Employment Discrimination Law in the United Kingdom: Achieving Substantive Equality at Work?

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1. Introduction

Workplace discrimination laws are seen as a key tool to achieve substantive equality at work. In the United Kingdom (‘UK’), workplace discrimination laws have been integrated into general equality legislation, meaning there is a single equality statute for addressing discrimination inside and outside the workplace. However, even in this unified structure, there are still differences in how discrimination laws are enforced which depend on whether the discrimination occurs in work or not. Thus, employment discrimination law is still seen as separate to general discrimination law, at least in its enforcement. While this has traditionally been a major advantage for claimants in enforcing substantive rights at work, as enforcement processes have typically been less costly and more efficient than processes in the general courts, reforms to the UK tribunal system have significantly undermined the position of all claimants in relation to workplace rights, including in the area of equality.

The purpose of this article is to map the discrimination law landscape in the UK, in order to evaluate the extent to which it is capable of achieving substantive equality at work. This is assessed across four areas: the structure of the law (Part 2), the domestic view of the law (Part 3), remedies and enforcement (Part 4) and the role and use of positive action (Part 5). I argue that, while the UK system offers glimmers of substantive equality at work, which could be advanced via employment discrimination law, these glimmers are being increasingly repressed by government reforms. Thus, substantive equality at work remains an elusive goal in the UK.

2. The Structure of UK Anti-Discrimination Law

Anti-discrimination law in the United Kingdom is primarily contained in the Equality Act 2010 (UK) (‘EqA’), a single piece of equality legislation that provides protection against discrimination in work, services and public functions, premises, education, associations, and transport. The UK legal framework has been influenced both by US anti-discrimination law, and by the introduction of EU equality directives that must be implemented at the domestic level. The inclusion of some grounds of discrimination

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(such as age discrimination) in UK law has been primarily driven by EU legal developments.

The broad scope of the EqA means it straddles human rights law, labour law and (potentially) constitutional law. Further, it is complemented by some provisions in human rights law which focus on equality. The European Convention on Human Rights, for example, contains a prohibition of discrimination in article 14, which says:

> The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

The Human Rights Act 1998 (UK) s 3(1) requires, ‘so far as it is possible to do so’, for legislation to ‘be read and given effect in a way which is compatible with the Convention rights.’ However, article 14 of the Convention is limited to rights under the Convention only. The broader prohibition of discrimination in Protocol 12 to the Convention is not one of the Convention rights to which the Human Rights Act 1998 (UK) refers. Indeed, the UK has not signed or ratified this protocol. This may mean that European human rights norms and constitutional equality principles will have limited influence on the development of UK equality law.

The vast majority of claims pursued under the EqA relate to work. This may explain why anti-discrimination law is often perceived to be a part of labour law, rather than human rights law. That said, the EqA (and the public sector equality duty (‘PSED’) in particular) are increasingly used to achieve human rights ends, beyond the realm of labour law, and this appears to be a growing and developing field.

On the face of it, then, the EqA creates a single, unified equality statute for addressing discrimination inside and outside the workplace. According to its Explanatory Memorandum, the EqA was directed to two key purposes: (1) harmonising discrimination law in the UK, and (2) strengthening existing laws to ‘support progress

herein are those of the author and are not necessarily those of the Australian Government or Australian Research Council.
2 However, Fredman argues that the case law of the European Court of Human Rights has expanded the scope of article 14, to include issues within the ‘ambit’ or exercise of a Convention right, even if a Convention right has not been breached: Sandra Fredman, Discrimination Law (Oxford University Press, 2nd ed, 2011) 146. This may significantly extend the impact of article 14.
on equality.\textsuperscript{6} This first aim was achieved by bringing together and restating nine existing pieces of legislation, and adopting a single, harmonised approach ‘where appropriate’ if there was inconsistency between the statutes.\textsuperscript{7}

However, even in this unified structure, there are still differences in how discrimination laws are enforced, which depend on whether the discrimination occurs in work or not. Under the EqA, employment discrimination claims may be enforced: by individuals in Employment Tribunals (‘ETs’), with potential remedies including a declaration of rights, award of compensation or a recommendation;\textsuperscript{8} by individuals in the county court, to remove or modify discriminatory contractual provisions;\textsuperscript{9} or by the Equality and Human Rights Commission (‘EHRC’), which is empowered to take enforcement action spanning investigations, unlawful act notices, compliance notices relating to the PSED, action plans, agreements, applications to restrain, conciliation, and legal proceedings.\textsuperscript{10} Non-work complaints generally fall within the jurisdiction of the county court.\textsuperscript{11}

ETs are independent judicial bodies, which are intended to provide a less formalised, more efficient and less costly means of resolving employment claims than court proceedings.\textsuperscript{12} When cases proceed to a full hearing of an ET, they are typically heard by a Tribunal of three people: a legally qualified Employment Judge, and two lay members. It is questionable how this system will work as equality law becomes increasingly technical: can lay members continue to add insight to technical legal arguments? Or are lay members more likely to be swayed by legally-trained employment judges, reducing their influence on the decision-making process? While lay members have previously been regarded as sitting at the ‘heart’ of the ET system, their role is increasingly being questioned: indeed, lay members have been removed from unfair dismissal cases.\textsuperscript{13} As Lord Justice Briggs has noted,

although at [the ET’s] inception there was good reason for a new statutory jurisdiction to be adjudicated upon by a tribunal with a majority of lay members, the strength of that reason has diminished with the growth of detailed jurisprudence, to the point where both the ET and the [Employment Appeal Tribunal] are predominantly judge-led.\textsuperscript{14}

Questions over the future role of lay members are dwarfed by more general concerns about the role and structure of ETs. In 2016, Lord Justice Briggs concluded a review of the UK civil courts structure, including the relationship between the courts and tribunals such as ETs. Lord Justice Briggs noted the ‘uncomfortable split of

\begin{itemize}
\item \footnotesize{\textsuperscript{6} Exploratory Memorandum to the Equality Act 2010 (UK), [10].}
\item \footnotesize{\textsuperscript{7} Ibid [11].}
\item \footnotesize{\textsuperscript{8} EqA s 124(2).}
\item \footnotesize{\textsuperscript{9} EqA ss 142, 143.}
\item \footnotesize{\textsuperscript{10} Equality Act 2006 (UK), ss 16, 20–22, 32.}
\item \footnotesize{\textsuperscript{11} See EqA pt 9, ch 2.}
\item \footnotesize{\textsuperscript{12} Acas, Employment Tribunals (15 February 2008) <http://www.acas.org.uk/index.aspx?articleid=1889>.}
\item \footnotesize{\textsuperscript{14} Lord Justice Briggs, ‘Civil Courts Structure Review: Final Report’ (July 2016) 11.14.}
\end{itemize}
jurisdiction between the civil courts’ and ETs. The report considered the most appropriate future ‘home’ for ETs, which could either involve merging with the civil courts or becoming part of the main Tribunal structure, ‘if they are not to continue their rather lonely existence in between,’ ‘uncomfortably stranded between the civil courts and the main Tribunal Structure.’ Lord Justice Briggs ultimately concluded that it would be beneficial to integrate the ET system into the civil courts. This could have implications for the procedural rules adopted in ETs, which are simpler than those in the civil courts – for Lord Justice Briggs, though, ‘there is no reason why bringing the ET and the [Employment Appeal Tribunal] within the civil courts structure should mean that the [Civil Procedure Rules] would have to be applied to them’. rather, the ET could retain its own procedures, within the civil courts structure. It remains to be seen whether the UK government adopts this recommendation, and the implications this shift would have for achieving substantive equality at work.

ETs are also facing a significant period of instability due to the introduction, and subsequent invalidation, of Tribunal fees. Since 29 July 2013, ETs have charged substantial fees to hear claims or appeals. When originally proposed, the introduction of fees in ETs was seen as a way to shift the cost of running the ET system to ‘service users’ – that is, employees and claimants – to facilitate budget savings for the Ministry of Justice. Fees would cause the cost of ETs to be ‘shouldered by the party who causes the system to be used’ – typically claimants – rather than the general taxpayer. This would also help to reduce ‘waste’, including by using a ‘price mechanism … to incentivise earlier settlements, and to disinsentivise unreasonable behaviour, like pursuing weak or vexatious claims’. For discrimination claims, claimants were required to pay a claim fee of £250, and a hearing fee of £950. This is a significant sum of money for most in the UK, as median household disposable income was estimated to be only £26,400 in 2015–16. fees to proceed with a discrimination claim therefore represented 4.5% of median household disposable income, putting them beyond the reach of claimants who were vulnerable or in low pay jobs. While there was a fee remission system in place, and ETs could

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15 Ibid 2.83.
16 Ibid 3.63.
17 Ibid 11.10.
19 Ibid 11.18.
22 Ibid 50.
23 Ibid 49.
24 Ibid 50.
26 See also the discussion of hypothetical claimants in R (on the application of UNISON) v Lord Chancellor [2017] UKSC 51, [51]–[55] (Lord Reed). The Court concluded that, to afford ET fees, these claimants would have to sacrifice ‘ordinary and reasonable expenditure’ required to maintain an acceptable standard of living, such as that on clothing, personal goods and services, social and cultural participation, and alcohol: [55], [93]–[94] (Lord Reed). Thus, the fees could not be seen as affordable: [93] (Lord Reed).
order employers to reimburse a successful claimant’s fees, it appeared that the fee regime substantially deterred claimants in practice: from October to December 2013, ETs received 79% fewer claims compared with the same period in 2012, and 75% fewer claims than in the previous quarter.27

The Conservative government completed a review of tribunal fees in January 2017. In that review, the Minister of State for Justice noted the ‘significant’ decline in claims in ETs, but argued that it was ‘hardly surprising that charging for something that was previously free would reduce demand.’28 From the government’s perspective, the introduction of fees achieved its objectives: ‘users’ were now contributing between £8.5 million and £9 million a year in fee ‘income’ to the ET system; and more claims were being conciliated via Acas (the Advisory, Conciliation and Arbitration Service).29 However, the government acknowledged that improvements could be made to the fee remission system, adopting a simplified process and more detailed guidance for claimants.30

On 26 July 2017, the UK Supreme Court held that the ET fees regime was unlawful under both domestic and EU law as it prevented access to justice.31 The Court noted that there had been a ‘dramatic and persistent fall’ in the number of ET claims since the introduction of fees, in the range of 66–70 per cent.32 This particularly affected low value claims.33 The fall in claims was ‘so sharp, so substantial, and so sustained as to warrant the conclusion that a significant number of people who would otherwise have brought claims have found the fees to be unaffordable.’34 Thus, the fees infringed the domestic constitutional right of access to the courts, and the EU principles of effectiveness and effective judicial protection. The fees order was quashed, being unlawful ab initio.

It remains to be seen how the UK government will respond to this decision: the Supreme Court appeared to leave open the possibility that lower fees could be charged.35 In the interim, though, Tribunals have stopped accepting or requiring fees,36 and the Ministry of Justice has said it will take ‘immediate steps to stop charging fees in employment tribunals and put in place arrangements to refund those who have paid’.37 This may serve to significantly increase the number of claims that progress to Tribunal.

29 Ibid.
30 Ibid.
31 R (on the application of UNISON) v Lord Chancellor [2017] UKSC 51, [98], [119] (Lord Reed).
32 Ibid [39] (Lord Reed).
33 Ibid [40]–[42], [96]–[97] (Lord Reed).
34 Ibid [91] (Lord Reed).
35 Ibid [100] (Lord Reed). Indeed, Lady Hale’s judgment was implicitly offered as guidance to the government to avoid ‘potentially unlawful discrimination in any replacement Order’; at [121] (Lady Hale).
36 As at 16 August 2017, the GOV.UK website says: ‘You do not have to pay a fee to make a claim to the Employment Tribunal, even if it says so on the form.’ See GOV.UK, Make a Claim to an Employment Tribunal GOV.UK <https://www.gov.uk/employment-tribunals/make-a-claim>.
The flipside of reforms to the ET system is the increased focus on conciliation of employment discrimination claims in the UK. For employment claims, there is now also a system of early conciliation, via the statutory body Acas. Acas offers individual and collective conciliation and mediation to attempt to resolve employment disputes, while avoiding the potential cost, time and stress of the tribunal system. Unlike the Australian equality commissions, Acas is not tasked with the enforcement of employment or discrimination law and conciliation – it is focused on conciliation and education only.

Since April 2014, a new system of ‘early conciliation’ has been in place,\(^{38}\) which now makes it compulsory for claimants to notify Acas before lodging a Tribunal claim (though there are some exceptions to this).\(^ {39}\) While conciliation itself is not mandatory, in effect, the move to early conciliation has created a system of semi-compulsory conciliation, as many parties confuse compulsory notification with compulsory conciliation, and proceed with conciliation on that basis.\(^ {40}\) Acas conciliation is attempted for one month after notification, and is still available after an ET claim has been lodged, up until the time judgment is handed down.

Following the move to early conciliation, in 2014–15 Acas received 83,000 early conciliation notifications across all areas (not just discrimination). Of these, 73 per cent of notifications proceeded to conciliation, and 78 per cent of notifications did not lead to a Tribunal claim.\(^ {41}\) Only 10 per cent of claimants and 11 per cent of employers did not agree to participate in conciliation.\(^ {42}\) Fifteen per cent of notifications (or 11,000 claims) led to a formal settlement following conciliation, and 10 per cent of notifications were resolved without a formal written agreement.\(^ {43}\) A sizable number of notifications therefore appear to be abandoned at some stage during the Acas process. Of notifications that proceed to a Tribunal claim, many are later resolved via Acas conciliation: from April to December 2014, 63 per cent of early conciliation notifications did not proceed to a tribunal claim; 15 per cent resulted in a formal settlement; and 22 per cent progressed to a tribunal claim. Of those that progressed to a tribunal claim, more than half (51 per cent) were later resolved via Acas conciliation, after a claim had been submitted to the tribunal.\(^ {44}\)

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\(^{40}\) Indeed, in the first year survey of claimants who had notified Acas of their claims, 30% participated in conciliation because they thought it was compulsory: Matthew Downer et al, ‘Evaluation of Acas Early Conciliation 2015’ (04/15) 5.

\(^{41}\) Ibid.

\(^{42}\) Ibid.

\(^{43}\) Ibid.


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Thus, Acas early conciliation and post-claim conciliation appear to have been very successful at diverting claims away from ETs. Of course, this cannot be divorced from the impact of ET fees on claiming behaviour: in the first year conciliation statistics released by Acas, of the 63 per cent of claimants who did not proceed to a tribunal claim, but who failed to achieve a settlement, 26 per cent indicated that tribunal fees deterred them from proceeding with their claim.\(^{45}\) It remains to be seen how many claims will be diverted away from ETs by conciliation once the ET fee regime has been removed or amended.\(^{46}\)

In the UK system, claimants need to decide whether to pursue a discrimination claim, contract claim or unfair dismissal claim. Compensation for unfair dismissal is capped, whereas there is no cap for discrimination claims. Common law claims (such as contract claims) are capped at £25,000 in ETs, though higher amounts are available in the county or high court. A discrimination claim – which is uncapped – may therefore be the most attractive option for a claimant. Anecdotally, though, the introduction of fees for ET claims (which often exceeded fees for claims in the county court) drove claimants to pursue common law actions in the county court, even where they fell within the jurisdictional limit of ETs.\(^{47}\) This trend may reverse now that the ET fee regime has been found to be unlawful.

Traditionally, ET decisions have not been easily accessible: decisions were often delivered orally, or kept on a paper file in the Tribunal registries. From 9 February 2017, however, ET decisions have been made available online via the GOV.UK website. This will significantly increase the accessibility of ET decisions. However, the website only covers future decisions, not past cases, and some decisions are still very brief, noting only that oral reasons were delivered.

### 3. The Domestic View of Employment Discrimination Law

Employment discrimination law is generally taken seriously in the UK. The UK has a long history of discrimination law, and predates or exceeds EU directives in some areas (such as in the adoption of the PSED). While some provisions in the EqA were introduced to implement EU directives at the domestic level, and are therefore vulnerable in the wake of the Brexit vote in 2016, it appears that the government has no intention (at least for the time being) of repealing employment discrimination law. The government’s White Paper on a Great Repeal Bill, published in March 2017, commits to retaining the EqA in UK law.\(^{48}\) However, concerns have still been raised that equality protection could be lost ‘almost inadvertently’ in the UK’s bid to become a low-tax, low-regulation economy post-Brexit.\(^{49}\)

\(^{45}\) Downer et al, above n 40, 97.

\(^{46}\) See further R (on the application of UNISON) v Lord Chancellor [2017] UKSC 51, [46] (Lord Reed).

\(^{47}\) Briggs, above n 14, 2.83. For discussion of the different fee regimes, see R (on the application of UNISON) v Lord Chancellor [2017] UKSC 51, [20] (Lord Reed).


While the UK government is opposed to the introduction of ‘red tape’ for businesses, provisions have been introduced requiring businesses to disclose their gender pay gap. The *Equality Act 2010 (Specific Duties and Public Authorities) Regulations 2017* (UK) SI 353/2017, which relate to public sector employers, and the *Equality Act 2010 (Gender Pay Gap Information) Regulations 2017* (UK) SI 172/2017, which apply to private employers, will require most employers with over 250 employees to publish annual gender pay gap reports. This implies that the government is taking employment discrimination fairly seriously in practice, at least where this imposes limited costs on business.

At the same time, the government also appears skeptical that discrimination law claims (like employment claims generally) are legitimate. This is reflected both in the introduction of ET fees, at least in part to ‘disincentivise unreasonable behaviour, like pursuing weak or vexatious claims’; and introducing restrictions on accessing legal aid for employment matters. While legal aid funding is still available for discrimination matters, most discrimination claims are initially raised as employment matters, meaning reforms to legal aid may have an ‘indirect chilling effect’ on discrimination claims. There has also been a move to privatise the resolution of employment disputes, via the introduction of early conciliation and compulsory notification of Acas before proceeding to a Tribunal claim. The move to private, confidential conciliation reflects the idea that employment disputes (and, equally, discrimination complaints) are disputes between private parties, in which there is limited public interest. This shows significant disregard for the structural and systemic nature of much discrimination, and the public interest in remediating discriminatory behaviours.

At the judicial level, UK anti-discrimination law is assisted in its interpretation and application by the shifting of the burden of proof. Section 136(2) of the *EqA* provides:

> If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.

This does not apply if the person (A) shows that they did not contravene the provision.

Despite the shifting of the burden of proof, discrimination claims still have low levels of success at Tribunal. As Table 1 shows, in the 2014–15 financial year, between 1 and 6 per cent of discrimination claims were successful at hearing, depending on the ground of the claim.

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50 BIS, above n 21, 50.
51 See *Legal Aid, Sentencing and Punishment of Offenders Act 2012* (UK) sch 1, pt 1, s 43.
52 EHRC, ‘Response of the Equality and Human Rights Commission to the Consultation on Reform of Legal Aid in England and Wales’ (15 November 2010) 11.
53 See the critique of this approach in *R (on the application of UNISON) v Lord Chancellor* [2017] UKSC 51.
Table 1: Outcome of Claims by Jurisdiction, UK ETs, 2014–15 Financial Year

This implies that, even with the shifting of the burden of proof, it is still difficult to prove discrimination at hearing. Alternatively, it may imply that strong cases are being settled via Acas conciliation. This may, then, undermine the argument that ET fees were deterring weak claims from proceeding to Tribunal.55

4. Remedies and Enforcement

The growth of early conciliation offers parties the opportunity to tailor their own solutions to discrimination claims, including through the negotiation of systemic changes. Despite this potential, remedial creativity appears to be occurring in only a minority of cases that proceed to early conciliation, such as where a reference or apology is negotiated. The vast majority of claims attain results also achievable in an ET, and are primarily focused on financial compensation. In the first year statistics

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55 See similarly R (on the application of UNISON) v Lord Chancellor [2017] UKSC 51, [57] (Lord Reed).
from the UK’s early conciliation process, the majority (91 per cent) of claimants reported receiving financial compensation as part of their settlement. However, the size of payments varied considerably, with the median sum of money received being £1,200, and payments ranging from £12 to £100,000 (though with the majority being at the lower end).56 While claimants may receive lower financial compensation at conciliation than at hearing, it appears that these amounts are more likely to be paid than awards at Tribunal: 96 per cent of claimants and their representatives who received a financial payment as part of their settlement confirmed that it had been paid. This statistic was much higher than for claimants given a financial award at tribunal, where only 63 per cent said that they had received their payment.57 While the vast majority of settlements (91 per cent) reached in the first year of early conciliation involved financial compensation, a far smaller number involved a reference (25 per cent) and/or an apology (4 per cent).58 There was no mention in the statistics of claimants achieving systemic change as a result of the conciliation process.

At Tribunal, discrimination claims may result in a declaration of rights, award of compensation or a recommendation.59 Compensation may involve both pecuniary and non-pecuniary awards. There is no upper limit or cap for compensation claims, which compares favourably to the situation under unfair dismissal law. While Tribunals could – in theory – make very large compensation awards in discrimination claims, this does not appear to be occurring in practice, though some claims do result in very large awards. The largest award that could be found by the author was made in 2011, when a senior doctor was successful in her claims for race and sex discrimination, after she was bullied after taking maternity leave. The doctor developed post-traumatic stress disorder, and was awarded over £4.4 million in compensation. The bulk of this award was compensation for loss of wages and pension entitlements, as the ET concluded the claimant would never work again as a doctor. The award included an injury to feelings award of £30,000, and £4,000 in exemplary damages. Over £2 million was awarded to cover the tax payments due.60

This award was highly unusual, however, and largely reflected the claimant’s long-term inability to work and high earning potential. Other claims generally result in far lower awards. In 2011, the median injury to feelings award (including aggravated damages) in disability discrimination cases was £5,000. Of 45 awards, three were below £1000, and 26 were above £5,000.61 Similarly, in 2014–15, there were 219 discrimination cases where compensation was awarded in ETs. The maximum amount awarded (£557,039) was in the sex discrimination jurisdiction.62 However, as Table 2

56 Downer et al, above n 40, 6, 69. Larger payments may have been negotiated through private, non-Acas settlements, which would not be captured by these figures.
57 Ibid 6.
58 Ibid 69.
59 EqA s 124(2).
61 Equal Opportunities Review, August 2012, 227.
demonstrates, the median amount awarded was much lower, ranging from £1,080 in the religious discrimination jurisdiction to £13,500 in the sex discrimination jurisdiction in 2014–15.
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**Table 2: Compensation awarded by ETs – mean and median amounts, 2007–08 to 2014–15**

Source: Ministry of Justice, Tribunals and gender recognition certificate statistics quarterly: April to June 2015
Compensation appears to be the primary remedy awarded by ETs for successful discrimination claims. This is consistent with ET decisions generally: in the 2013 Survey of Employment Tribunal Applications (which related to employment claims generally, including those in the unfair dismissal jurisdiction), around 90 per cent of cases involved an award of money; re-engagement in the claimants’ old job was ordered in only two per cent of cases; and re-engagement in another job within the organisation was ordered in only one per cent of cases. The mean compensation awarded was £18,667; and the median was £10,000. This appears generally higher than for discrimination claims (except those relating to sex discrimination).

While systemic outcomes may not be achieved through private conciliation, it is also becoming harder to achieve systemic outcomes in ETs. The Deregulation Act 2015 (UK) s 2 removed the power of ETs to make wider recommendations that did not affect the claimant (though recommendations that do affect the claimant may still be made ‘for the purpose of obviating or reducing the adverse effect on the complainant’: EqA s 124). In its response to consultation on this measure, the government argued that:

Wider recommendations are discretionary on employers. In our view, the types of recommendations made in the tribunal cases so far show that in practice, wider recommendations have tended to be obvious and non-technical – in particular that an employer's human resource practices should be improved or that staff be given equality training.

The Government considers that whilst the types of recommendations made highlight wider issues around lack of awareness and knowledge by employers of equality and employment law, the wider recommendations provision is not the right way to address this issue. We think a better approach is through the practical non-legislative measures proposed by the Government in May 2012 as part of the Red Tape Challenge equalities package announcement. We intend to work with businesses, particularly small businesses and their representative organisations to increase understanding of compliance and best-practice in avoiding risk of adverse tribunal decisions; and through very short, straightforward web-based guidance for small businesses on equality law areas known to be particularly difficult for them.

Thus, guidance and government information will replace the ET’s ability to make wider recommendations. This will arguably be less effective in practice, as employers are unlikely to look to best-practice guidance without targeted prompting from a body like a Tribunal, and the government is unlikely to be able to target all small businesses through its campaigns. Further, the old power to make recommendations

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63 Department for Business Innovation and Skills, ‘Findings from the Survey of Employment Tribunal Applications 2013’ (Research Series 177, June 2014) 187.
64 Ibid 190.
had significant potential to address discriminatory practices in organisations where an employee had left their employment.  

Enforcement of the EqA is primarily dependent on individual litigation in ETs. Collective enforcement of equality matters is ‘very weak’ in the UK.  

UK trade unions have traditionally avoided using litigation to address equality issues, except in the field of equal pay:  

Conley notes the ‘historic and contemporary tensions between the collective bargaining functions of trade unions and their engagement with individualistic, rights-based equality legislation.’  

This is consistent with the discussion of the Australian context by Gaze and Chapman (this issue). While trade unions may undertake a limited role in equality litigation, union representatives can still have a positive impact on organisational equality practices.  

While the EHRC is empowered to enforce discrimination legislation, these powers are exercised infrequently. In its years of operation, the EHRC has assisted or intervened in more than 300 cases of ‘national importance’.  

The Commission will only become involved in ‘strategic’ cases, with a view to using its limited resources most effectively.  

Under the EHRC’s Strategic Litigation Policy, a case is more likely to be pursued where it: will set precedent or arouse public interest; addresses ongoing breaches of the EqA; has prospects of success over 50 per cent; has progressed to appellate level, or is unlikely to settle; offers the opportunity to clarify or strengthen the law, or extend or test compliance, including in strategically significant sectors or organisations; will secure better understanding of equality rights and obligations; will address systemic or widespread breaches; and where other litigation has been unsuccessful. The Commission will also take into account its strategic plan and priorities, whether it is the most appropriate body to take action, whether non-litigious solutions are possible, whether the use of resources would be proportionate, and whether it can act in partnership with others. Given these exacting requirements, it is unsurprising that the Commission rarely brings cases of its own accord, and is more likely to intervene or assist in certain matters. More generally, while agency enforcement, such as that undertaken by the EHRC, is an important means of addressing structural discrimination and demonstrating the state’s commitment to addressing discrimination, significant budget and staffing cuts have limited the

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69 Ibid 320.
73 Dickens, above n 67, 475.
efficacy of the EHRC’s operations.\textsuperscript{74} Instead, the ‘weight of enforcement’ has fallen on individual complainants via enforcement in the courts.\textsuperscript{75}

For individuals bearing the load of enforcement, this can come at a significant personal financial cost. As noted above, legal aid funding is now limited for employment actions, which may have an indirect effect on discrimination claims. Thus, legal advice may pose a significant financial cost for individual claimants. Preliminary advice on equality matters can be obtained from the Citizens Advice Bureau, a charity which offers advice via phone, online, through webchat, or in person, including on discrimination matters; online information sheets produced by the EHRC; from the Equality Advisory and Support Service, which offers a helpline, but does not provide legal advice or pursue court or ET actions; via the Acas helpline; or from union representatives. Few of these sources of information will negate the need for a qualified legal representative to advance a complex equality matter. Despite the desirability of legal advice in many cases, there has been a rise in self-represented litigants in the UK since the changes to legal aid took effect.\textsuperscript{76} However, this trend appears to be limited to non-ET claims: in ET proceedings, legal representation now appears more common than in 2011–12 (see Table 3). This may reflect the higher financial stakes associated with ET claims with the introduction of tribunal fees, and may revert in future years.

\begin{table}
\centering
\begin{tabular}{|l|c|c|c|c|c|}
\hline
Represented by & 2011/12 & % & 2012/13 & % & 2013/14 & % & 2014/15 & % \\
\hline
Trade Union & 5,998 & 3 & 5,955 & 3 & 3,282 & 3 & 3,496 & 6 \\
Lawyers & 129,137 & 69 & 136,858 & 71 & 74,862 & 71 & 46,233 & 75 \\
No rep information provided (includes self-represented) & 33,878 & 18 & 34,676 & 18 & 21,304 & 20 & 7,842 & 13 \\
Other & 17,318 & 9 & 14,052 & 7 & 6,355 & 6 & 3,737 & 6 \\
Total Claims & 186,331 & 100 & 191,541 & 100 & 105,803 & 100 & 61,308 & 100 \\
\hline
\end{tabular}
\caption{Table 3: Representation of Claimants at Employment Tribunals, 2011/12 to 2014/15}
\end{table}

Costs awards may also be made in ETs, exposing claimants to a risk of later expenses, and increasing the risks of litigation. In 2014–15, 870 costs awards were made in ETs, down from 889 in 2013–14. Of these, 334 awards were made for respondents; and the maximum costs award was £235,776, though the median figure was only £1,000. Overall, respondents tended to receive larger costs awards, though claimants were more likely to get their costs awarded (see Table 4).

\textsuperscript{74} Budget Cuts May Leave to All White Management at EHRC (10 September 2012) HRreview <http://www.hrreview.co.uk/hr-news/diversity-equality/budget-cuts-may-leave-to-all-white-management-at-ehrc/38788>.
\textsuperscript{75} Dickens, above n 67, 475.
Table 4: Costs awarded in Employment Tribunal claims, 2007/08 to 2014/15
Source: Ministry of Justice, Tribunals and gender recognition certificate statistics quarterly: April to June 2015

<table>
<thead>
<tr>
<th>Costs awarded</th>
<th>2007/08 No. of cases</th>
<th>2008/09 No. of cases</th>
<th>2009/10 No. of cases</th>
<th>2010/11 No. of cases</th>
<th>2011/12 No. of cases</th>
<th>2012/13 No. of cases</th>
<th>2013/14 No. of cases</th>
<th>2014/15 No. of cases</th>
</tr>
</thead>
<tbody>
<tr>
<td>&lt;£200</td>
<td>22</td>
<td>33</td>
<td>8</td>
<td>31</td>
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<tr>
<td>£201-£400</td>
<td>6</td>
<td>34</td>
<td>20</td>
<td>20</td>
<td>15</td>
<td>36</td>
<td>6</td>
<td>33</td>
</tr>
<tr>
<td>£401-£600</td>
<td>14</td>
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<tr>
<td>£601-£800</td>
<td>11</td>
<td>24</td>
<td>7</td>
<td>20</td>
<td>8</td>
<td>12</td>
<td>12</td>
<td>16</td>
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<tr>
<td>£801-£1000</td>
<td>15</td>
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<td>42</td>
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<td>£1,001-£2,000</td>
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<td>60</td>
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<td>18</td>
<td>52</td>
<td>28</td>
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<td>9</td>
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<td>5</td>
<td>2</td>
<td>2</td>
<td>1</td>
<td>-</td>
<td>-</td>
</tr>
</tbody>
</table>

All 134 327 110 272 88 323 132 355 116 1294 132 522 242 647 536 334

Maximum award £17,775 £28,394 £13,942 £83,000 £36,466 £54,740 £58,022 £235,776
Median award £1,000 £1,152 £1,000 £1,273 £5 £1,842 £1,000 £1,000
Average (mean) award £2,095 £2,665 £2,288 £2,830 £1,292 £3,141 £2,856 £3,228

In one multiple case consisting of 800 claimants they were all made liable for a costs award of £4,000 to the respondent, i.e. £5.00 per claimant, which has skewed the median. Replacing the 800 £5.00 awards and substituting with one of £4,000 gives a median of £2,973.
It is unclear how satisfied claimants and respondents are with the new state of employment discrimination law enforcement in the UK. In the survey of first year conciliation participants, most conciliation participants (83 per cent) were satisfied with the conciliation process generally. However, not many claimants were satisfied with the actual outcomes achieved: only 48 per cent of claimants and their representatives, 65 per cent of employers and their representatives, and 57 per cent of participants overall reported satisfaction with the actual outcomes of conciliation. Thus, satisfaction with a particular process may not necessarily lead to satisfaction with outcomes.

5. Role and Use of Positive Action

The EqA allows (but does not require) employers to take positive action that is a proportionate means of:

- enabling or encouraging persons who share a protected characteristic to overcome or minimise disadvantage connected to that characteristic;
- meeting the needs of persons who share a protected characteristic which are different from the needs of persons who do not share the characteristic; or
- enabling or encouraging persons who share a protected characteristic to participate in an activity in which their participation is disproportionately low.

Similarly, positive action may be taken in recruitment and promotion to address disadvantage or disproportionately low participation. However, a person with a protected characteristic may only be treated more favourably if: they are as qualified as the other person; the employer or company does not have a policy of treating persons who share the protected characteristic more favourably in recruitment or promotion; and the action is a proportionate means of overcoming or minimising the disadvantage, or promoting participation in the activity.

While positive action is allowed under the EqA, most employers are unlikely to use these provisions: positive action is regarded as too risky to be beneficial, and creates a ‘potential minefield’ of legal action if employers ‘get it wrong’; the EqA is a ‘trap for the well intentioned’. Overall, then, legal uncertainty will limit any possibility of positive action in the UK.

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78 Downer et al, above n 40, 7. Again, this would not capture the views of parties to private, non-Acas settlements.
79 EqA s 158(1)–(2).
80 ibid s 159.
81 ibid s 159(3)–(4).
84 See further Lizzie Barmes, ‘Navigating Multi-Layered Uncertainty: EU Member State and Organizational Perspectives on Positive Action’ in Geraldine Healy, Mike Noon and Gill Kirton (eds), Equality, inequalities and diversity: contemporary challenges and strategies (Palgrave Macmillan, 2010) 56.
The EqA also establishes the PSED, requiring public authorities or people exercising public functions to, in exercise of their functions, have due regard to the need to:

- eliminate discrimination, harassment, victimisation and conduct prohibited by the EqA;
- advance equality of opportunity between persons who share and do not share a protected characteristic, including by:
  - removing or minimising disadvantages suffered by persons who share a protected characteristic that are connected to that characteristic;
  - taking steps to meet the particular needs of persons who share a protected characteristic; and
  - encouraging persons who share a protected characteristic to participate in public life or activities in which their participation is disproportionately low; and
- foster good relations between persons who share a relevant protected characteristic and persons who do not share it, including by tackling prejudice and promoting understanding.\(^{[85]}\)

Positive duties have the potential to require public sector organisations to develop their own solutions to equality issues,\(^{[86]}\) promoting a more proactive and less compliance-focused approach to the implementation of equality law.

A review of the PSED was conducted in 2013 ‘to establish whether the Duty is operating as intended’.\(^{[87]}\) The Steering Group conducting the review concluded that it was too early to make a final judgement about the impact of the duty, as the available evidence was, as yet, inconclusive.\(^{[88]}\) At a theoretical level, a number of concerns have been voiced about the PSED. The ‘due regard’ standard may be ‘too flimsy’ to encourage organisations to integrate equality law into their decision-making.\(^{[89]}\) The duty is arguably insufficiently prescriptive and too open-ended in its pursuit of ‘equality’ to allow a determination of when it has been complied with or breached in practice, impairing its efficacy.\(^{[90]}\) Further, claims under the PSED must be enforced by judicial review in the civil courts. The use of judicial review and attempts to develop settled principles to monitor and enforce the PSED may have encouraged ‘mere procedural compliance’ and ‘box ticking’ by public sector organisations,\(^{[91]}\) or may force public bodies to seek judicial determinations of whether they have complied with the PSED.\(^{[92]}\) Overall, the PSED is rarely used in the context of employment, as it is likely easier to pursue claims under other parts of the EqA. Further, remedies

\(^{[85]}\) EqA s 149.


\(^{[89]}\) Fredman, ‘The Public Sector Equality Duty’, above n 86, 419.


\(^{[92]}\) Fredman, ‘Breaking the Mold’, above n 90, 281.
typically ordered for a breach of the PSED – such as a declaration – are unlikely to be satisfactory for most claimants, making the general EqA provisions more attractive in practice.

6. Discussion and Conclusion

UK discrimination law – as embodied in the EqA – offers a unified approach to addressing discrimination inside and outside the workplace. However, even within this unified statute, there is reliance on two separate streams of enforcement: one, generally in ETs, for work discrimination; the other in the civil courts. While ETs traditionally offered a desirable route for enforcing individual claims, this has been significantly undermined by government reforms directed at all employment claims. Discrimination claimants may be significantly disadvantaged by ET fees, compulsory Acas notification requirements, restrictions on legal aid, costs orders in ETs, and a reliance on individual enforcement. These limitations are not remedied by positive action or the PSED, which are having limited impact on the workplace. This, then, emphasises the fragility of any model of equality law that relies on individual enforcement for its efficacy.

Overall, then, UK employment discrimination law is ill-equipped to achieve substantive equality in the workplace. While the EqA offers a promising framework for pursuing individual claims, it is not supported by adequate enforcement mechanisms. Achieving substantive equality in the workplace would require stronger collective and agency enforcement of equality rights and reduced reliance on individual enforcement, a review of the use of costs orders in ETs, and a strengthening and clarification of positive action provisions and the PSED. While the UK government does not appear opposed to intervention in equality matters, changes to equality law are likely to be eclipsed by the dramatic implications of Brexit for years to come.

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93 See the judgment of Lady Hale in R (on the application of UNISON) v Lord Chancellor [2017] UKSC 51.