Access to legal aid for discrimination cases

Executive summary
June 2019

Equality and Human Rights Commission
Introduction

Equality law provides a legal footing to the fundamental principal that everyone is born equal and should be judged on their own merits. It recognises the harm that is done to the person who is discriminated against – whose value as an employee, a customer, a human being, is called into question on the basis of their personal characteristics. When everyone has the opportunity to succeed free from discrimination, society can thrive. And in an increasingly globalised marketplace, it is more important than ever that people can make the most of their talents.

The law provides protection from discrimination by giving individuals rights that they can enforce in the courts. The threat of legal action provides a powerful deterrent, holding perpetrators to account and making it clear that society will not tolerate such behaviour. An effective and accessible legal system is crucial to this.

However, recent years have seen access to justice restricted to such an extent that many people experiencing discrimination are not getting the help they need to seek redress.

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Claims concerning discrimination in the workplace must be brought in the Employment Tribunal, but the introduction of tribunal fees in 2013 led to a drop of around 70% in the number of claims. The fees were abolished in 2017, after the Supreme Court held that they were unlawful because they prevented access to justice¹, but the number of claims has not recovered to pre-2013 levels. And while legal aid is available for advice and representation in certain types of discrimination case, it does not cover representation in the Employment Tribunal. This means that individuals must either pay privately for representation or represent themselves, often against an opponent with more resources and professional legal representation. This ‘inequality of arms’ is particularly stark when cases are factually and legally complex, which is often true of discrimination claims.

¹ R (on the application of UNISON) v Lord Chancellor [2017] UKSC 51.
Furthermore, where legal aid is available, it is subject to strict financial eligibility requirements, the thresholds for which have not been updated since 2010. Not keeping pace with inflation has meant that, in real terms, more and more people are being excluded from legal aid despite being unable to afford to fund their case themselves.

The Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO) came into force in 2013. Its stated aim was to discourage unnecessary litigation, target legal aid at those who need it most, make significant savings to the legal aid budget, and deliver better overall value for the taxpayer. Some of the key changes it introduced were to: strictly limit the types of case for which legal aid is available; introduce additional eligibility requirements for people on certain benefits; raise the contributions that some have to pay towards their legal aid; and reduced legal aid providers’ fees.

LASPO also removed the right of a successful privately-paying claimant to recover certain legal costs from the defendants. Instead, ‘qualified one way cost shifting’ was introduced to provide costs protection for claimants in certain types of case. However, this does not include discrimination claims. People funding their own discrimination cases therefore risk having to pay the defendant’s full costs if they lose. This uncertainty acts as a barrier to justice, discouraging people from taking their cases to court.

We commissioned research into the impact of LASPO on access to justice. The people we spoke to reported significant financial deprivation as a result of trying but not being able to resolve their legal issues. A lack of early advice meant that they were unable to deal with issues at an early stage. In some cases, this meant costs were transferred to the public sector, including an increased reliance on welfare benefits as a result of unresolved employment issues.

The Government recently carried out a review of LASPO and we made a submission to the review setting out recommendations to address the issues that we identified. We are pleased that some of these have been adopted as part of the Government’s action plan following the review. We recognise the cost involved in implementing the action plan and we welcome the Government’s commitment to it as an indicator of how important it considers these reforms to be.

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4 EHRC (2018), ‘The impact of LASPO on routes to justice’.
But we remain concerned that victims of discrimination are not getting the help they need to enforce their rights in the courts. This inquiry took a closer look at whether legal aid allows victims of discrimination to access justice. We found too many barriers in their way.

The commitments made in the Government’s action plan must be implemented in a way that genuinely improves access to justice. We make recommendations on how this can be achieved. And we recommend further steps that the Government should take to reduce the additional barriers that we have identified.

Findings and recommendations

Face-to-face advice

Since LASPO, most people seeking legal aid for a discrimination issue must do so through a phone line known as the Telephone Gateway (‘Gateway’). If they are then assessed as unsuitable for telephone advice, they should be referred for advice face-to-face. Yet, of the 7,768 discrimination cases taken on between 2013/14 and 2017/18, only 18 such referrals were made.

Of the 7,768 discrimination cases taken on through the Telephone Gateway between 2013/14 and 2017/18, only 18 were referred for face-to-face advice.

Many of the service users we spoke to said they would have liked face-to-face advice, but legal aid providers told us that the system discouraged them from making these referrals. The Government has committed to making the Gateway non-mandatory. To us, this means ensuring that face-to-face advice a genuine option for anyone who wants it by:

- Identifying the minimum number of legal aid providers required to provide acceptable geographical coverage across each procurement area.
• Ensuring that the contracts offered are sustainable enough to attract sufficient interest from providers.

• Keeping the minimum number of legal aid providers, and the minimum number of ‘matter starts’ (cases that each provider can open), under review to ensure that supply continues to meet demand if public awareness of legal aid increases as a result of better promotion of its availability.

**Telephone advice**

Telephone advice will still be the preferred option for some people. But we found that service users do not always get the support they need to access advice in this way. This support should include making reasonable adjustments for disabled people (such as ‘Typetalk’ or BSL translation for people with hearing impairments), or providing translation services for people who do not speak English. The Government should:

• Satisfy itself that systems are in place to ensure compliance with the Equality Act 2010, and with human rights obligations under the UN Convention on the Rights of Persons with Disabilities, by ensuring reasonable adjustments are put in place for every disabled person who requires them to access telephone advice.

• Satisfy itself that other service adaptations are made for anyone requiring them to access telephone advice.

• Ensure that Gateway operators and specialist providers discuss the availability of adjustments and adaptations with each service user, at first contact and again at any point during the case if it becomes clear that the client needs additional support to access the service.

**Extent of help provided and outcomes**

Only 1 in 5 cases received anything beyond telephone advice.
We found that the majority of Gateway discrimination cases receive only telephone advice (not casework, representation assistance or representation in court), and just 13% of cases resulted in a positive outcome. We also found an unexplained disparity in the number of white service users and the number of ethnic minority service users receiving positive outcomes. The Government should:

- Monitor and compare the stages that discrimination cases reach, and the outcomes that are secured, across modes of delivery (telephone and face-to-face) and providers.
- Where disparities are identified, take steps to identify and address the underlying causes, such as peer review of specialist providers’ case files. This may include ensuring that all providers have the knowledge and capacity to apply for representation funding and carry out litigation.
- Take steps to understand the cause(s) of the disparity between positive outcomes for white and ethnic minority clients, and put measures in place to mitigate against them.

**Representation in court**

99.5% 0.5%

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Only 0.5% of Gateway discrimination cases receive funding for the service user to be represented in court. Our evidence suggests this may in part be caused by two areas of misunderstanding about how the funding rules should apply to discrimination cases.

The first is that the discrimination claims are often treated as being ‘primarily for damages’ even when they seek additional remedies, such as an injunction or declaration. The ‘cost benefit’ test for claims that are ‘primarily for damages’ simply compares the likely cost of the case with the likely damages. It is very difficult for discrimination claims to pass this test because their complexity means legal costs tend to be high, while damages awards tend to be low.
A different test applies to claims that are not primarily for damages (or of significant wider public interest). This test asks whether a reasonable privately-paying individual would be prepared to fund the case, taking into account the prospect of success and all the other circumstances of the case. Recognising the importance to the individual and to society of challenging discrimination, it should not be assumed that discrimination claims seeking other remedies in addition to damages are ‘primarily for damages’.

The second is the assumption that a discrimination claim brought in the county court will be allocated to the ‘small claims track’, for which representation funding is not available. Track allocation depends on a number of factors, including the value of the claim and the complexity of the facts, law or evidence. We found that some providers appeared to believe that representation funding was not available in the county court at all, presumably on the assumption that the low value of discrimination claims would mean they are allocated to the small claims track. In fact, the complexity of discrimination claims means they are often allocated to another track, for which funding is available.

The Government should amend the Lord Chancellor’s guidance for civil legal aid to:

- Recognise the importance to the individual and to society of challenging discrimination, and advise that, as a general rule, a discrimination claim that seeks other remedies in addition to damages should not be assumed to be ‘primarily a claim for damages’.

- Highlight that county court discrimination cases may, regardless of their value, be allocated to the fast track or multi track as a result of their complexity, and that decision makers should bear this in mind when determining funding applications.

To increase transparency and provide comprehensive, accessible information about discrimination cases in the county court, HM Courts and Tribunals Service should:

- Publish data on discrimination claims in the county court.

- Publish copies of written judgments in proceedings brought in the county court under the Equality Act 2010.

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7 Lord Chancellor’s guidance under section 4 of LASPO 2012.
Between 2013/14 and 2017/18:

- 17,717 calls about discrimination were taken by legal aid providers
- Of those, 7,768 were taken on as cases
- Of those, 1,646 received casework assistance
- And 43 received funding that would cover representation in court

Exceptional case funding

Funding is not routinely available for representation in the Employment Tribunal but ‘exceptional case funding’ (ECF) can be granted for any case where it is necessary to avoid a breach of a person’s human rights or EU rights. Between 2013/14 and 2017/18, 10 applications were made for ECF but none were granted, suggesting that the scheme is not providing the safety net that it should. The Government should amend the Lord Chancellor’s ECF guidance to:

- Include a section setting out considerations relevant to an application for ECF for a discrimination case. These should include the legal and factual complexity of the case, the relative resources of the parties, and any factors that may affect the person’s ability to present their own case.
- Amend the section on employment cases to highlight the above factors when considering funding applications for employment cases involving discrimination.

Financial eligibility

Research shows that even some people living below the poverty line are not financially eligible for legal aid. There is a growing justice gap between those who are eligible for legal aid and those who can afford to pay for their own legal advice. On top of that, the complex evidence requirements can put some people off applying for funding. It is critical that everyone has the ability to enforce their rights, either with their own resources or with legal aid. In fulfilling its commitment to reviewing the legal aid financial eligibility requirements, the Government should:

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8 Ministry of Justice, Lord Chancellor’s Exceptional Funding Guidance (Non-Inquests).
• Ensure that the thresholds are set so that only those who can genuinely afford to pay for their own legal representation are excluded from legal aid. Any contributions people are required to make towards their legal costs should be set at a level that is genuinely affordable.

• Ensure the financial evidence requirements do not present barriers to legal aid providers or prevent individuals from securing the legal support to which they are entitled.

• As an interim measure, immediately reinstate the ‘passporting’ process, where people in receipt of certain benefits are automatically deemed eligible for legal aid. This can provide the basis for a pilot to support the upcoming review.

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Awareness of legal aid

Our research found low levels of awareness of legal aid among the public and, to a lesser extent, in the advice sector. In fulfilling its commitment to promote awareness of legal aid, the Government should:

• Actively publicise the availability of legal aid for discrimination cases and the ways in which it can be accessed. This includes ensuring that information on Government websites about legal aid for discrimination cases is clear and easily located.

• Work with the advice sector to build awareness of the availability of legal aid for discrimination, the processes by which to access it, and to identify and address barriers to referral.

• Monitor the effectiveness of its work to promote awareness, adapting it where necessary to ensure maximum impact.
Contacts

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