

## The Equality Bill and the Dispute Resolution Challenges it poses

by John Crawley

As the Equality Bill returns to the House of Commons from the House of Lords moving a step closer to Royal Assent I have compiled an update for dispute resolution practitioners on the challenges it poses. Tim Kingsbury, Head of Investigation Services at CMP has already picked up on some of the implications for workplace investigators and equality and diversity practitioners in his excellent article 'Working your way through the Equality Bill 2010'. The Equality Bill Draft Employment Statutory Code of Practice for Consultation poses some interesting challenges for dignity at work policy makers, workplace dispute resolution and conflict management practitioners and managers.

### Challenge 1 – Resolving equality and diversity disputes 'within the workplace' so as to avoid resorting to legal proceedings.

*'It is good practice, and in the interests of both employers and employees, to try and resolve disputes within the workplace so as to avoid resorting to legal proceedings.'*

The draft code is explicit about rights, and this clause reinforces the right to resolution.

Organisations will be expected to provide a range of internal dispute resolution options. This

reinforces current guidance in the ACAS code<sup>1</sup> which encourages employers to improve early and effective dispute resolution at work to avoid employment tribunals unless necessary. Many organisations are already improving dispute resolution processes but are less successful applying these methods to equality and diversity issues. As discrimination claims to tribunal continue to rise<sup>2</sup> (particularly regarding race and age) there appears to be a lack of confidence in informal dispute resolution



## The Equality Act, making equality real

methods such as mediation amongst potential claimants. For more on ensuring that your

<sup>1</sup>Acas Code of Practice on Disciplinary and Grievance Procedures April 09

<sup>2</sup> The Employment Tribunal and Employment Appeal Tribunal (EAT) 2008-09 statistics

dispute resolution practice does not sabotage your diversity and inclusion agenda see my other article 'Mishandling bullying and harassment will hijack the diversity and inclusion agenda'.

### **Challenge 2 – Ensuring disciplinary and grievance procedures do not discriminate**

*'Employers should ensure that when conducting disciplinary and grievance procedures they do not discriminate against an employee because of a protected characteristic. For example, employers may need to make reasonable adjustments to such procedures to ensure that they do not put disabled employees at a substantial disadvantage or adapt such procedures to accommodate an employee at home on maternity leave.'*

Policy makers, managers, mediators and investigators please note that you need to start thinking more proactively about how reasonable adjustments apply to dispute resolution process and practice.

### **Challenge 3 – Managing 'inappropriate' behaviour**

*'Employers should ensure that their policies cover the use of inappropriate or derogatory language in the workplace, which could amount to harassment if it is related to a protected characteristic and is sufficiently serious. Employees should be reminded that all employees have the right to be treated with dignity and respect in the work place. Policies should make it clear that employees should not make derogatory comments, jokes or use derogatory terms related to a protected characteristic.'*

Although policies may make this clear, who does the 'reminding' and who 'makes it clear' about jokes and derogatory language? What is the difference between an acceptable joke and a derogatory joke? We have huge numbers of managers, HR staff and people at work generally who contact us about this issue. It requires skill and personal strength to be able to recognize derogatory language and challenge appropriately. It is in the variations of when and how to challenge inappropriate behaviour that many tribunal claim is forged. Creating more skilful consistent management of 'inappropriate' behaviour requires good practical guidance and support for managers and staff who find themselves in that position. Dispute resolution practitioners also need to be able to do this in a non-blaming way without losing their impartiality.

### **Challenge 4 – Ensuring 'professional standards of behaviour off work premises or outside normal working hours'**

*'Employers are liable for unlawful discrimination in the course of employment. This includes discrimination taking place during working hours and on work premises. However, it is also likely to include discrimination occurring off work premises or outside normal working hours'*

*but where there nevertheless remains some connection with work. Employers should therefore take steps to ensure that discrimination does not occur because of a protected characteristic outside of the office, for example, at team building days, social events to which all employees are invited, business trips or client events. Such steps might include drafting disciplinary and equality policies that refer to behaviour outside the office, checking dietary requirements to ensure that all employees are catered for and reminding employees to maintain the normal professional standards of behaviour.'*

We are encountering a growing number of allegations of bullying and harassment which do occur outside office hours and off work premises. The interpretation of the phrase 'remains some connection with work' will be interesting.

### **Challenge 5 – improving the openness and transparency of grievance procedures**

*'Grievance procedures can provide an open and fair way for complainants to make their concerns known, and for their grievances to be resolved quickly, without having to bring legal proceedings.'*

*'It is recommended that employers monitor the number of employees who have brought grievances or been subjected to disciplinary action [certain public authorities with at least 150 full-time staff have a legal duty to do this in respect of race], and the outcomes of each case. It will also be useful to be able to match the data with information about the employees' grades, their managers and the areas of the organisation where they work.'*

*'As part of their equal opportunities review, employers should use the monitoring data on grievances and disciplinary action to see if there are significant disparities between groups of people defined by protected characteristics, investigate the possible causes in each case, and take steps to deal with them.'*

For many years I have advocated monitoring to enable efficiency and consistency evaluation (and other monitoring such as keeping information about the activity time spent by parties, managers, external experts and others during grievance and disciplinary procedures). The main challenge will be to effectively manage the confidential collection and storage of such data, and also to ensure that it is used as an instrument of positive change rather than blame.

### **Challenge 6 – building commitment to early conflict management and mediation**

*'Sometimes grievance and disciplinary procedures alone are not able to resolve workplace disputes. Mediation can help in such circumstances.'*

As mentioned in Challenge 1 above, mediation has a useful role to play in ensuring parties can resolve behavioural issues to do with equality and diversity. The challenge is to ensure that mediation practice is able to enable the difficult conversations that this will involve, empower people to speak and listen, and encourage mutual learning. Allegations of harassment,

inappropriate behaviour and bullying involve tricky power issues and mediators need to be well trained and prepared for that.

### **Challenge 7 – leaders and managers modelling effective dispute resolution**

*'Employers can avoid possible conflicts by noticing problems at an early stage and attempting to deal with them by, for example, talking to the people involved in a non-confrontational way. It is important to encourage good communication between employees and managers in order to understand the underlying reasons for potential conflicts.'*

Recent surveys<sup>3</sup> suggest that managers are not very good at this so this is likely to come back and bite if not addressed in skills audits and training needs analyses.

### **Challenge 8 – creating accessible, timely external support mechanisms**

*'Where conflict cannot be resolved by a manager or employer alone, it may be better to seek outside help, particularly if there are concerns that there could be a breach of a person's rights under the Equality Act or the Human Rights Act.'*

When these issues arise help is often difficult to find and comes too late. With resourcing challenges likely to continue for the foreseeable future, dispute resolution providers will need to create lean, flexible, timely solutions which yield a good return on investment. These may be delivered by expert internal or external providers.

When we get human rights issues wrong the cost is high. A White paper will follow on how to respond to the challenges posed by the Equality Bill Draft Employment Statutory Code of Practice for Consultation.



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CMP Resolutions work to Close, Manage and Prevent disputes at work through skills development, mediation and investigation services.

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<sup>3</sup> Contact CMP for more information on recent surveys re managers ability to handle conflict