

1 Introduction

Aims and objectives

Under the Sex Discrimination Act 1975 (SDA) and the Equal Pay Act 1970 (EqPA) individuals who feel that they have been discriminated against in employment because of their sex can seek redress at an industrial tribunal. Any such individual is free to seek advice, assistance or even legal representation in pursuing a case against an employer. The Equal Opportunities Commission (EOC) was established under the SDA and has the discretion to assist individuals to take cases of sex discrimination and equal pay to an industrial tribunal. The power to grant either advice, or assistance, or legal representation is contained in section 75 of the SDA. This section authorises the EOC, if it so wishes, to grant assistance when a case raises a question of principle, or when it would be unreasonable to expect the applicant to deal with the case unaided (either because of the complexity of the case, or because of difficulties experienced by the applicant), or for some other special reason. The EOC's powers to assist applicants are therefore discretionary, and in any case the Commission does not have the financial resources to provide legal assistance to all those who require it. Therefore the level of support provided by the Commission is not necessarily a reflection of the Commission's views on the strength or weakness of the applicant's claims, although such inferences are frequently made by both employers and applicants.

An individual's application to an industrial tribunal is essentially his or hers alone, is confined to the circumstances of the alleged act of discrimination or unfair treatment, and does not extend beyond the act complained of to a wider investigation of the employment practices of the employer cited by the applicant. This indeed is what was

intended by the legislation, and it was left to the EOC through a process of persuasion, education, investigation and advice to bring about wider improvements in employment practices which would have the effect of removing obstacles and promoting greater employment opportunities for women.

Nevertheless it seems reasonable to expect that individual litigation by applicants might lead an employer to remedy those aspects of policy and practice which gave rise to the discriminatory activity, and might prompt the employer to look at omissions or defects in procedures especially where these had given rise to the complaint from the applicant.

Although some internal scrutiny and reflection is likely as a result of a complaint raised by an applicant (even if that complaint is later withdrawn, settled or lost at tribunal), specific follow-up action by an employer seems most likely in cases where discrimination has been proved, and where the employer is required to make some form of compensation to the applicant.

This research investigates the extent to which an application which has been successful under either the SDA or the EqPA has been effective in eradicating the causes of the grievance, and in bringing about greater equality of treatment for men and women in the organisation concerned. It therefore focuses on those employers who having been brought before tribunals by individual applicants, have had a finding made against them, and examines their employment practices before and after the tribunal hearing. It is quite possible that a finding of discrimination or unfair treatment made against one employer, especially if that decision has been widely reported or commented on in the media, could be picked up and used constructively by another employer. Indeed the series of leaflets produced by the EOC ('Sex Discrimination Decisions') is designed to produce just such an impact. However, we are not concerned here with the wider effects of an industrial tribunal decision on other employers, although this aspect will be an important consideration in any overall assessment of the value of individual litigation.

In this research study we seek to provide answers to the following questions:

- 1) is the system of legal enforcement through industrial tribunals also an effective way of getting employers to examine their equal opportunity policies and practices and make appropriate changes?

- 2) is the tribunal decision effective in encouraging employers to remove the factors, or alter the practice or procedure, which caused the initial discrimination?
- 3) what factors contribute to a tribunal decision being utilised in a progressive manner by an employer?

Answers to these questions may make an important contribution to any wider evaluation of current strategies for tackling employment discrimination through legislative intervention. In particular, the findings of this research may help identify current weaknesses in the industrial tribunal system by drawing attention to missed opportunities for intervention by regulatory agencies, and to ways in which present structures could be used to greater effect. Many commentators question whether current legislative arrangements are tough enough to eradicate persistent and pervasive employment inequality between men and women, or are capable of creating better employment opportunities for women, or are targeted in such a way as to bring about real pay parity between the sexes. But what can be done within the constraints of the present framework to make the mechanisms which we have work more effectively?

The research may therefore assist in providing solutions to a broad range of operational questions. Is special training in discrimination law for tribunal members likely to produce qualitatively better decisions? Are well-reasoned decisions more effective than badly reasoned ones in promoting organisational change? Does representation make a difference to the quality of the employer's response, and if so, should representation be more widely available and legally aided? Does the intervention of the EOC influence the likelihood of the decision being put to broader effect, and if so, should the EOC intervene more often and with what resources? Can employers be expected to give wider effect to decisions without greater intervention by the EOC? Should available resources be devoted to other methods of combatting employment discrimination against women, such as strategic investigations of employers, and should resources be diverted from support for individual litigation to these other methods? In sum, are there ways in which the tribunal system can be made to operate so as to have greater impact, or do we have to accept that its effectiveness has to be judged only in so far as it resolves individual employment grievances?

In focusing on employers' reactions to, and action taken as a result of, tribunal decisions we look at various dimensions of change from the general and qualitative to the specific and perhaps more easily measurable. First, how has the decision affected the attitude of the employer and his general receptivity towards the promotion of equality of opportunity? Is it possible to detect any heightened sensitivity, or greater awareness, or any move towards more progressive ways of thinking? Or has the decision had the reverse effect and made the employer more entrenched in his attitudes? Secondly, has the decision led the employer to introduce an equal opportunity policy, or where an equal opportunity policy statement already exists, has it led the employer to review the operation of that policy? Thirdly, has the employer taken any specific course of action designed to prevent a similar incident of discrimination or unfair treatment re-occurring? Fourthly, have any actions been taken to deal with those who were judged to be responsible for the discriminatory behaviour. And finally, where recommendations were made by a tribunal to an employer were these recommendations implemented?

Background issues

In recent years the volume of information about the workings of industrial tribunals in discrimination cases has greatly increased. But there is nothing in the currently available literature to suggest that industrial tribunals are having any effect at all on wider employment practices.

We can note first that the most recent statistics on industrial tribunal applications published by the Department of Employment for the period April 1985 to March 1987 continue to show that the success rate for applicants at industrial tribunals in discrimination cases is very low, and that the majority of cases are either withdrawn or settled prior to coming to the tribunal. In fact, the number of both equal pay and sex discrimination applications increased sharply in 1986-87 compared with 1985-86, but the success rate of cases reaching tribunal declined. Twenty-two per cent of sex discrimination applications were successful in 1986-87 (compared with 25 per cent the previous year, and 27 per cent for the period 1976-83 examined by Leonard).² Of equal pay applications, 27 per cent were successful at tribunal in 1986-87, compared with 52 per cent in 1985-86 and 19 per cent for the period 1976-83.³ This means that for 1986-87 only

8 per cent of all sex discrimination applications and 8.5 per cent of equal pay applications resulted in success at an industrial tribunal. There has, however, over recent years been an increase in the number of cases which are settled before coming to tribunal.

Secondly, recent research⁴ has cast doubt on the extent to which even the small proportion of cases which are won by applicants can be called real victories. The amount of compensation received by applicants was low, and frequently did not offset expenses incurred in pursuing a case. In addition, obtaining compensation from the employer was not always an easy matter. Applicants suggested that workplace relationships deteriorated after raising an application. Some reported ill-feeling towards them, others direct victimisation or difficulties in finding other employment. We might hypothesise that, if applicants themselves did not experience a qualitative improvement after taking a case to a tribunal, then the chances that the tribunal will have brought wider improvements in policy and practice will be low.

Thirdly, what little research evidence there is on the consequences for employers of individual tribunal proceedings suggests that successful applications do not necessarily bring about improvements in the lot of other workers. More of Leonard's sample of applicants reported that conditions for other workers had either deteriorated or been unaffected, than reported definite gains. We should note, however, that Leonard's sample of applicants included many who would not have been in a position to assess consequent changes, since included in the sample were applicants in both recruitment and dismissal cases. A major objective of this research has been to come to a more reliable assessment of effects and consequences through case studies of organisations, and by gathering information from a wide range of informed individuals.

Fourthly, we have already noted that the tribunal process is not itself designed to bring about changes in employment practice, but to decide whether an employer has breached anti-discrimination legislation, and to provide a remedy for an offended individual. Given this background we could regard any improvements in employment practices as an added bonus.

Section 65(1) of the SDA reads as follows:

Where an industrial tribunal finds that a complaint presented to it under section 63 is well-founded the tribunal shall make such of the following as it considers just and equitable—

- (a) an order declaring the rights of the complainant and the respondent in relation to the act to which the complaint relates;
- (b) an order requiring the respondent to pay to the complainant compensation of an amount corresponding to any damages could have been ordered by a county court or by a sheriff court to pay to the complainant if the complaint had fallen to be dealt with under section 66;
- (c) a recommendation that the respondent take within a specific period action appearing to the tribunal to be practicable for the purpose of obviating or reducing the adverse effect on the complainant of any act of discrimination to which the complaint relates.

The tribunal does therefore have the power under section 65(1)(c) of the SDA to intervene more generally in the affairs of an employer but only infrequently is the power used. It is likely that a tribunal's ability to make pertinent and apposite observations, far less arrive at well targeted recommendations, will be undermined if members of the panel are inexperienced in matters of discrimination law, or have a poor understanding of the origins of discriminatory acts. Sadly, there is evidence that such a state of affairs is the rule rather than the exception,⁵ and the EOC, noting that discrimination law deals with 'subtle relationships', and that there is 'a clear need for tribunals to work towards a consistent application of the law', has recommended that there should be special training in discrimination law for panel members.⁶

Finally, to the list of factors which might indicate a limited probability of significant changes in general employment practices, we should add the lack of provision, statutory or otherwise, for systematic monitoring of an employer by the EOC consequent to a tribunal decision. It will be important for us to examine the extent to which the involvement of the EOC in assisting an applicant at a tribunal has been instrumental in effecting change. But it would be surprising if the mere involvement of the EOC at that level would be sufficient to bring about constructive developments without further interventions in the form of assistance, guidance or cajoling. Yet very little constructive follow-up of employers who have been found to be in breach of equality legislation takes place, even when the EOC has been directly involved in assisting the applicant during the

proceedings, and there in consequence one would expect EOC to have discovered a lot of information about the respondent organisation.

Despite these various observations and arguments, not all commentators are pessimistic about the possibility of wider changes being brought about through the industrial tribunal process. As one commentator recently observed:

Successful cases engender more complaints as potential applicants come to believe that using the law can provide an effective remedy. The more cases there are, the better educated the judges become and the more the law is likely to be interpreted in accordance with its underlying objectives. Therefore, the more complaints that are brought, the more likely it is that complaints will succeed. The more successful complaints and the greater the price of discriminating, the more likely it is that employers will take voluntary steps to avoid litigation by ensuring that they are complying with the law by not discriminating.⁷

Methods

This research is based on successful equal pay and sex discrimination cases occurring during the three year period 1984-86. During that period applications were successful against 108 employers and the data derives from a sample of 40 of these, that is, over one in three of the total group. It was not our intention to carry out case studies of the complete group of 108 organisations as such an exhaustive programme would not have been attainable in the time period available for the research. It was therefore necessary to restrict the size of the sample and various selection criteria were adopted.

The sample of employers is described in detail in Tables 1-4. Organisations were selected from all parts of the United Kingdom excluding Northern Ireland, and we tried to ensure that all the main types of employment discrimination, including discrimination in recruitment, promotion and transfer, and dismissal and pay were included in our case studies. Our intention was to select from the group of 108 employers a sizeable number of major private and public sector bodies. It seemed important to find out if employers with tens of thousands of employees were making changes, because the effects of any changes made would impinge on a greater number of people than changes made in small organisations. Nevertheless, small and medium-sized employers have not been excluded as it was also important to discover if organisational size was related in any way to capacity for change.

We wanted to ensure that the sample included more private than public sector organisations. We took the view that public sector employers, operating in a political arena, were more likely than private sector employers to have introduced changes, and that they therefore constituted a softer research target. In addition, there has been a greater amount of research conducted on equal opportunities policies in the public sector, especially among local authorities, and it was felt necessary to make a contribution towards redressing this imbalance. Nevertheless, private sector organisations proved much less cooperative than those in the public sector and we would like to have included more than proved willing. But, again, for comparative purposes it was necessary to have both sectors represented.

It was thought important to include case studies of organisations where the applicant had been legally assisted by the EOC especially in terms of assistance with representation. It is known that the chances of success at tribunal are significantly increased if the applicant has a representative at the tribunal who can organise, present and argue the case. We wanted to discover if legal representation was itself a factor which increased the prospects of the decision having wider impact, and, of more importance, to find out if the involvement of the EOC in the case acted as an incentive to employers to engage in a review of policy and practice.

In a very few cases brought under the SDA the tribunal makes specific recommendations to employers to examine or alter a practice or procedure which might be having a discriminatory effect. We aimed to include all cases where such formal recommendations had been issued, and, in addition, to include cases where it seemed that the attention of the tribunal had been brought to bear on particular practices or procedures but where no specific recommendation was made.

Another criterion adopted in selecting cases derived from a recognition that some cases are won only after an appeal to the Employment Appeal Tribunal (EAT) or to the Court of Appeal, and that such cases might attract a great deal more publicity than cases considered only by the industrial tribunal. We therefore wanted to find out if cases which were won or upheld on appeal were cases which had more general effects and consequences, and we therefore sought to include in the sample cases which had been heard on appeal.

Using these criteria, organisations were selected after reading all 108 industrial tribunal and EAT decisions from the three-year study period. Additional information on applicants and employers was collected from the various regional offices of the industrial tribunals, and, in some cases, from the central office of industrial tribunals.

We contacted by an introductory letter more organisations than the final forty which made up the research sample. Ten employers refused outright to participate, and all of these were private sector organisations. In fact, it would have been very easy to construct a sample of exclusively public sector bodies as these organisations presented us with very few access problems. Some employers allowed only limited access, and we had to make a judgement as to whether the information collected was of sufficiently good quality to qualify for inclusion in the sample. In some instances it clearly was not (for example, where the data amounted to only a telephone interview with a manager of a large company and where other contacts proved fruitless). In other cases, however, and especially in smaller organisations of less than 100 employees (which had no personnel structure, which were self-proprietorships, or where there was no trade union organisation), it was possible to gather exhaustive and reliable information about the organisation on the basis of more limited contact.

We have divided the research sample of 40 case studies into a primary and a secondary group on the basis of the volume and depth of information it was possible to collect in each organisation. The primary group of 20 are for the most part larger, more complex organisations with a formal line-management structure and often, but not always, with recognised trade unions. In these organisations we sought face-to-face interviews with representatives from personnel management, line management, an employee representative (generally a trade union representative or officer) and the applicant. We indicate who the interviewees were in the account of each case study. Fewer interviews were conducted in the secondary group of organisations although it was the aim to interview a management representative and, if possible, the applicant.

Interviews were conducted with a total of 102 individuals. The great majority of these were face-to-face interviews often conducted, if the interviewee was agreeable, with the aid of a tape-recorder. A few interviews were conducted by telephone. Interviews were

semi-structured and were carried out using a pre-arranged question list devised for each type of respondent (management, trade unionist, applicant etc.). Although more time-consuming, data collection by semi-structured interview was judged to be preferable to data collection by a structured postal questionnaire for three reasons.

First, we were collecting often sensitive information from employers who had been found guilty of breaches of employment legislation, and information which, it was judged, might indicate continuing non-compliance with that legislation. We did not feel that information of sufficient depth and reliability could be obtained without developing a personal rapport with the interviewees. Secondly, each case arose out of a unique set of circumstances which it would have been difficult to encompass in a postal, or even fully-structured face-to-face, questionnaire. It seemed to us important to collect information about everyday workplace interactions and social dynamics in order to understand the origins of the discriminatory act and appreciate the obstacles to progressive change. This could more easily be done with the chosen methodology. Thirdly, we expected a higher rate of non-cooperation and non-response through postal questionnaires than would have been acceptable in a small population of only 108 employers.

Data collected by means of interview forms the basis of this research report, but in addition, we studied all 108 tribunal decisions, collected documentary information from employers on equal opportunity policies, and in the larger organisations collected factual data on workforce size and make-up by means of a short self-completion questionnaire.

The structure of the report

The report has four substantive chapters which consider in turn cases of discrimination in recruitment under section 6(1) of the SDA (Chapter 2), of discrimination in promotion and transfer under section 6(2)(a) of the SDA (Chapter 3) and of discrimination concerning dismissal from employment under section 6(2)(b) of the SDA (Chapter 4). Equal pay cases are considered in Chapter 5 and the conclusions of the report are presented in Chapter 6 including a tabular analysis of effects and consequences.

Within each chapter we first consider organisations in the primary group and a set of conclusions is arrived at for each employer

individually. Secondary group employers are then considered followed by a summary of findings for that group. Each chapter has its own conclusions and summary which can be read separately from the text for quick access to an account of the effects and consequences of tribunal decisions for employers considered in that chapter.

All organisations have been assigned fictitious names in order to preserve the anonymity of the employers who agreed to participate and of individual interviewees. A guarantee of anonymity was, we believe, crucial in obtaining the cooperation of many employers.

Table 1 Type of employer and size in number of employees

	Sample		Group	
Type				
Private sector	28	(70%)	77	(71%)
Public sector	12	(30%)	31	(29%)
	40		108	
Size				
1-49	6	(15%)	[not known]	
50-99	3	(7.5%)		
100-499	9	(22.5%)		
500-999	4	(10%)		
1000+	19	(45%)		
	40			

Table 2 Applications and applicants

Type	Sample		Group	
Recruitment	8	(20%)	25	(23%)
Promotion	10	(25%)	20	(18%)
Dismissal	8	(20%)	19	(18%)
Equal pay	9	(22.5%)	25	(23%)
Other	5 *	(12.5%)	19 **	(18%)
	40		108	
Number of applicants per case				
One only	36	(90%)	96	(89%)
More than one	4	(10%)	12	(11%)
	40		108	
Total number of applicants	69		162	

* comprised one case of victimisation, one case of 'other detriment' and three cases filed under more than one heading, namely, equal pay and promotion, promotion and victimisation, and equal pay and victimisation.

** includes six joint cases, three cases of victimisation, nine cases of 'other detriment' and one case under section 12(3)(a) of the SDA.

Table 3 Region where tribunal was held

	Sample		Group	
Scotland	7	(18%)	28	(26%)
London and SE England	13	(32%)	19	(18%)
S and SW England and E Anglia	4	(10%)	13	(12%)
Midlands	4	(10%)	13	(12%)
Yorkshire and NE England	6	(15%)	16	(15%)
NW England and Wales	6	(15%)	19	(18%)
	40		108	

Table 4 Representation

Type of representation		
Solicitor/barrister	26	(65%)
TU official	6	(15%)
Other	1	(2.5%)
Self-represented	7 *	(17.5%)
	40	
Legal assistance from the EOC		
Yes	21	(52.5%)
No	19	(47.5%)
	40	

* In one of these seven cases the applicant represented herself at the industrial tribunal but she was legally represented before the EAT.

In all, five cases (12.5%) were appealed to the EAT.

Notes

1. Since April 1985 statistics have been collected within the industrial tribunal system itself, and are reckoned to be more accurate than those for previous years. In addition, they are now collected on a financial rather than calendar year basis. See *Employment Gazette*, October 1987.
2. Leonard, 1986.
3. The statistics on success rates at tribunal especially for equal pay claims are subject to distortion because of an unknown number of multiple-applicant claims. Leonard has pointed out that if the figures for 1976-83 were adjusted to take account of a 630-woman case lost at a tribunal hearing, then the success rate for women applicants would be 27 per cent and not 19 per cent.
4. Leonard, 1987a.
5. Leonard, 1987b.
6. EOC, 1988, p.19.
7. Rubinstein, 1988.