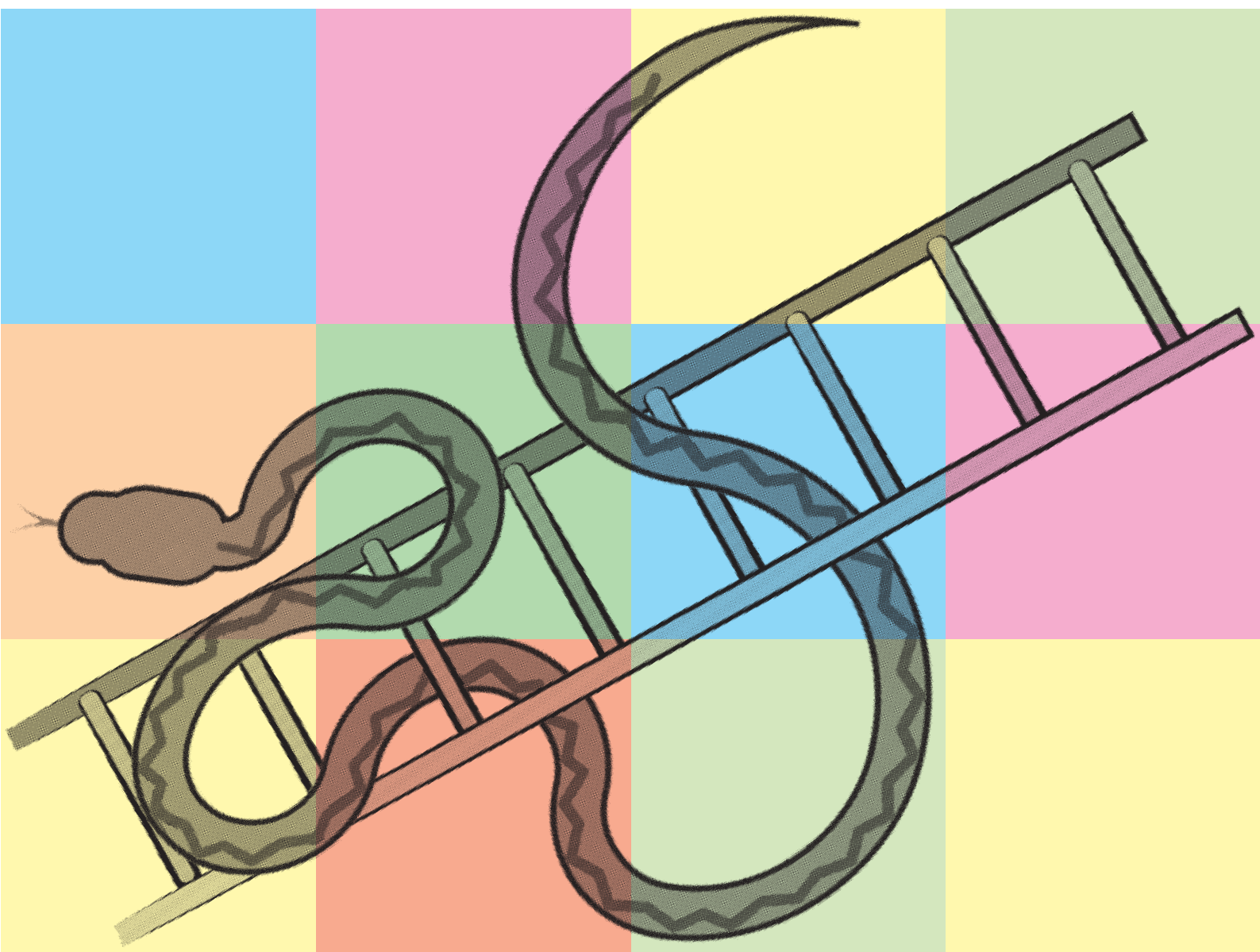


SNAKES AND LADDERS

Advice and Support for Employment Discrimination Cases in Wales



COMMISSION FOR
RACIAL EQUALITY



COMISIWN
CYDRADDOLDEB
HILIOL

legal services

COMMISSION



Disability Rights Commission
Comisiwn Hawliau Anabledd



Comisiwn Cyfle Cyfartal
Menywod, Dynion, Gwahanol, Cydradd.
Women, Men, Different, Equal.
Equal Opportunities Commission

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ISBN 1 84206 044 9

Designed and printed by **alphagraphics®**
2 Collivaud Place, Ocean Way,
Cardiff CF24 5PD
Tel: 029 2047 0024 Fax: 029 2047 0025

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Foreword

I am delighted to write the foreword to this important piece of research by a distinguished team from the University of Wales, Bangor. “Snakes and Ladders” explores the experience of people who have suffered discrimination in Wales, charts the hurdles they have to overcome in order to seek redress, and makes recommendations for change.

This report has its origin in the widely held belief that people in Wales are less likely than citizens in other parts of the UK to bring cases of discrimination through the Employment Tribunal system, and that even when cases are registered they are more likely to be withdrawn and are less likely to be successful than elsewhere. The Commission for Racial Equality, Disability Rights Commission, Equal Opportunities Commission and Legal Services Commission are to be thanked for commissioning and publishing this valuable research exploring these propositions. Its publication is itself an example of the partnership working between equality organisations which has developed in Wales, particularly in the context of devolution. The report suggests, however, that much more can be done to improve partnership working in Wales generally.

Of particular concern is the report’s portrayal of Wales as an “advice desert”, with too few sources of quality advice in the complex field of discrimination, especially in rural Wales.

Lack of co-operation exacerbates these problems. The report calls for better co-operation between advice and equality agencies and a programme to share and transfer expertise. Often discrimination problems go undetected by frontline general advice providers, so improvements are needed here, as well as between specialist advice providers to ensure adequate support to challenge discrimination, including cases of multiple discrimination.

Those who suffer discrimination are often the most vulnerable in our society. Addressing these problems will not only be good for specific individuals, it will benefit our society as a whole. I am sure that all those committed to equality and social justice will be interested in the findings of this research, and will wish to consider the part that they can play to improve the situation.

Carwyn Jones AM
Minister for Open Government and Equality

February 2003

Introduction

There is a considerable dearth of employment advice in Wales. As a result, there is a significant risk that:

- applicants from Wales do not enter the tribunal system on equal terms with their counterparts in other parts of the UK and may not be able to secure comparable outcomes
- potential applicants are deterred from entering the system.

In addition:

- the 'legal aid' eligibility limits restrict the numbers of people able to access free legal advice about employment matters
- the provision of employment advice has not formed part of the social inclusion agenda of local authorities and the Welsh Assembly Government, resulting in the neglect of the development of advice services for people who are experiencing discrimination in Wales.

'Advice provision in Wales is fragmented, disjointed and sparse, with few trained and experienced specialists in this complex area of the law'

Research Background

In 2000, a group of interested parties came together to establish an Employment Rights Network for Wales. This body identified the need for a research study to characterise the level and nature of advice provision in Wales and to explore the implications of previous small scale research that suggested differential outcomes at tribunal for people in Wales as compared with other parts of Great Britain. This report is based on research carried out by a team from the University of Wales, Bangor, on behalf of the Commission for Racial Equality, the Legal

Services Commission, the Equal Opportunities Commission and the Disability Rights Commission.

The research aims to outline the current pattern and level of information, advice and representation for people in Wales who may be seeking redress under the equalities legislation in employment discrimination. It seeks to assess the likely impacts of existing support on tribunal outcomes, both in terms of quality and quantity. It attempts to identify the specific barriers to accessing advice, information and support in all areas of unlawful discrimination (race, gender and disability) as perceived by both the providers and applicants within the system, as well as other key stakeholders. It also makes recommendations for change in order to achieve a more efficient and effective national system of complainant aid. It is hoped that the findings of this study will assist the work of policy makers in determining the level and direction of future developments to the system of complainant aid in Wales.

Key Issues

The research identified a number of issues that militate against a seamless and effective system of complainant aid in Wales. The main ones are:

- ***Lack of information about rights and sources of advice***
- ***Weak infrastructure for delivering advice, support and representation***
- ***Lack of training and quality accreditation amongst major advice providers***
- ***Poor system of referral and co-ordination between agencies, including a failure to transfer expertise between agencies***

- *Ineffective systems of client support*
- *Lack of statistical information disaggregated for Wales*

If this situation is to be addressed, action is required on the part of a number of stakeholders in Wales. The effectiveness of this action will be enhanced if steps are taken in a co-ordinated fashion and on a partnership basis.

The Welsh Context

Wales has a poor historical record on equality of opportunity. A number of factors particular to the Welsh context have a bearing on the incidence of discrimination. Changes in the nature of the labour market have affected the job security of individuals and particularly in rural areas. Wales has employment rates that are consistently lower than equivalent GB rates. There are a higher number of women workers in Wales concentrated in the part-time low paid sector by comparison with other parts of the UK. The pay gap in Wales stubbornly persists, with average hourly and weekly earnings of women still much lower than those of men. Discrimination is identified as a key factor in the gender pay gap. The available evidence suggests that economic activity rates are lower amongst ethnic minorities in Wales than whites and particularly low amongst ethnic minority women. Such labour market exclusion extends to disabled people in Wales with a number of barriers, both physical and attitudinal, impeding access of disabled people to the workplace. The Labour Force Survey indicates that Wales has the highest proportion of its working age population who are disabled people as compared with the rest of Great Britain. In addition, the Welsh labour market is characterised by a high number of small and medium-sized enterprises (SMEs) where the support mechanisms for sustaining complainants, such as trade union membership, may be lacking. All these factors have a part to play in understanding the patterning of discrimination in Wales.

Following devolution, the Government of Wales Act 1998 imposes a legal imperative on the Welsh Assembly Government to promote equality of opportunity, with equality clauses that effectively confer 'positive rights' on all citizens of Wales. To this end, it is necessary for territorial disparities to be recognised and addressed.

Every year, the total number of discrimination cases coming before the tribunal increases. Sex discrimination registrations in Wales (Region 6, of which Wales forms the largest part) are steadily increasing. Registrations for race are consistently lower than England or Scotland. Registrations for disability are lower than England or Scotland. However, with new developments in discrimination law, the demand for complainant aid is set to rise substantially. Since there had been no prior in-depth studies into the level and quality of advice-giving in Wales and its potential impacts, this research was commissioned.

Main Findings and Policy Recommendations

Addressing the lack of information about rights and services

The study reveals that rights awareness amongst applicants and potential applicants is low, as is their knowledge of the role and function of key agencies. The challenge in Wales is to develop a more informed, rights-aware populace by creating a more integrated and substantial network of information bases. Information about key agencies, their role and function, needs to be more readily available via allied statutory services such as job centres, social work departments, clinics and schools as well as via the voluntary sector organisations. Such critical sign posters need to be adequately resourced. Use of the Internet is increasing and this is a vital mechanism of community support and information sharing for marginalised groups as well as a source of

factual information. Efforts should be made to capitalise on this development.

‘It is the few, and only those well-equipped, who are using the system but even for them the pathways are complex and the obstacles are many..... it’s like a game of snakes and ladders’

Findings

- There is a significant information gap in Wales. Public awareness of rights and of the role and function of key agencies of redress is low.
- There is considerable unmet need in Wales, as many potential applicants do not enter the system of redress following discrimination at work due to geographical, economic, psychological and cultural barriers.
- Applicants often experience persistent discriminations over a long period of time and yet fail to define their experiences as discrimination within the context of the law.

Recommendations

The *equality commissions* should:

- Better advertise their role and more explicitly clarify the level and extent of their commitment to casework. They should continue to promote rights awareness using the full range of media, including developing access to their websites. They should consider ways in which they could use access points such as job centres, doctors’ surgeries, schools, colleges and community organisations more effectively. The commissions could capitalise more significantly on cases won at tribunal for publicity purposes in order to build confidence in the community.
- Undertake further research on the use of helplines with the focus on what use individuals make of the information provided.

- Consider a presence for the commissions in north Wales in parallel to the north Wales office of the DRC.
- Establish and build strategic partnerships with other networks of advice providers, including the Law Society, NACAB, the Advice Services Alliance, RECs, disability organisations and the TUC to permit them to deliver more effectively good information at first-tier level to enhance effective signposting.

ACAS could:

- Clarify their role and publicise it more effectively to potential applicants.

The *Legal Services Commission* could:

- Review the accessibility and dissemination strategy of parts of their directory, including the list of solicitors with employment expertise and CABx employment specialists in order to improve access for claimants to specialist advisors (i.e. mini-directories).

Building the infrastructure

The study has demonstrated the existence of vast ‘advice deserts’ in Wales in which the quality of generalist advice is variable and the availability of specialist advice is non-existent. There is a need for the identification of earmarked specialists beyond the existing Legal Services Commission (LSC) contracts in all areas of Wales. In rural areas, outreach work appears to be vital to improve access to justice for very marginalised individuals. One way of ensuring consistency of coverage would be the establishment of Employment Advice Consortia with formalised constitutional links between major providers. As yet no thoroughgoing audit of funding of advice provision has been undertaken.

‘Action is required on the part of a number of stakeholders. The effectiveness of this action will be enhanced if steps are taken in a co-ordinated fashion and on a partnership basis’

Findings

- The pattern of advice-giving agencies in Wales reveals substantial ‘advice deserts’ with whole areas of Wales having no specialist employment provision and restricted access to generalist services.
- There is lower per capita funding of generalist providers in Wales by comparison with England.
- Applicants secure representation at tribunal in approximately 60% of cases, although the quality of representation is variable. In approximately 40% of cases applicants represent themselves.

Recommendations

The National Assembly for Wales should:

- Consider the provision of advice services for discrimination cases as part of the strategy to address social exclusion in order to ensure the provision of advice and support services to those people who are ineligible for publicly funded legal assistance.

The Legal Services Commission could:

- Co-ordinate the establishment of Employment Advice Consortia. These bodies, possibly four in total, would comprise a partnership of key providers from the statutory, independent sectors and be charged with the responsibility of delivery of effective services for the area served. Each consortium would monitor and evaluate need in their area, establish the framework for strategic development of services and ensure good quality localised coverage.
- Encourage more advice agencies to become accredited with the LSC Quality Mark and extend LSC contracts to build the number of specialist providers across Wales.
- Support an audit of the funding of advice services in Wales in conjunction with the Welsh Assembly Government, the Welsh Local Government Association and in co-operation with major service providers such as NACAB, TUC and Race Equality Councils.

The *legal professional bodies* should:

- Assist the co-ordination of a Free Barrister service for north and mid Wales and facilitate the extension of the existing South Wales Free Representation Unit to include other key players, especially the equality commissions and solicitors.

Trade unions should:

- Develop a more consistent network of specialist advisors for discrimination cases.

Training and Accreditation

The current system of training of generalist and specialist advisors is partial and variable. At a generalist level, providers require consistent and additional training and development in order to provide a service that accurately identifies and appropriately refers cases to the specialists. This is critical in relation to CABx providers, trades union branch officers and other first-tier workers. At a specialist level, the picture is again characterised by ad hocery, with few providers benefiting from consistent and ongoing quality training. The basis of a national standard of competency for Employment Advice exists and is overseen by the Legal Services Commission (LSC Quality Mark). This could be reformed and extended to ensure standardised and good quality advice-giving in all parts of Wales. In addition, accreditation of a national qualification in advice work is required. Within the ET Service there is a need to promote the development of specialist expertise in discrimination.

Findings

- Generalist advisors lack the training and support to identify discrimination cases appropriately. Consequently, the quality of advice-giving from generalist providers such as CABx, solicitors, ACAS and the trade unions in Wales is very variable.
- Training of specialist advisors is inconsistent.

- Specialist expertise within the Employment Tribunal panel membership is not being drawn on consistently. There is a need to ensure development of specialist discrimination expertise amongst members through increased training and the establishment of a discrimination panel.

Recommendations

The *ET* service should:

- Increase resources for the training of Chairs and Panel Members and make more effective use of specialist expertise amongst the members with a view to establishing a ‘discrimination’ panel.

The *equality commissions* should:

- Support the development of the Employment Rights Network Wales in order to improve liaison, quality of training, competency development and the sharing of expertise.

The *Higher and Further Education Institutions in Wales* could:

- Consider the accreditation of courses towards a national qualification in advice work.

Trade unions should:

- Ensure that local representatives are more highly trained in discrimination issues and their areas of expertise identified and deployed more effectively.

NACAB could:

- Ensure that the training of generalist advisors be tailored towards the more effective identification and referral of discrimination cases.

The *Law Society* and/or *Bar Council* should:

- Give consideration to following the Scottish Law Society’s lead in providing for expert status accreditation based on peer review for employment discrimination work for solicitors.

Co-ordination and transfer of expertise

Co-ordination between major agencies in the field is weak. This is particularly pertinent in the light of the fact that many discrimination cases involve multiple jurisdictions. To enhance effective liaison and referral, more formalised systems are needed. In addition, in order to steer strategic developments in the provision of quality advice, there is a need for an appropriately resourced high-level co-ordinating body. This body would be responsible for disseminating best practice across the country and building the mechanisms to facilitate the transfer of expertise. It would be responsible for initiating and overseeing training developments and research programmes, for identifying key statistical indicators that adequately measure the system in Wales and pressing for the collection of the relevant data. It could act as a major conduit for user views through links with the Employment Tribunal User groups and the National Assembly for Wales as well as the major equality bodies. Although in its embryonic form, the Employment Rights Network Wales has this potential.

Findings

- The referral system is unsystematic with no formalised protocols on pathways to advice and support. The current system is fragmented and not conducive to client need in terms of providing for a smooth and coherent transition through the process of seeking information and advice, gaining representation and/or support in finding resolution to the issue. Users experience being shunted from pillar to post between a number of agencies and frequently do not receive a satisfactory service.
- Advice workers work as single operators and co-ordination between agencies is ad hoc and reliant on personal and informal connections.
- Transfer of expertise is unsatisfactory. Training/learning and the sharing of expertise are all weak with no strong information pools for advice-givers or comprehensive system for the accreditation of standards across Wales.

Recommendations

The National Assembly for Wales should:

- Give consideration to funding a high level co-ordinating body responsible for strategic developments.

The Legal Services Commission could:

- Establish formalised channels for the transfer of expertise between employment specialists and those at general help level through contracting specialist providers to engage in capacity building.

The equality commissions should:

- The CRE in particular - consider the identification and development of a core REC earmarked and funded for specialist casework support and advice to which other generalist providers across Wales, including other RECs, could make referrals for specialist support in race cases.

NACAB could:

- Establish strategic partnerships between CABx in order for specialist expertise to be available as a resource to a network of bureaux, following the model of the Special Support Unit.

Trade unions could:

- Develop better links between branch and region and strengthen the procedures for access to discrimination specialists without delay.

Statutory agencies, such as Job Centres, Social Security offices, Social Services, could:

- Develop a procedure for the appropriate identification and referral of discrimination cases.

Meeting client needs

'I found the whole experience extremely daunting and I couldn't have managed it on my own....I feel the odds were stacked against me from the beginning'

A number of obstacles exist in the system that militate against client satisfaction in pursuing claims of discrimination. In addition to accessible and good quality information and advice, claimants require continuity of service to be assured of the link between advice and representation. In addition, this study makes clear the need for emotional support and counselling for applicants, which could be provided by workplace support groups and specialist community groups. Mediation is critical. The LSC pilot initiatives in mid Wales demonstrate the potential of formalised partnership arrangements for the delivery of a comprehensive mediation service. Such pilots could be extended and developed across Wales.

An audit of access to, and the amenities within, tribunal locations should be conducted, particularly in relation to disabled users. The voice of the user needs to be strengthened via the ET user groups. There is also a need to recognise the needs of those whose first language is not English in advice provision in Wales. Welsh language provision should be monitored and research is urgently needed to establish the level and quality of provision but also to review the satisfaction of Welsh national origin claims in employment.

In terms of Welsh language developments, greater co-ordination and service support is required for the Employment Tribunal Service to offer an effective and comprehensive service.

Key agencies in the field need to reflect the diverse nature of Welsh society in their personnel profiles.

Findings

- There is a lack of diversity amongst Chairs and Panel Members. There is a need to target recruitment to ensure representation from minority groups.
- No thoroughgoing audit has been conducted of the accessibility of tribunal hearings or key advice-giving agencies for disabled people.
- Bilingual provision of advice-giving is sparse.
- High levels of stress characterise users' experience of attempts to gain redress for their grievance. Emotional costs often far outweigh the benefits of proceeding with a case and therefore applicants look for a cluster of qualities in advice-givers, including emotional support.
- The limit on 'legal aid' eligibility restricts the possibility of redress for some applicants.

Recommendations

The *Lord Chancellor's Department* should:

- Widen the eligibility criteria in order to extend the number of people eligible for publicly-funded assistance.
- Extend public funding of discrimination cases to include representation at tribunal.

The *Law Society* and/or *Bar Council* should:

- Consider standardising the fee arrangements and make provision for user-friendly information on how contingency work is funded.

The *ET Service* should:

- Continue to make efforts to establish an office in north Wales with a permanent and full-time Chair.
- Establish clear targets for the recruitment of lay members in order to promote greater diversity. In this respect we endorse the Hepple Report recommendation that: 'An equality scheme for the

employment tribunals should set targets for achieving lay membership of not less than 40% women by 2003, and 50% by 2006 and a percentage that reflects the proportion of ethnic minority communities in each region by 2006'. In addition, Employment Tribunals need to maintain consistent standards in relation to targeting disabled people.

- Establish a target for the recruitment of Welsh speakers amongst the lay membership of not less than 20% in this respect.
- Consider establishing (along with other tribunals) a specialist support unit to advise and assist individual tribunals on Welsh language service matters, to supervise hearing arrangements where Welsh is to be used and to provide specialist translation services.
- Conduct an ongoing review of the premises being used, in terms of accessibility generally, but particularly in relation to disabled users.
- Continue to make efforts to strengthen the ET User Group as a forum for enhanced liaison between advice providers and the ET Service and as a more effective channel for communicating the needs of service users.

The *equality commissions* should:

- Consider how they promote their services amongst the Welsh speaking community and monitor the use of bilingual services.

The *Legal Services Commission* could:

- Extend the framework for a system of third party independent mediation (as demonstrated by pilot initiatives in mid Wales) to other areas of Wales.

***Trade unions* could:**

- Follow best practice in the provision of telephone support for workers experiencing difficulties at work.

ACAS should:

- Consider a more proactive role related to rights-based work moving beyond communication and conciliation to an equal opportunities role.

Addressing the lack of statistical information

Wales has never had a system of Employment Tribunals that is particular to itself. At present, a fully integrated system covers both England and Wales. In Scotland and Northern Ireland the situation is different. They benefit from autonomous systems under their own President. Until March 1987, Wales was not regarded as an entity at all. Half the country was administered from Regional Offices situated in England. The Regional Office in Cardiff dealt with south Wales, Hereford, Worcester and Gloucester. On reorganisation, the whole of Wales became part of the administrative area known as Region 6 which also incorporates areas in England. The report finds that the analysis of ET outcomes is necessarily limited by the lack of statistical integrity for the country. If policy makers in Wales are to be in a position to track trends and to monitor outcomes then there is an urgent need to address the difficulty of producing accurate, detailed and robust data for Wales that can be subjected to comparison.

Findings

- It is not possible to statistically dis-aggregate data on tribunal applications, cases or outcomes specifically for Wales, which constrains attempts to monitor impacts of the Welsh equalities policy agenda.
- In terms of the settlement of cases, the withdrawal rate in Wales appears to be higher than that of Scotland or England.

Recommendations

The *ET Service* should:

- Ensure the production, and regular output, of ET statistics dis-aggregated for Wales. It is proposed that the designation ‘a Welsh

case' should refer to claimants who live or work within Wales, irrespective of where the case is being heard.

ACAS could:

- Increase regional monitoring, particularly in relation to the withdrawal rate in Wales.

The Research Methodology

Information was obtained from a number of sources in order to throw light on the existing arrangements for complainant aid in employment discrimination and its impact on outcomes in the areas of race, gender and disability.

- A review of the available literature, research, policy documents and government reports relating to developments in the equalities field and the operation of Employment Tribunals was conducted.
- The research group consulted leading academics and experts in the field of discrimination in Wales, including the Commissioners of the equality bodies, the Legal Services Commissioner and equality advisors at the National Assembly for Wales.
- Statistical information on tribunal outcomes for the region in which Wales forms a substantial part was obtained from the Public Register. The statistical analysis considered trends across the period 1996 to 2001 for race, gender and disability. The analysis considered the number of discrimination complaints registered in Wales by the Employment Tribunal Service and compared these with England and Scotland. It also took into account the relative population sizes of the different countries by comparing the number of cases registered in the differing countries per 100,000 of the estimated 1998 population. It compared the number of complaints registered for sex, race and disability discrimination in Wales with the equivalent returns for England and Scotland.

- The tribunal reports of 116 cases of discrimination heard by the Employment Tribunal in Wales in 1999 and 2000 were analysed. Seven reports were discarded because information relating to key variables was missing from the data set.
- Researchers attended the meetings of the newly established Employment Rights Network Wales over the period of the study, observed tribunal hearings, attended a training day for Chairs and Panel Members and attended meetings of the Employment Tribunal Users group. The minutes of these groups were examined for the period 1999-2002.
- In-depth, semi-structured interviews were undertaken with five key stakeholder groups. Those included in the qualitative study were: Chairs and Panel Members serving in the Employment Tribunal Region 6; professional advisors and information providers in statutory and community organisations; and three groups of applicants taken from the three areas of discrimination - sex, race and disability.

Issues and Challenges

‘The challenge in Wales is to develop a more informed, rights-aware populace and to build a more integrated and substantial network of complainant aid’

In post-devolution Wales a number of key developments, both legislative and institutional, have forged a new equalities agenda. This agenda is being given a strong steer by the Welsh Assembly Government. Against this backdrop the Government has announced proposals for the creation of a Single Equality Body with the aim of harmonising the organisational structure of statutory equality bodies. The implications of this proposal are currently being debated but will necessarily include discussions about the institutional framework for resolving discrimination cases. Whatever the outcome, the mandate has been established for closer

co-ordination and joint working between the equality bodies. It will, however, take time for these developments to bed in and make visible changes in organisational practice and culture in Wales.

It will also take time to convince the average worker that strong and effective systems of redress are open to the individual irrespective of where they live and work in Wales. The challenge in Wales is to develop a more informed, rights-aware populace and to build a more integrated and substantial network of complainant aid.

Whilst this study has illustrated the significance of a number of factors on how people fare in the process of seeking redress in Wales, the analysis is necessarily limited by the lack of statistical integrity for the country. If we are to be in a position to track trends and to monitor outcomes, then there is an urgent need to address the difficulty of producing accurate, detailed and robust data that can be subjected to comparison.

There remain two major impediments to the strategic development of services in Wales. Neither Employment nor Legal Services are devolved responsibilities. Neither is tied constitutionally to Wales. Much will depend, therefore, on the political will and ability of Welsh Government to lobby for enhanced service provision in Wales and to capitalise on the obvious good will and commitment to reform that exists amongst key agencies in Wales. Organisations, such as the Welsh Local Government Association, must recognise and address the need for adequate, appropriate and secure funding arrangements to underpin the necessary developments. The hope is that this report will add impetus to the momentum for change and that the changes recommended can be achieved sooner rather than later.

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Snakes and Ladders: Advice and Support in Employment Discrimination Cases in Wales (2002) by Charlotte Williams, John Borland, Aled Griffiths, Gwyneth Roberts, and Elspeth Morris, Department of Social Science, University of Wales Bangor can be downloaded from the Wales pages of the Commission for Racial Equality website at www.cre.gov.uk the Disability Rights Commission website at www.drc-gb.org the Equal Opportunities Commission website at www.eoc.org.uk or the Legal Services Commission website at www.legalservices.gov.uk