

# Research Paper

Addressing discrimination in the workplace on multiple grounds – the experience of trade union Equality Reps

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**September 2011**

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## KEY POINTS

This small-scale exploratory research aims to provide some insight into the complexities of dealing with discrimination on more than one ground through an examination of the experiences of trade union Equality Representatives (ERs), focusing primarily on two public services unions - UNISON and PCS. ERs are a new form of workplace rep, being piloted in some unions, with a remit to address equality in its broadest form, rather than having a focus on one form of discrimination in the way that, for example, branch women's or race equality officers have. ERs are therefore well placed to deal with members' individual and collective experiences of discrimination on any or multiple grounds. The research explored the forms of combined discrimination identified by ERs, and the measures taken to address this, both in terms of legal remedies and action in conjunction with employers. It found:

- Discrimination itself, but particularly multiple discrimination, can be difficult to identify and there can be confusion about the specific grounds upon which discrimination may be based because of the inter-relationships between race, gender, disability, age, sexual orientation and ethnicity;
- Persistent occupational and sectoral segregation means that clear examples or articulations of direct discrimination were not always obvious and that the identification of comparators is problematic;
- ERs identified a variety of combinations of grounds for possible discrimination in the workplace, including race and religion; age and sexual orientation; gender, age and disability; and sexual orientation and disability;
- The existence of a 'glass ceiling' in an organisation inevitably leads to combined discrimination, usually on the basis of gender and age, as older women are bunched at the top of pay scales as a result of failing to gain promotion;
- In this small study multiple discrimination was often addressed through broader employment rights (e.g. unfair dismissal) rather than discrimination law, or through pursuing cases of multiple discrimination using one strand of discrimination legislation;
- Disability appeared to be a prevalent feature of multiple discriminations and this suggests firstly that bullying/harassment or unfavourable treatment on another ground may result in stress-related or psychological disability, and secondly that the declaration of a disability may provide more effective resolution of problems due to the strength of the disability provisions in the Equality Act 2010. The increasing stringency of sickness absence procedures appears to encourage this and furthermore changes in the default retirement age may exacerbate these cases;
- There are issues which interviewees experienced as multiple discrimination, but would not be within the definition proposed but not taken forward in the Act – namely protected grounds combined with migration status or trade union activity;

- Problems with the proposals for combined discrimination highlighted by ERs included the limitation to two grounds and the need for claimants to identify a comparator who does not share the characteristics on either of the specified grounds;
- These findings suggest that current models of anti-discrimination cannot adequately capture the complexity of intersectionality in a form that is compatible with current models of anti-discrimination law is low;
- This small-scale research indicates that multiple discrimination is often dealt with at an individual level when it is actually a collective issue reflecting wider policies and procedures. Therefore multiple discrimination in the public sector may be more effectively addressed by enforcing the Equality Duty and the effective use of Equality Impact Assessments;
- There was some evidence of employer reluctance to undertake Equality Impact Assessments. In addition, the restriction of positive and pre-emptive equality law to the public sector, together with the uncertainty surrounding the specific duties, combine to reduce the possibility of addressing multiple discrimination using the Impact Assessment route;
- The current context of threatened and actual significant job cuts which, are likely to exacerbate inequality, appear to be deflecting attention from equality issues at workplace level.

## **1. INTRODUCTION**

### **1.1 Aims of the project**

This small-scale research project commissioned by Acas examines the experiences of trade union Equality Representatives (ERs) in dealing with discrimination on more than one ground. ERs are a recent form of workplace rep with a remit to address equality in its broadest form, rather than having a focus on one form of discrimination in the way that, for example, branch women's or race equality officers have. ERs are therefore well placed to deal with members' individual and collective experiences of discrimination on any or multiple grounds.

The study focuses primarily on two public services unions - UNISON and PCS - drawing on contacts with ERs developed through previous research carried out by Working Lives Research Institute (WLRI). The research sought ERs' views on their experience of both identifying and dealing with discrimination on multiple grounds. It took place between January and March 2011. Prior to the Equality Act 2010 there were no provisions for claimants to bring cases of combined discrimination. The Act did make some attempts to provide a legal remedy. However the provision was subject to secondary legislation and at the time of the start of this research there was uncertainty over whether this would be introduced. On 23 March, however, it was announced in the 2011 Budget in the document 'The Plan for Growth' (HM Treasury 2011: 23) that the government would not bring this part of the Act into force.

The research therefore offers a timely small-scale scoping study identifying some key issues surrounding multiple discrimination and approaches to representing workers who experience it, and to suggest where further research could be fruitfully undertaken.

The research addresses the following questions:

- How do Equality Representatives (ERs) identify and deal with combined discrimination in the workplace and what forms does such discrimination take?
- How have ERs attempted to address combined discrimination cases with the employer and how have employers responded?
- Would legislation that allows for cases of combined discrimination help

### **1.2 Structure of the report**

The report first sets out the legal framework in relation to multiple discrimination, then examines the theoretical background to the concepts of intersectionality and multiple discrimination and considers how these fit with current conceptions of the law. The role of the new union rep, the Equality Representative, is then briefly outlined, highlighting key points from previous research. The research methodology, together with difficulties in reaching respondents, is then described.

The findings of the research are presented in relation to the research questions given above. Additional themes that emerged during the course of the research are also discussed, including areas of potential combined discrimination that go beyond discrimination law as currently framed; the potential use of proactive or collective remedies to address multiple forms of discrimination; and the possible impact of the public sector spending cuts.



## 2. BACKGROUND TO THE RESEARCH

### 2.1 Multiple discrimination: the legal framework

The consultation on the Equality Bill recognised that discrimination law, as it stands, may be preventing people who belong to more than one protected group and who may suffer more than one form of discrimination from gaining adequate legal redress (DLR, 2007). These considerations were also behind the formation of the Equality and Human Rights Commission (EHRC) from the previous separate equality bodies covering race, gender and disability. The Government Equalities Office published a discussion document in April 2009 "*Equality Bill: Assessing the impact of a multiple discrimination provision*" in which the proposals for including multiple discrimination in the Equality Bill were detailed. Section 3.4 outlines the differences between single strand discrimination, additive discrimination and intersectional discrimination and states that it is intersectional discrimination that the new law would have addressed. The definition of intersectional discrimination is as follows:

"...when the discrimination involves more than one protected characteristic and it is the unique combination of characteristics that results in discrimination, in such a way that they are completely inseparable. This often occurs as a result of stereotyped attitudes or prejudice relating to particular combinations of the protected characteristics. This is known as *intersectional* multiple discrimination and the current discrimination law framework does not always provide a remedy for it." (GEO, 2009: 11)

Chapter 4 of the discussion document detailed the proposals for including multiple discrimination in the Equality Bill. The provision proposed to allow claimants to make claims on no more than two grounds of discrimination from a list of seven protected characteristics – age, disability, gender re-assignment, race, religion or belief, sex, sexual orientation. The protected grounds of pregnancy, maternity, marriage or civil partnership were omitted from this provision. The provision was limited to claims of direct discrimination only. Section 4.7 of the discussion document provided details of how the provision could work in practice:

"In a multiple discrimination case, the same legal test would apply as in single strand direct discrimination claims. Therefore, for a claim to be successful, the claimant must be able to demonstrate that less favourable treatment occurred *because of* the combination of characteristics alleged. It must also be the case that the treatment the person experienced is prohibited for each protected characteristic individually, but it won't be necessary for a claim in relation to each characteristic included in the combination to be successful if brought separately. For example, if a person claims that they were discriminated against because of a combination of disability and sex, the allegedly less favourable treatment they received would have to be prohibited in respect of each of the protected characteristics of disability and sex. The claimant must be able to demonstrate that the reason for the treatment was the combination of the protected characteristic of disability and sex together, but need not be able to succeed if the claims were brought as disability and sex discrimination separately." (GEO, 2009: 15)

The Equality Act was passed into law on the 8<sup>th</sup> April 2010. In the Equality Act 2010 multiple discrimination is referred to as “combined discrimination: dual characteristics” and is contained in Part 2, Chapter 2 s. 14. However the provision was subject to secondary legislation and it was announced in the 2011 Budget as part of the document ‘The Plan for Growth’ (HM Treasury 2011: 23) that the government would not bring this part of the Act into force.

However, other sections of the Equality Act may offer an alternative route to challenging multiple discrimination. Academics such as Squires (2008, 2009) and Fredman (2010, 2001) have argued that proactive duties are an important adjunct to individual rights based legislation for addressing discrimination. Conley (2008) particularly notes the use that trade unions could make of the equality duties. Conley and Page (2010) have highlighted the importance of the specific duty to produce equality impact assessments to the success of achieving the objectives of the Equality Duties. The amalgamation of the separate Equality Duties for race, disability and gender and the extension to cover the other protected characteristics contained in the Equality Act 2010 were motivated by desire to take a more intersectional approach to discrimination. It is therefore important to note that, at least in the public sector, the Equality Duty provisions in the Equality Act 2010 (Part 11 Ch1 s. 149-157) provide an important approach to addressing multiple forms of discrimination. This may be particularly important because under existing models of anti-discrimination a rights-based, static approach to intersectional discrimination could not be applied to many of the complex institutional forms of discrimination. The general Equality Duty comes into force on 5<sup>th</sup> April 2011. However the government has recently (17<sup>th</sup> March 2011) taken the decision to postpone the implementation of the specific duties, which significantly weakens the possibility of trade union representatives using the Equality Duty to challenge multiple discrimination.

## **2.2 Multiple discrimination and intersectionality: theoretical framework**

Multiple discrimination has emerged at the same time as the wider feminist sociological theory of intersectionality and may be located within this. Theories of intersectionality developed from the work of Black feminist thinkers, particularly Kimberlé Crenshaw (1989) who is generally credited with first using the term ‘intersectionality’ to highlight the ‘multidimensionality’ of the experience of marginalised subjects (Durbin and Conley, 2010). Crenshaw (1991) detailed how structural intersectionality, which places women of colour at the intersection of race and gender, makes their experience qualitatively different from that of white women. While primarily exploring intersections of gender and race, Crenshaw notes that the concept of intersectionality can be expanded to include other social divisions such as class, sexual orientation, religion, age and citizenship. Intersectionality thus provides a methodological and theoretical approach that conveys the multiple and simultaneous oppressions that individuals experience. It is argued that such oppressions cannot be abstracted, compartmentalised, rendered additive or hierarchical. As such it is important to find the connections between them and the ways in which society is structured and experienced through multiple forms of differentiation (Brah, 1996).

Equality Reps have emerged in the context of a broader shift from a focus on specific forms of discrimination to a more integrated concept of equality (Squires, 2009). This wider approach was manifest for instance in the formation of a single Equality and Human Rights Commission replacing the previous equality bodies, and, to some extent, by the introduction of the Equality Act 2010, incorporating all previous anti-discrimination legislation. Kantola and Nousiainen (2009) have asked how far we are witnessing the institutionalisation of intersectionality through such developments. However, they contend that there is a distinction between intersectionality and multiple discrimination, and that EU policies follow the latter approach, focusing on anti-discrimination policy as opposed to wider measures which can further equality, associated with intersectionality. This is because intersectionality is informed by 'the conjuncture of social structures' – the dynamic interaction of individual and institutional factors - and not the categories of identity which underpin 'human rights discourse' and anti-discrimination law and equality policies (2009: 462). Rather, they agree with Grabham et al (2009) that intersectional approaches 'explore the ways in which domination, subordination and subjects are constructed in particular locations and contexts'.

The limitations of a legal definition of multiple discrimination are also suggested by Moore (2009). Exploring the labour market experiences of older women she found that discrimination was bound up with gender, race and class and that all three categories had structured their lives, making it difficult to disentangle age from other categories. In particular, older women's working lives were shaped by occupational and sectoral segregation and this meant that clear examples or articulations of direct discrimination were not always obvious. Respondents questioned how far they were experiencing discrimination based upon her age or gender or both, whilst for black women, age was also racialized. In addition unfamiliarity with the concept and definition of discrimination on the grounds of age (because the regulations on age discrimination were not in force at the time of the research) meant that older women workers may not have had an accessible language in which to define their experiences or may have been reluctant to define themselves as 'older' and more likely to recognise racial and/or gender discrimination. When describing incidents from their earlier working lives, they often retrospectively reconstructed their identities in terms of political discourses around feminism and/or anti-racism. Moore concludes that addressing age discrimination requires a more complex approach to and understanding of the structural nature of disadvantage than can be offered by legislation alone, involving challenges to persistent occupational and sectoral segregation. For Squires (2009) the language of the single Equality Bill 'echoes popular perceptions of equality, which focus on the idea of equal opportunities, or protection from discrimination' (2009: p), 'a fairness approach to equality...structurally antithetical to developing a nuanced recognition of intersectionality'. Both she and Kantola and Nousiainen suggest how an integrated and institutionalised model of equality has entered the political discourse. Yet intersectionality theorists question the likelihood of adequately capturing its complexity in a form that is compatible with current models of anti-discrimination law. It will be argued below that other forms of discrimination in the workplace are often complex and difficult to disentangle from structural or institutional factors and complex, multiple forms of disadvantage were evident in the accounts of Equality Reps in the workplace.

### **2.3 The role of trade union Equality Reps**

Equality Representatives are a relatively new form of workplace rep, that the TUC believe are uniquely placed to promote fairness in the workplace. This is achieved in a number of ways: firstly by raising the equality agenda among fellow workers and their own unions, secondly by encouraging employers to make equality and diversity part of mainstream collective bargaining and thirdly by working with 'vulnerable workers' and trying to ensure that every worker receives fair treatment irrespective of gender, race, disability, religion, age, gender reassignment or sexual orientation (TUC 2009). The case for statutory rights for a new type of trade union workplace activist was made by the TUC in its submission to the Women and Work Commission in 2005. However the Commission did not accept the argument that they should have statutory rights to paid time off, facilities and training, but did recommend that financial resources be made available via the Union Modernisation Fund (UMF) to train and develop networks of ERs and that unions and employers voluntarily re-negotiate recognition agreements to provide time off and facilities for them (TUC 2009). The Labour Government made £1.5 million of UMF money available for pilot projects 'to help develop a union infrastructure to support the workplace activities of equality representatives – for example through training and development' (Equality Bill White Paper 'Framework for a Fairer Future'). Further attempts by the TUC to gain statutory rights for Equality Reps through the Equality Bill (now the Equality Act 2010) were also rejected by the Labour government.

In addition to the TUC Equality Reps project, which trained 400 ERs, seven equality rep projects were established in UNISON, Unite, the NUT, Prospect, PCS, GFTU/Connect and the TSSA (TUC, 2010). Both the 'Establishing Equalities Reps in UNISON' project and the PCS 'Equality Representatives' Training, Development & Support Programme', the subject of evaluations by WLRI (Moore, 2010; Moore and Wright, 2010), were funded as part of the second round of UMF projects and began in 2008. UNISON's project focused upon the establishment, training and development of Equality Representatives in UNISON as part of the union's Equality Strategy, as well as aiming to develop partnerships with employers to effectively fulfil their statutory duty to promote equality. The PCS project aimed to build capacity to support training and education for ERs and to improve the union's ability to respond to the needs of a diverse membership and labour market.

It has been argued that since the functions of Equality Reps (as well as Union Learning Representatives) do not involve collective bargaining and joint regulation 'the restricted nature of the roles they offer cannot be minimised or downplayed' (Daniels and McIlroy, 2009, p. 140). Unlike other unions UNISON made a decision that ERs should not take individual discrimination cases (unless they did so in their role as a shop steward), although they may provide support for members involved in cases. Similarly, in UNISON, initially at least, ERs were not seen as playing a role in bargaining or negotiating at a branch level, but their expertise would inform branch negotiating teams. The TUC argued that equality reps are much less effective at doing their jobs without legal rights to time off (TUC, 2010). But the ER position as a workplace rep focusing specifically on equality issues offers a distinctive perspective and function, and despite some limitations of the role, there is evidence of ERs having an impact in raising and dealing with equality issues with employers in the workplace and in contributing to a stronger and clearer equality agenda within the union (Moore, 2010; Moore and Wright, 2010; TUC, 2010).

## 2.4 Research methodology

In the first stage of the project a short screening survey was emailed to ERs from the WLRI database of ERs in UNISON and PCS, with the agreement of the unions. The survey asked basic information about their understanding and experience of multiple discrimination at work (see Appendix for questions), and was used to identify ERs to take part in more detailed qualitative research. The survey was sent to 37 PCS and 18 UNISON ERs, but almost a quarter were returned as no longer valid email addresses. In addition, therefore the PCS North West Region agreed to email all Branch Equality Officers in their region, and UNISON sent out details in their e-bulletin to equality reps and branch equality officers. The TUC also circulated the questions to their database of trained Equality Reps, as well as union legal officers. Finally, it was sent to the e-mail distribution list of members of the TUC's UnionReps network via the equality forum.

Although it was anticipated that the number of ERs with experience of multiple discrimination cases would be small, the routes did not achieve the intended 10-15 ERs to interview, so this was supplemented by interviews with other union reps and officers with experience of multiple discrimination cases identified in conversations with the ERs interviewed, or through contacts made in previous research on ERs. Twelve interviews were conducted in total, of whom seven were ERs, three were other union officers and two were union members referred to the researchers as possibly experiencing multiple discrimination. All were from public sector unions: PCS, UNISON and lecturers union the UCU.

The researchers believe that several factors contributed to the low response from ERs. The first is, as discussed below, the difficulty of identifying specific multiple discrimination cases, and possibly related to this is the restricted role of some ERs in individual casework (although the questions did specify that the research did not only concern legal cases, but also where issues of multiple discrimination had been addressed in the workplace). The fact that the UMF funding for ER projects had ended in both PCS and UNISON affected the currency of contacts and perhaps also the capacity of ERs to perform their role. Finally, there was some evidence that the widespread cuts facing public sector workers meant that many union reps and officers were engaged in the defence of members' jobs and had limited time to respond to research requests.

### **3. RESEARCH FINDINGS**

#### **3.1 Findings: The experience of multiple discrimination in the workplace**

The first research question concerned how Equality Representatives (ERs) identify and deal with combined discrimination in the workplace and the forms that such discrimination takes. This section first considers the role of ERs in identifying an equality dimension to workplace issues, then highlights the difficulties of identifying and proving discrimination, particularly where multiple forms may be occurring. Following this, evidence is presented of a variety of forms of multiple or intersecting discrimination dealt with by respondents.

##### ***3.1.1 Identifying multiple discrimination in the workplace***

Identifying the equality dimension of workplace issues was seen as one of the functions of ERs. A UNISON ER pointed out that there could be confusion as to whether issues were a result of specific discrimination or a function of the wider employment relation:

“Prior to now, we’ve had very little in the way of an understanding of “is this an equalities issue or is this just an employment issue? Is this an equality issue or is this an issue around sickness absence? Is this an issue around health and safety or is this an issue about equality? [...]” So there’s not been that separation out of what is intrinsically, at its basis, an equalities issue. Or what is essentially just an employment issue. So I think that once we start looking at cases with a bit more context, and start being a bit more braver about saying, “Yes, this is an equalities issue. Yes, we’re going to fight it on the equalities agenda”. I think that’s when we start, the learning curve really starts kicking in. I think that’s the same for most of our equality reps that we’ve recruited. I think their understanding of equality is fairly limited, but they would say that themselves.”

Related to this was the role of ERs in the promotion of collective issues, rather than just identifying individual grievances, since it was anticipated by the unions that issues would be generalised to become strategic matters to be tackled with employers. In the evaluation of the UNISON ER project one UNISON national officer saw this potential concern with policies and procedures as positive:

“I think the real bonus of the workplace equality reps is that they’re looking not at the representational point of view, but they are looking more holistically at policies and procedures ... so they’re tackling institutional discrimination with the employers, cooperatively, collaboratively ... So I think what’s emerging is a much more multidimensional view of equality and it being less compartmentalised.”

ERs highlighted the difficulties of both identifying and proving discrimination in general, and multiple discrimination in particular. A number talked about the difficulties of identifying discrimination, for one woman with a disability who had taken up the ER role:

“I thought it was an issue of discrimination but probably it was much more complicated than that, and on reflection I wish I had ... asked the union to

take it up... I wrestled on my own and really that was one of the reasons why I later decided that I would like to be a steward... I came away with a feeling of having had those bumps and bruises but actually I didn't want anybody to go through the same sort of thing, and I could use it positively - so it was a positive thing in the end."

Her activism on equality issues emerged from what was perceived as a generalised experience of injustice. In line with concepts of intersectionality, which capture the interplay of sexual orientation, disability, class, gender, race and ethnicity, workers may be unable to disentangle specific forms of discrimination, since one or more form of discrimination may be inextricably related and there may be confusion in identifying a determinant factor (Moore, 2009).

In one civil service workplace, the PCS ER (the respondent is a mixed heritage gay man in his 50s) felt that the target-oriented workplace culture that did not value people's different work styles or attributes resulted in difficulties gaining promotion for anyone who did not fit into the white, now female, norm of manager. He perceived that black women and men, older workers and gay staff did not have the same opportunities for promotion or reach management grades in the same numbers, although he noted that that the civil service has established a programme, *Realising Potential*, to support BME workers in gaining promotion in recognition of their under-representation. The ER perceived the organisation as having a:

"very hard management style that brought out the worst in people's discrimination. It grew very target and goal oriented, less towards recognising people's individual values to the organisation, and more towards recognising their specific skills in a way that I felt was discrimination in some way. It's difficult to define why.... I think because people in that situation tend to gravitate towards people similar to themselves, so if it had been majority middle-class white men, which it was at one time, then they tend to promote their colleagues or people that were the same as them or had the same attitude towards work."

Promotion required a period of acting-up into a senior role, but while these opportunities had previously been shared out among staff, in this department, only one member of staff was selected for this experience. Although this was felt to be unfair by several staff – mostly older or BME women - the ER initiated an ET claim himself to challenge this, feeling he had the best individual case. He took the case on the basis of gender, as this would provide a clear comparator, arguing that most recent promotions had gone to women, although he also believed that his ethnicity – the respondent was from a mixed heritage background - his gay sexuality or his age might also have been factors. While he was supported in this view by promotion figures for the department relating to gender and ethnicity, together with the experiences of his colleagues, he was aware that it would have been very difficult to prove these grounds. His claim resulted in a default favourable judgement as the employer failed to present any response. However, due to personal circumstances, he did not pursue the case to a full costs hearing. This case raises the question of whether a collective approach to addressing perceived inequalities in promotion procedures would be more appropriate (see below).

A UCU ER made the point that the presence of a 'glass ceiling' in an organisation would inevitably lead to combined discrimination, usually on the basis of gender and age, as older women bunched at the top of pay scales as a result of failing to gain promotion. The rep considered that statistics indicate women academics tended to bunch at the top of the grade underneath the first competitive senior 'promoted' grade. She argued that women lose out in the competition for promotion with male academics initially on the basis of gender but eventually also on the basis of both age and gender, as it became additionally difficult to gain promotion due to age.

### **3.1.2 Forms of multiple discrimination dealt with by ERs**

Interviews revealed a variety of intersecting forms of discrimination, combining most strands protected under the law, although disability cases combined with other grounds were most prevalent.

The UCU ER recounted a case in which a black, Muslim male academic who was widely published had not gained an expected promotion. While the ER believed it to be a case of combined race and religious discrimination, the member was reluctant to identify it in this way, and his highly qualified status meant that he was able to choose to leave the organisation for promotion rather than taking a case against the employer.

In one civil service workplace a PCS ER had defended a member in a case of combined sexual orientation and age discrimination. By chance they discovered that a manager had written derogatory comments in the personnel file of a young gay man, regarding his sexual orientation, dress sense and hair colour. The manager was known to have homophobic views.

"He's got an issue with this young person who's out in the workplace, quite flamboyant, but was very hard worker, just a young man who was celebrating life, basically. And this manager, for whatever reason had taken against him and targeted him. But he did it in a covert way. He didn't actually express it to the young man's face where he'd obviously have the right to reply and challenge. He was slipping it into the management file."

The member was very upset when he discovered that such negative comments had been written without his knowledge and which could affect other managers' perceptions of him and potentially his career prospects – he consequently took some time off sick. The ER filed an ET claim on the basis of injury to the employee's mental wellbeing (using Section 24 of the Employment Rights Act 1996, concerning health and safety) along with discrimination on the separate grounds of sexual orientation and age. This quickly brought the employer to the table and a settlement was reached. The ER believed that the use of an ET claim was effective in making the employer take the matter seriously and forcing them to take action against the manager, however she was disappointed that the issues of combined discrimination were not tested by the tribunal.



### **3.1.3 Combined disability discrimination**

In another civil service department the PCS had supported a case of sexual orientation and disability discrimination, which were felt to be inextricably linked:

“It started off as a colleague making homophobic comments which precipitated an illness which ultimately led to a dismissal. We started it off on the basis that there were no reasonable adjustments and they never tackled the discriminatory behaviour of the other member of staff.”

In this case, the disability – a stress-related, psychological condition – resulted directly from the experience of homophobic discrimination, in fact suffered by a transgender member. It is likely that other instances of bullying and harassment on protected grounds may result in similar negative health outcomes which may not be classed as a disability; in this case PCS felt that it was important that the underlying cause of the disability was recognized in order that it was remedied by the employer, as well as dealing with its effects upon the member.

Disability and age were found to combine in a case dealt with by a PCS ER in a government department, where a profoundly deaf member of staff wanted to continue in work after age 65. While this had been agreed for other non-disabled staff in certain circumstances, it was not being considered for him. He had previously won a settlement in an ET case over the employer’s failure to make reasonable adjustments. He believed that the reason he was not being allowed to stay on was due to his disability. The ER submitted an ET on grounds of disability and age, which again resulted in a quick resolution. The member received a settlement and stayed on at work for another year, until he left at 66 of his own choice. Such cases may increase under changes to public sector retirement policies resulting from the forthcoming abolition of the default retirement age, but under which employees have to prove their fitness to remain in post.

A UNISON ER working for a local authority had personal experience of discrimination on disability grounds that she felt highlighted issues for older women workers more widely. She had been refused adequate time off for hospital appointments for her diabetes, so, on the advice of the union, had declared herself disabled in order to get the time that she needed under the reasonable adjustment provisions of the legislation. But she also had a number of other routine health screenings to attend, and believed that some of these applied disproportionately to older women:

“Obviously as an older woman you have more screenings, breast screening, you only get certain screenings when you’re over a certain age. Men don’t have as many. I think they have one or two, but women do have more, and then if you’re a diabetic woman, then you have more again.”

While it is possible to debate the evidence about whether older women in fact have more health screenings (in addition to breast screening, it is suggested that cervical cancer screening is more frequent among some older women at risk), she also pointed out that older age and disability can combine to disadvantage those with medical needs, especially in the context of increasing stringency over sickness absence in the public sector noted by other interviewees (see below). She also pointed to a different impact of disability and younger age, resulting in non-disclosure of the disability:

“I think people when they are younger fear that if they declare themselves disabled it would impact on their career, and a lot of people don't want to do that.”

She gave examples of two younger staff members with conditions that they did not want to declare (asthma and limited vision), fearing it might have a negative impact on their careers.

The survey of ERs carried out as part of the PCS Equality Reps project (Moore and Wright, 2010) found that 40 per cent of ERs defined themselves as disabled and that problems under the sickness absence procedure was one of the most common issues dealt with by ERs. Along with the evidence presented above, this may suggest two factors related to multiple discrimination: one is that harassment or unfavourable treatment on another ground may result in stress-related or psychological disability and the other is that declaration of a disability may provide more effective resolution of problems (such as difficulty getting time off for medical appointments or protection from disciplinary action over sickness absence) due to the strength of the reasonable adjustment provisions in legislation.

### **3.1.4 Other non-protected grounds of discriminatory treatment**

ERs raised two other significant areas where they believed discrimination was taking place on multiple grounds, but which did not fall under the strict definitions of the anti-discrimination legislation. These concerned less favourable treatment because of their position as a union rep, combined with other protected grounds, and cases of migration status intersecting with race discrimination.

A PCS ER who returned to work part-time after childbirth was told by a manager that she would not be considered for promotion both because of her union role, and because she was a part-time worker and a “baby machine”. After she complained, action was taken against the manager for her discriminatory comments in relation to women with children who chose to work part-time. Pregnancy is not included as a protected strand for the combined discrimination provisions, therefore this case would not be eligible for consideration.

For a UNISON ER coming up to retirement age, her difficulties in getting time off for attending union courses was compounded by her age, with her manager taking the attitude that “oh well, she's retiring anyway, it's not really worth her bothering doing some of these courses” as justification to refuse. This was picked up in Moore's (2009) study of older women workers, along with their sense that in the context of restructuring they were not seen as the ‘ideal worker shape’ and that accumulated experience can give older women a perspective and confidence from which to provide a critique of change, represented by employers as resistance *per se* and something which is not welcomed.

The interrelation between race discrimination and differential treatment because of migration status was raised in interviews. One PCS ER was pursuing a tribunal case on behalf of a Nigerian member who had experienced harassment from managers while waiting to hear the decision of the UK Borders Agency concerning renewal of his visa. The ER said:

“Every single day he was being asked about his visa and he kept repeating himself and they kept saying ‘you're going to lose your job’, and he was

made to feel for the first time that the colour of his skin and also his nationality was a problem. He said he'd never felt that way and he's lived in this country for six years and his manager was behaving as if he'd done something wrong."

A further example was of a newly qualified nurse attempting to complete a 'preceptorship' to consolidate her training. However, her first preceptor or assessor gave up the role for no apparent reason and another was appointed who was then too busy to meet with her, delaying her qualification. She attributed this to discrimination on the grounds of race, since other 'white British' nurses had had no such difficulties completing the programme. She was originally a migrant worker who had qualified as a teacher in her country of origin and it was unclear whether this was a compounding factor in her treatment.

Migrants may face additional difficulties in relating to caring for relatives abroad. This was seen in the case of a cleaning supervisor working for a contractor who had applied three months in advance for extended leave to care for her sick father in the Caribbean, but had received no response from her line manager and was dismissed for gross misconduct after she had been forced to buy her air ticket and take the leave. The union was taking the case to an Employment Tribunal for unfair dismissal, although discrimination on the grounds of race was apparent, complicated by being a migrant with caring responsibilities (a disproportionately female role). At the same time she was the only member of staff who was still covered by TUPE regulations after being transferred from a local authority and entitled to longer leave entitlement than newer workers, confirming the difficulty of disentangling employment issues and discrimination.

### **3.2 Findings: Addressing multiple discrimination with employers in the workplace**

The second research question asked how ERs have attempted to address combined discrimination cases with the employer and how employers have responded. The section above shows how ERs, particularly in PCS, have successfully used ET applications as a way of getting the employer to discuss the issues of discrimination that they have raised. While this has often resulted in a settlement and perhaps workplace adjustments or changes in practice for the member concerned, it has not normally lead to the employer making changes that affect wider groups of staff that could also be disadvantaged by their practices.

Equality Impact Assessments, as part of the public sector equality duties, represent a route for addressing both multiple and collective issues of discrimination in the workplace (see above). However, several ERs had requested that their employers undertake Equality Impact Assessments on rules or procedures being applied by the organisation, but had been unsuccessful. The issue of restricting time off for medical appointments impacting more heavily on older women highlighted by the UNISON ER above, had been raised with management, who concluded prior to any assessment, that it did not impact more heavily on women.

A PCS ER reported that recent changes to the sickness absence procedure of her civil service department had resulted in a huge increase in casework for her, and

she believes that the new rules discriminate against workers with disabilities, pregnant workers and also older and female workers. She felt that in introducing the strict policy of targeting staff after five days absence or three absences amounting to more than five days in total, the employer had not taken “due regard” in terms of ensuring they had equality proofed the new rules and followed a fair procedure. She believed that it was “targeting the most vulnerable in the workplace” and furthermore she saw it as related to government cuts to public services (discussed below). The policy was also being applied uniformly, requiring for example, that everyone must pay time back for hospital appointments, including ante-natal appointments. The union was fighting this by putting in Employment Tribunals (ETs) straight away, and achieving settlements, as pregnancy-related discrimination is a clear breach of legislation. She said:

“But the employer seems to think that they’d rather pay the costs of employment tribunal compromise agreements rather than look at their policies and sort it out, because some people feel so aggrieved that they leave and others because they’re so vulnerable, don’t want to take action. So they’re sorting of balancing it up and hoping that people won’t take it forward. Drag it out and people throw the towel in.”

In the civil service department discussed above in which the PCS ER identified potential inequalities in relation to promotion opportunities based on a combination of gender, ethnicity, age and sexual orientation, one union response could have been to request an Equality Impact Assessment of the department’s promotion procedures. However, given the employer resistance to undertaking these reviews identified here, he may have had little success, which suggests a weakness in the law that could be used to address multiple forms of disadvantage.

In one local authority two ERs unsuccessfully attempted to secure an Equality Impact Assessment in the context of the relocation of work outside the city centre. They argued that this would disproportionately affect women and disabled workers, since it would entail ‘hot desking’ which may not provide adaptations for workers with disabilities. They further argued that, because there was reduced public transport particularly in the evenings, which could raise safety issues for women travelling alone if they did not have use of a car.

### **3.3 Findings: Using the law to address multiple discrimination**

The third research question addressed the issue of whether legislation allowing for cases of combined discrimination would help. Taking account of difficulties in using current law, the research was interested in how the anticipated combined discrimination provisions would help.

A UCU equality rep highlighted that discrimination in Higher Education was often unlikely to present itself as direct discrimination:

“Because of the type of people that you deal with on the employer’s side who are very articulate usually and who would never say directly it’s because of your skin or because of your sex. It’s very much more indirect and that fact is very much more difficult to prove in terms of the law and what kinds of evidence you need than direct discrimination. It makes it

difficult to get past those hurdles”.

The rep went on to state that, because of this, very few cases of multiple discrimination were likely to present themselves in higher education. As the proposals for combined discrimination in the Equality Act apply only to direct discrimination and not to indirect discrimination it is difficult to see how it will be effective.

A PCS Regional Secretary with experience of taking cases saw the law as a tool that they needed to use to fight discrimination, particularly where legal rights were unclear such as in the case of bullying:

“What we want is legislation to support good workplace practices and I think that’s what the role of tribunals is. It’s not an opportunity to litigate come what may, and that’s always been our position. But unfairness is unfairness, isn’t it? We have members routinely come to us saying I’ve been bullied at work, I want to take my employer to a tribunal, and they don’t understand that bullying per se is not unlawful. So the more opportunities that we have to find an equality hook upon which to file a claim, or a number of hooks to combine a claim, then we would welcome [that].”

In bullying or harassment cases it is often hard to pinpoint the precise cause or grounds for bullying (see also the case above of a young gay man who felt his age and sexual orientation were combined factors in his manager’s bullying comments), so combined discrimination provision could be useful in tackling this, as long as it amounted to direct discrimination.

A UNISON ER had taken discrimination cases that he believed were on multiple grounds, but had to choose the strongest ground:

“We have had cases, but the problem has been that you can only take them on one basis ....I can think of a situation. There was a black lesbian woman, one of our members, who felt that she was being discriminated against. Although it was quite obvious that it was racial, the motive, she also felt that because she was a lesbian she was also being discriminated against. But she couldn’t prove it and that was the difficulty. We could only go on what we had in terms of evidence. It was to do with bullying. It was to do with comments that had been made about her to other colleagues by her manager at the time. We did fight the case and we did get a retraction - the manager got disciplined in the end and put on a first warning. That’s as far as we could take it. We took it on race. It’s choosing the one which you are more likely to win on, that’s what you go for.”

He also felt that many members, or indeed “the person on the street”, did not really understand what multiple discrimination means.

For a UNISON national officer responsible for disabilities, even the unimplemented provisions for combined discrimination in the Equality Act were limited by its restriction to only two discriminatory factors:

“I think the intentions for the Bill are one thing, but what we are seeing in reality, because we believed we were promised some new legislation that

would bring everything together. It would provide levelling up [...] and it's not. What we know is that it will be looking at two characteristics only. So it will be looking at race and disability, or it will be looking at gender and sexuality. But it won't be looking at characteristics that straddle a number of areas, three or more. So older, - age related disability - a big issue [and] LGBT access to healthcare provisions, as preventative measures. We're not getting what we understood we would be getting."

Much of the experience of the representatives interviewed seemed to echo the points made in the literature that a simplistic legal approach to multiple discrimination would not capture the complexity of the problem. The UCU rep summed this up:

"How do you choose which strands? The reasoning given for just having two by the previous government is that it is easier for people to understand and that's not a good justification in anyone's mind. What? Are we too simple to take a case, too stupid to understand three strands? It doesn't make any sense because you can take a case on two strands and take a separate case on the third strand. So it doesn't solve the issue of simplicity. In fact it over-complicates things and of course makes them more expensive, which in my mind is part of the policy. To make it so expensive and complicated that people do not take cases."

She felt that the need for comparators still posed a problem:

"Comparator is the one thing that, if you are really trying to achieve a society without discrimination, then you get rid of comparators. There is no other way around it."

The rep explained that any requirement for a comparator was based on a conceptualisation of equality based on 'sameness' and that a more proactive approach would recognize difference in the same way that the disability legislation does with the requirements for 'reasonable adjustments'. She felt that finding a comparator often discouraged people from taking cases and, even if a comparator could be found, the concept of 'sameness' is subjective, stating that "employers can always find one more article that the comparator has published or teaching or admin that they have done and you haven't".

The UCU rep also identified that trade union structures and processes for gaining access to legal aid might discourage members from taking cases of multiple discrimination:

"Trade unions also play a part in disabling people taking cases in that in order to take a case based on discrimination you need to prove at least 53 per cent not 51 per cent that you have got a good case<sup>1</sup>. If not the union's solicitors will not be interested in taking it. In our union you have to get through the regional office. You cannot just ring up the solicitor even if you are representing someone. You have to go through the regional office and they have to be notified and then it might go to the solicitor but it could be stopped at region. So there are processes and

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<sup>1</sup> The likelihood of success that trade unions often require their solicitors to gauge before deciding to take on a case.

filters there that also discourage people from taking cases.”

The findings suggest, therefore, that the combined discrimination provisions, were they to be implemented, would still offer only a very limited route to redressing multiple discrimination in the workplace.

## **4. ADDITIONAL THEMES EMERGING FROM THE RESEARCH**

### **4.1 The impact of public sector cuts**

In undertaking the research it was clear that the public sector funding cuts contained in the 2010 emergency budget and comprehensive spending review were already significantly impacting on the work of trade unions and ERs:

“It’s a difficult time, so people are very reluctant to put their head above the parapet not realizing that there is no cover here!.. Everyone is in the firing line at the moment. They are not thinking about being discriminated against on the basis of sex, race, age, sexual orientation. They are thinking am I going to be made redundant or not.” (UCU Equality Rep)

As discussed above, one PCS ER believed that the recent changes to the sickness absence procedure of her civil service department were “targeting the most vulnerable in the workplace”, and saw this as directly related to government cuts to public services:

“We do believe they are bringing it in as a vehicle to dismiss staff, especially in view of the cuts agenda of the government.”

A similar view was expressed by a PCS Regional Officer who believed that redundancies would affect disabled workers and women adversely, suggesting that in some workplaces employers were making more redundancies than needed:

“in order to recruit new people with the type of attitudes and attributes which they think promote a better business environment in the workplace. And what they’re talking about is people that aren’t off sick very often, people that aren’t going to be absent from the workplace for family reasons and people who work regular working patterns who they know they’ll have where they want them to be at the appropriate time. And of course lots of that flies in the face of legislation which has, in many respects, not only allowed people to remain in work, but to consider coming back to work after childbirth, for example, or coming back to work on a part-time basis following an accident or a major illness.”

### **4.2 Structural issues in relation to the ER role**

This research sought to investigate how Equality Reps, with their particular workplace responsibility for drawing attention to equality issues - defined broadly - might have a role to play in tackling multiple forms of discrimination. However it found a number of concerns in relation to the ability of ERs to function effectively in their role.

One Unison ER had been attracted to the role because of her interest in equality issues, and a particular difficulty in knowing how to deal with a case of regular racist comments made by a colleague that was not being addressed by the manager. However she reported barriers to being effective in her role as she found it hard to get time off and to be taken seriously. So she then became a steward as well:



“I felt it was better being a steward. I felt I had more authority and I wasn’t reliant on the equalities officer. I could try and do more and bring things to the attention of the team as a steward. I felt as if I was taken a bit more seriously as well.”

The UNISON ER research similarly found that whilst there are examples where branches have negotiated dedicated time-off for ER’s to undertake their roles, the follow-up research suggests there has been limited progress. The vast majority of those participating in the research saw the absence of specific time off for ERs as a barrier. It is a particular issue for new ERs who do not hold another position in the union and needs to be addressed at branch, regional and national level. It also concluded that whilst the value of the ER is in the role they play in the workplace, this can mean that there is confusion between the ER and shop steward role, particularly in workplaces where there is no existing steward. It may also mean that the ER role may become an escalator to the shop steward role, which may lose dedicated ER capacity. Similarly in PCS whilst nearly a third (33 per cent) of BEO (Branch Equality Officer)/ERs said that they were covered by a formal agreement with time-off for BEO/ER duties, in many cases they were using the wider branch allocation or the facility time they received for another branch officer role. Another third either had no facility time or took time informally and the majority saw the absence of specific time-off as a barrier to their effectiveness and this is a particular issue for BEO/ERs who do not hold another position in the union.

A further issue raised by interviewees was the effect of the ending of support provided by the UMF-funded Equality Rep projects. Some felt that it was more difficult to effectively perform the ER role without support from a union-backed project that gave access to a network of support from other ERs and paid workers. There were also fears that the priority given to equality issues while the ER projects were running would be lost, making it harder to take up equality matters in the workplace.

## 5. CONCLUSIONS

This small-scale research project has highlighted the complexities of tackling issues of multiple discrimination, starting from the challenge of first seeing workplace issues as having an equality dimension and then identifying which forms of intersecting disadvantage may be addressed through existing law. It both indicated the hesitance of some to perceive themselves as experiencing discrimination and the difficulty in identifying unfair treatment as stemming from either particular or combined forms of unlawful discrimination. Further research could expand upon this preliminary finding in relation to combined discrimination, perhaps by in-depth case studies of specific cases supported by equality representatives and/or branch officers.

Multiple discrimination took a number of forms and combinations, but disability discrimination commonly coincided with other forms, for example sexual orientation, age and gender. In part this was a function of the stringent sickness absence policies being introduced in areas of the public sector that made it difficult for people to get time off for necessary medical appointments in the face of disciplinary action on the grounds of sickness absence. Additionally, discrimination can provoke stress-related conditions that result in a disability. The reasonable adjustment provisions of disability law provided a relatively successful route to a remedy, offering a proactive measure that does not rely on a comparator for proving discrimination. Further research on how reasonable adjustments are used in multiple discrimination cases would be useful to see how far this finding can be generalised.

The difficulties of proving discrimination were compounded in relation to combined or multiple discrimination – and the proposed legal requirement for a comparator who had *neither* of the protected characteristics of the claimant would have made proving discrimination very problematic. The individualistic approach of the remedies available under anti-discrimination law also does not address the concerns of ERs here who raised collective issues, for example in relation to promotion; health issues affecting older women; or the disproportionate impact of sickness absence policies on women, older workers and disabled workers. Furthermore, the implementation of such procedures were seen by some union reps and officers as part of an attempt to target vulnerable workers and reduce staff numbers to meet spending reductions.

ERs in the public sector were aware of the potential for addressing collective issues such as these through the provisions in the public sector equality duties for Equality Impact Assessments. However they had been less successful in persuading employers to undertake these reviews, suggesting a weakness in the implementation of this part of the equality legislation. Further research is required to assess how far changes in the specific duties will affect the ability of ERs to use the new equality duty. As the specific duties are already significantly stronger in Wales and likely to be stronger in Scotland, comparative regional research would also be particularly useful. In addition such remedies are not available in the private sector and therefore ERs there have fewer regulatory tools to address multiple discrimination at their disposal. As unions are showing an increasing interest in establishing ERs (TUC, 2011) a further comparative study examining ERs in public and private sectors would be valuable and timely.

Kantola and Nousiainen (2009) make a distinction between multiple discrimination - that fits with the individualistic anti-discrimination model of most of the legislation - and the more complex concept of intersectionality, which it is argued can more effectively be addressed through proactive measures such as the public sector equality duties (Squires, 2009). Our research findings support this distinction in practice, showing that many of the issues of multiple discrimination identified by union reps are collective rather than solely individual issues. Multiple discrimination may therefore be better addressed through collective remedies that can take account of the complexity of intersecting forms of disadvantage, rather than the simplistic legal remedies that have been suggested to date. However further research is required to identify how far the rather complex theoretical developments on intersectionality can be utilized in practice by trade unions and employers.

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## APPENDIX – EQUALITY REPS’ EXPERIENCE OF ADDRESSING MULTIPLE DISCRIMINATION AT WORK

We are contacting Equality Reps to ask for your help with research that we are carrying out into experiences of multiple discrimination at work, i.e. where there may have been discrimination on the grounds of both race *and* sex, or disability *and* age or sexual orientation or religion and belief, etc. This research is being funded by the conciliation and advice service ACAS as they are interested in understanding more about employees’ experiences of such discrimination in order to improve their support and guidance in this area. We are aware that it can be difficult to identify the causes of discrimination that people suffer at work, but we are interested in any experience that you have of addressing individual or collective issues that you think *could* have involved discrimination on more than one ground or your views on how they can be addressed. For example, we’d be interested to hear whether, in your experience, age discrimination is more likely to affect older women, or whether disability discrimination can be more likely to affect ethnic minority members etc. UNISON, PCS and the TUC are also supporting this research.

We would be very grateful if you could reply to this email answering the five questions below. Please also forward this email to other Equality Reps who you think might have experience of dealing with these issues.

Please be aware that any personal information you give will be confidential and only shared with researchers at WLRI, for example, individual names will not be available to Acas or used in any published reports.

If you have any further questions about the research or about taking part, please contact Sian Moore [sian.moore@londonmet.ac.uk](mailto:sian.moore@londonmet.ac.uk) or Tessa Wright [t.wright@londonmet.ac.uk](mailto:t.wright@londonmet.ac.uk) at Working Lives Research Institute, London Metropolitan University, tel: 020 7320 3042.

1. In your experience as a union rep, has any member raised issues with you that seem to be examples of discrimination on more than one ground, i.e. race and sex, or disability and age or sexual orientation or religion and belief, etc? If yes, please describe briefly.
2. Do you consider that you personally have experienced discrimination at work on more than one ground? If yes, please describe briefly.
3. As a union rep, have you raised any issues or cases with the employer that could be considered as discrimination on more than one ground?
4. If yes, please briefly describe the issue and employer response.
5. Can you say how you have dealt with cases of discrimination on more than one ground, or how you think you might deal with such cases (even if you have dealt with it as one particular form of discrimination or a more general grievance)?
6. Have you attempted to use anti-discrimination legislation and, if not, do you think it would help?

We are very interested in talking to Equality Reps who have dealt with issues or cases of multiple discrimination in the workplace, so if you have answered yes to any of the questions above, we would be very grateful if you could provide a telephone number so that we could contact you to discuss this further in confidence.

Telephone number:

Most convenient time to call you: Morning?      Afternoon?      Evening?

Thank you very much for taking the time to answer these questions.





