was partly political and partly due to the anxiety that the commission would be swamped with cases that would distract from its other powers and duties.

The limitation of this particular power in relation to human rights might suggest that human rights are a less important area for the CEHR than equality. In fact, the limitations of this power are in a sense a 'red herring' because in many ways the human rights duties of the CEHR impact in a very fundamental way not only on the interpretation of anti-discrimination law but in all areas of employment law.

There are three main ways in which human rights in the context of the CEHR are relevant in the employment sphere:

- in relation to the duty to promote human rights, including compliance by public authorities
- in relation to the compliance powers of the CEHR with regard to human rights, including advice giving, interventions and judicial review, and
- with regard to the good relations duty of the CEHR.

Public v private

Many people assume that the duty to promote awareness and understanding, and the protection of human rights, applies solely to public authorities, and even then not to employment law because there is no stand alone right to employment in the HRA. This can be misleading on both counts.

It is true that only full public bodies such as central and local

government, the police, prisons and immigration service are required to comply with the HRA in everything they do, including employment practice. It is also true that there is no right to work in the HRA. However, work is regulated by law and that law must comply with the HRA. The courts, therefore, must interpret it accordingly. But, although it is not possible to take a private employer to tribunal directly under the HRA and private bodies are not *directly* required to comply with the HRA, all courts including employment tribunals – as public bodies – must comply with the HRA in their interpretation of employment law. The CEHR duty to promote awareness and understanding will, therefore, involve a duty to dispel the myth that private bodies are exempt from human rights considerations.

How the courts approach the issue of compatibility between employment law and the HRA was spelled out in the 2004 case of *X v Y*, (*X v Y* [2005] IRLR 625). This approach will need to inform CEHR’s litigation and advice strategies.

X was dismissed by his private employer after receiving a caution from the police for having consensual sex with another man in a public toilet. Having lost his claim for unfair dismissal at the employment tribunal and employment appeal tribunal, X went to the court of appeal to claim that the tribunal had not interpreted the Employment Rights Act (ERA) so as to be compatible with his rights under of section 3 of the HRA. Section 3 requires the courts to interpret all legislation compatibly with ECHR rights ‘so far as it is possible to do so’.

The court, however, upheld the tribunal’s decision that he was fairly dismissed. This was because the activity leading to

his dismissal had taken place in public so the right to respect for private life (Article 8 ECHR) was not engaged. However, the court also made the following points:

- Section 3 of the HRA applies to all areas of legislation including employment law, and the rules of procedure in employment tribunal regulations
- Section 3 draws no distinction between legislation governing public authorities and legislation governing private individuals, and
- the employment tribunal is a public authority and, therefore, in the case of a claim against a private employer, it is under a strong obligation to interpret all rights compatibly with ECHR rights.

Duty to promote good relations

The CEHR has a duty to promote good relations among different groups and between groups and wider society. This will involve various strategies and techniques, including using human rights principles to address conflicts and tensions in the workplace.

Although some rights are absolute in international human rights law, such as the right to be free from torture, in reality the human rights framework is largely a means for addressing tensions and conflicts between individuals and groups or between individuals and groups and the wider society. With the rise in individual rights, particularly under anti-discrimination legislation, human rights law may provide a important framework within which to make decisions where competing rights create conflict.

An apt illustration of how this might be brought to bear is an employment case brought in Northern Ireland. In *Re Parsons*, a Protestant applicant to the Police Service of Northern Ireland was rejected because of positive discrimination brought in to ensure that the police force became equally represented by Protestants and Catholics. The court found against him on the grounds that the policy was necessary and proportionate for the social good, and this supplanted the right to claim discrimination.

The human rights framework is important because the techniques engaged in addressing these types of legal questions are also intended to go beyond that of a decision making tool in an adversarial approach, to one that encourages mutuality and respect in all aspects of our lives including employment relations. Consider, for example, a situation where a number of employees simultaneously have an individual right to time off or the right to request flexible working. Conflicts may arise where the employer cannot accommodate all the requests without damaging customer services or the viability of the organisation. Working together using an alternative dispute resolution process such as mediation to generate options that meet everyone’s interests is likely to be a more effective approach to resolving many conflicts of this nature than attempting to resolve the conflict via the courts or tribunals.

The challenge for the CEHR is to raise awareness through public education work of people’s wider rights and responsibilities in the workplace, and to encourage a cultural shift that engages a more balanced approach to conflict resolution

on a daily basis. This has the potential to avoid an escalation of disputes that threaten a breakdown of employment relations that can only be resolved through litigation. If this message is not heard loud and clear there is a danger that human rights will be seen purely as an additional avenue of litigation to pursue rather than an agent for social change.

This article draws on a presentation given by Francesca Klug to Acas in October 2005, in addition to other sources. Francesca Klug is Professorial Research Fellow at the Centre for the Study of Human Rights, LSE.

Further reading

"Fairness for All"? An analysis of human rights powers in the White Paper on the proposed Commission for Equality and

Techniques used to address conflicts of rights under the human rights framework

- is a right engaged that is protected by human rights law?
- is a limitation on this right necessary to meet a social good, in particular those set down by human rights law which includes the rights of other individuals?
- is this limitation proportionate?
- does the limitation obliterate the essence of right engaged?

Human Rights, Francesca Klug and Claire O'Brien, Public Law, Winter 2004

The new Commission for Equality and Human Rights, Lord Lester and Kate Beattie, Public Law, Summer 2006.

Human Rights at Work, KD Ewing, Institute of Employment Rights, 2000

Joint submission of evidence to the Equalities Review by Francesca Klug, Helen Wildbore and the BIHR, available at http://www.lse.ac.uk/Depts/human-rights/index_documents.htm for more information on the human rights approach to equality.

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An age old problem

After a long and tortuous journey the Employment Equality (Age) Regulations have finally made it onto the statute books and will come into force in October 2006. Acas, who provided the guidance to accompany the regulations, has been receiving calls and delivering training over the past year to prepare workplaces for the implementation of the latest area of anti-discrimination law.

There remains, however, a lack of awareness of the fundamental impact that this new law will have on Britain's workplaces. A recent government survey found that only 20 per cent of workplaces were training or informing staff of one of the most important pieces of anti-discrimination legislation to be introduced in recent years.

To some extent this is unsurprising given the long and uncertain lead up to the introduction of the new legislation. There has been a considerable amount of haggling between the social partners over the detail, in particular around retirement age. But the challenges presented by the age regulations start far earlier than the point at which we expect to retire.

Stereotypes

As part of the consultation process to produce the guidance Acas ran a number of road shows across England, Scotland and Wales to raise awareness among employers of the forthcoming legislation and gain an understanding of employer concerns. It was clear that employers had spent time thinking about the issue. But, despite speaking to what were fairly informed audiences, we still came across some very

stereotypical assumptions.

At all the events Acas ran, employers perceived older workers as a problem and less able to perform well in their roles. When we asked, 'why?' the feedback focussed on stereotypical views, such as older people being less inventive, creative, motivated and driven.

Ageism remains an area unaffected by the stigma of other areas of discrimination. It is still deemed acceptable to openly discriminate in and out of the workplace. In the media, journalists often employ stereotypical language to describe both the old and the young. There is no doubt that this influences attitudes in the workplace, albeit unconsciously.

To a certain degree the way in which the new legislation is drafted does not challenge these deep-seated prejudices because employers can directly discriminate by providing objective justification of a given decision. The default retirement age also allows age discrimination at the age of 65, something no other piece of anti-discrimination legislation allows except under the Genuine Occupational Requirement.

Misconceptions

One of the most common misconceptions surrounding the regulations is the assumption that they are aimed purely at older workers. It also comes as a shock to employers when they learn about the impact on recruitment and job advertising. For example, what the regulations mean for employers advertising for graduates. As one adviser recounted: "I had one employer who talked about employing graduates and I said 'Well I

could apply for that' and he kind of looked horrified and said 'Yes, but I mean someone who has just become a graduate, not someone old like you'. Similar assumptions accompany employers' understanding of apprenticeships.

Employers need to ensure, for example, that graduate recruitment schemes are not limited to university 'milk rounds'. Instead, they need to use a broader strategy to capture a wide pool of applicants of differing ages.

Performance management

One of the main areas where stereotypical assumptions currently impact is around performance management of older workers. The experience of our advisers reveals an unwillingness to deal with poor performance in older workers. As one adviser commented: "They don't want to have to go through discipline and grievance procedures, they just want a quick fix, so they can get rid of them. The common perception is you don't do anything with poor performance where employees are approaching 65".

Calls to our helpline are often along the lines of "she's getting on a bit, can we not just get rid of her?". Although this attitude is not new, the view of several of our helpline staff was that there has been an increase in these types of calls. There appears to be a push from employers to rid themselves of older employees before new protection comes in later this year.

Selection criteria and age

Understanding the basic concepts surrounding the regulations is only the first

step. There are a number of areas that are causing concern in terms of implementation, particularly in relation to new rules governing selection criteria for recruitment and redundancy.

An issue repeatedly raised in relation to protection for younger workers is the cost of insurance, particularly for driving jobs. Many employers will only hire drivers over 21 because of the high cost of premiums for younger drivers. Under the new regulations, this form of discrimination will be difficult to justify at a tribunal in terms of cost. Employers therefore need to think carefully and ask whether, for example, they need all the sales people in a car dealership to be able to drive.

Conversely, some organisations are concerned that they will not be able to recruit younger workers to match the image of the company and for example, why they can't employ attractive young women if they are the target audience for their products. In time, the stereotype of 'young equals beautiful and dynamic' and 'old equals unattractive and spent' will disappear but it won't happen overnight.

On selection for redundancy, many employers are unwilling to stop using age as a criterion for LIFO (Last In First Out). Inevitably, younger workers are likely to have joined the organisation more recently and will therefore will be disproportionately affected by such a policy.

As one Acas adviser noted: "employers often want length of service to constitute 30-40 per cent of the criteria when selecting for redundancy. This approach is often supported by trade unions because their members tend to be older." However, as another senior Acas official pointed out: "most sensible employers stopped using length of service some time ago because of race and sex discrimination".

Right to request

The most contentious area of the new law was whether to implement a default retirement age. This was eventually introduced and has been set at 65. However, employees have the right to request to stay on, mirroring to a large extent the right to request flexible working available to those caring for younger children. Most calls from employees have been around this issue, but it is also something that employers have a keen eye on and which, as suggested earlier, may have accelerated employer action to dismiss workers approaching retirement age. In fact, it is a fairly weak entitlement from an employee point of view and, unlike the right to request flexible working, employers do not have to give a reason for refusing requests.

The default retirement age will be reviewed in 2011 but, until then, Acas advisers are predicting this as an area of future confusion and dispute.

Employers are unlikely to give reasons for refusing requests because they are not required to and because they might incriminate themselves by doing so. But not giving a reason is likely to cause anger and resentment among employees. It may also give rise to claims under other anti-discrimination law where employees suspect that they have been refused on the basis of disability, sex, race etc and there is an existing comparator.

There is unlikely to be a huge wave of employees demanding to stay on in the immediate future. Employees reaching pensionable age will have planned for their retirement and will not be seeking to work beyond it. But attitudes and expectations will change. We are living longer, spending more and retirement pensions are becoming less generous. If lack of pensions affordability drives down retirement income, more employees will be forced to work longer. Then, we will see mounting pressure for greater flexibility around retirement arrangements and removal of the default retirement age.

Acas Publications

- Guidance for employers: *Age and the workplace: Putting the Employment Equality (Age) Regulations 2006 into practice* and
- Guidance for individuals: *Age and the workplace.*