

EQUALITY BILL: BRC BRIEFING

The retail sector has one of the best records on diversity across industry. The sector currently employs nearly three million people, with a demographic which is very reflective of the UK population. It gives valuable working opportunities to those who had been long-term unemployed, to those caring for children or other dependents, to those who are studying, to those whose religions require certain hours working, and to those whose health prevents full-time working and who would in other sectors have left for long-term sick¹.

Retailers need support to continue the valued work they have been doing, not additional costly regulation. While the Bill comes from best intention, the Government must be careful to avoid imposing disproportionate burdens on business which actually fail to deliver their objectives.

TIMING AND APPROACH

Scrutiny process: We are very concerned that the Government seems intent on pushing what is a very complicated piece of legislation through Parliament as quickly as possible. This Bill has been promised for several years. Proposals were announced in the form of the Discrimination Law Review, and then scrapped. A package of measures was announced last summer, which lacked sufficient detail and failed to include some of the proposals, subsequently included in the Bill, likely to have the biggest impact. Therefore it is essential sufficient time is given for proper scrutiny.

Impact assessment: The impact assessment has failed to consider most of the costs involved with the proposals despite the fact that this has been highlighted by a number of business organisations during a number of stakeholder engagement events. The estimates contained in the Regulatory Impact Assessment for both the Bill and the accompanying multiple discrimination consultation paper are based on no more than “assumption” and an estimation that familiarisation with the new proposals would take the average business just two hours. The Bill proposes numerous changes to the law which businesses will have to take advice on. They will have to evaluate their policies, potentially re-write them, communicate with their workforces etc and this is without the costs caused by increased claims and further complexity – inevitable consequences of some of the Bill’s proposals.

PAY GAP REPORTING

Misinformation: We are disappointed that the Bill proposes to bring in powers to require pay audits and had been promised that this would not be the case. We oppose this measure and believe that mandatory publication of average hourly pay rates will:

- Divert resources away from genuinely addressing the issue – as businesses are forced to spend time and money number-crunching instead of targeting resources on work to address any under-representation
- Put women off certain companies or even industries, irrespective of whether issues are being addressed
- Spread misinformation – as companies publish average hourly rates and not like-for-like rates. Comparing rates which simply indicate the difference in average hourly rates (as one figure taken across all jobs) will only indicate whether there are more men in higher positions and will fail to provide any insight as to whether any actual discrimination exists.

¹ The Retail workforce comprises 62% women and provides part-time working opportunities to 58% of its employees (ONS December 2008). Our latest membership survey showed members provided valuable entry-level opportunities to younger workers with 19% of the workforce between 18-21 years of age (BRC Survey 2009). It employs 13% disabled workers, in line with the UK population and 12% ethnic minority workers in proportions reflective of local populations (Labourforce Survey/Skillsmart).

We believe that the way to address any differences in opportunity is by improving career advice, challenging stereotypes and supporting women to achieve top qualifications.

Clear intentions: While the Government Equalities Office has promised any such power to enforce mandatory pay gaps will not be used until 2013, this is not explicit on the face of the Bill. In the event that Parliament decides the power should be retained, the 2013 date must be made explicit.

MULTIPLE DISCRIMINATION

Consultation: We are disappointed that a complex legal issue like multiple discrimination has only been given a 6 week consultation period, with limited participation.

Evidence: The Government has not made a case for this proposal, failing to identify cases where single-strand claims have failed where they would have succeeded if there had been a multiple-strand mechanism. This new provision would bring with it 21 new claims for discrimination. This does not include combinations including accompanying single strand claims. Further, the Bill does not preclude bringing more than one multiple claim, which could allow individuals to bring several different combinations in one case – dramatically increasing costs, uncertainty and complexity with no additional benefit.

Costly burdens: The impact assessment figures are based on nothing more than assumption. It fails to consider costs associated with familiarisation (beyond two hours per business), costs of over-compliance, costs involved in revising policies and retraining staff and managers as well as costs involved as tribunal claims become more complicated and more time consuming, and employers become more likely to settle to avoid these increased costs.

TRIBUNAL'S PROPOSALS

Penalties: We are concerned that widening tribunal's powers to make recommendations in discrimination claims will effectively penalise businesses twice. The claimant may also have a large degree of control over the scope of the recommendation, and in any case argument over the content of any recommendation will increase the costs of the case. The Government has also failed to consider how a recommendation would operate in the case of a multi-site business. Where adequate equality policies are in place but a breach occurs at local level, it would be very unfair for the recommendation to suggest that a failing at company level existed, and indeed to further penalise the company for failing to implement the recommendation should any subsequent claimant at a different local site bring a successful case.

Repercussions: We are concerned that the first few cases in which a tribunal recommendation is made will have very public repercussions for the business. This will not assist an employer to address their policies and enhance the culture within their organisations.

POSITIVE ACTION

Confusion: While businesses should be supported to address under-representation in their workforces, it is imperative that legislation and accompanying guidance is clear on how this should be done. Currently the explanatory notes refer to candidates who are "equally qualified" in terms of positive action in recruitment, and "as qualified" in the Bill. The two are clearly distinct and likely to confuse – the latter identifies a principle of minimum merit (both candidates have reached the same minimum standard) whereas equally qualified indicates that they achieve the same overall application score.

Clear guidance: The current example about selecting the underrepresented candidate from two equally qualified, equally suitable applicants is artificial. The situation will never arise where two candidates are as suitable for the post in every way and employers will need much clearer guidance on how they can use this power to ensure they do not end up falling foul of the law.

PROCUREMENT

Burdens on small business: The Bill essentially uses public sector procurement to impose duties on the private sector. We are extremely concerned that the costs associated with proving equality at what is already a very difficult time will see some smaller private businesses unable to compete which could put them out of business.

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