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Acas Policy Discussion Papers

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Back to basics. Acas' experience of equality and diversity in the workplace

The *Acas Policy Discussion Papers* series is designed to stimulate discussion and debate about key employment relations issues.

This *Acas Policy Discussion paper* was written by Sarah Podro of the Acas Strategy Unit. The views expressed are those of the author and not the Acas Council.

We welcome your comments and opinions. These should be sent to the author c/o strategy@acas.org.uk

Summary

The equality and diversity debate and the language associated with it have become increasingly sophisticated over the past 10 years, and the accompanying legislation more complex. As a result many employers and employees feel left behind, still struggling with the basic concepts surrounding discrimination. If we want to see the realisation of truly diverse workplaces in the future we need to understand why things go wrong at a practical level, and how existing law, and the intention behind it, can be implemented more effectively.

In this, the fifth in the series of Acas policy discussion papers, we focus on how employers and employees are dealing with the profound changes presented by the equality and diversity agenda. It draws on the experience of front-line Acas staff to provide a snap shot of what is happening on a day-to-day basis in our workplaces.

This paper is split into three parts:

Part one is an overview of current issues in equality and diversity and looks at the challenges for policy makers, the unique window on the world of work that Acas commands, employer fear of equality legislation, and the experience of small and multi-site employers.

Part two asks 'why things go wrong?' and examines the myths and misconceptions that surround equality legislation in relation to gender, race, disability, transgender, sexual orientation, religion or belief. It also looks forward to likely issues to arise under new age legislation, and examines the experience of migrant workers.

Part three looks at overcoming the barriers to change, the use of procurement to promote diversity and the contradictions inherent in legal enforcement. It examines the use of mediation where there is no obvious legal solution to competing demands of individuals, colleagues and the employer.

The paper ends by making a number of **recommendations**, including:

- greater use of plain language by agencies and diversity specialists in order to demystify the concepts surrounding equality and diversity
- CEHR led campaign to make a connection with those people on the fringes of the equality and diversity debate
- support for employers to change attitudes and behaviour amongst their staff
- support for an education campaign on the benefits of mediation, and training for workplace mediators
- more widespread use of procurement by public authorities as a form of encouraging best practice in equality and diversity
- greater emphasis by employers on training for line managers in employment relations and managing a diverse workforce
- more awareness of rights and responsibilities at work to be included as part of secondary education for those about to enter the workplace.

Part one – an overview

The challenges facing policy makers

As equality and diversity continues its steady rise up the policy agenda, the workplace has become the focal point for addressing the discrimination and inequality that exists in our society more generally. For many individuals their first meeting with the concept of discrimination or prejudice will be when they start their first job. Even some aspects of immigration control are now being transferred to employers.

Predicted changes in the diversity of the labour force are linked to the continued feminisation of the workforce, as well an increase in the proportion of ethnic minorities, migrant workers, older workers, and disabled workers, groups who have traditionally been underpaid, undervalued or excluded. In some cases these changes are a result of employers recruiting from these groups because the traditional workforce is not plentiful enough, or does not want the type of work on offer. It can also be because individuals who did not previously need, or want to work, or who were discouraged from working, now choose to do so out of financial necessity, or as a result of change in societal attitudes, as in the case of working mothers, for example.

Whilst market forces and demographics may create a diverse workforce they do not ensure best practice. There are therefore a growing number of government initiatives and a plethora of accompanying policy recommendations directed at promoting equality and diversity in the workplace. Over the past five years we have seen the introduction of:

- anti-discrimination law on sexual orientation, religion or belief, and age
- the Gender Reassignment Act
- the new Disability Discrimination Act (DDA)
- legislation to establish the Commission for Equality and Human Rights (CEHR), and
- the Work and Families Act

as well as the forthcoming disability and gender duties, proposals for a single

equality act, the Women and Work Commission recommendations, and the ongoing equalities review and discrimination law review. The government has also recently published *Success at Work*, a policy statement on 'protecting vulnerable workers, and supporting good employers'.

The challenge for policy makers, and in particular the CEHR, is how to make our workforce more diverse but at the same time how to ensure that what is described as the 'hour glass economy', with the clustering of high paying and rewarding jobs at the top and low paying low skilled jobs at the bottom, becomes less occupationally and vertically segregated.

Post-Macpherson, the concept of institutional racism, and institutionalised discrimination more generally, has been widely recognised by the public sector, and moves made to address the disadvantage this causes through existing and planned public duties for race, disability and gender. However, this is not the case in the private sector. Procurement is seen by some as the silver bullet to tackle this anomaly, but more cynical voices point out that, though a welcome opportunity to encourage good practice, it may be unenforceable in any legal sense.

In their rationalisation of inequality, policy makers are looking at a range of factors including the impact of education, economic status, caring responsibilities, as well as discrimination and prejudice. However, the balance may be tipping too far towards a circumstantial explanation of inequality in our society. This focuses attention on the groups who face disadvantage or discrimination, but may fail to look at what motivates those who perpetrate discrimination and prejudice, be that deliberate or unwitting.

It certainly makes sense to encourage women into traditionally better paid professions where there are recruitment shortfalls, but this will not make undervalued feminised sectors of the economy, such as caring or cleaning any better paid or secure.

One strategy, adopted by proponents of equality and diversity to persuade employers through non legal means of the need for greater fairness, has been to focus on the business case. There are, however, emerging concerns about the limitations of this approach. Many of those attending the Acas diversity symposium, held in April 2006, including academics, policy makers and representatives from business and trade unions expressed a disquiet that the business case may have received a disproportionate emphasis. Many felt there was a need to return to ethical arguments for equality as well as developing more varied methods of persuasion to fit different audiences.

Legislation and its enforcement are critical in changing behaviour and raising awareness. But this must be balanced with information and support, not only for employers expected to abide by the law but also for the workforce. Without such awareness the tools to fight discrimination and prejudice can simply fuel resentment and inflame greater prejudice and a sense of exclusion. Should employers be involved in changing attitudes as well as regulating behaviour, as part of the government's broader agenda for social cohesion? If this is the case, then employers will need support. They also need to be part of an integrated approach that begins before people enter the labour market, and continues both in and out of the workplace.

Moreover, with the growth of individual rights there may not always be a fair way of resolving conflict through legal channels.

Where rights compete and conflict there may be a need to use more consultative methods of resolving conflict, such as mediation.

Acas window on the world of work

Acas is traditionally associated with conflict resolution and its conciliation role in both individual and collective disputes. In fact, its contact with the world of work is far more extensive. The Acas helpline currently receives around 900,000 calls a year from employers, employees and their respective representatives. The website – with its information and advice and e-learning packages – receives around 200,000 visitors a month, and now has 52,000 registered users of e-learning packages with 200 new users joining monthly. Acas advisers deliver training on a broad range of employment relations issues, as well as going into individual workplaces to provide tailored advice and support.

The organisation is also:

- working on national projects with, among others, the NHS and local government and associated trade unions as they undergo large scale change under the government's public sector reform programme
- providing information and advice to individual private sector employers, in particular small and medium size enterprises (SMEs)
- involved in sectoral initiatives with, among others, the CITB, the building industry training organisation, and the hospitality sector
- working with a range of local partners including regional development agencies, local trade unions and employers groups on a variety of joint initiatives and projects.

Acas has a unique perspective on the world of work through the daily contact that its staff have with Britain's workplaces, not least because its impartiality and independence mean that the interaction it enjoys is, perhaps, an unusually frank and honest one for an organisation dealing with all sides of the employment relationship.

This paper brings together the accounts of over 90 of Acas' front line staff – helpline advisers, equality advisers, general advisers and trainers, and conciliators and senior managers – to provide a rare insight into areas of the equality and diversity debate not always touched on by other research. The areas picked out by the paper reflect the majority view of those interviewed in a series of face-to-face interviews and focus groups in January 2006.

By its nature Acas is an organisation that people go to when there is a problem, and the picture that this discussion paper provides can seem negative. It does not, it should be stressed, provide a definitive account of what is happening in relation to discrimination in the workplace. Its aim is not to quantify but to offer a realistic picture of what goes wrong and why.

Good practice exists in many workplaces and Acas endeavors to share this through our guidance, training and online products. At times, however, the debate seems to have become so sophisticated that some workplaces have become left behind, overwhelmed by the growing complexity and coverage of anti-discrimination laws, and the sophistication of the diversity debate. This paper, therefore, attempts to remind us of the practical difficulties involved in navigating this important area, in order to point the way to practical solutions to addressing inequality in the workplace.

Awareness of equality and diversity

The ground appears to be shifting in employers' awareness of diversity, or as one senior Acas adviser from London described: 'If you used the term diversity 10 years ago a lot of employers would assume you were talking about product range'. However, this shift is by no means universal. Although awareness is heightened in some sectors and geographical areas, there also remain pockets where little has changed.

Diversity is in many ways an amorphous term. Many smaller to medium sized employers always in search of greater certainty, find the leap required from not discriminating to actively embracing all forms of difference, too intangible.

To date, an understanding of diversity and its implementation remains the domain of larger organisations with an HR department. These organisations have the 'luxury', as many smaller organisations would see it, of having a dedicated member of staff to develop the area, not to mention a large enough workforce for there to be a measurable outcome. Although over half the working population is employed by organisations with 500 or more staff, a significant proportion (26%) are employed in workplaces with between one and 49 employees, and this rises to over a third if you include workplaces with up to 100 employees. (*Source: Small Business Service Analytical Unit*).

The business case for diversity – that a more diverse employee base will attract a more diverse customer base and increase sales, improve service etc – is a well argued one. But for small employers and family businesses a strong driver for recruitment remains a tendency to seek employees, particularly at more senior levels, that they identify and feel comfortable with socially and culturally. They may also worry about incurring additional costs – perceived and real – through the need for adjustments to accommodate disability, or absence due to pregnancy.

The shared experience of our advisers is that a large proportion of smaller organisations that contact us, at best, tend to focus on how to treat employees fairly within the law. The introduction of new legislation on sexual orientation, religion or belief, age etc mean that there is heightened awareness of equality compared to, say, five years ago. Most employers could probably tell you what areas you shouldn't discriminate on, but there is far less understanding of the detail and the practical implications of the legislation.

Small and multi-site employers

The huge body of legislation on employment rights, more generally, is a particular challenge to smaller employers. Although our advisers do report good practice among many, especially in relation to flexible working practices, there is a tendency for this group to be reactive rather than proactive in their approach to equality, only dealing with discrimination issues when they have a problem. With fewer employees they are statistically less likely to deal with a tribunal claim for discrimination than larger organisations and, therefore, less likely to develop any expertise of the detail.

> 'For smaller companies the attitude is often, "I've got a business to run, I've got to worry about the Inland Revenue and I've got to worry about getting contracts and orders". What they perceive as the 'soft stuff' around equality is not something they have time for. Many are still grappling with the discipline and grievance regulations.' **(Senior adviser, South East)**

Although it is easy to generalise about the way in which smaller employers respond to

and cope with anti-discrimination legislation, large employers are by no means exempt. Personnel specialists also struggle with the influx of new legislation. Even for larger employers discrimination is not an issue that they deal with on a daily basis. Multi-site employers often have a similar profile, in terms of experience and expertise, to small employers, and face similar problems. And the trend for employment relations responsibility to be devolved to line managers and away from human resources means that managers often lack the right training and a detailed knowledge of the law.

Fear of equality

It is well recognised that employers and employees alike find discrimination legislation a difficult area of employment law. One reason for this is that the less tangible concepts that the law contains require employers to investigate and interpret before making a judgement about a particular individual or situation. But there are two other key reasons why both sides struggle.

Anti-discrimination law is an area that is surrounded by fear and misconceptions, in part due to tabloid press coverage that often presents discrimination law as 'political correctness gone mad' and 'too much red tape', or covers high profile city cases with potentially huge payouts. As a result, many employees and employers simply do not get as far as examining the detail. Employees often assume they have more rights than they do, and some employers will not even dip their toe in the water, fearing that even starting a dialogue on sensitive issues involved in discrimination will open up Pandora's box.

The resistance to the equal rights agenda by many employers with whom Acas comes into contact, also stems from their belief of the negative impact on their bottom line, particularly in relation to equal pay, maternity rights, and though often more perceived than real, reasonable adjustments to accommodate disabled employees. The effect of these three factors contribute to what are persistent areas of inequality.

Part two – Why things go wrong

How employers, employees, and their representatives experience discrimination can cut across the different legislative areas. However, we have chosen to look separately at the different areas of discrimination to give as vivid an illustration of the types of misunderstanding and the difficulties experienced by all sides of the employment relationship. Below, we examine the ways in which these manifest themselves.

Defining disability

Negative attitudes towards disability encapsulate most clearly all the reasons why employers often struggle with discrimination legislation generally. It is an area that employers feel very frightened of, struggle to understand, and believe to be costly. As the definition of disability has widened, so has employers' confusion. Calls to the helpline and questions to advisers most commonly focus on the most basic concepts contained within the Disability Discrimination Act (DDA):

- What is a disability?
- What is a reasonable adjustment?
- What is reasonable?

Employers look for prescription and panic when they realise they have to work it out for themselves, say advisers. Common misconceptions include the belief that you cannot sack someone who is disabled, or the other extreme, that you can automatically sack someone if they have been on sick leave for a certain amount of time, without any need to look into the reasons behind the absence. Many of those contacting Acas also believe that employees do not have

protection for the first year of employment, and that small employers are exempt from the regulations.

Reasonable adjustment
There is a common perception that reasonable adjustments are costly, and as a result many employers that contact Acas fail to be proactive or even responsive to employee needs. There may be a cheap and simple solution, but the failure to deal with it can result in a costly tribunal case. In one case where Acas provided conciliation, a partially sighted woman working in a large DIY store was having problems with certain aspects of her job such as stock taking and pricing goods. Her problem would have been easily rectified with a hand held magnifying glass in combination with the glasses she wore, but her employers failed to look seriously at simple adjustments, and so lost the case at tribunal. One positive outcome has been the company's subsequent commitment to investigate what went wrong and consider how they can do things better in future.

However, in many other cases, employers are keen to support employee needs but are genuinely unaware of them. It is becoming more common now for employers to ask about disability on application forms, but it is not the rule, and many remain unclear about what they can and can't ask about. Employers sometimes fail to understand that where questions on health may be appropriate for some jobs on health and safety grounds, they may not be relevant for other roles.

Employees contact Acas asking whether they have to fill in the questions on disability, or whether they have to tell their employer that they have developed a disability in the course of their employment. They fear that disclosure will lessen their chances of being selected, or increase their chances of dismissal. The problem is, sometimes the first an employer knows of an employee's impairment is when they lodge a claim with the tribunal. The statutory discipline and grievance procedure should counter this. But if employees do not disclose information to their employer there remains the risk that an employee will see their impairment worsen, perhaps risking lower productivity or long-term absence because changes that the employer could have made to support them are not addressed.

Stress
One type of impairment that both employee and employer both seem to be unwilling to raise, say advisers, is that of mental illness. And since the removal of the requirement for mental illness to be clinically recognised, Acas advisers are increasingly being asked how to deal with situations involving stress.

Often associated with long-term absence, stress can be more difficult for employers to identify than other forms of disability, and harder to prove for the employee. A report of stress at work can carry implied blame for the organisation – for example, stress might be caused by a badly managed discipline and grievance procedure. Managers are often unsure how to react to stress. They fear that intervention might make things worse, whilst also worrying that doing nothing might allow the situation to deteriorate. From an employee perspective, admitting to stress or any form of mental illness runs the risk of being stigmatised and seen as 'weak' and 'not up to the job'.

The causes of stress raise fundamental questions about workplace culture, in general, including increases in workload, long working hours and how staff are managed. But more specifically, the reticence of both employers and employees to deal more openly with disability points to a need for fundamental cultural change both in the workplace and in society more generally. Organisations need to demonstrate a positive approach to disability

and make potential and actual employees feel confident about disclosing their impairment. They need to ask questions that highlight the importance of capability and the jobs people can do, rather they focusing on what they cannot.

The latest consultation from the Disability Rights Commission (DRC) looking at widening the definition of disability is focused on just this paradigm shift. In what the DRC acknowledges would be a radical reform of the law, the new definition would apply to anyone with any level of impairment. So someone with a broken leg or a short-term mental illness would be covered. This would shift the definition from a medical model to a more social model of disability and breaking the association between the DDA and disabled people, and help to focus on the act of disability discrimination itself.

Women in the workplace

Two of the most commonly raised discrimination topics on the helpline in relation to gender are pregnancy discrimination and equal pay.

Pregnancy discrimination
The Equal Opportunities Commission formal investigation into pregnancy discrimination identified it as a persistent area of inequality for women. In a survey of 1000 women almost half (45%) said they had experienced dismissal or disadvantageous treatment because of their pregnancy. According to Acas staff nationally, there is a basic understanding of women's rights to maternity leave, but many employers remain surprised that women are also allowed time off for antenatal appointments. Where they are aware, they can on occasions monitor women to such a degree that women feel harassed and undermined as illustrated by the following case involving a college lecturer.

'The woman (claimant) is arguing that when she was entitled to time off for antenatal appointments her manager checked up on her by telephoning the doctors to double check what times the appointments were, to make sure with the midwife that these appointments were necessary. The claimant felt that she should be trusted, and that the line manager should have accepted her word on what was necessary and the timing of classes etc. She then asked to work slightly different hours as she approached the point when she would be going off on maternity leave. The college were checking up on her to make sure that she'd completed work, were talking to her students to make sure that they'd had all their tutorials set without coming to her to ask. So she felt that it was undermining her professional abilities and standing in the college. She then wanted to come back part time and she felt as though the treatment she had received from her line manager which she reported to the college had been condoned in effect because they hadn't instigated the grievance procedures, they hadn't set dates, they'd dragged their heels. She felt as though her grievances were unanswered and that the relationship had been damaged and she couldn't go back. So we're in the process of trying to organise a settlement which includes mutual termination. It is almost at its conclusion now.' (**Conciliator, South West)**

The case was subsequently settled successfully.

Many employers are also unaware that they have a duty of care to carry out a risk assessment, and advisers report that

employers sometimes express horror that women can have paid time off for medical reasons even before their leave begins. The EOC investigation found that 'only 8% of employers surveyed who had employed a pregnant worker in the past three years mentioned the right to a risk assessment when asked to name a statutory right. Many overlook simple everyday dangers such as standing for long periods, heavy manual handling or a stressful working environment, all of which can cause premature birth and have lasting health implications'.

The impact of current maternity legislation and the promised extension of maternity and paternity leave appears to be creating a backlash. There is now a growing body of anecdotal evidence of employers being unwilling to recruit women of childbearing age. In one survey, 80% of HR professionals replying to an online survey admitted that they think twice before employing women of childbearing age. Some of the small employers taking part in focus groups, run by Acas as part of the EOC investigation, admitted that they had already discriminated in this way.

The ongoing experience of Acas staff is that this attitude remains common. One extraordinary illustration of this reluctance was a call to our Glasgow helpline from the mother of a teenage girl who had applied for a job as an assistant at a chemists. According to her mother, as part of the interview the chemist took a pregnancy test off the shelf and sent the girl off to the bathroom to take a pregnancy test.

It is not uncommon for employers to openly express to our helpline and at Acas training events that they don't see why they shouldn't just sack women if they are pregnant.

Why are employers so open about their opposition to pregnancy? It seems that where cost is involved employers feel they have a legitimate reason for discrimination. Clearly, having several workers off on maternity leave if you are a small company is an undeniable burden in the short term. Costs include recruitment, training and pay for maternity cover if there is time to organise this, additional burdens for remaining staff where cover is not arranged or a new staff member is not up to speed. But equally where employers help women back to work, they save on recruitment and training and they retain valuable experience and are likely to end up with a more loyal and committed worker.

It is hard, however, to make the business case to a small employer when the impact of losing a member of staff for nine months or longer is going to jeopardise the long term survival of the company. Ultimately, it is the legal argument that takes precedent and the growing weight of case law in this area that provides the most persuasive argument for good practice.

Small employers, according to our advisers and the focus groups with small employers, resent the lack of support that government provides particularly with recruitment and training costs. With the extension of maternity leave there may well be more pressure on government to provide greater financial incentives.

Equal pay conundrum

Equal pay remains one of the most intransigent employment relations issues despite over thirty five years of legislation. The Women and Work Commission found that factors such as occupational segregation, careers advice, lack of childcare and discrimination all played a part in explaining the pay gap. But the resurgence of equal pay cases in the public sector has put the spotlight on workplace discrimination once more.

The most common misconception that Acas advisers encounter is a continued lack of

awareness and confusion over the nature and intent of the legislation. Calls to the Acas helpline, for example, highlight a common misunderstanding of the need for opposite sex comparators. Both employees and trade union representatives often misinterpret equal pay as being about fair pay. As one helpline manager noted 'calls tend to fall into two camps – those from male drivers with no female comparators and female carers tending to have no male comparators'.

Establishing the right to equal pay can be a long and complex process if a woman is seeking to prove equal value rather than simply a discrepancy in pay rates for the same job. In the private sector, Acas advisers report that employees are less likely to know the pay rates of their colleagues because of a general lack of transparency in pay systems, or even the existence of any coherent pay system. This makes taking any form of equal pay claim far more difficult, but it also makes identification of inequalities and their resolution by employers more complex. For the private sector the fear that even investigating pay equality will render employers vulnerable to an equal pay claim, and concern that they will not be able to afford to remedy any inequalities if a number of staff are affected, mean they prefer to avoid the issue altogether. Acas is rarely asked to conduct a full equal pay audit.

In the public sector by contrast, there is greater transparency in pay systems. But harmonisation of manual, clerical and managerial pay onto one set of pay and conditions under single status agreements (local government) and Agenda for Change (NHS) have highlighted further complexities. One of the main problems is the way in which incentive and bonus schemes have distorted the pay system over time. Historically, it was male jobs that attracted bonuses as a way of raising low wages amongst manual workers in times of pay restraint e.g. 'height money' for arborists, 'dirt money' for bin men. The problem comes when local authorities attempt to merge pay spines even where there is agreement on equal value between jobs. One adviser working with a council in the North West described some of the difficulties involved:

> 'In one local authority the refuse collectors, all men, were on a set rate for the round, set days and set streets for a set amount. If they did the work in five hours they would get paid the same amount as if it took them seven hours. They also got bonuses for lack of complaints and dirt money. Some teams did not replace men when they left and shared the money between them. This was compared with a job that was potentially of equal value. Street cleaners (almost all women) picked up litter, and were on an hourly rate and had no bonuses. There was no way of telling the hourly rate for men. How do you compare a £100 per day with a rate per hour?' (**Senior adviser, North West)**

The moral argument for equal pay has been won. Like pregnancy discrimination however, the greatest obstacle is arguably cost. There are always winners and losers in the evaluation of pay and grading structures and the remedies necessary to address equal pay discrepancies. Often the losers are men. Local authorities are trying to find ways to minimise the impact for those losing out. In one authority in the North East three potential pay models produced between 20.7 and 23% losers. Bin men were some of the biggest losers (£4,000 to £5,000 less per year), the biggest winners being school cooks (up £7,000 per year).

In local government, pay audits are effectively mandatory under single status. But unlike the health service, where money

has been provided to bring in a new pay system, the lack of sufficient funds to pay for change in local authorities has thrown unions, employees and employers into conflict with one another. Historically, trade unions have been supportive of the concept of equal pay for women, although not always active in pressing for change because of the delicate balancing act required in representing both their male and female members in a tight budgetry environment. According to Acas advisers it is still an issue that individual trade union representatives in both private and public sector are reluctant to raise.

At a more strategic level unions, particularly those that are female dominated, are taking a more proactive stance. But their position has been one of reaching negotiated settlements for groups of women that ensure protection for all members. One approach taken by the unions has been to negotiate pay protection or 'red circling' for jobs threatened with wage reduction. This is problematic for a number of reasons. It can take years for women's pay to catch up, particularly when inflation is low and, if red circling is allowed to continue for too long a period the employer remains vulnerable to equal pay claims. Further, it can cause resentment amongst male workers if it is implied that red circled workers are overpaid, when this is not the case. It was never the aim of equal pay legislation to depress male wages.

Without appropriate funding to equalise wages up, trade unions are struggling to secure women's rights under equal pay legislation whilst also protecting the wages and jobs of male members. As a result, an independent lawyer has taken a swathe of employment tribunal cases on behalf of frustrated female members mainly against their employers, but most recently in the North East against the unions themselves (including GMB and Unison). This trend looks set to continue.

Right to request flexible working

The new right to request flexible working is ostensibly aimed at anyone with young children who wishes to reduce or flex their hours to accommodate their childcare responsibilities. In practice this right appears to be predominantly taken up by women. According to helpline advisers around 90% of calls are from women. According to the Department of Trade and Industry's second flexible work survey, over 4/5 of employee requests for flexible working were fully or partly accepted by employers. In our experience, however it is a very misunderstood set of employment regulations by employees.

A large proportion of the queries that come to us via the helpline and in conciliation involve women returning from maternity leave, and assuming they have the right to return on part-time hours.

> 'You have situations where a woman on maternity leave waits till the last minute to apply for flexible working. They have already burnt their bridges and can't go back to their original hours. The employer has not yet considered the request or been given enough time. There is a general lack of awareness that employers need at least a couple of months for discussion and appeals.' (**Helpline adviser, Glasgow)**

Employers, on the other hand, sometimes think they can say 'no' without giving a reason or having properly investigated. However, the view of advisers was that, in general, employers were far better informed of what was expected of them than their employees. What they do struggle with are the formal procedures and, in particular, keeping within the set time frames, and the practicalities of implementing requests.

There was some evidence from advisers that certain more unscrupulous employers are keeping staff deliberately ignorant of procedures to thwart successful applications.

> 'A lot of employers know that if the employee does not make the request in writing, and specify the four requirements for the application (ie change applied for, date, effect on the employer, how effect could be dealt with) it won't stand up in law. And some take advantage. We get employees phoning up and saying they had verbal agreement from their employers before they went off on maternity leave but when they came back the employer reneged and then told them they needed it in writing. I have also spoken to at least half a dozen employers who certainly knew that the employee needed the request in writing, and who phoned seeking reassurance that they wouldn't have to grant their request because the employee had failed to do so.' **(Helpline adviser, London)**

Some of the dilemmas that arise for employers include:

- how to accommodate employees who previously worked nights, or are on 24 hour standby and no longer want to sleep over, thereby changing the nature of the job
- where to draw the line when an ever increasing number of employees request to work flexibly
- resentment from employees not eligible to request flexible working.

Potential resentment from staff is sometimes given as an excuse for not granting flexible working, say Acas advisers, but they also report it as a source of low level conflict in the workplace with those without young children, or who are caring for older relatives feeling aggrieved. One adviser also described a degree of backlash from those who have to cover for those working flexibly, in particular he said, from white working class men who 'feel the pendulum has swung too far, and who feel they are being edged out. It may not be true, but that is their perception, and we need to explain why this is not the case and why other workers have rights that they do not'. **(Senior adviser, London)**

The stigma of racism

The experience of the 90 plus staff interviewed in gathering evidence for this paper is that race is an area that employers appear to find particularly difficult to confront. Helpline advisers, advisers and equality advisers all agree that there are a deceptively low level of queries, in particular, from employers. Unlike the subject of pregnancy discrimination that employers are quite happy to talk openly about, race is a topic that employers would rather avoid. One of the main reasons for this appears to be their fear of the stigma of being labelled *racist*, above all other accusations of prejudice. The approach of Acas advisers is to cloak advice on race discrimination within more general advice on equality and diversity. This, they say, helps to put employers at their ease when discussing their concerns.

There are employers, with whom our advisers come into contact that are committed, in theory, to racial equality. But they are sometimes scared of taking a proactive approach. Their fear is that they will unearth evidence of prior discrimination that may have occurred unwittingly, and make themselves vulnerable to tribunal claims. For example, if an employer monitors their workforce and discovers serious under-representation of people from black or ethnic minority (BME) groups, will it be seen as discrimination if they fail to recruit more individuals from BME groups? Many employers choose instead to do nothing. Similarly, there are employers who believe that by disciplining ethnic minority staff they

will run the risk of exposing themselves to claims of racial discrimination. There is no evidence to support this view but the end result is that employers can create a new problem by failing to effectively performance manage ethnic minority staff.

Overt racism is far less common than it used to be, although racial harassment still exists and can manifest in very extreme forms. In a recent case settled by our conciliators the claimant suffered harassment and physical violence involving cigarettes being stubbed out on him and hammers thrown at him. But much discrimination occurs in relation to recruitment, promotion and training and development. Some employers still remain ignorant of the difference between direct and indirect discrimination, or even the most basic definition of racism. Employers will say in their defence 'I can't be racist, I employed him in the first place', or 'but half my staff are Asian'.

The other common misconception is that race discrimination is confined to discrimination by white people against black people, or that only those from ethnic minorities can make a claim on the basis of race. In fact, Acas staff are seeing more problems involving discrimination between different ethnic groups, sometimes crossing over into sex discrimination. One employer Acas worked with found that his Sri Lankan manager was favouring the Sri Lankan members of his team and was discriminating against African workers, particularly women, which the manager deemed perfectly acceptable. 'In inner cities this is a huge issue in terms of getting different cultural groups to understand our concept of discrimination', explained one adviser.

Religion or belief

The Employment Equality (Religion or Belief) Regulations 2003 are still a relative unknown for many employers, and calls to the helpline remain fairly low on this subject. Although the Equality Act has now clarified the inclusion of a lack of belief, employers and employees alike tend to understand the legislation as protecting those who belong to a particular faith or religion.

Like other anti-discrimination legislation, the regulations protect employees from direct and indirect discrimination, harassment and victimisation. Despite fears of a backlash against Muslims post 9/11 and the attack on London in July 2005, feedback from focus groups and individual interviews did not raise any significant rise in enquiries from Muslims suffering harassment or direct discrimination on religious grounds. It may be that this form of discrimination is experienced more on racial grounds. One adviser in the South East noted that:

> 'All the Asian community (not just Muslims) are finding it hard to get interviews in the current climate.'

Preliminary analysis by Acas of tribunal applications has found that around 60% of employees making claims under religion or belief regulations are also making a claim under the Race Relations Act.

There have been enquiries from less mainstream Christian groups such as born again Christians reporting disparaging remarks about their beliefs, and other Christians wanting to opt out of Sunday working. In the main, however, employers are looking for guidance in interpreting what would be a reasonable response to requests for prayer rooms or washing facilities, or time off for prayer or religious holidays, and how religious clothing can be accommodated within a work uniform.

> 'In Somerset there are a lot of Somali workers for instance, and their religion requires that they wash and pray at certain times of the day. Employers

> I know are doing all the right things. They're putting in special facilities, allowing prayer rooms. All they want mostly is for "somebody to say what is it we're supposed to do, and once we know we will do it to the best of our abilities." In my experience most employers and, to be honest, most employees respect people's religion and belief. But they do get nervous they might say a word out of place or you know, get the terminology wrong. People worry about the correctness of the things they say.' **(Senior adviser, South West)**

As with other areas of anti-discrimination law, employers are nervous about when it is acceptable to say 'no'. In one workplace where Acas was asked to provide advice the employer, who had a high proportion of Muslim workers, was conscious that his managers were so anxious about the legislation they were saying 'yes' to all requests for fear of discriminating if they said 'no'. Because it was a production line factory making washing machines with a 24/7 shift pattern, having people take time off whenever they asked for it was disrupting production and creating tensions with other members of the workforce.

Handling meat is also a dilemma that has arisen in enquiries from both employers and employees in relation to cooks, packers, and those working in food preparation. In a multicultural workforce an employer might have to accommodate a number of different requests from employees of different religious backgrounds. Acas provides guidance on consulting the workforce to help employers accommodate these needs.

Sexual orientation and colleague attitudes

As with religion or belief, the sexual orientation regulations brought in at the same time are still a relatively new area for employers and employees. As one conciliator put it:

> 'A lot of employers haven't quite come to grips with what they should be doing and what is acceptable and what's not. The main issues I've had are in relation to attitudes of work colleagues and what they would call banter, pranks that have been played and people thinking it's funny. There is a lot of work to be done training managers to deal with these situations but also attitude training for colleagues.' **(Conciliator, South West)**

One adviser even reported this type of behaviour in a training session he gave covering the sexual orientation regulations.

> 'There was a man who was perceived to be gay by his colleagues. He had been in the organisation a month and had a manager sitting opposite him and two other members of his team, and they started sniggering when we were discussing gay and lesbian issues. They then started whispering between them. I dealt with the situation and then it spread further down the line to the corner of the table with this perceived gay guy being the butt of a couple of jokes.' **(Senior adviser, Wales)**

Numbers of individual claims remain low. Part of the reason behind this is likely to be the fear of being 'outed' by those who have chosen to keep their sexuality hidden. In a recent study of lesbian, gay and bisexual workers and their employers by the London Metropolitan University, researchers found that even in good practice organisations some lesbian, gay and bisexual employees still choose not to come out, and many come

out only to certain colleagues, or in certain departments within one organisation. With the introduction of statutory discipline and grievance procedures employees must now go through an internal process before taking a claim to tribunal, increasing the possibility of them being outed more widely than they are comfortable with.

Preliminary analysis by Acas of the applications to employment tribunals has revealed that London based employees taking cases are already 'out' at work, and show no evidence of being unsure, embarrassed or fearful about revealing their sexual orientation. Furthermore, the employers involved are often the last you would expect. For example a gay bar, a women's refuge. Other cases have involved 'straight employees' taking cases against gay employers. These findings would suggest that the great extent of workplace homophobia remains unchallenged and untouched by the legislation.

Despite fears of the potential for conflict arising from gay, lesbian and bisexual employees wishing to work in organisations with a religious ethos, our advisers say this is rarely raised. Of the very few enquiries we have received, one Christian organisation asked whether it could exclude all applications from gay, lesbian or bisexual workers; and a Muslim organisation requested training on anti-discrimination legislation but asked for any mention of sexual orientation regulations to be excluded The request was not met.

A more frequent query from employers involves monitoring, and whether they should or should not monitor the sexual orientation of staff. Even where employers are gathering statistics for all the right reasons they are often nervous about asking about the sexual orientation of staff because some employees may not want their sexual orientation known, even where it is held as confidential information. Sexual orientation monitoring differs from other areas for a number of reasons because:

- employees can choose to keep their sexual orientation hidden (unlike gender and race)
- it is more difficult to link monitoring to any practical benefits, such as reasonable adjustments, time off for religious holidays or the need for better access to facilities (as can be done in relation to religion or belief, and disability).

In other respects, however, monitoring in this area raises similar questions, namely 'why do you want to know?', and 'what are you going to do with the information?' New guidance from Stonewall, the national campaign and lobby group for lesbian, gay and bisexual rights, and existing guidance from the TUC and Acas, stress that monitoring must not take place in a vacuum. There must be an overt policy on the employment of lesbian, gay and bisexual staff. More specifically there needs to be a clear explanation that the reason for monitoring is to ensure that gay, lesbian and bisexual employees are widely represented across the organisation and are not being discriminated against; and that information gathered will be used confidentially to improve representation and workplace culture where it is found wanting.

The introduction of civil partnerships and changes to adoption law in December 2005 allowing same sex couples to apply for joint adoption, and the potential impact on benefits and pensions may well help to provide a link between monitoring and the 'why do you want to know?' question. It is likely to be an area for which employers and employees will need considerable support and guidance for some time to come.

Gender reassignment

Laws to protect the rights of transgender

employees have now been in place since 1999. Although discrimination against transgender employees is a gender rather than a sexual orientation issue, this area is often grouped with policies and lobbying on sexual orientation. This is partly due to the small size of the transgender community and the need to link with a group that has more political leverage. But it is also because the type of discrimination suffered is similar to that experienced by gay, lesbian and bisexual workers where public perception and prejudice fails to differentiate between the two groups.

Employers who contact Acas are generally clear on what this legislation means, but they face difficulties in dealing with both customer and colleague perceptions and the treatment of those who have undergone gender reassignment.

The most common scenario that employers are faced with is the intolerance of fellow employees.

> 'Things like going to the toilet become a nightmare, and then you get knock on cases from other employees who object to having a transgender person in the toilet. All your policies have to be looked at.' **(Conciliator, Scotland)**

Employer reluctance to address this type of conflict, and what may be entrenched prejudice of other staff or customers, can cost them dear. One claimant deprived of work opportunities, because of customer perceptions, and after a long history of employment for the organisation, recently won a £100,000 settlement.

An age old problem

After a somewhat uncertain passage, the Employment Equality (Age) Regulations came into force on 1 October 2006. Acas, who provided the guidance to accompany the regulations, has been receiving calls and delivering training over the past year and a half to prepare workplaces for the implementation of the latest area of anti-discrimination law.

In both consultation events run for employers across Britain, and in enquiries to our helpline and workplace advisers, it is clear that stereotypical assumptions around age remain prevalent. In particular, employers perceive older workers to be a problem and less able to perform well in their roles because they are 'less inventive', 'less creative', 'less motivated', and 'less driven'. Advisers also report the view that 'older workers call in sick more often and that as they approach retirement they just stop trying', for which there is no evidence.

Ageism remains an area unaffected by the stigma of other areas of discrimination. It is still deemed acceptable to openly discriminate in and out of the workplace. In the media, journalists often employ stereotypical language to describe both the old and the young. There is no doubt that this influences attitudes in the workplace, albeit unconsciously.

To a certain degree the way in which the new legislation is drafted does not challenge these deep seated prejudices because employers can directly discriminate on the grounds of age where this can be objectively justified. This differs from all other areas of anti-discrimination legislation where objective justification can only be used in relation to indirect discrimination.

Moreover, the default retirement age also allows for direct discrimination of all those over the age of 65. Heyday, a membership organisation developed by Age Concern is currently seeking judicial review of the mandatory retirement age which it believes contravenes the EU Framework Employment Directive outlawing age discrimination.

Misconceptions and assumptions
The most common misconception surrounding the regulations is that they are aimed purely at older workers, and this is accompanied by the assumption that retirement age and pensionable age are one and the same thing. According to our advisers it also comes as a shock to employers when they learn about the impact on recruitment and advertising, and for example, what the regulations mean for employers advertising for graduates.

> 'I had one employer who talked about employing graduates and I said "Well I could apply for that" and he kind of looked horrified and said "Yes, but I mean someone who has just become a graduate, not someone old like you."'**(Senior Adviser, Leeds)**

Similar assumptions accompany employer understanding of apprenticeships, where older can mean 17 rather than 16 years old. For example, one helpline adviser received a call from a career advisory service, concerned about an employer that only wanted to take on 16 year old apprentices because if they took on 17 and 18 year olds they would have to pay them more under the National Minimum Wage regulations.

One of the main areas where stereotypical assumptions currently impact is around performance management of older workers. The experience of our advisers reveals an unwillingness to deal with poor performance in older workers.

> 'They (employers) don't want to have to go through discipline and grievance procedures; they just want a quick fix, so they can get rid of them. The common perception is you don't do anything with poor performance where employees are approaching 65.' **(Equality adviser, London region)**

Although this attitude is not new, the view of several Acas helpline staff was that there has been an increase in these types of calls. There may have been a push from employers to rid themselves of older employees before new protection was introduced.

Selection criteria and age
Understanding the basic concepts surrounding the regulations is only the first step. There are a number of areas that are causing concern in terms of implementation, particularly in relation to new rules governing selection criteria for recruitment and redundancy.

Employers are concerned that they will no longer be able to use length of service and age for shortlisting, something which they say is essential for them to assess whether employees will 'stick it out', and can alert them to periods out of the labour market, such as time spent in prison that may make them unsuitable for certain jobs. Length of service, say employers, can also highlight whether applicants are lying about previous salary. Employers also use age as a way of managing large volumes of applications. One car manufacturer, for example, regularly gets 400 applications for one job.

Some organisations use random selection as a means of separating candidates of equal ability.This has been tested in the courts and found to be non discriminatory. However, there needs to be a sift based on competency before a random sift is used. The advice to employers is to put age and date of birth on monitoring forms so that they are sending out a message to recruiters and applicants that they are looking for competencies, and there does seem to be growing support for this approach.

An issue repeatedly raised in relation to protection for younger workers is the cost of insurance particularly for driving jobs. Many employers will only hire drivers over 21 because of the high cost of premiums for younger drivers.

Under the new regulations this form of discrimination will be difficult to justify at a tribunal in terms of cost. Employers therefore need to think carefully and ask whether, for example, they need all the sales people in a car dealership to be able to drive.

On selection for redundancy, many employers are unwilling to stop using age as a criterion for LIFO (last in, first out). Inevitably, younger workers are likely to have joined the organisation more recently and will therefore be disproportionately affected by such a policy. As one adviser noted:

> 'Employers often want length of service to constitute 30-40% of the criteria when selecting for redundancy. This approach is often supported by trade unions because their members tend to be older.' **(Senior adviser, Wales)**

Working beyond the default retirement age
The most contentious area of the new age regulations has been whether to implement a default retirement age. This was eventually introduced and has been set at 65. However, employees have the right to request to stay on, mirroring to some extent the right to request flexible working available to those caring for younger children. Most calls from employees have been around this issue, but it is also something that employers have a keen eye on and which, as suggested earlier, may have accelerated employer action to dismiss workers approaching retirement age. In fact, it is a fairly weak entitlement from an employee point of view and, unlike the right to request flexible working, employers do not have to give a reason for refusing requests.

The default retirement age will be reviewed in 2011 but, until then, Acas advisers are predicting this as an area of future confusion and dispute. Employers are unlikely to give reasons for refusing requests because they are not required to and because giving a reason could incriminate them. But not giving a reason is likely to cause anger and resentment among employees. It may also give rise to claims under other anti-discrimination law where employees suspect that they have been refused on the basis of disability, sex, race etc and there is an existing comparator.

There may not be a huge wave of employees demanding to stay on in the immediate future. Employees reaching pensionable age may have planned for their retirement and therefore not be seeking to work beyond it. But attitudes and expectations will change. We are living longer, spending more and retirement pensions are becoming less generous. If lack of pensions affordability drives down retirement income, more employees will be forced to work longer. Then we will see mounting pressure for greater flexibility around retirement arrangements and removal of the default retirement age.

Demographic change and migrant workers

As the government prepares to introduce some of the biggest changes to the immigration system for 40 years, the debate around migrant workers has become increasingly fluid. On the one hand there is shared concern over the exploitation and abuse of trafficked workers such as the Chinese cockle pickers who died tragically at Morcambe Bay. The Gangmasters' Licensing Authority was set up last year to curb the most extreme forms of abuse, although only in the agricultural, horticulture, shellfish gathering and associated processing and packaging industries. Currently more contentious, however, is the debate stirred by immigration from new EU member states, in particular from Poland.

Recent Home Office statistics, far outstripping original government predictions show that 450,000 people have registered to work in the UK since 2004, although the number of east European workers is nearer 600,000 when self-employed workers are included and potentially far higher if those who have not registered are added. These latest figures appear to have fuelled anti-migrant feeling once again, just as it seemed that their presence was being more publicly welcomed as a benefit to the UK economy. Now the debate has centred on whether the level of immigration is economically sustainable, and some voices have linked levels of migration to the recent rise in unemployment figures, while others argue that migrant workers are moving into areas where there is low unemployment and no available indigenous workforce. Commentators also point to evidence that many East European workers come for work but do not settle permanently.

It is a complex area for employment relations because of the interrelation between immigration status and employment status, and the relationship between indigenous workers and migrants and their employers and trade unions.

Over the past year and a half, Acas has been dealing with an increasing number of enquiries in relation to migrant workers from employees, employers, and their representatives. Although the profile of workers varies from region to region, migrants most often mentioned by our advisers are those from Eastern Europe and, in particular, Poland. Most work through agencies that have often brought them over in the first instance. They work predominantly in hotel and catering, agriculture and food processing. And in the latter two sectors our advisers most frequently cite queries from workers in mushroom farms and fish factories.

Employers that approach Acas, either through our helpline or via advisers on the ground, are often seeking information on immigration status and right to work, something that they are required to check under the Asylum and Immigration Act (1996). Acas does not advise on this area and will direct callers to the relevant agencies. But employers also ask for information on how to avoid indirect race discrimination when they request documents to prove immigration status. There is a growing awareness of the potential for indirect race discrimination in this area and the need to be proactive about avoiding discriminatory behaviour. Both the Commission for Racial Equality and the Home Office provide guidance on this area.

Some migrant workers speak good English, many however speak little or none. This can impact on employment relations in a variety of ways. Employers have contacted Acas asking about how to communicate important information to migrant workers, without basic levels of English, particularly around health and safety. Conversely, employees also contact Acas, concerned that employers are hiring non-English speakers who cannot follow health and safety instructions. There are examples of good practice in tackling this area, however. Some employers have begun to use visual signs to communicate or provide literacy classes for non-English speakers.

Sources of conflict

There are two main reasons why organisations choose to hire migrant workers. They are often cheaper to employ than the indigenous workforce, and they are willing to take up jobs that indigenous workers do not want to do where there are skill shortages. Resentment caused by employers attempting to undercut or get rid of an existing workforce is already spilling over into collective disputes. In one example involving a contractor to the airline industry, the predominantly Asian workforce feared that its employer was going to bring in Polish workers on lower rates of pay. Similar fears in relation to Balkan migrants are being expressed by indigenous workers employed on major UK construction sites. Part of the

problem is that there is a genuine shortage of skilled construction workers in Britain. The potential for conflict exists where employment of migrant workers turns into exploitation and abuse.

Aside from collective disputes involving migrant workers where Acas is providing conciliation, the bulk of problems that Acas deals with on an individual level fall under protection of wages legislation rather than under anti-discrimination legislation. Most calls from employees, usually via a friend or representative, involve failure to pay wages or holiday pay, unlawful deduction from wages for accommodation, food, and uniform – sometimes leaving workers with almost nothing more than a few pounds. One caller who worked in a restaurant reported that he had not been paid for a year.

Although by no means representative of all employers, there are those who believe that migrant workers do not have the same rights as indigenous workers and some typical questions include 'can I pay my East European bar staff £2 per hour?', or 'They (migrant workers) don't get holiday pay and things do they?'.

In the worst cases, Acas advisers from a number of different regions reported that indigenous employees complain that their employers have threatened to sack them and replace them with migrant workers if they do not agree to changes in terms and conditions. And migrant workers, dependent on a particular job for their work visa, report threats to sack them if they complain about deductions and low pay. Helpline advisers have also taken calls from migrants who say they have been employed before their papers have been sent through from the Home Office, and claim the employer then uses this as an excuse to default on payment until the papers arrive.

Access to justice
Migrants are taking cases to tribunal, often with help of Citizens Advice Bureau. But a combination of factors is likely to limit large numbers either reaching or succeeding. Whilst most migrant workers will be working legally, a proportion will be working illegally because they either entered the country illegally or failed to get a valid permit to work, whilst others will have visas that have expired. It is this group that is most at risk of exploitation and abuse. A further proportion will simply not be aware of their rights, either because they do not have similar rights in their own country, or because they do not have the language skills and the contacts to find out and assert their rights.

Conciliators also report difficulties contacting migrant workers who may have no permanent address or telephone number, and who are unable to communicate on the phone without someone to interpret. This can be particularly problematic in cases involving non payment of wages for which conciliation is time limited to seven weeks following reforms to the dispute resolution framework. Although the mobility of claimants will remain difficult to address, Acas is now planning the introduction of a telephone interpreting service in addition to the provision of face-to-face interpreting currently available.

It is not uncommon, say conciliators to find that migrant workers have returned to their own country before the conclusion of a case. This might support the view by some commentators that although levels of immigration are high some workers are returning home.

Part three – Overcoming barriers to change

For each area of equality there are specific difficulties, but persuading and supporting employers to implement change in a more proactive way that will encourage diversity raises more universal problems.

The barriers

Barriers to implementation of good equality and diversity practice range from what are attitudinal hurdles – such as lack of awareness, entrenched attitudes, embarrassment, 'head in the sand' mentality – to more organisational barriers such as the absence of clear lines of responsibility.

One of the most difficult types of employer to persuade of the economic benefits of equality and diversity, say our advisers, are those organisations that have recently grown from being a relatively small outfit to one where they are managing more staff.

> 'Maybe they started 25 years ago. We often get the support person coming in and saying "How do I convince the MD that he can't carry on treating people how he has always done". It is especially difficult if they are well off and the company is doing well. They are often scared of change and think if they do things differently the company will fail.' (**Senior Adviser, South East)**

Further, there remains the view across all sizes of company that equality and diversity is 'something to do with HR'. So, when something goes wrong, encouraging people to understand that equality and diversity is everybody's responsibility is challenging.

> 'Managers get confused because, on the one hand, they are given targets and they are driven down the route that they've go to get work out. And that doesn't sit well with requests for the afternoon off by someone whose child is sick'. **(Senior Adviser, South West)**

HR and equality and diversity remain low down on the list of business priorities, say Acas advisers. In large organisations the prejudices and lack of knowledge at senior management level mean that the issues remain sidelined. Even where you have a proactive middle management, if there is a lack of support at the top there is little chance of real change. In smaller organisations the problem is both an attitudinal one and a result of limited time and resources, as discussed earlier.

Responsibility for equality and diversity is increasingly falling to line managers, however. In some cases this is a deliberate strategy by HR to encourage managers to take responsibility for employment relations and to put a stop to the flow of cases landing in the lap of personnel once the situation has already become a serious one that should have been dealt with earlier. But how prepared are managers for this role?

Line manager training

The general view of Acas advisers is that line managers are frequently unprepared for their role. 'If they are good at it they have taught themselves' said one adviser: 'They get training on product knowledge, but not how to manage staff, never mind equality and diversity.' But equally advisers are quick to point out that it is not about line manager capability rather a lack of training. 'They have been good at their job and they inherit responsibility for managing staff on top of their other duties.'

The problem is that training rarely precedes delegation of responsibility for staff. 'HR delegates responsibility, and then realises that managers can't cope. It is not just about how they manage equality and diversity. It is about a whole range of personnel issues but discrimination issues can be particularly daunting and the result is often inaction leading to low level problems becoming potential tribunal claims simply because they were not dealt with earlier.'

Failure to manage a diverse workforce is not just a problem for an organisation that may lose staff, it also renders useless other government initiatives to get less advantaged groups into the workforce. A drive in a particular region, for example, to support increased employment of ethnic minorities may appear to be working if the

numbers recruited rise. However, if the new recruits are leaving within weeks or months of joining because employers are unable to manage a culturally diverse workforce then the increase is meaningless.

A frequent comment from employees to conciliators highlights the impact of a lack of effective communication between managers and their staff. Sometimes the conciliation is the first time that the two sides have sat down and spoken directly about the problem, and it is not uncommon to hear claimants say "if the employer had explained that to me in the first place I wouldn't have put in a claim."

The view of one conciliator is that larger organisations are more susceptible to problems becoming exacerbated because of the way that a disciplinary issue can be shot up the line and end up on the desk of senior management. It is then dealt with in a very formalised setting rather than being dealt with more informally at a lower level.

Awareness of equality and diversity is important for line managers. But an equally essential tool in avoiding discrimination claims is to treat employees with dignity and ensure that fair and transparent procedures are in place. Having a mechanism for employees - especially those from communities covered by the legislation- to voice their concerns either directly or via a representative is crucial. If an employee feels unjustly treated but cannot pinpoint the reason for this treatment they may take a claim for unfair dismissal, or take out a grievance in relation to bullying. However, they may ultimately conclude that their treatment was motivated by, for example, their gender or race. Their claim or grievance then becomes a discrimination one. In some cases, they use the discrimination hook in a number of ways:

- as a lever to further their cause
- to overcome the lack of legal protection involving bullying, more generally
- to compensate for the fact that they do not have the year's service for unfair dismissal, even though they may not actually believe there was discrimination involved.

A good employer will ensure that their systems reassure all employees that they are valued regardless of their race, gender, sexual orientation, whether they get pregnant etc.

Contradictions of legal enforcement
For most employers it is legislation that acts as the prime motivator for introducing better equality practice, followed by economic arguments ('the business case') and finally the moral case. But, for some employers, particularly the smaller ones, legislation may be the only reason. And this highlights a contradiction inherent in legal enforcement.

Legislation is currently the most important tool for achieving change, say advisers, but it also presents a barrier.

> 'The tribunal does put the fear into a lot of employers and is one of the reasons why people come on our courses, but post tribunal who is going to tell employers to stop what they are doing and revise their policies? All the employment tribunal can do is award £5,000 or £6,000. But at the same time we need organisations to open up. If there is more enforcement employers may just clam up. We need to show them the business benefit. But there remains a lack of matrices that effectively demonstrates the impact on productivity of good equality and diversity policy.' **(Training and equality service manager, London)**.

Further, legislation makes employers jump through hoops. As they focus on the detail they often lose sight of the purpose of that legislation and become distracted from the real problem.

Using procurement

Larger organisations that want to be seen as leading edge employers are more likely to

embrace the economic arguments of equality and diversity as part of their recruitment strategy in a tight labour market and, in particular, in industries where there are skill shortages.

Measuring the impact of diversity and good equal opportunities policies on productivity is notoriously difficult although there is a growing body of anecdotal evidence. Using the business case as the sole form of persuasion is likely to be limited however. A recent report from the Work Foundation found that 'organisations who are currently benefiting most from diversity are those who believe there is a business case and that this is the right thing to do – are getting on and doing it. This is not to say they don't evaluate their strategies and ensure they link with the business plan and their other HR policies. But they are not constantly re-visiting whether they should have those policies in the first place; there is always room for improvement, but not retrenchment.'

For smaller organisations the case is harder to make, but a new weapon, procurement, appears to be making some headway in harder to reach employer groups. As a result of guidance produced by the Office of Government Commerce, procurement is now being used as a way of encouraging private sector providers of public services to demonstrate that they have equality and diversity policies in place and that they put them into practice.

Acas is currently working with various local authorities including Leeds City Council and Kirklees to develop a procurement package to help smaller to medium sized enterprises meet the requirements of public sector bodies when they are tendering for particular contracts. As a result of this work Acas has been approached by businesses seeking help in developing policy and practice, and our advisers are reporting similar approaches across other areas of Britain.

The difficulty highlighted by our staff is that, for some, it is seen as a tick box exercise, and there are employers that contact Acas for an off-the-shelf remedy just to win a contract, which Acas will not provide. Others panic because they have lost contracts through failure to monitor the workforce, and genuinely want to understand how they can improve practices to win back business. But despite a certain degree of cynicism there is no doubt that procurement is helping to take the debate forward.

> 'Procurement, from the point of view of getting small organisations to look at what they are doing around equality is an excellent idea. I mean I've only been involved with Kirklees, but we've had some good sessions where people have turned up and of course there is an ulterior motive – they want business from the local authority. But at least a healthy number are saying "we want business so we'll look at this equality stuff'. Some of them already had equality policies but didn't understand why. It's helping to spread the word, and I think it will go on and on.' **(Senior adviser, North Yorkshire)**

Striking a balance

It is undeniable that there remain unacceptable levels of prejudice in society and, therefore, in the workplace and that employers continue to discriminate unlawfully against employees. Laws are necessary to ensure that employers fulfill their responsibilities and that individuals are able to seek justice. The introduction of age legislation means there is now no one without recourse to anti-discrimination law. In many ways, however, the rise in individual rights has produced a pendulum swing away from the notion that collectively other people have rights and that individuals have responsibilities.

But the legislation can become part of the problem. You need to provide enough encouragement, information, advice and support on good practice and alternative methods of dispute resolution alongside information on the legislation. Where employers feel overwhelmed by the complexity of the anti-discrimination legislation, or fearful that any dealings with it will expose them to tribunal claims even where they want to improve employment practice, then they may simply avoid addressing equality issues altogether.

In reality, few employers have the resources to spend the amount of time that a tribunal will have, poring over the legal arguments involved in what can be very complex legal questions. Employers have to deal with conflict amidst all the other demands of running a business. If further proof were needed of how difficult it is to keep up with the details of anti-discrimination legislation, conciliators report that although trade union representatives may help claimants lodge a discrimination claim they will rarely go on to represent the employee during the tribunal process, instead passing them on to a specialist lawyer on behalf of the union. This, say conciliators, has been the trend for approximately the past year and a half.

Concililation
Where a tribunal case is lodged with the Employment Tribunal Service, Acas has a statutory duty to offer conciliation, bringing parties together to help build trust, inform and facilitate discussion, working closely with both sides to reach an agreement. In some cases both sides are so entrenched that it may be almost impossible to facilitate a settlement. There are many reasons why both sides settle in discrimination cases. But one of the things that Acas does is 'to calm everybody down and get them to focus on the legal tests and risks of litigation and try and get them back on track'.

The misconceptions described throughout this paper often persist even where litigation has ensued. Conciliators describe claimants expectations being unrealistically raised by accounts they have read in the papers of large payouts, but also by their representatives, albeit inadvertently. In these cases Acas conciliators can help to provide a more balanced view of the options available.

Once a claim has been lodged it can be very difficult to repair the employment relationship because of the adversarial nature of the litigation process. Even where parties agree to settle before the actual hearing, this will often be on the basis of a termination of the employment relationship and compensation because of the damage that has already been done. A legal decision at the end of the process will also result in a loser and a winner, making a continuation of the employment relationship difficult to sustain in practice. Acas also offers, therefore, what is described as 'mediation' at an earlier stage, before a legal claim has been made.

Mediation
Mediation offers those in conflict – individuals, groups of individuals, employers and colleagues – the opportunity to sit down and discuss the problem and seek a solution that will accommodate everyone's needs. It cannot be used in all situations, and would be inappropriate for example, in relation to inalienable rights such as maternity leave, or pay, but it can offer a forum for generating options where the law may be unable to deliver what an individual or group of individuals perceives as justice.

As can happen in conciliated settlements it may be that an individual will settle for less than their legal 'rights' in return for recompense that the law cannot deliver. This might be an apology from the perpetrator of harassment, a commitment from senior management to provide training in diversity or bullying and harassment to line managers. Often individuals who have suffered harassment or discrimination will say that they don't want compensation they

just want to be sure that what they have suffered will not happen to anyone else. And by avoiding the litigation there is far more chance that an individual will remain an employee in the organisation.

Mediation can also provide a solution in situations where there are competing demands from employees, and these may be underpinned by statutory rights or may have no legal basis but yet represent a 'legitimate' need. Take the following scenario of a woman wanting to work flexibly:

> 'I work in a small office, just the manager and two staff. I've been here about four years. I've got a small daughter so I've been working three days a week, Monday, Wednesday and Friday. Some time ago I asked my manager if I could change my hours as my daughter was starting school. I wanted to work five short days instead, because it was difficult and expensive to get child care for just a few hours after school. He said it shouldn't be a problem so, even though we didn't put anything in writing, I thought it was all OK.
>
> Then my colleague left and they appointed someone to replace him. When he started, it turned out that he was Jewish, and that he needed Friday afternoons off, so they'd agreed that he could work late on the other days and leave at lunch time on Friday. This was not long before my daughter started school, so I went to see my manager to check that I would still be able to change my hours. He said that I could change them on the other days but that I had to work Friday afternoons because he could not manage the office on his own.
>
> I was really upset. I can't find anyone who wants to take my child just for a few hours every Friday – it isn't worth it for a childminder. So now I am going to have to leave. It seems so unfair that a new person gets the hours he wants, but I can't, even though I've been there four years.
>
> My manager said he was very sorry about it, but he had no choice. Apparently there are now these laws that say that he has to accommodate people with religious beliefs if they want time off for religious reasons. He said that he had only said that he thought it would probably be OK for me to change my hours, but he hadn't promised.
>
> I don't have a problem with someone getting time off because of their religion. But even if I am not religious – and I am not – surely I have rights too?'

The employer can only resolve this type of dilemma, and keep both his staff, by sitting down and discussing their individual needs and understanding exactly what they need to balance their responsibilities at work with their non-work commitments. An open and frank discussion would reveal that the Jewish employee, in fact, only needs to get home on a Friday before sundown, when the Jewish Sabbath begins. Therefore, he will only need to leave the office before 5 o' clock for a few months of the year, perhaps allowing the female employee time to organise childcare.

Acas not only provides mediation in a given situation it also trains in-house mediators so that organisations can develop their own competence in alternative dispute resolution. For smaller firms however, how to mediate in a situation where there is potential conflict may still be something that they will seek advice on via other routes: through the helpline, website or short training on, 'Having difficult conversations'.

Challenges ahead

The merging of the three existing equality commissions into the Commission for Equality and Human Rights (CEHR) and the proposed single equality act will undoubtedly address some of the dilemmas presented in this paper. The CEHR will be able to promote diversity in the round in all its complexity whilst retaining expertise on each strand. It will offer employers and employees a single point of reference and enable a far more effective understanding of multiple discrimination. A new act will hopefully help employers to better comprehend the similarities and interrelation between the different statutes. It may even harmonise areas of anti-discrimination legislation that currently provide varying levels of protection for different groups.

One source of tension that the CEHR will face is the combined role for enforcement and advice that it will inherit from its predecessors. This has made employers wary of approaching the existing commissions for fear that any wrongdoing they reveal when seeking advice will render them vulnerable to enforcement action. A single act may simplify to a certain extent the maze of legislation we have, but the complexity of the concepts it embodies will remain the same and its enforcement through the tribunal system will still risk irreparably damaging the employment relationship.

There must therefore be a balance between legislation that sets standards and enforces rights and responsibilities, and the support and advice necessary to encourage best practice without alienating those employers that feel most overwhelmed or resistant to regulation on equality and diversity. Employees need easy to understand and quickly available information and advice on their rights and responsibilities when things go wrong. And, there needs to be a greater use of alternative forms of early dispute resolution that generate options that legislation and regulation cannot hope to resolve.

Recommendations

- Greater use of plain language by agencies and diversity specialists in order to demystify the concepts surrounding equality and diversity, and to reduce the fear associated with this area of employment relations

- CEHR led campaign(s) to:
  - encourage plain language
  - make a connection with those people on the fringes of the equality and diversity debate
  - promote dignity in the workplace more broadly as part of its joint responsibility for human rights and equality.

- Government funded support for employers to change attitudes and behaviour amongst their staff. This should include a proactive campaign and promotional activities on a national and regional level to reach those with lower levels of awareness or interest, and those most resistant to equality and diversity issues

- Government funded support for an education campaign on the benefits of mediation, and training for workplace mediators

- More widespread use of procurement by public authorities as a form of encouraging best practice in equality and diversity

- Targeted campaigns in areas where equality and diversity in the workplace has not been prioritised as part of regional economic strategy. (For example, in regions, or pockets within regions where the ethnic minority community is relatively small, and where equality and diversity has been wrongly perceived to be purely about race.)

- Greater emphasis by employers on employment relations training for line managers including managing a diverse workforce, and dignity at work. To be promoted by public bodies such as Regional Development Agencies (RDAs), employer organisations, large public and private sector employers via procurement and supply change management.

- Investment by public bodies such as RDAs, Sector Skills Councils, and Learning and Skills Councils in promotion of skills training for employers in managing a diverse workforce. A coordinated strategy that links this with social cohesion initiatives to ensure that rising rates of employment for underrepresented groups are maintained in the long-term.

- Equality and discrimination, and rights and responsibilities in the workplace to be included as part of secondary education for those about to enter the workplace.

Further reading

Acas policy discussion papers and research studies can be found on the Acas website at **www.acas.org.uk**.

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