



The Bar Council

## **Bar Council response to the Ministry of Justice Call for Evidence on Costs Protection in Discrimination Claims**

This is the response of the General Council of the Bar of England and Wales (the Bar Council) to the Ministry of Justice Call for Evidence on Costs Protection in Discrimination Claims.<sup>1</sup>

The Bar Council is the voice of the barrister profession in England and Wales. Our nearly 18,000 members – self-employed and employed barristers – make up a united Bar that aims to be strong, inclusive, independent and influential. As well as championing the rule of law and access to justice, we lead, represent and support the Bar in the public interest through:

- Providing advice, guidance, services, training and events for our members to support career development and help maintain the highest standards of ethics and conduct
- Inspiring and supporting the next generation of barristers from all backgrounds
- Working to enhance diversity and inclusion at the Bar
- Encouraging a positive culture where wellbeing is prioritised and people can thrive in their careers
- Drawing on our members' expertise to influence policy and legislation that relates to the justice system and the rule of law
- Sharing barristers' vital contributions to society with the public, media and policymakers
- Developing career and business opportunities for barristers at home and abroad through promoting the Bar of England and Wales
- Engaging with national Bars and international Bar associations to facilitate the exchange of knowledge and the development of legal links and legal business overseas

To ensure joined-up support, we work within the wider ecosystem of the Bar alongside the Inns, circuits and specialist Bar associations, as well as with the Institute of Barristers' Clerks and the Legal Practice Management Association.

As the General Council of the Bar, we are the approved regulator for all practising barristers in England and Wales. We delegate our statutory regulatory functions to the operationally independent Bar Standards Board (BSB) as required by the Legal Services Act 2007.

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<sup>1</sup> [Costs protection in discrimination claims: Call for Evidence - Ministry of Justice - Citizen Space](#)

**Question 1: Do you consider that there are any obstacles to bringing discrimination claims under the Equality Act (2010)? If so, does this relate to the prospect of adverse costs, or something else?**

1. There are a number of obstacles.
2. The first point to note is that it is not sensible to consider 'civil' as one homogenous concept for these purposes. There is a significant distinction between a claim being considered on the small claims track and the fast track.
3. The small claims track has a number of similarities with the Employment Tribunal; a limited costs jurisdiction, a lack of formality and pleadings not being held to a strict standard. In contrast, the Fast Track has a costs regime and strict formality in terms of pleadings.
4. However, even the small claims track has a difference in terms of procedure and culture in contrast with the Employment Tribunal. In the Tribunal, preliminary hearings will be listed to ensure that the pleaded case is sufficiently clear so as to proceed to a full hearing. In the County Court, the Court will take a more legalistic and less holistic approach to the litigation process and will be less likely to tolerate that which would be resolved at a preliminary hearing in the Tribunal. This is exacerbated further when the claim is allocated to the fast track.
5. Consideration should be given to the extent to which goods and services claims could be brought within the remit of the Employment Tribunal. This was most recently considered by the Law Commission in its report on employment law hearing structures.
6. We have limited evidence that the prospect of adverse costs is a significant factor in deterring claimants. In stating this, we do not deny that it could be a factor, rather we refer to other, structural problems in relation to bringing such claims. It is possible to conceive of circumstances in which costs could be a significant factor. For example, we recognise that historically, in the Employment Tribunal fees have operated as a greater barrier to the bringing of complaints of discrimination. At present there is no fee for instituting such a claim in the Employment Tribunal, but this could of course change.
7. In the County Court, Equality Act claims generally have a six month time limit. Whilst this is more generous than the Tribunal time limit (which may be amended by the current Employment Bill) it may still be the case that an individual may not recognise that time has started to run or is weighing up additional factors such as entering a jurisdiction in which there may be adverse costs consequences.

**Question 2. If you have been involved in a discrimination claim, how was this funded? If so, please provide details on the funding method.**

8. We are aware of the following funding methods being used in civil discrimination cases:

- a. Self-funding / family assistance;
- b. Union funding;
- c. Conditional Fee or Damages Based Agreements;
- d. Crowdfunding or charity or similar funding;
- e. Pro bono assistance from counsel / solicitors.

**Question 3. Are any claims related to protected characteristics under the Equality Act disproportionately affected by obstacles or costs issues? If so, how are they affected and why do you consider this may be?**

9. We address disability in answering Q4 below. We would also comment that the pressures attendant upon short primary time limits, and the need to conciliate via ACAS in order to bring a claim in the Employment Tribunal, can exacerbate pressures on those with claims arising from maternity, paternity or other forms of parental leave.

**Question 4. Are there particular obstacles to bringing disability claims under the Equality Act?**

10. To a lay person, the disability discrimination regime may appear to be particularly complex. It is an area that contains some of the most technical and prescriptive statutory language. It also contains legal concepts such as discrimination arising from disability and failure to comply with a duty to make reasonable adjustments that require additional and sophisticated understanding in terms of what may amount to discriminatory behaviour.

11. For example, in order to succeed in a reasonable adjustments' claim, a provision criterion or practice needs to be identified before the Court or Tribunal goes on to consider substantial disadvantage and the reasonableness of any adjustment proposed. In the Employment Tribunal, this is often discussed in detail and in many cases rectified at a preliminary hearing so as to allow the case to proceed. That is not really provided for in the County Court, on any track and in so far as there is case management, it is culturally and substantively different to the Employment Tribunal.

**Question 5. How do you consider the extension of fixed recoverable costs (FRC) in civil cases will impact on (a) disability-related discrimination claims or (b) other forms of discrimination claims under the Equality Act?**

12. If the fixed recoverable costs regime were to apply to the fast track, we are not aware of factors that would cause this to have a significant impact. A more radical provision would be to introduce some form of fixed recoverable costs to the small claims track alongside reform of which Equality Act cases are considered within the small claims track. This would likely increase access to justice in that it would enable parties in relatively small value cases to obtain representation when they otherwise would not, whilst also deriving some benefit from the informality of the small claims track which is more akin to the Tribunal process.

**Question 6. Do you think that some form of costs protection regime should be introduced for (a) disability-related discrimination cases or (b) other forms of discrimination claims under the Equality Act? If so, please provide suggestions as to how this should be designed.**

13. Costs protection in personal injury cases exists and is the current settled position because Defendant insurers are more content with a qualified one-way costs shifting regime in most cases in contrast with high adverse bills in cases that are lost by the insurers.

14. There is no such settled position in respect of Equality Act claims. The bodies are not defined in that there is not an 'insurance' sector able to coalesce around a position.

**Question 7. Do you think there is a role for alternative dispute resolution in resolving (a) disability-related discrimination claims or (b) other forms of discrimination claims under the Equality Act? If yes, please specify what this role should be.**

15. There may be some value in extending the role of ACAS to have the power to conciliate in goods and services Equality Act claims. Any such extension would need to be funded and for additional training to be provided.

16. The value in having a third-party conciliator is of greatest assistance where one or both parties are unrepresented. There is less value where both parties have professional representation.

17. We would not suggest extending the role of ACAS to cover housing cases and in particular cases where the Equality Act is raised as a late defence to a claim for possession. Such matters are likely to have a role for the involvement of legally aided legal advice and the Court.

**Question 8. Have you previously used alternative dispute resolution to resolve discrimination claims related to (a) disability discrimination or (b) other forms of discrimination under the Equality Act? If so, and where appropriate, please provide details on the following:**

- **What was the type of dispute?**
- **What method of alternative dispute resolution was used to resolve your dispute?**
- **Were you satisfied with the outcome of the alternative dispute resolution?**
- **Was the process of alternative dispute resolution helpful in understanding the other party's position or in narrowing the issues in dispute, even where it did not successfully resolve the dispute?**

18. We have experience of using ADR to resolve employment disputes. This ADR came in the form of ACAS Conciliation, party to party settlements, private mediations and judicial mediations.

19. The experience of the Employment Tribunal is that the best way of understanding the dispute or narrowing the issues is effective case management before an experienced Judge. ADR is then more effective once this necessary step has taken place.

**Question 9. If additional measures are needed to improve obstacles to bringing discrimination claims, what should they be?**

20. Nothing further.

**Bar Council**

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For further information please contact:

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