

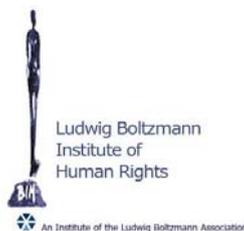


## **GUIDEBOOK**

# **Consolidated results of the Twinning Light project HU2004/IB/SO01-TL „Enforcement of equal opportunity policies and the effective implementation of the anti-discrimination law”**

### **Activity 1.4**

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June 2007

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*The great team is back, the great team is back, the great team is back, oh back again,*

*Only tell us, only tell us, only tell us if you are hurt!*

*We are fighting, we are fighting, we are fighting along with you.*

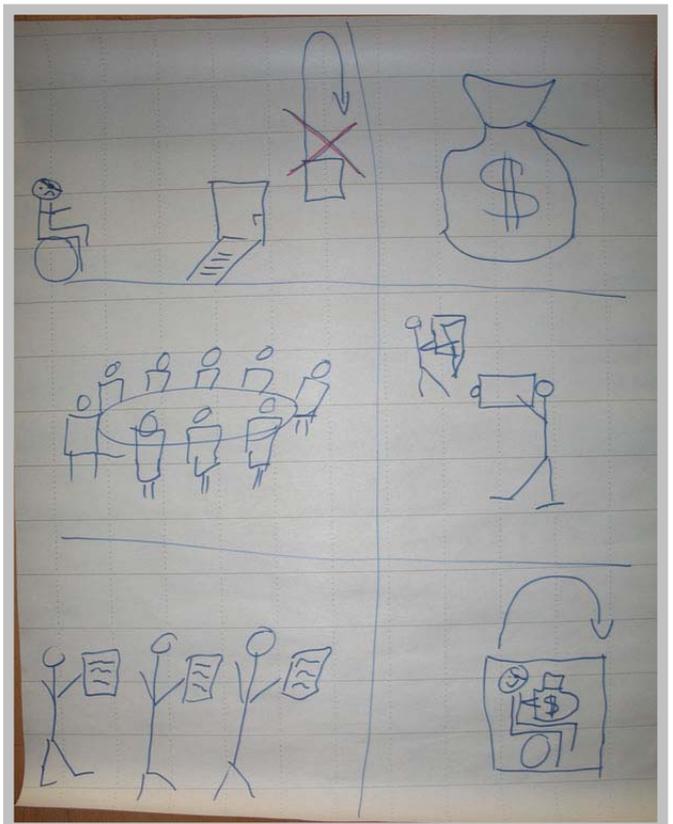
*Be our brethren 'cause we are not afraid,*

*let us celebrate the great reunion.*

*And so we can protect you we will ask you to refrain from hurting anybody else.*

*And when we've protected you we will ask you to spread the word about us.*

*(Song written and performed at the Team Building Seminar in Balatonszemes on June 14<sup>th</sup> 2007)*



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# 1 Introduction

This guidebook is based on all the results of and insights gained during the training sessions that have so far taken place within the framework of the Twinning Light project called “Enforcement of equal opportunity policies and the effective implementation of the anti-discrimination law”. These training sessions include the

- general anti-discrimination training for central public administration staff,
- anti-discrimination training for ETA staff,
- joint general anti-discrimination training for central public administration and ETA staff,
- methodological training for ETA staff.

Furthermore, the guidebook takes into account the findings and results of the following reports drafted in the course of the Twinning Light project:

- Assessment Report into the Carrying out of the Hungarian Equal Treatment Authority’s Statutory Mandate (by Marta Hodasz and Geraldine Scullion),
- Report on the Development of Strategies for the Hungarian Equal Treatment Authority (by Barbara Cohen, Dieter Schindlauer and Katrin Wladasch),

It also comprises impressions and examples collected during the study visits to Austria, the Netherlands and Ireland.

The guidebook integrates the knowledge gained by both the experts from the ETA and the external experts involved in the project to give practical guidance to the members of the ETA in their day-to-day work. It starts out by outlining the duties of the ETA as they are currently defined and perceived by the Authority. The presentation of the status quo closes with raising questions focusing on specific challenges faced by the ETA. The following chapters aim at giving guidance to the staff of the Authority in answering some of the questions raised. Regarding the great variety of the duties the Authority has to fulfil chapter 3 picks up on the missions of the ETA with a focus on the role(s) of the legal officers and how victims of discrimination are perceived in the process of reviewing complaints. In order to be able to accomplish its aim of supervising compliance with the obligations of equal treatment in Hungary, the ETA will have to become a more active player in the policy field of anti-discrimination, which could be achieved by developing a more strategic approach in prioritising and structuring its duties (chapter 4). Chapter 5 gives guidance on various important steps during the process of reviewing complaints such as interviewing the applicant, collecting evidence, communicating with the respondent and imposing sanctions.

## 2 Status quo

The Equal Treatment Authority (ETA) has been responsible for supervising compliance with the obligations of equal treatment in Hungary for more than two years. It has the power to act on all grounds of discrimination in each of the protected areas.

### 2.1 Duties

It has to cover a wide range of rather diverse duties, which require quite different qualifications and skills. These duties encompass

- regularly informing the public and the government about the situation concerning the enforcement of equal treatment. This gives the ETA the opportunity to first of all explain what its tasks are and to promote the importance of implementing the principles of equal treatment and non-discrimination, and secondly to impart knowledge on the extent and quality of discrimination in Hungary to policy makers and opinion leaders. As a consequence awareness for the problem of discrimination would be raised and it would become apparent that everybody has the right to non-discrimination.
- continually supplying those concerned with information and providing assistance in acting against the violation of equal treatment. Regarding this task it is important for the ETA to disseminate information on the concept and mechanisms of discrimination as well as the kind of support and assistance it offers to potential victims and witnesses of discrimination. Both victims and witnesses have to know the concept of discrimination and that discrimination is prohibited by law, in order for everyone to be able to enjoy the right to non-discrimination. As soon as an alleged victim of discrimination files a complaint with the ETA, it starts reviewing it to see if the principle of equal treatment has been violated and reaches a final decision. Cases reviewed and decisions taken should be made public in order to inform potential victims and witnesses and other allies in the fight against discrimination about discriminatory incidents and how to combat them and potential perpetrators about measures taken.
- initiating investigations on its own to establish whether the obligations of equal treatment have been violated and reach a final decision. Such *ex officio* investigations can only be started in a limited number of cases. Preconditions are that an infringement has already occurred, which the claimant must demonstrate. Civil society organisations are not allowed to initiate proceedings in front of the ETA in defence of specific groups as a public interest claim. Nevertheless, it can be a powerful tool in demonstrating that potential victims of discrimination have a powerful ally – the ETA – which can impose effective

and dissuasive sanctions contributing to raising awareness among potential perpetrators that discrimination is prohibited by law.

- initiating lawsuits with a view to protecting the rights of persons and groups whose rights have been violated. The *actio popularis* gives the ETA the opportunity to initiate a lawsuit without involving specific victims of discrimination, which do often not have enough resources to take cases to court and therefore refrain from taking on the risk of court proceedings, but aiming at combating more effectively general conditions unfavourable to equal treatment. One major field of action could be segregation of Roma children in the educational system.
- conducting investigations at request to establish whether the employers obliged to do so have approved an equal treatment plan and take a final decision. Equal treatment plans are important tools for raising awareness for the issue of discrimination among representatives of the top management, human resource managers, works' council members and the staff. Therefore, it is quite important that the ETA takes on its responsibility to enquire about not only the mere existence of these plans but about the activities developed to ensure implementation of the plan and the processes established to prevent or to deal with discriminatory incidents.
- co-operating with NGOs, interest representation organisations and the relevant government agencies. Such a co-operation should not be restricted to individual cases but should also include the overall exchange of information and experiences regarding individual cases, activities aiming at awareness raising, overall strategies in combating discrimination and in forming strategic alliances.
- making proposals concerning governmental decisions and legislation pertaining to equal treatment as well as commenting on drafts of legal acts, other legal instruments or reports by public administration concerning equal treatment. The ETA can both build on its own experience and knowledge gained by other relevant actors in the field to influence agenda setting in the policy field of non-discrimination and to promote changes in legislation necessary to making the fight against discrimination more effective.
- assisting in the preparation of governmental reports concerning the principle of equal treatment and the harmonisation of the EU directives on equal treatment.
- annually reporting to the government on its activities and experiences gained. These reports are important not only to inform policy makers about the extent and quality of discrimination but also about the challenges the ETA faces in

combating discrimination. These annual reports are important tools to point out which changes in legislation and policy are necessary to make the fight against discrimination more effective.

## **2.2 Organisational structure**

The ETA is independent in relation to the conduct of its duties. It is overseen by the Minister for Social and Labour Affairs and is led by a president who is appointed and may be dismissed by the Prime Minister on the joint recommendation of the Minister of Social Affairs and Labour and the Ministry of Justice and Law Enforcement. The appointment is for an indefinite period of time. The president represents the ETA at the national and international level, sets the agenda and determines the policy of the Authority. S/He controls the operation of the Authority and acts on its behalf. The president also conducts investigations into discrimination complaints.

The ETA is assisted by an advisory board, which currently consists of 6 anti-discrimination law experts who were appointed after a consultation with the NGO sector. The role of the Board is to assist the Authority in performing its duties by offering non-binding interpretations of the law. It acts as a consultative body but has no supervisory role. The members provide opinions on interpretation of the principles of the law. They may make proposals to parliament on the development of the law. The Board has drafted position papers on a range of topics including access of people with disabilities to public goods and services and has been focusing on direct and indirect discrimination, the segregation of Roma school children, same sex partnerships, victimisation and harassment during the first half of 2007.

The Authority has a staff of 15 overseen by the president and the vice-president; there are 3 departments composed of the secretariat, the legal department and a finance department. The legal department consists of the head of the legal department and 5 lawyers. The main focus of the work of the legal staff is dealing with and investigating complaints.

## **2.3 Investigating complaints**

According to the current President the main focus of the Authority in 2007 is the investigation of complaints and the promotion of publicity to inform the public about the Authority and non-discrimination in Hungary.

The staff are involved with cases from the receipt of an initial complaint until its closure. The first contact to the ETA can either be established

- personally during the client service hours on Monday afternoon, a service provided by the legal officers on a rotary basis;
- personally or on the phone outside the client service hours, advice is given to clients by whatever officers are available;

- by letter or e-mail;
- by other institutions referring the case to the ETA.

If a complaint is received via the phone or by a personal contact the legal officers decide whether the complaint falls within the jurisdiction of the Authority and if so draw up a memo on the case which is sent to the president. The president reads all the memos and complaints received by letter or e-mail. S/He identifies the type and grounds of the discrimination involved and assigns the cases to legal officers taking into account their work load, areas of experience and expertise. Cases which in the opinion of the president do not classify as discrimination or are outside the scope of the ETA are referred to a legal officer who sends an information letter to the complainant. The Authority has recently designed a case filtering system which is available on ETA's website, where complainants can test whether their cases fall within the jurisdiction of the ETA.

All the complaints are additionally read by the vice-president and the head of the legal department who jointly supervise the conduct of the case. They may both re-assign the case if they consider it appropriate, in which case they inform the president about the re-allocation. The officer assigned to the case meets on a one-to-one basis with the vice-president and the head of the legal department to discuss and agree the strategy and timetable for the case every Monday. In addition to that, the president and the legal staff meet for 2-3 hours every Friday to talk over the work, EU legal decisions and issues arising in the cases. While peer support is well developed and valued within the team, a view was expressed that meetings could be better planned to enable more time to discuss case law issues.

The officer assigned to a case drafts a timetable for the investigation which must lead to a decision within 75 days, in cases involving minors and other particular types of cases the time limit is 45 days. Although there is scope for one extension of up to 30 days, staff indicated that the time limits presented a challenge. In complex cases it is difficult to conduct an investigation observing professional standards. In simple cases, where the provision of information will answer the complaint, a letter of information is drafted. All correspondence is checked by the vice-president before being posted.

The ETA is obliged to notify the respondent/defendant within 5 days of receipt of a complaint that they have been drawn under procedure. This time limit does not allow for obtaining supplementary information on the complaint before deciding to take action. Beyond that the legal officers do not involve themselves in extensive communication with respondents. The respondents are met face-to-face for the first time at the hearing.

Hearings of complaints are only organised by the Authority if the complainant has met the first step in establishing the case, i.e. that s/he has demonstrated that it is likely that s/he has suffered a disadvantage and possesses a protected characteristic. The hearing takes place in public although they are not publicly announced. The requirement to conduct the hearing in the respective local government area of the complainant imposes burdens on the staff in terms of travelling.

An increasing number of complainants are represented by lawyers at the hearings. Usually two legal officers attend a hearing, one is the officer in charge of the case and the other one contemporaneously takes minutes. At the hearing, the officer in charge of the case will inform the complainant about their role to act as an independent investigator. It was reported nevertheless that victims have enquired whether the legal officer is representing them or whether they are independent of the parties. The questions and a summary of the answers are recorded in the minutes which are agreed and signed by the parties before the conclusion of the hearing. The outcome of the hearing is a recommendation by the officer in charge.

Case recommendations are drafted by the legal officer in charge of the case and all decisions are checked and confirmed by the head of the legal department, the vice-president and finally by the president who signs the decision. In case of disagreement, a final consensus is reached by discussion and persuasive argument.

When a case is closed, the outcome is recorded and any appropriate changes may be made to the categorisation as recommended by the officer in charge of the case. Statistical reports are compiled from these records by a staff member of the administrative department. There are no database or case management database systems to easily report on progress or on the nature of complaints.

According to the Authority's Annual Report published in 2006, 491 claims were filed in 2005. In 2006 the number of complaints filed almost doubled. Most of the claims were related to the area of employment. In 2005, most of the complaints concerning access to employment were filed by Romani people and concerning both access to and dismissals by women over 50, women with children and people with disabilities. Numerous claims were filed in connection with education, segregation of or the use of individualised class-schedules for disadvantaged students. Denial of services by retailing and catering businesses was almost exclusively reported by members of the Romani minority, while access to other services was denied to people with disabilities. There have only been four *ex officio* investigations up to now and no use of the *actio popularis* powers.

**Table 1: Number of complaints filed and action taken by the ETA**

Action taken by ETA	2005		2006	
	Abs.	%	Abs.	%
Discrimination established	9	2	27	3
Agreements reached	9	--	13	--
Fines imposed	3	--	10	--
No discrimination established or proceedings terminated	149	30	200	22
Written advice to applicants or referral to other public bodies	333	68	684	75
<b>Total of complaints filed</b>	<b>491</b>	<b>100</b>	<b>911</b>	<b>100</b>

The table above shows that the number of cases is increasing. The increase may be attributed to the fact that information about the ETA and its work develops throughout Hungary. The number of cases in its second year of existence has almost doubled compared to the first year. However, the table also shows that only 30 per cent of the complaints received by the ETA in 2005 and 25 per cent in 2006 fell within the competence of the Authority. Another important question is why discrimination could not be established or proceedings had to be terminated in so many cases? Do these problems relate to lack of evidence and fear on part of the alleged victims of discrimination?

## 2.4 Duties beyond investigating complaints

The other duties of the Authority going beyond investigating complaints (see 2.1) are divided among the legal officers. One officer attends parliamentary committees on equal treatment issues in order to report to the president and s/he also takes responsibility for providing the answers to parliamentary questions. Another officer is responsible for writing reports to international bodies or for international conferences or projects. Two officers are the contact point for international networks, for example Equinet. While the main responsibility for court appearances is assigned to the three more experienced legal officers, this task is also allocated to the less experienced staff. One officer is responsible for maintaining relationships with the Houses of Equal Chances and another for external communication through, for example, the newsletter. In addition, staff provides opinions on draft legislation and all of the legal staff are involved in media relations. Staff emphasised how their responsibilities overlapped with their main investigation tasks and stressed the need for flexibility to respond to urgent demands as they arose.

The ETA informs the public about equal treatment through the organisation of 2 conferences with employers and NGOs every 6 months and through the provision of training and its media work. The results of casework inform ETA's work with the media which it uses to publicise its successful decisions. Staff members are in regular contact with the media and get good publicity for their cases. The information on decisions on the website has been used to refer complainants to as a source of advice on the law and good practice applicable to their complaint. Staff also reports that on a case by case basis, they will advise the respondent employer or service provider about their responsibilities under the law and how to avoid discrimination in the future.

## **2.5 Relations with other authorities and NGOs**

The ETA has specified contact persons for establishing relations with the Houses of Equal Chances and NGOs. According to a survey conducted at the beginning of the Twinning Light project, both the Houses of Equal Chances and NGOs had already referred cases to the Authority, some however were not informed about the outcome of these cases. None of the trade unions that had participated in the survey had referred a case to the ETA, and neither have employers' organisations that see themselves as representing the interests of employers and therefore do not see a need to refer cases to the ETA. Good relationships have been established to governmental bodies, such as the Ombudsman for National and Ethnic Minorities or the Educational Mediation Service, concerns were expressed about relationships with other public authorities such as the Labour or the Consumer Protection Inspectorates. The Authority has good contacts with the Roma Anti-discrimination Network, with whom they have a joint annual meeting to evaluate discrimination against Roma, besides the network is a source of relevant local information and for referring cases outside the ETA's scope. The network of Anti-discrimination Signalling System created by the Ministry of Education has not forwarded any education cases to the Authority yet. The formalisation of the exchange of information between all these relevant actors in the field of anti-discrimination was seen as an important aim in strengthening and promoting co-operation.

## **2.6 Conclusions**

These conclusions regarding the status quo will just raise a few questions some of which will be later on taken up again in the course of this guidebook.

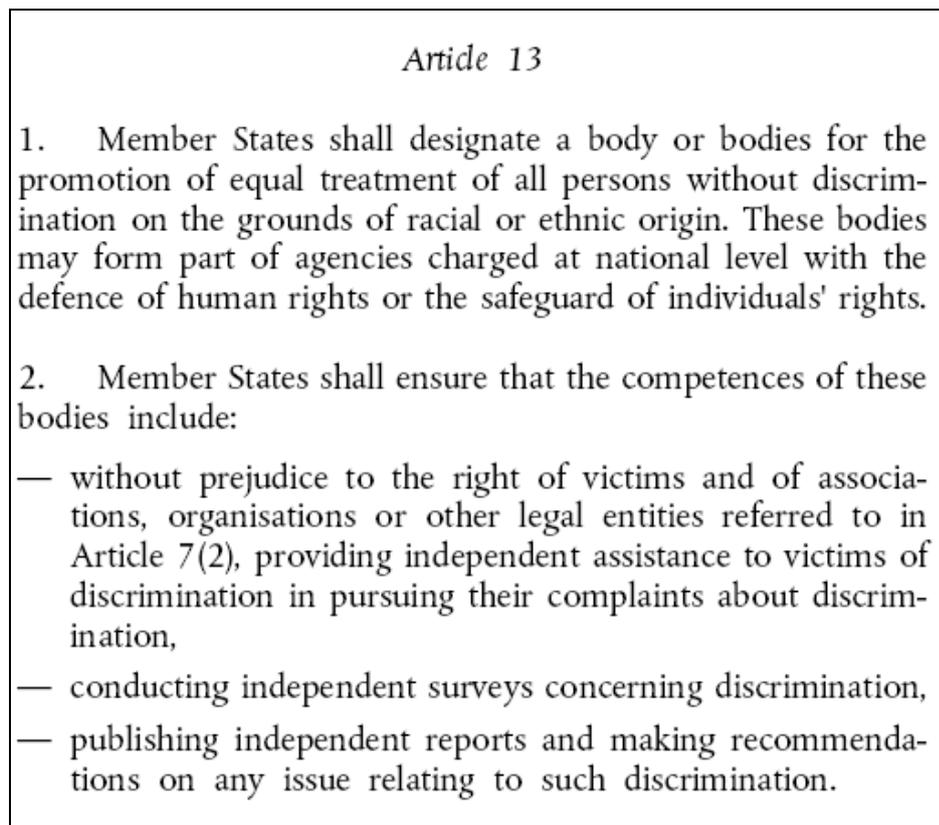
- Has the focus on investigating complaints and informing the public about the ETA and non-discrimination in Hungary made it possible for the ETA to fulfil the diverse spectrum of duties assigned to it?
- How can the ETA ensure that a higher percentage of complaints reported to it falls within its scope of competences?

- What strategies can the ETA develop to meet the provision that hearings have to be conducted in the respective local government area and relieve its staff of some of the burdens connected with this provision?
- How can the ETA ensure its role as independent investigator especially with regard to victims?
- Why has such a large number of cases to be dismissed?
- How can it be ensured that the investigations meet professional standards although they have to be conducted within severe time limits?
- How can the procedures in reviewing cases be standardised and formalised?
- Are the currently established mechanisms for allocating and supervising cases guaranteeing the most effective use of the ETA's resources and expertise?
- Are the currently established forums for exchanging information on the work, issues arising in the cases and EU legal decisions ensuring consistent decisions?
- How can it be guaranteed that legal officers develop expertise in all the grounds of discrimination covered by the ETA?
- How can the cases be monitored in order to see what kind of cases are reported but also not reported to the ETA?
- How can the co-operation and exchange of information with other governmental bodies and NGOs be improved?
- What information do governmental agencies and NGOs need to be able to pass on relevant cases to the ETA?
- How can the ETA guarantee that its public relations achieve a high level of awareness for the issue of discrimination among potential victims, witnesses, perpetrators and policy makers as well as opinion leaders?

## 3 Missions of the ETA

### 3.1. What is the Equal Treatment Authority?

The basis for the creation of the Equal Treatment originates in the EU Directive 43/2000/EC which requires:



In the Hungarian legal system these requirements are implemented in the Equal Treatment Act and the Government Decree 362/2004 on the Equal Treatment Authority and the Detailed Rules of its Procedure.

Article 14 of the ET-Act lists the powers of the Authority. It reads as follows: The Authority shall

- based on a complaint or in cases defined herein, conduct ex officio an **investigation** to **establish** whether the principle of equal treatment has been violated, and make a **decision** on the basis of the investigation;
- pursuant to the right of claim enforcement in the public interest, **initiate a lawsuit** with a view to protecting the rights of persons and groups whose rights have been violated;
- review and **comment on drafts** of legal acts concerning equal treatment;

- make **proposals** concerning governmental decisions and legislation pertaining to equal treatment;
- regularly **inform the public** and the Government about the situation concerning the enforcement of equal treatment;
- in the course of performing its duties, **co-operate** with the social and representation organisations and the relevant state bodies;
- continually provide information to those concerned and **offer help with acting against the violation of equal treatment**;
- assist in the preparation of governmental **reports** to international organisations, especially to the Council of Europe concerning the principle of equal treatment;
- assist in the preparation of the **reports** for the Commission of the European Union concerning the harmonisation of directives on equal treatment;
- prepare an **annual report** to the Government on the activity of the Authority and its experiences obtained in the course of the application of ETA.

From this legal basis it becomes clear that the actual tasks of the Authority go far beyond the minimum requirements of the EU-Directive (although independent surveys are not mentioned in the Hungarian law). The Authority is not only designed as to provide independent assistance to victims of racist discrimination in pursuing their complaints, but it is at the same time obliged to receive, handle and decide on these complaints. The decisions of the Authority are legally binding and these decisions may comprise financial fines or “public shaming”.

The various tasks of the Authority are all very important but require a shift of relationship with complainants.

### **3.2 Assisting the victims or impartially decide (judge) discrimination cases?**

One major conflict of roles derives from two basic tasks in relation to the complainants who turn to the Authority. On the one hand it is a clear and statutory duty of the Authority to assist (potential) victims of discrimination in pursuing their complaint and on the other hand it is the Authority's duty to conclude cases with a legally binding decision.

The Authority does not have a choice whether it wants to concentrate on one of these tasks. Both are necessary and obligatory.

As experienced in the study trips – such a concept of a single body fulfilling both tasks is quite uncommon in Europe. The Dutch Equal Treatment Commission – like the Austrian – concludes cases with a legally non-binding opinion, whereas the Irish

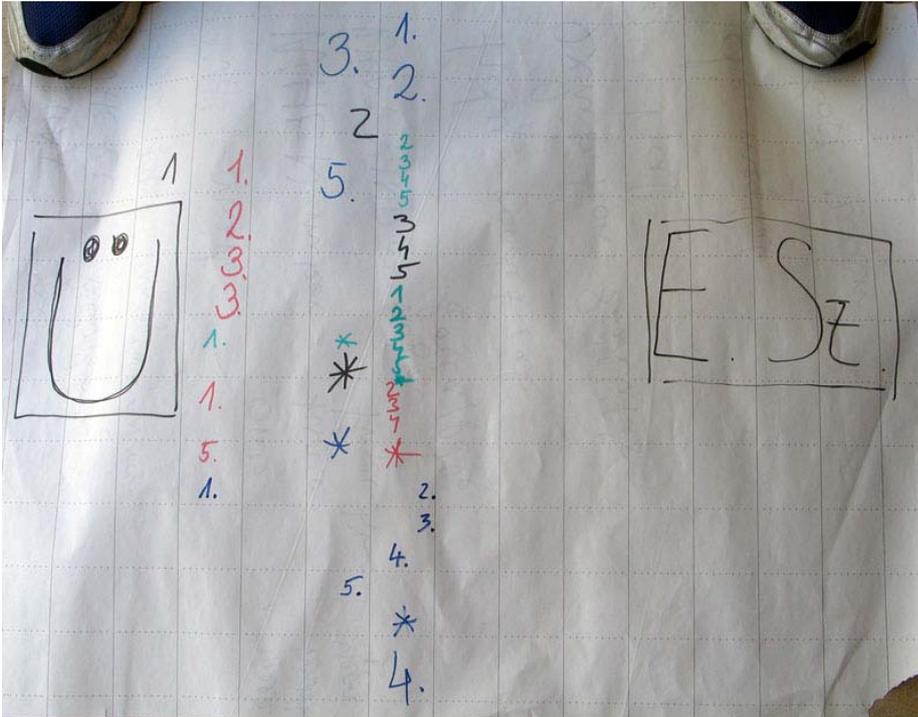
Equality Authority is clearly partial on the side of the victim, while the legally binding decision is made by the Equality Tribunal. In the Dutch case, Employees of the Commission take on the task of supporting and investigating the cases, while the Commissioners concentrate on the finding only. In Austria, the National Equality Body is taking care of the partial assistance to victims and the Equal Treatment Commission is only required to make a decision.

Regarding the requirements set out in the European Directive the assistance to individual complainants is an absolute essential part of the duties of any so-called "Specialised Body". The Directive is silent on the requirement of decision making.

The Hungarian Authority – by law – is ordered to mix these duties and conduct the whole procedure. This is a challenging task and makes it necessary to develop clear and firm division of tasks, in order not to compromise the Authorities duty to be partial in one aspect and impartial in another aspect of its work on the same case.

During the methodological training, participants were asked to mark on a flipchart, where they see their position during the different phases of a procedure.

**Graph: positions during the procedures**



This picture clearly indicates that the current division of tasks demands the impossible from them: They should be assisting one party of the procedure while being im-

partial. It also shows that interaction with the respondent is not (and cannot be) in their focus.

Also the workshop on communication strategies revealed that the main message the participants wanted to convey to the public and especially to the groups most vulnerable to discrimination was "There is help!". It is also clear that a great effort of the Authority has to be made to encourage victims of discrimination to come forward with their complaint and to pursue it further.

All this is understandable and right but it is always likely to compromise the impartiality of the Authority. Although the staff stated in the workshops that generally they do not see it as a problem to fulfil both requirements at the same time, it might be useful to think about methods to relief them from these double-binding positions.

### 3.3 Division of tasks to prevent conflicting roles

The most suitable solution for this problem of possibly or even necessarily conflicting roles is to divide these roles clearly. In the current situation, a case is assigned to a member of legal staff as a whole. So communication with the complainant, the respondent, investigation and decision making is in one hand. Although there is regular internal communication about cases and the decision is triple checked by the management, the main person remains the same staff member. This staff member has to professionally advise and support the claimant in pursuing the complaint while at the same time ensure fair conditions for the respondent and preparing an impartial judgement. Additionally this staff member has to communicate these positions to all parties involved. It seems hardly possible to do all this at the same time.

In the current situation it seems that the focus of the Authority lies with safeguarding the impartiality – which lowers the level of support the Authority is able to offer to complainants.

A typical division of tasks could be designed like this:

#### Intake Officer (IO):

Tasks: Sifting the incoming cases; advise complainants; inform complainants fully about the procedure and possibilities. Those cases which fall under the jurisdiction of the Authority shall be preliminary investigated by the intake officer. The intake officer is **partial** on the side of the complainant. He/she assists the victim to prepare for the procedure and seek for the best possible outcome. The IO does not communicate with the respondent. If further pursuance of the case is found improper by the IO; this preliminary decision has to be backed up by a decision of an Investigation and Decision Making Officer.

#### Investigation and Decision Making Officer:

Tasks: handle complaints from a certain point on. This point has to be defined clearly. It could be the point where the Intake Officer is convinced that the burden of proof shifts to the respondent. The Investigation and Decision Making Officer is clearly **impartial** and concludes the case with a decision or with a settlement reached by the parties to the conflict.

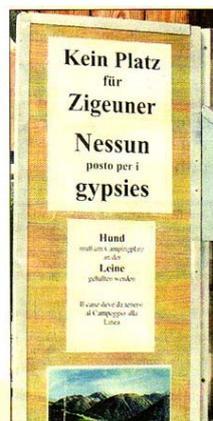
In a larger institution it could even be worthwhile to divide the tasks of investigation and decision making between different staff members, but with this basic two-fold division the main contradiction of the tasks is eliminated.

### 3.4 Definition of a “victim”

Victims are those that are adversely affected by discrimination. What does affected mean in this context and to what extent does a victim have to be directly affected by discrimination?

The owner of a camping site puts up a sign saying “No gypsies allowed”.

#### Graph 2: Picture of the sign “No gypsies allowed”



The picture was taken at a camping site in the Tyrol, Austria, in summer 2005.

© ZARA

A victim of this discriminatory sign would be a person who

- defines him-/herself as a member of the ethnic group of Roma who travels to the camping site, sees the sign and decides to go to another camping site.
- defines him-/herself as a member of the ethnic group of Roma who travels to the camping site, tries to enter the camping site and is not accepted as a customer with reference to the sign.
- does not define him-/herself as a member of the ethnic group of Roma but is nevertheless identified by the owner of the camping ground as a person belonging to this group and therefore prevented from entering the camping ground.

- defines him-/herself as a member of the ethnic group of Roma who just happens to pass by the camping ground without the intention of entering it.
- does not belong to the ethnic group of Roma, but is accompanied by a person defining him-/herself as belonging to this ethnic group, who together travel to the camping site, see the sign and decide to go to another camping site.
- does not belong to the ethnic group of Roma, but is accompanied by a friend either defining him-/herself as belonging to this ethnic group or perceived by the camping ground owner as belonging to this ethnic group, who together travel to the camping site, try to enter it and are told that s/he is only accepted as a customer if s/he enters the camping site without her/his friend.
- anybody who just happens to pass by the camping ground without the intention of entering it and who sees stereotypes being reproduced and re-enforced and feels adversely affected by the atmosphere the sign creates.

### 3.5 Service Equity<sup>1</sup>

It is a part of the Authorities duties to ensure that everyone receives the same service and has the same, equal access to the office. This is an enormous challenge to any public institution but especially to the Equal Treatment Authority as expectations in this respect might be exceptionally high.

A service equity model treats people differently according to their diversity, needs and circumstances to achieve equitable service for everyone.

Specialised Bodies around the world must provide timely, relevant and fair service. In addition to providing high quality service, a service equity model recognises the public's diversity and honours fairness and relevance. Designing appropriate models of service delivery that consider changing demographics requires flexibility and creative adjustments to traditional administrative procedures. Specialised Bodies can and must provide equitable and efficient service.

#### ***3.5.1 Definitions of service equity and equitable service delivery***

'Service equity' and 'equitable service delivery' originated as terms describing a method of analysis and a set of practices used to ensure that systemic barriers, intentional or not, are removed from organizational policies and practices. The concept of equity was employed specifically to address the reality that under "equal treatment" the diverse needs of previously excluded groups and individuals were not adequately served and their access to public services was undermined.

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<sup>1</sup> This chapter is tailored after UNDP, How to Handle Complaints, A Guide for Ombudsman Institutions, Bratislava 2006, pp 73ff

### ***3.5.2 Foundation for development of effective and equitable practices***

Three principles provide the foundation for developing equitable and effective practices:

- (a) The necessity to examine critically policies or practices that may appear neutral so systemic barriers, systemic disadvantages and/or adverse impact to service access can be removed;
- (b) Acknowledgement of and respect for differences among groups and individuals so that those who provide service can use appropriate and realistic procedures for service delivery; and
- (c) Recognition that power and privilege inherent in policies, behaviours and structures, at times, may work against some people or groups the Authority must serve.

### ***3.5.3 Standards for equitable service delivery***

Fundamental to achieving service equity is the commitment to equal consideration and respect for all complainants in providing services. Equal consideration and respect do not necessarily mean identical treatment, since respecting the differences between people and groups of people (including different circumstances, needs and wants) often require different treatment.

Equal respect for all complainants means both being sensitive to the possible implications of the complainant's apparent or stated social location, and not stereotyping or being inflexible based on that awareness. Social location is about who people are and how they identify themselves.

It is based on factors including: gender, religion, ability, sexual identity, race, age, colour, marital status, physical appearance, family status, ethnicity, class, culture, geographic location, citizenship, criminal record, residency status, education, occupation, language, political, trade union and community group affiliations.

Social location is not just about recipients of the Authority's service. It shapes staff perception, and how the Authority and staff understand and interact with complainants and colleagues. Equitable service must take into account the social location of the Ombudsperson and staff, and the impact that may have on others. The Ombudsperson and staff must therefore foster critical self-awareness, because their social location, lived experience, and the degree to which they are knowledgeable about issues of importance to complainants, affect the Authority's ability to provide services effectively and equitably.

These standards relate directly to a Specialised Bodies mandate, vision, mission and to all the office's work. They focus on internal practice and external service delivery. They provide an Ombudsperson with a way to measure the office's effectiveness and progress in achieving equitable service delivery.

## **Value difference and demonstrate respect**

- Be open and receptive to communication styles that differ from your own.
- Demonstrate sensitivity to issues being presented, regardless of the behaviour being exhibited.
- Identify and challenge your own assumptions, as these will affect your interactions.
- Be aware that non-visible identities (such as hidden disabilities) may exist and impact interactions.
- Educate yourself on the various non-visible identities that exist and the systemic issues faced by people in those groups.
- Do not make assumptions about any groups an individual “may” belong to.
- Ask open-ended/clarifying questions to gain more information.
- Challenge others on their assumptions and commentary about any groups, particularly when these are disparaging, disrespectful or uninformed.

## **Listen actively to enable meaningful participation**

- Seek to connect with others by identifying and challenging any discomfort you may experience within yourself.
- Move beyond assumptions about behaviour and demonstrate empathy and respect.
- Make an effort to listen for what may be behind the words – particularly to others who experience difficulty expressing themselves.
- Expand your own perspective by taking the time to understand that of others.
- Take the time to listen without interrupting.

## **Promote and ensure full access to service of the Authority**

- Make adjustments in work hours and locations to accommodate groups that cannot access service of the Authority easily.
- Recognise and offer options for service to meet the needs of groups that may require assistance to access service.
- Select locations that are barrier-free and centrally accessible for people.

## **Practice attitudinal openness**

- Provide options without making assumptions about an individual’s choices for the Authority’s service delivery and/or access.
- Do not label people by characteristic unless it is explicitly relevant.

- Use appropriate language to characterize people when relevant (e.g. person with disability as opposed to disabled person) by putting the individual in the picture first, followed by any relevant description.
- Speak in plain language and explain the process and procedure of the Authority and other authorities openly and clearly.
- Be aware of your own social location and its relationship to that of others.
- Be sensitive at all times to potential or real systemic barriers to access the Authority.
- Provide practical and useful referrals and service options to complainants and colleagues when programs or procedures do not meet their needs.

### **Actively implement inclusivity**

- Seek input and participation of as many diverse groups as possible in all initiatives.
- Identify and discuss systemic issues that may exist or occur due to organizational change.
- Be open to explaining details that others may require to engage fully in the process you are following.
- Seek learning opportunities to educate colleagues on particular equity issues.
- Identify opportunities to reach groups that have historically experienced barriers to accessing services.

### **Recognise power and privilege**

- Acknowledge your own power and privilege in each interaction or process in which you are engaged.
- Be open to hearing the impact of your actions and assumptions and take responsibility for them.
- Name mistreatment when you observe it happening and work in a constructive way to address it.
- Continuously educate yourself and learn from your experiences about the impact of discrimination and mistreatment.

### **Communicate appropriately and effectively**

- Be open and flexible in the methods and vehicles used to communicate with others, both within the Ombudsperson's office and externally.
- Ensure that publicity for programmes run by the Authority reach targeted constituencies.

- Be responsive to the need for translation and interpretation in every interaction and undertaking.
- Access and adjust all materials for bias, prejudice and systemic impact.
- Share your knowledge and experience concerning appropriate referrals for complainants who need particular services in the community.
- Consult with community resources on an ongoing basis to ensure appropriate referrals and to maintain relevance with community trends.
- Ensure that all materials reflect in illustration and text, the diversity of the population.

### **Foster participation**

- Be explicit about the elements of fairness that are built into the complaint resolution process.
- Present your knowledge, skills and perspectives fully and appropriately with complainants and colleagues.
- Use communication and public education strategies that ensure that useful information is reaching all potential complainants, including non-traditional and alternative networks and media within diverse communities.
- Volunteer information about the complaint resolution process and keep complainants and other staff informed appropriately on a regular basis.
- Maintain regular contact with complainants on the progress of any investigation.

### **Recognise personal/professional responsibility and accountability**

- Participate fully in training and education provided on the issues of service equity and accountability.
- Take responsibility when you make mistakes and when something you do or say is hurtful to others.
- Adopt the service equity framework in all aspects of your work and bring forward questions or issues that require clarification.
- Be direct about your own conflicts or struggles and respectfully address differences with others.

### **Identify systemic issues**

- Ask clarifying questions to better understand an individual's complaint of systemic discrimination.

- Seek out opportunities to discuss the visible/obvious and hidden/invisible impacts of systemic discrimination.
- Actively identify trends and opportunities to undertake systemic and system-wide investigations.
- Be clear on the groups in society that experience systemic discrimination.
- Continue to seek out learning opportunities to examine and understand the nature of systemic discrimination.

### 3.6 Power of language

Language plays a very important and powerful role in both reinforcing and combating discrimination. Words are always related to concepts which generate certain images that are quite powerful.

If we for instance take the sentence: "All men are born equal in rights." This statement first of all reflects history, because only males used to have access to certain rights, and it still supports the imagination of only males having equal rights because when we talk about men we envisage males. So in order to promote imaginations including both women and men the statement would either have to be "all human beings" or "all women and men are born equal in rights".

Certain concepts used for denoting marginalised groups in society or potential victims of discrimination express disrespect and derision. Such concepts generate images of prejudice and stereotyping which are permanently attached to the group denoted by the discriminatory concept.

The term "cigány" is sometimes used by members of the ethnic group of Roma to denote themselves, but when it is used by non-Roma it is understood as discriminatory. "Cigány" triggers images of people "stealing children", "being dirty" or "being travellers". Therefore, it is important that new concepts denoting groups whose members often become victims of discrimination, which do no longer contribute to creating discriminatory imaginations, are coined by those affected. The term Roma was introduced by the International Romani Union in the 1970s to overcome prejudices and achieve self-consciousness.

When dealing with complaints reported by alleged victims of discrimination language also plays an important role. People are adversely affected by discrimination and therefore it is often not easy to talk about the situation in which one encountered discrimination. Therefore it is even more important to make clear that it is not the person's fault that s/he had been discriminated against and s/he has the right to non-discrimination. Victims of discrimination are in need of support in order to be able to develop strategies coping with discriminatory incidents and enjoying their right to non-discrimination.

### 3.7 Individual and institutional discrimination

Institutional discrimination refers to the way institutions or organisations systematically treat people showing certain characteristics or being perceived as showing certain characteristics. As opposed to individual discrimination institutional discrimination is not about individuals who consciously or unconsciously discriminate people but about the processes, attitudes and behaviour of all involved in an institution or organisation resulting in discrimination.

The term institutional discrimination is best defined in relation to racism meaning “the collective failure of an organisation to provide an appropriate and professional service to people because of their colour, culture or ethnic origin”, which “can be seen or detected in processes, attitudes and behaviour which amount to discrimination through unwitting prejudice, ignorance, thoughtlessness, and racist stereotyping which disadvantages minority ethnic people<sup>2</sup>.”

**Table 2: Discrimination on the ground of disability ...**

individual	structural
A person with a visual impairment applies for a job and is told by the head of a department that he is not going to employ him/her because he “has already had problems with blind employees”.	A person with a visual impairment applies for a job. S/he is invited for a job interview. There is no non-visual equipment in the elevator. S/he is told that the company has a policy of not employing people with disabilities, as it would e.g., be much too expensive to adapt the computer systems and many organisational processes to the needs of people with visual impairments.

So in the above example of structural discrimination on the ground of disability it is evident that the potential employer displays an organisational culture which collectively fails to stop discriminatory behaviour in recruitment procedures. Within this organisational culture a policy of not employing people with disabilities is not perceived as discriminatory, because reasons given by the company seem to be seen as justified (e.g. too expensive), and therefore as unlawful. Employees are instructed to discriminate as the organisational policy seems to legitimise their not selecting people with disabilities for a job. By excluding people with disabilities the organisational culture supports prejudices and stereotyping as well as ignorance towards abilities and resources of people with visual impairments.

<sup>2</sup> Macpherson, William (1999) The Stephen Lawrence Inquiry, presented to Parliament by the Secretary of State for the Home Department by Command of Her Majesty, available at: <http://www.archive.officialdocuments.co.uk/document/cm42/4262/4262.htm>

## 4 From reaction to action – strategy as a tool

The ETA's main goal is to ensure compliance with the principle of equal treatment, including the promotion of equal opportunities, on all 19 grounds and across all relevant sectors in Hungary. In order to reach this goal the Authority has put its focus on the investigation of complaints and informing the public about the Authority and non-discrimination in Hungary for the last two years.

Investigating and deciding individual cases has to be one of the main tasks of the ETA, as it is the right of individuals who feel discriminated against to obtain a decision on the question of whether or not they have been discriminated against according to the Hungarian law and if discrimination has been established to obtain a binding decision that they have been treated unlawfully. Decisions of the Authority are very important to create case law and to transform the principles of non-discrimination and equal treatment into practice. Decisions of the Authority on the unlawfulness of discriminatory acts and imposition of sanctions can be a very important tool for raising awareness of the fact that discrimination is prohibited. Using this power in a more strategic way could ease the authorities' tasks and could quicken the process of acceptance by society of the principle of equal treatment.

According to the Authority's reports and those so far drafted in the framework of this Twinning Light project the Authority has to dismiss a high percentage of cases either because they do not fall within the competence of the Authority or because evidence of discrimination cannot be obtained. The potential capacities of the ETA are to some extent restrained by putting much effort into finding out whether a case falls into the competence of the Authority on a case by case basis. Staff members are burdened by a general overload of work resulting in lacking time and resources for other important tasks allocated to the ETA. The Authority currently fulfils a kind of gate keeping function which binds resources and prevents it from developing its potential capacities and forces it to focus on "reactive" tasks.

### 4.1 Advantages of developing a strategy

By developing an overall strategy – which specifies long-term aims, makes possible strategic choices and allows for evaluation to regularly adjust the measures and long-term aims – the currently applied case-oriented approach could be turned into a policy-oriented approach. The ETA would then be able to play an active role not only in setting its own agenda but also in determining what the main issues regarding non-discrimination are in the public arena. With regard to the gate keeping function currently exercised by the ETA the first step would be to analyse why many of the cases reported to the ETA do not fall within its competences.

- Are the applicants members of any of the target groups identified by the ETA?

- Do applicants have the relevant information about the competence of the ETA?
- What kind of information do governmental or non-governmental organisations have on the ETA when they want to pass on cases?
- How much resources are used in order to inform the public or other relevant target groups about the competences of the ETA?
- What channels are used to disseminate this kind of information?
- What does the investigation of single cases contribute to clarifying the competences of the ETA?
- What kind of information is published by other actors in the field of anti-discrimination defining their competences?

This analysis is the first step in developing a strategy guaranteeing the ETA to become an active player in the policy-field of anti-discrimination. At this stage the ETA has to identify problems, barriers and restrictions faced as well as advantages for and strengths of itself and its environment. This analysis is not yet goal-oriented. It just produces knowledge about a situation and should take into account a variety of factors and parameters which could or could not be useful in the further steps.

By answering these questions some of the problems, barriers and restrictions faced by the ETA could become more obvious and visible. Based on this analysis the Authority could go ahead and develop a strategy which evolves by taking the right choices. Usually a strategic analysis provides a broad range of possible directions to choose from. So the question determining the direction of the strategy of the ETA could be whether it wanted to remain the gatekeeper it currently seems to be, to be a qualitatively different gatekeeper than it is now or to take on a totally different image.

At this stage some possible ways of proceeding have to be excluded by way of prioritising so that power and resources can be concentrated on achieving defined targets. Defining these targets is the central objective of this step. One such target might be to increase the number of cases that fall within the competences of the ETA to 60 per cent of the cases reported to it within the next two years.

Having agreed on such a goal, a strategy giving direction to the work of the ETA can be developed. This means that particular activities have to be planned and conducted, disturbances and barriers have to be eliminated and activities not supporting the strategy have to be terminated. Such a strategy is not only a plan designed to achieve this particular long-term aim but it also contributes to the overall planning and directing of the Authority's activities in combating discrimination. It would give the ETA the opportunity to bring together its different activities in a more focused

way and maximise its resources, including the potential collaboration of different partners and stakeholders. Some of the relevant measures taken in connection with the above mentioned aim might e.g. be

- informing other relevant actors in the field about the competences of the ETA,
- distributing checklists to other relevant actors including the criteria for a case to fall within the competence of the ETA,
- encouraging other relevant actors to disseminate information on their competences in the field of anti-discrimination,
- analysing to what extent relevant target groups are reached with the information material currently available and whether it is comprehensible,
- analysing the consequences when a specific case is made public by the ETA – are similar cases, cases by the same group of victims, etc. reported to the ETA?,
- analysing what kind of information provided to the public and the government has an effect on the cases reported to the ETA and what kind of effect.

After having implemented the measures, it has to be evaluated whether they have contributed to reaching the aim of increasing the number of cases that fall within the competences of the ETA to 60 per cent of the cases reported to it. Evaluation plays an important role in a coherent strategy. At the stage of making strategic choices, one has to work on the basis of assumptions. These assumptions can be turned into certainties to some extent by evaluation. Besides, evaluation opens the possibility to learn from success and failure. Knowing about the strengths and weaknesses of a strategy gives the opportunity to adjust and refine targets or even redefine targets as they might not have been the right choice based on the strategic analysis.

#### **4.2 Responsibilities and participation – top-down and bottom-up**

Recognising the importance of strategy as a tool for turning the ETA from a reactive player into an active one participating in agenda setting and the promotion of anti-discrimination policy falls within the responsibility of those representing the ETA, setting its agenda, determining its policy and overseeing its day to day work. A strategy cannot be developed without those being in charge of the management actively promoting and supporting this idea and taking responsibility for making strategic choices. They have to conduct the strategic analysis trying to find out why e.g. so many cases not falling within the competence of the ETA are reported to it and identify the direction they want the Authority to follow by developing specific goals. These decisions have to be communicated to all staff members of the ETA and the criteria and motivation for these decisions should be made transparent.

When it comes to developing and implementing measures necessary for reaching the goals set by those in charge of the management, participation by those involved is a good and necessary way of making all the staff identify with the strategy. This can be done by way of action planning, which means that potential activities supporting the achievement of the goals set have to be developed by those involved.

The ETA might establish a steering group reflecting the organisational and hierarchical structure and gender-composition of the Authority that is responsible for suggesting activities and linking them to resources that are currently available, resources that are not currently available but necessary and a realistic time-frame. As soon as the action plan is agreed on by the steering group and approved by those in charge of the management, who are responsible for making resources available guaranteeing the successful implementation of activities, it has to be communicated to all staff members so that everybody can act accordingly.

This participatory way of developing a strategy makes everybody identify with it and feel responsible for implementing activities and reaching the goals defined. When developing such an action plan evaluation should not be forgotten as an important tool of fine-tuning activities and goals. This means that whenever activities are designed, it should be specified how they will be evaluated. It will make evaluation easier as evidence is collected by all staff members and can easily be generated.

When developing strategies it is always important to keep in mind

- the whole spectrum of possible activities that are available in connection with all the duties assigned to the ETA,
- the potential allies within or outside the ETA that might be relevant,
- the participation of those affected by discrimination.

## 5 Procedural particularities and challenges

### 5.1 Interviewing the applicant

Practice shows that the ETA is mainly starting procedures according to a request or application by an individual who feels affected by discrimination.

A first contact by the individual is usually followed by a face to face interview with the client. It is important for the success of the following procedure to make the best possible use of this interview. During the activities on methodological training, the participants produced the following check list which could be used as guidance for developing a standard procedure for first interviews (noted and amended by Barbara Cohen and Dieter Schindlauer).

Possibly the most important message conveyed by this list is that the interview is a communication process in which both sides have to provide information. It is vital for the following procedures that the applicant knows what to expect from the ETA and how to get information and support from other sources. It is also vital that the applicant has a basic understanding of the procedure and of basic concepts like victimisation.

The initial interview is the chance for the officer to build trust with the complainant, to explain the rules and to sift out those complaints which should not be continued. This is the moment where complaints can evolve to applications.

In case the intake officer is of the opinion that the complaint should not be turned into a formal application this has to be made very clear to the complainant. Nevertheless, this decision should not be final as the complainant can still decide that he/she wants to file an application, anyway. It is vital for keeping up the reputation of the Authority that in such a case any further decision on the matter is taken by a different officer.

FIRST FULL INTERVIEW WITH INDIVIDUAL COMPLAINANT WHO ALLEGES BREACH OF  
THE PRINCIPLE OF EQUAL TREATMENT

A. Preliminary matters:

1. Does the complainant have any special requirements – for example needing an interpreter (non-Hungarian speaker, deaf person) or any other forms of assistance (physical arrangements, accompanied by relative, friend, NGO or trade union representative, lawyer)
2. Explain the purpose of the interview, how long it is likely to last

B. Essential elements of every interview:

1. Recognise the effect the discrimination may have had on the complainant
2. Establish trust
3. Be patient
4. Listen
5. Show respect
6. Appear confident
7. Before concluding verify that complainant has basic understanding of what was the outcome of the interview

C. Gathering information from the complainant:

1. Personal data:
  - a. name
  - b. address
  - c. telephone number
  - d. other relevant details

- e. (see ID card?)
2. Personal characteristic(s) relevant to the complaint
3. Disadvantage(s):
  - a. What happened (in each incident if more than one)? Why does s/he consider this amounted to discrimination?
  - b. Where?
  - c. When – one incident, several incidents, continuous
4. Who caused the disadvantage (referred to herein as “alleged perpetrator”):
  - a. Name of organisation or institution
  - b. Names of individuals involved
5. Complainant’s relationship with alleged perpetrator:
  - a. Previous or pre-existing relationship
  - b. Relationship at the time of the incident
6. Has complainant contacted any other organisation/institution, any other public administrative body or applied to a court concerning this matter? (If so, then advise regarding the legal limitations on what the ETA can do)
7. Full details of any witnesses
8. What documents or other forms of evidence could support the complainant’s complaint? In whose possession are these?
9. Past conduct of the alleged perpetrator: previous complaints/cases by persons with similar personal characteristic(s)
10. Treatment by alleged perpetrator of persons not having the same personal characteristics in the same or similar circumstances (comparator(s))

11. What outcome is the complainant seeking?

- a. Have there been any attempts to settle?
- b. Would the complainant be willing to have a settlement?
- c. If so, would the complainant wish to engage in mediation to achieve a settlement?

D. Providing the complainant with information about the ETA and how the ETA will deal with her/his case:

1. Ask what the complainant knows about the ETA, how s/he decided to contact the ETA and what expectations s/he has regarding what the ETA is able to do.
2. Provide relevant information about the ETA (give leaflet if appropriate)
3. Explain what the ETA is able to do:
  - a. Investigation process and the complainant's role
  - b. How and when the ETA will contact the alleged perpetrator and what the alleged perpetrator will be told regarding the complainant's complaint
  - c. Time limits
4. Explain relevant provisions of the Equal Treatment Act and any other relevant legislation with a focus on the prohibition of victimisation
5. Explain possible outcomes
  - a. Through the ETA
  - b. Through other agencies
  - c. Through the courts
6. Explain procedural rules under Equal Treatment Act, the Decree, Act regulating public administrative bodies etc.

7. Explain ETA expectation of complainant:
  - a. Good faith
  - b. Active participation
    - i. Responding promptly to requests for information or documents
    - ii. Attend when requested, or, if unable to do so, notify well in advance
8. Provide information about sources of help in relation to case before the ETA, for example a relevant NGO, lawyers' network, trade union etc.

## 5.2 Collecting evidence

The Authority spends a lot of time and resources for thorough investigations. This is necessary to ensure the best possible basis for a good decision. Nevertheless, the methodological training revealed some possibilities for improvement:

### 5.2.1 Developing an investigation plan

After having received as much information and hints for further evidence from the applicant as possible, an investigation plan can be made.

Good investigations begin with good planning. Good planning helps the investigator to think through which issues to investigate, what is required to prove or disprove each allegation and what actions and resources are needed to conduct and conclude the investigation<sup>3</sup>. Good planning assures appropriate resource use, and prevents spending staff time and money without good results. Planning helps insure that investigations are rational, methodological and professional. A good plan is like a road map – it helps the traveller arrive at the destination with as few detours and as quickly as possible. It helps the investigator to stay focussed and step back from immediate details to see the whole picture.

An analysis of the allegation is the key to developing a good plan. Investigators should consider different ways to determine the facts. They should seek methods that take the least amount of time or are most economical but that still meet the reliability needed for confidence in investigative results.

An investigation plan may be simple or complex. It provides a strategy and sets limits so only essential information is collected. It serves as a checklist of who should be interviewed, what records should be reviewed, what questions should be asked and what is the most effective strategy for conducting the investigation.

Such an investigation plan shall be quite detailed and focus on data which might exist in documented form (documents, lists, ...) and take into account additional information which shall be obtained by questioning the parties, witnesses or experts.

4 questions are essential while conducting the investigation:

- |   |   |
|---|---|
| ✓ | What needs to be established to make a decision on the allegation?  |
| ✓ | What does this document/ interview/ question add to the knowledge of facts of the investigation?  |
| ✓ | What evidence would contradict the prevailing direction of the investigation and where might it be found?                                       |
| ✓ | What difference would it make to the investigation if this interview is not conducted, this question not asked, or this document is not sought? |

<sup>3</sup> See: UNDP, How to conduct investigations, a guide for ombudsman institutions, Bratislava 2006, pp 61ff

### ***5.2.2 Make use of the official notification to the respondent***

The procedural rules demand for a formal written notification to “the person drawn under procedure”. In most cases this is the first contact between the Authority and the respondent.

This is a challenge a great chance for the Authority. This first contact can be used to serve a number of purposes:

#### **a. Introduce the Authority and its tasks. Make clear that the issue is serious.**

In the workshops conducted within this project, members of the Authority have frequently voiced their dissatisfaction with the responses of respondents. It seems to happen quite often, that respondents do not deem the matter serious and do not even bother to respond or take any other appropriate action. Often they seem to be unaware of the Authorities powers. This can be remedied by a good and clear standard letter which should form part of every notification. This standard letter should contain a clear header (e.g. “You now have been drawn under procedure by the Equal Treatment Authority”), explain the role and powers of the Authority in a non-legalistic language, mention the possible outcome and sanctions, indicate the quite deterring maximum amount of fine, explain about the rights and duties of a respondent.

#### **b. Confront the respondent with the allegation.**

By receiving the notification the respondent should have a clear picture about the allegation on stake. A brief summary of the established facts and the possible legal subsuming shall be given.

#### **c. Ask for relevant pieces of evidence which have to be obtained from the respondent.**

A notification letter should also include a detailed list of pieces of evidence the Authority wants to obtain from the respondent. They should be given a brief but fair time limit to hand them in. One possibility which is being used in the UK with good results is to send a questionnaire to the respondent which contains detailed questions and indicates which form of evidence would be acceptable (for the examples used in the workshop see Annex A).

A questionnaire like this can be quite comfortably deducted from a detailed investigation plan.

#### **d. Explain the function of the shift of the burden of proof.**

The shift of the burden of proof is a strong incentive to the respondent to actually come forward with the relevant pieces of evidence. Therefore it is necessary to explain this very clearly. The respondent must get the point: Bringing the required evidence is in his/her own interest, because a refusal to do so will only strengthen the position of the complainant. It is also necessary for the respondent to understand why the shift of the burden of proof has been incorporated in the law. He/She has to

understand that the Authority is only interested in a fair procedure – so it is advisable to actively participate and use the opportunity to bring evidence.

e. Warn about the prohibition of victimisation/retribution.

In order for the prohibition of victimisation to be effective, the respondent has to learn about it as soon and as clear as possible. So it is essential that the notification already contains a clear and firm warning about any forms of retribution. It has to be very clear that the Authority will pay attention to any attempt in this direction.

### **5.3 Communicating with the respondent**

Although a lot of attention is given (and is to give) to the complainant, good communication with the respondent is also an important duty and challenge for the Authority. In fact, given the penal nature of the procedure before the ETA, it seems that the law sees the respondent as the primary addressee of the Authorities actions.

Prevention (special and general) can only work well, if the perpetrator understands his/her wrongdoing and believes in a fair trial. During methodological training two main problematic situations for staff members of the ETA have been discussed, delivering the following output:

1. Problem: Interviewer feels sympathy for the Respondent having been brought into the procedure

**a. Why?**

- i. Respondent had no knowledge of the alleged breach of the principle of equal treatment
- ii. Respondent had no intention to commit a breach of the principle of equal treatment
- iii. Allegation by client might be false
- iv. Personal circumstances of the Respondent
- v. Respondent expresses regret regarding the incident that gave rise to the complaint by the complainant

**b. Some methods for overcoming this problem**

- i. Explain the procedure and the role of the ETA
- ii. Explain the law:
  - liability/responsibility of employers
  - no requirement of “intention” for breach of the principle of equal treatment under the Equal Treatment Act
  - shift of the burden of proof – ETA looking to respondent to prove there was not a breach of the principle of equal treatment

- iii. Reassure the respondent of the open-ness, fairness of the procedure and explain opportunities to challenge evidence of the client
- iv. If respondent expresses regret, then encourage settlement
- v. Take respondent's personal circumstances into account when determining sanctions

2. Problem: Respondent tries not to answer

**a. Why?**

- i. Respondent knows s/he is "guilty"
- ii. Respondent has different perception of the facts
- iii. Respondent feels aggrieved at being accused
- iv. Respondent wants to gain time, delay the procedure
- v. Respondent does not know his/her rights in the ETA procedure
- vi. Respondent does not understand the questions being put to her/him

**b. Some methods to overcome this problem**

- i. Explain the procedure and the role of the ETA
- ii. Explain the role of the respondent - assisting the ETA to have full knowledge of the facts
- iii. Explain the law – shift of the burden of proof
- iv. Explain the benefit to the respondent of answering the Interviewer's questions, presenting her/his position and the possibility of a defence under the Equal Treatment Act

## 5.4 Shift of the burden of proof

### 5.4.1 The law

According to Paragraph (1) of Article 50 of Act CXL of 2004 on the general rules of public administration procedures and services (hereinafter called: the Ket), the Equal Treatment Authority (ETA) is obliged to clarify those facts of the case that are needed for bringing its decision. If the data available are not sufficient for this, then ex officio or upon a request, it is to conduct a proving procedure. According to Paragraph (3), it is not necessary to prove facts that are officially known to ETA and facts that are known to the public.

According to Point b) of Paragraph (2) of Article 3 of the Ket, ETA, ex officio, is to establish the facts of the case and to determine the method and scope of proving, and in the course of this, it is not tied to the proving initiatives of the clients, and at the same time, in the course of clarifying the facts of the case, it has to take into consideration all the circumstances that are relevant from the aspect of the case.

Article 19 of Act CXXV of 2003 on equal treatment and the promotion of equal opportunities (Equal Treatment Act) prescribes special rules of proof for procedures that are instigated because the requirement of equal treatment was violated. These rules have to be applied in the case of the procedures of the ETA as well.<sup>4</sup>

The Equal Treatment Act prescribes that either the injured party or the party entitled to *actio popularis* is to prove that the injured person or group has suffered a disadvantage, and the injured person or group has some protected characteristics determined in Article 8 of the act.

If the injured person provided a successful proof, then the person drawn under procedure may conduct an exemption proving: it is exempted from the establishment of violation of the right, if it can prove that it observed the requirement of equal treatment or that in respect of the given legal relationship it was not obliged to observe it.

#### ***5.4.2 The point of shifting the burden of proof***

The rules concerning the shifting of the burden of proof are crucial for the procedure before the Authority. Although the procedure is – unlike a civil court case – not carried forward by the parties to it, the point where the burden of proof shifts is of utmost importance. It is also important that the involved parties know about this point.

Especially the message to the respondent must be – in his/her own interest – very clear. Respondents must understand that they are going to lose the case if they are not able to provide sufficient evidence on their behalf. If this message is conveyed firmly and decisively a heavy burden is taken off the Authority.

The main task for the Authority stays to help the respondent identify acceptable and useful sources of evidence and to guide the respondent on how to prepare and submit it. If this task is fulfilled properly and fairly it is the respondents decision how to cooperate and provide the required pieces of evidence. Respondents have to be warned that the Authority will decide on the basis of already established facts if they are not complying with the request for producing further evidence.

To be able to fulfil this task, it seems very helpful to use the investigation plan (see Pt. 5.3.1) or to use questionnaires (see examples in Annex A)

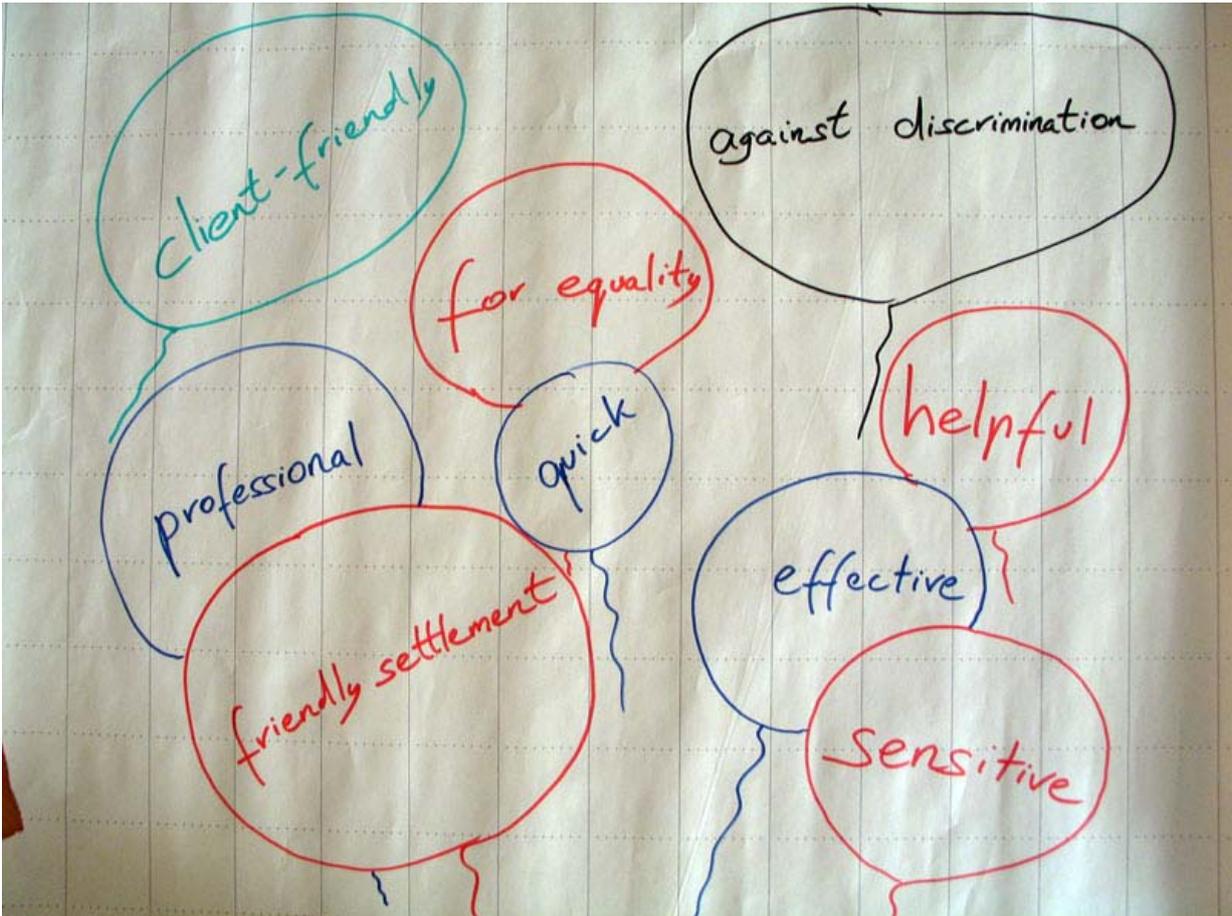
It has to be admitted that the Hungarian legal implementation of the rules on the shift of the burden of proof as set out by the relevant European Directives might not be completely meeting the requirements therein, as it seems that the complainant shall be obliged to provide full prove of disadvantage. This is somehow smoothed by the fact that the Authorities role in the investigation is not limited to the use of evidence directly provided by the complainant.

Still: Proving a disadvantage remains a quite high barrier for complainants as it might in most cases (not in harassment cases) include finding a comparator and proving a

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<sup>4</sup> see Position No. 10.007/1/2006 TT of the Advisory Board of Equal Treatment on the division of the burden of proof, January 13, 2006

differential treatment. These are usually the key questions to the case and often evidence for these elements lies with the respondent (esp. the employer) only.



## Annex A – Collecting evidence

### METHODOLOGICAL TRAINING – SESSION 2

#### CASE 1

The ETA receives the following complaint from Andras:

I began work as a computer programmer for WIZZO on 4 March 2006. I am a gay man.

I like my job. However I have been very upset at times due to homophobic comments and gestures made by my colleague Istvan, who works at the desk next to mine. His remarks are heard by others in the office who seem to find them amusing and sometimes join in.

For example:

- About a month after I began at WIZZO, Istvan walked around my desk with mincing steps, a limp wrist and silly smile. He repeated this about once a week for three or four months. On a few occasions he was joined by Ferenc, another programmer.
- When a male student started a training placement at WIZZO in July 2006, Istvan said “Oh, don’t you fancy him, he looks like your type”
- When a report about HIV-Aids was published in the newspaper in November 2006, he cut out the report, marked “WARNING” on it with a red pen and attached it to the back of my chair.
- On many occasions when I walked past Istvan’s desk he would say things like “Not now darling” or “Which gorgeous guy is it tonight” or “What a pretty poof”; others in the room who heard his remarks either laughed or made similar remarks.

I reported these remarks to Mr. Csukas the personnel manager several times; he appeared to listen sympathetically but did not do anything. On 15 March 2007 I wrote to Mr. Csukas setting out in writing my complaints about harassment related to my sexuality. I have not had a reply.

At the beginning of February 2007 I went to see my doctor, since I was finding it difficult to sleep. I find it very difficult to come to work, since I dread what form of abuse I will experience. For this reason since February 2007 I have stayed away from work on about 8 or 9 occasions. On 3 May 2007 I received a letter warning me that if my attendance does not improve immediately I will be dismissed.

## **QUESTIONS IN CASE 1 REGARDING SEXUAL ORIENTATION HARASSMENT AND DISCRIMINATION AND/OR VICTIMISATION**

### Is there evidence of harassment for which the employer is liable?

1. What steps has the employer taken when they were made aware of the harassment after oral complaints?
  - a) to investigate
  - b) to prevent recurrence
2. What evidence of steps taken: (where there are relevant documents, please supply copies)
  - a) dates of conversations or meetings
  - b) notes or minutes
  - c) correspondence
  - d) notices or memos to any members of staff
3. If no steps were taken, why?
4. After receiving the letter sent on 15 March 2007, what steps were taken
  - a) to investigate
  - b) to prevent recurrence
5. What evidence of steps taken after receiving the letter sent on 15 March 2007 (where there are relevant documents, please supply copies)
  - a) dates of conversations, interviews or meetings
  - b) notes or minutes
  - c) correspondence
  - d) notices or memos to any members of staff
6. If no action was taken after receiving the letter sent on 15 March 2007, why?

### Is there evidence of discrimination or victimisation by the employer?

1. What is the employer's normal policy in relation to sickness absence?
2. What evidence of normal sickness absence policy:
  - a) written policy - supply copy
  - b) treatment of staff absent due to sickness
    - i. in last 3 years number of staff absent for more than 8 days
    - ii. in each case the sanction, if any, imposed
    - iii. in last 3 years number of staff threatened with dismissal for sickness absence
    - iv. in last 3 years number of staff dismissed for sickness absence
    - v. Of the above, what was their sexual orientation, if known?

3. Sanctions for sickness absence

- c) Who monitors staff absence?
- d) Who determines whether sanctions should be imposed?
- e) What is the normal procedure for dealing with sickness absence?

4. In this case who made the decision to threaten dismissal?

- a. When was this decision made? Evidence?
- b. With whom was it discussed? Evidence?

## METHODOLOGICAL TRAINING - SESSION TWO

### CASE STUDY 2

Luca worked for Hungaria Kft. as secretary from July 2003 until her dismissal on 23<sup>rd</sup> January 2007. In November 2005, the Claimant informed her employers that she had been diagnosed as suffering from epilepsy. Subsequently she had time off work to attend hospital appointments on 5 occasions. However she made up the time on each occasion by working additional hours without pay.

Luca was dismissed following a disciplinary hearing on 21<sup>st</sup> January 2007. Her letter of dismissal stated that she was dismissed for poor performance. Her employers stated that she was careless in her work; she objected to working late even though that was necessary at times; that she had a bad attitude to management and she distracted her colleagues by chatting; that she made too many personal telephone calls and that she was sometimes late back from lunch.

Luca's appeal on 2<sup>nd</sup> February 2007 was unsuccessful.

Luca had received no disciplinary warnings during her employment. She believes she has always been co-operative and hard-working. The only times she has had to refuse to work late have been on two occasions for health reasons since her diagnosis with epilepsy.

### ***QUESTIONS RE CASE STUDY 2 (Claimant is Luca)***

1. Please state who took the decision to dismiss the Claimant and on what date.
2. Please state all the reasons for which the Claimant was dismissed.
3. Please state every person who was consulted regarding the decision to dismiss the Claimant, when they were consulted and what were their views.
4. Please state who took the decision to reject the Claimant's appeal and the reasons.
5. Please state who was consulted, when, and their views.
6. Please state with dates every example of carelessness in the Claimant's work.
7. Please state with dates every occasion when the Claimant allegedly objected to working late. On each occasion, please state
  - a. who made the request that the Claimant work late and why it was necessary
  - b. how late she was expected to work
  - c. what she allegedly said
  - d. what time she left on that occasion
  - e. whether she was paid overtime.
8. Please state what is the Respondents' view on how often the Claimant should be prepared to work late and for how many hours; and whether she would be paid overtime.
9. Please state when, if at all, the Respondents communicated to the Claimant their expectations regarding when she would work late and what that entailed. Please give the date and the Claimant's response.
10. Please state what the policy was with regard to working late by other secretaries in the department.
11. Please state with regard to each secretary in the department in the period 1.7.02 to the date of answering this Questionnaire
  - a. all occasions on which she has worked late, giving the time at which she left
  - b. the reason she worked late
  - c. whether she was paid overtime
  - d. whether she was given time off in lieu of the extra hours
12. Do you accept (and if not, why not?) that the need for the Claimant to work late could be avoided
  - a. by asking another secretary to assist with the work, whether during working hours or by staying late
  - b. by asking the Claimant to work through her lunch-break

- c. by leaving work till the next day
13. Please state every respect in which the Claimant allegedly demonstrated a bad attitude towards management, giving dates, people involved and all incidents relied on.
  14. Please state what is the Respondents' policy regarding
    - a. chatting by staff
    - b. making personal telephone calls
  15. Is it contended that no other members of staff engage in chatting?
  16. Is it contended that no other members of staff make personal telephone calls?
  17. How many personal telephone calls is it alleged that the Claimant has made, giving dates.
  18. Please state all occasions with dates and time taken at lunch when the Claimant was allegedly late back from lunch.
  19. Do the Respondents accept that the Claimant frequently worked through her lunch-breaks?
  20. Do the Respondents accept that the Claimant stayed late after work on a voluntary basis to make up the time when she was absent for hospital appointments?
  21. Please state all disciplinary action including dismissal taken against staff since 1 July 2003, stating in each case:
    - a. job title of member of staff disciplined
    - b. his/her dates of employment
    - c. nature of disciplinary action
    - d. nature of offence
    - e. whether s/he had a disability and if so, its nature

*Add any other appropriate common questions.*