

Gone but not forgotten?

Sharon Tan and Paul McGrath weigh up the impact of the abolition of the statutory discrimination questionnaire regime and the introduction of new non-statutory Acas guidance



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'Prospective responders should not see the abolition of the statutory regime as a "green light" to ignore questions or information requests.'

The statutory questionnaire procedure has been a familiar feature of UK discrimination law since the mid-1970s. It has provided a prescriptive and formal regime under which individuals who consider that they have been the victim of unlawful discrimination, or inequality of pay, have been able to ask questions of the alleged perpetrator. Most often, the alleged perpetrator, and recipient of the statutory questionnaire, has been the individual's employer or prospective employer, although questionnaires have also been served on colleagues (current, prospective or former).

Until recently, this statutory procedure was enshrined in s138 of the Equality Act (EqA) 2010 and the Equality Act 2010 (Obtaining Information) Order 2010. The procedure has been abolished, however, with effect from 6 April 2014, following the coming into force of s66 of the Enterprise and Regulatory Reform Act 2013. It has been replaced by an informal approach underpinned by new non-statutory guidance issued recently by Acas.

The old regime

Under the old regime, individuals who believed they might have been unlawfully discriminated against had a statutory right to ask the alleged perpetrator questions about any relevant matter. Furthermore, the EqA provided expressly that any question or answer would be admissible as evidence in discrimination proceedings. Prescribed forms were provided for use by parties in submitting questions and giving answers. Use of these forms was not mandatory but was common due to their familiarity and convenience.

Individuals were permitted to serve a statutory questionnaire either before

proceedings commenced or within 28 days of commencement. A statutory questionnaire could be served at a later date only with the employment tribunal's approval.

Special rules applied to service of the questionnaire, which was generally by hand or by post. In particular, electronic means (such as e-mail) could be used only if the other party had indicated in writing its willingness to accept service in that way.

There was no statutory provision that obliged the recipient of a statutory questionnaire to respond. The incentive for recipients to comply with the old regime was, instead, found in s138(4) of the EqA. That section provided expressly that a court or tribunal could draw an adverse inference if the recipient:

- failed to answer any question within eight weeks of receipt; and/or
- provided any answer which was evasive or equivocal.

The effect, of course, of an adverse inference being drawn in a discrimination case is that it then becomes the respondent's burden to prove (on the balance of probabilities) that the conduct in question was lawful. Hence, while the old regime imposed no express statutory obligation on a recipient to answer questions, the risk of an adverse inference being drawn, and thus a greater risk of a finding of unlawful discrimination being made, prompted many recipients to do so.

Out with the old

The proposal to repeal the statutory questionnaire regime came about as a result of the coalition government's

‘red tape challenge’, which is aimed at reducing financial and administrative burdens on businesses. In the government’s view, the statutory regime had failed to achieve its intended purpose of increasing pre-hearing settlements and had significantly increased bureaucracy for employers. Government research suggested that some 45,000 to 60,000 employee hours were being spent each year in compiling responses within the mandatory eight-week period.

Despite widespread opposition to the proposal (83% of the 157 respondents to a consultation launched in May 2012 were in favour of retaining the statutory regime), the government pressed ahead with reform. Its rationale was that, while it had no objection to the collection of pre-claim information to assess a possible claim’s strength and chances of success (the statutory procedure’s true aim), this did not need to be enshrined in law. With its prescriptive forms and time limits, the government viewed the statutory regime as encouraging undesirable micro-management of the process. It concluded that it would be more effective to leave businesses free to decide how, and whether, to respond to such enquiries, shouldering any attendant risk if they so choose.

The new regime

To help fill the void left by the abolition of the statutory regime, Acas has issued new non-statutory guidance on asking and responding to questions of discrimination in the workplace (the guidance). The guidance sets out best practice for individuals (referred to as ‘questioners’) on asking questions about perceived discriminatory treatment and for the alleged perpetrators (referred to as ‘responders’) on responding appropriately.

Guidance for questioners

The guidance suggests six steps that questioners should take when asking questions (and provides a very basic template document they might use in doing so). These, in effect, reflect the same information that was contained in the standard form questionnaire under the old regime. In summary, Acas suggests that a questioner should:

- Provide their contact details and those of the organisation or

person(s) who may have unlawfully discriminated against them.

- Identify which protected characteristic(s) under the EqA may have been the subject of the unfairness in question.
- Provide a brief factual description of the treatment, giving key details such as the date, time, place, number of instances and the

Guidance for responders

No template answer form is suggested for use by responders and the guidance in this respect is short (three steps) but again broadly reflective of the old regime. In summary, responders should:

- State whether they agree, agree in part or disagree with the individual’s description of the treatment in question (having done

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names of any other individuals involved. The questioner should ask if the responder agrees with this statement (and, if not, why not).

- Identify the type of discrimination alleged (such as direct, indirect, harassment or victimisation).
- Set out why they think the treatment was discriminatory.
- Ask any appropriate additional questions. These should be kept as short and relevant as possible but questioners can:
 - where relevant, seek to ascertain whether they have been treated in a manner consistent with the responder’s policies; and
 - ‘ask for statistical information to show how people with their protected characteristic are treated within the organisation’.

In equal pay matters, only three steps are suggested. The questioner should:

- identify a comparator who is receiving better terms and conditions;
- explain why the comparator is doing equal work; and
- ask any further relevant pay-related questions (such as how the responder determines pay and what is in the comparator’s job description that could explain any difference in pay).

some appropriate investigation and setting out their version of events).

- If relevant (for example because they admit indirect discrimination), state whether they consider that the treatment was objectively justified.
- Respond to the questioner’s specific questions. If they think that some specific questions are not relevant or unclear, they should clarify the purpose of those questions with the questioner to help them respond appropriately. If they decide not to answer a question, they should explain why.

The guidance recognises that certain information may be disclosed only in certain circumstances. Where information is commercially sensitive or confidential (including personal data), it suggests presenting that information in a non-specific (for example anonymised) way. Where this is not possible, however, the guidance acknowledges that this may be a valid reason not to provide the requested information.

In equal pay matters, these three steps will involve:

- investigating the questioner’s pay package;
- identifying whether there is any unintended discrimination; and
- rectifying, or objectively justifying, any discrimination.

Reference point

To download the Acas guidance, visit:
www.legalease.co.uk/acas-discrimination-questions

Potential issues

There are several:

Risk of adverse inferences

There is still a risk of the employment tribunal drawing adverse inferences if the responder does not respond to information requests appropriately. Certainly, prospective responders should not see the abolition of the statutory regime as a 'green light' to ignore questions or information requests. While responders remain under no legal

for an earlier response will not now be accompanied by a legislative threat. Acas advises responders to deal with questions 'seriously and promptly' and to respond within a 'reasonable time'.

If a responder cannot meet any deadline set by questioner, therefore, it is advisable to let the questioner know when they can expect a response (or, better still, to agree a mutually acceptable response deadline). Responders must now form their own view about what is reasonable but

Although it was not mandatory, the prescribed form statutory questionnaire was commonly used and responders were therefore familiar with what risks it triggered on receipt. The prescriptive regime for serving the questionnaire also went some way to ensuring that it made its way to an appropriate individual within an organisation. From now on, the less prescriptive nature of information requests may make it harder for recipients who are unfamiliar with the intricacies of employment litigation to identify seemingly innocuous correspondence as something that could lead to a later finding of discrimination. This difficulty may be compounded by the more liberal service regime, particularly if apparently nondescript questions are e-mailed to line managers unfamiliar with either the old or new regimes.

Any demand for an earlier response will not now be accompanied by a legislative threat.

obligation to respond, as the guidance makes clear, a tribunal may still:

... look at whether a responder has answered questions and how they have answered them as a contributing factor in making their overall decision on the questioner's discrimination claim.

Notwithstanding the abolition of s138 of the EqA, therefore, it is still open to tribunals to draw an adverse inference from a response, or lack thereof. The probability of an adverse inference being drawn is more likely if a responder fails to provide any response or refuses to grant access to information, as the European Court of Justice decision in *Meister v Speech Design Carrier Systems GmbH* [2012] makes clear.

Unclear timescales

The guidance does not set any timeframes. It tells questioners simply to:

... ask the responder to reply by a set date especially given the time limits for filing a Tribunal claim.

It is possible that questioners will now seek responses earlier than by the eight weeks allowed under the statutory regime. However, with the repeal of s138 of the EqA, any demand

engaging in correspondence about timings ought to help them in any later assertions they might make about the handling of their response.

Seeking clarification

The guidance expressly recommends that responders seek clarification where the relevance of a question is not clear. This goes further than the old regime. In future, it will be more risky for responders simply to refuse to answer a question because they do not consider it relevant.

No restrictions on how to ask questions

The guidance does not place any meaningful restrictions on what format questions can take, how they may be served and when. Questioners are advised simply to send the questions to the responder in 'any format either in the form of a letter, e-mail or questionnaire'. Documents can be delivered in person, sent by post, fax or e-mail and, unlike the old regime, no prior consent is required to send by electronic means. While the guidance makes clear that it is the sender's responsibility (whether questioner or responder) to ensure that documents are received, the suggested threshold for this is low (for example by requesting an e-mail 'read' receipt).

Impact on recipients of questions

Despite the abolition of the statutory discrimination questionnaire regime, legal risk remains for those who ignore or provide an insufficient response to information requests and questions about potential discrimination. In practice, doing so is usually only likely to push an individual into seeking the same information by other means. For example, they may make a similarly resource-intensive data subject access request, a specific disclosure application and/or a request for further and better particulars. Prudent recipients will therefore continue to treat questions and information requests seriously. They also need to be mindful that individuals may still use the statutory procedure to ask about alleged acts of discrimination that occurred before 6 April 2014.

The additional flexibility introduced by the new informal regime should, however, give recipients of questions about discrimination greater confidence to consider how best to respond to each request on a case-by-case basis. If a discrimination claim does ensue, recipients should be ready to explain the approach they took to responding to an individual's questions, including by reference to the Acas guidance. ■

Meister v Speech Design Carrier Systems GmbH
[2012] C-415/10