

Discrimination: An Overview

25 November 2010

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This paper provides an overview of discrimination law in the employment field. The areas covered are: race; sex; age; religion and belief; sexual orientation, gender reassignment, and marriage and civil partnership. Each of those areas now shares common tests for discrimination. Similar tests apply for direct discrimination; indirect discrimination; victimisation and harassment. Treating these areas together allows practitioners to see at a glance whether there are authorities in one area that may be of assistance in other areas.

Two areas are not dealt with in this paper: pregnancy and disability. Both are special cases. Pregnant women have special status under the law: if a woman is subjected to detrimental treatment because she is pregnant it is automatically discriminatory without the need for a comparison with a man. The Equality Act 2010 no longer uses the language of less favourable treatment in the case of pregnant women. The treatment they can complain of needs merely to be “unfavourable”, emphasising the fact no comparison between a man and a woman is required.¹ In most situations, disabled persons also have special protection. In the context of the employer’s duty to

¹ The Act permits asymmetric discrimination in this regard, permitting more favourable treatment in connection with pregnancy and childbirth. See Section 13(6)(b).

make reasonable adjustments and the obligation not to discriminate on the basis of matters arising from a person's disability, there is no need for a comparator.²

The Legislation:

Equality Act 2010 (EqA)

Race Relations Act 1976 (RRA)

Sex Discrimination Act 1975 (SDA)

Employment Equality (Sexual Orientation) Regulations 2003 (EE (SO)R)

Employment Equality (Religion or Belief) Regulations 2003 (EE(RB)R)

The Employment Equality (Age) Regulations 2006 (EE(Age)R)

Codes of Practice/Guides:

- EHRC Code of Practice on Employment³
- EOC Code of Practice – Sex Discrimination
- CRE Code of Practice on racial equality in employment
- ACAS guide, "Sexual Orientation and the Workplace"
- ACAS guide, "Religion or belief and the Workplace"
- ACAS guide, "Age and the Workplace"

Related websites you might find useful:

Equality guidance for employers on the Equality and Human Rights Commission website:

<http://www.equalityhumanrights.com/advice-and-guidance/equality-act-guidance-for-employers/>

Equality Act 2010 guidance for employers on the ACAS website

² EqA reverses the ruling in *LB Lewisham v. Malcolm* [2008] UKHL 43

³ This is a draft code of practice laid before Parliament on 12 October 2010. Previous codes remain in force until the draft is confirmed by Parliament.

<http://www.acas.org.uk/index.aspx?articleid=3017>

Equality Act 2010: Transitional Arrangements

The EqA 2010 consolidates and replaces most of the previous discrimination legislation for England and Wales. As well as consolidating existing law, the Act makes discrimination unlawful in circumstances not covered previously.

Discriminatory acts committed wholly before 1st October 2010 are covered by discrimination legislation in force prior to that date, but acts committed before 1st October 2010 and continuing thereafter are covered by the EqA 2010. Discriminatory acts that are committed wholly after 1st October will, of course, be dealt with exclusively under the EqA 2010.⁴

For example, acts of race discrimination committed on or before 30th September 2010 must be brought under the provisions of the Race Relations Act 1976, not those of the Equality Act 2010. The same goes for any other form of discrimination, harassment or victimisation experienced before 1st October.

⁴ Article 15 The Equality Act 2010 (Commencement No. 4, Savings, Consequential Transitional, Transitory and Incidental Provisions and Revocation) Order 2010

Protected Characteristics

Race

Discrimination is unlawful if it is based on race.⁵ There are four aspects of race listed in the Act.⁶

Colour

Nationality⁷

Ethnic origins

National origins⁸

Under both the RRA 1976 and the EqA 2010, the term 'racial group' means a group of persons defined by reference to colour, race,⁹ nationality or ethnic or national origins.¹⁰

In practice there is rarely an issue about membership of a particular group. Most claimants usually rely on colour (e.g. black), ethnic origins (e.g. Asian) or national origins (e.g. Irish) as the basis for a claim. In bringing a claim a person can also rely on the fact that they have been discriminated against because he or she does not belong to a particular group, in which case, for the purposes of the claim, they belong to "non-groups" (e.g. non-British).¹¹

⁵ s. 9(1) EqA

⁶ "Caste" may be added to the list by subordinate legislation – s. 9(5) EqA

⁷ This refers to present nationality and can change: *National Joint Police Board v. Power* [1997] IRLR 610 EAT.

⁸ It is possible to have origins in a country that no longer exists as a recognised state: *BBC Scotland v. Souster* [2001] IRLR 150 Ct of Sess: the English, by reference to national origins, are a race distinct from the Scottish.

⁹ "Race" does not feature in the EqA list.

¹⁰ RRA s. 3(1) and EqA s. 9(3)

¹¹ *Orphanus v. QMC* [1985] IRLR 349 HL: Greek national succeeds in indirect discrimination claim as a "non-EEC" citizen.

Historically the category of "ethnic origins" was used in attempts to cover various religions¹². Religions are now separately covered.

Sex

The protected characteristic of sex is a reference to a man or to a woman.¹³

Gender reassignment

A person has the protected characteristic of gender reassignment if the person is proposing to undergo, is undergoing or has undergone a process (or part of a process) for the purpose of reassigning the person's sex by changing physiological or other attributes of sex.¹⁴ A reference to a transsexual person is a reference to a person who has the protected characteristic of gender reassignment.¹⁵

Marriage and civil partnerships

It is unlawful to treat a married person or a civil partner less favourably than you would were he or she single.¹⁶

Religion

Both the EqA 2010 and the EE(RB)R define religion as 'any religion', and includes reference to a lack of religion, while the definition of belief is 'any religious or philosophical belief', and again includes lack of belief. The case law decided under the EE(RB)Rs will continue to be of relevance. The explanatory

¹² Sikhs and Jews fall within the definition but Rastafarians and, probably, Muslims do not. Sharing a common religion is only a factor in determining whether an ethnic group exists. More important factors are whether there is a long shared history distinguishing it from other groups, the memory of which keeps it alive, and whether the group has a cultural tradition of its own. (*Mandla v. Lee* 1983 ICR 385 HL: Headmaster unlawfully insists on "no turban" uniform for male Sikh pupil).

¹³ s.11 EqA

¹⁴ s. 7(1) EqA

¹⁵ s. 7(2) EqA

¹⁶ s. 8 EA , effectively replicating SDA s. 3

notes to the Equality Act suggest that the religion or belief must have a clear structure and belief system. Denominations or sects within a religion can be considered to be a religion or belief, such as Protestants and Catholics within Christianity.

A genuine belief in man-made climate change and the resulting moral imperatives is capable of being a ‘philosophical belief’, as is Darwinism¹⁷. In *Grainger Plc v Nicholson* Burton J held that there must be some limit placed upon the definition of philosophical belief:

- the belief must be genuinely held;
- it must be a belief and not an opinion or viewpoint based on the present state of information available;
- it must be a belief as to a weighty and substantial aspect of human life and behaviour;
- it must attain a certain level of cogency, seriousness, cohesion and importance;
- it must be worthy of respect in a democratic society, be not incompatible with human dignity and not conflict with the fundamental rights of others.

The law protects a person’s right to hold and express religious beliefs but there will be no protection for the substance or content of one’s beliefs¹⁸

¹⁷ *Grainger Plc v Nicholson* [2010] IRLR 4

¹⁸ *McFarlane v Relate Avon Limited* [2010] IRLR 196

It is doubtful that protection will be given in respect of a matter of personal choice and not an actual requirement of the religion or belief¹⁹.

Sexual orientation

Under the EqA s.12 and EE (SO)R 'sexual orientation' means a person's sexual orientation towards (a) persons of the same sex, (b) persons of the opposite sex, or (c) persons of either sex. Gay men, lesbians, bisexuals and heterosexuals are therefore covered.

The explanatory notes to the EqA 2010 state that a reference to a person who has a particular protected characteristic is a reference to a person of a particular sexual orientation, so for example a gay man, or a heterosexual woman. References to persons who share a protected characteristic are references to persons of the same sexual orientation, so for example a gay man and a lesbian share a sexual orientation as they are both attracted to persons of the same sex.

Age

The protected characteristic of age refers to a person of a particular age group.²⁰ A claimant can choose a relevant age group. This may, for example, be “over 40” or a more defined age group of, say, “20-30”.

Combined characteristics

The Act potentially permits a person to combine two characteristics for the purposes of making a claim.²¹ A person may therefore rely on the fact, for example, that he is a middle aged man for the purposes of a claim by combining the characteristics of age

¹⁹ Eweida v BA [2009] IRLR 78

²⁰ s. 5(1) EqA (which re-enacts the now repealed Reg 3 EE(Age)R)

²¹ s. 14(1), although the provision is not yet in force

and sex. A claimant can only rely on two characteristics. A claim could not be formulated on the basis that the claimant is, for example, a young Muslim man.

Discriminatory grounds

The subjective reason for an employee's treatment is immaterial to liability. It is not necessary to prove that the discriminator has racist, sexist, homophobic or other bigoted tendencies. Thus, the entitlement to free admission to a swimming pool by reference to different state pension ages for men and women was discriminatory even though there was no intention to discriminate.²²

The employer's state of mind is relevant, however, to the crucial question of causation: what was the cause or reason for the less favourable treatment?²³

Causation

It is enough to establish liability that the protected characteristic was an important factor in affording the less favourable treatment. It need not be the only factor²⁴. Put another way, the protected characteristic must have "a significant influence on the outcome"²⁵. Where a policy is inherently discriminatory a "but for" test is appropriate ("but for discrimination"). "I would have been allowed into the swimming pool for free but for the fact that I am a man"²⁶.

Most people do not find it easy to admit their prejudices or even acknowledge they have them. The law recognises this²⁷ and tribunals can and should go behind what an employer says to explore the reason, conscious or unconscious, for the less favourable treatment.

²² *James v Eastleigh Borough Council* [1990] IRLR 288 HL and see *R v Westminster City Council ex parte CRE* 1984 [ICR] 770 QBD: black refuse worker dismissed by enlightened manager who feared a strike by other workers.

²³ *Nagarajan v. London Regional Transport* [1999] ICR 877 HL. See for example *Chondol v Liverpool CC* [2009] EAT/298/08

²⁴ *Owen and Briggs v. James* 1982 IRLR 502 CA: black shorthand typist refused job due to relatively poor skills and race.

²⁵ Per Lord Nicholls in *Nagarajan v. London Regional Transport* 1999 ICR 877 HL

²⁶ *James v. Eastleigh Borough Council* 1990 IRLR 288 HL

²⁷ Per Lord Nicholls in *Nagarajan v. London Regional Transport* 1999 ICR 877 HL

Perceived grounds

The Act outlaws discrimination “because of” a protected characteristic.²⁸ This replaces the most commonly used formula of “on the grounds of” under the previous statutory provisions. The new test encompasses discrimination by perception. A claim may therefore be brought even though the victim does not have a particular characteristic but is perceived to possess it. This would cover, for example, homophobic taunting of a heterosexual man who is perceived to be gay.

Victimisation

The victimisation provisions require that the detrimental treatment is afforded “because” a protected act has been, may be or believed to have been done.²⁹ The old formula, “by reason of”, has been interpreted as giving rise to an issue of fact for the tribunal to decide: was victimisation the “real reason, the core reason, the causa causans, the motive” for the treatment complained of?³⁰ The test is likely to remain the same.

Associated persons

The new “because of” formula in the Act also encompasses discrimination by association. This means that a person can bring a claim if the reason for the less favourable treatment in his or her case relates to a protected characteristic possessed by another. Thus, a white, British employee working for a car-hire firm successfully brought a claim for a race discriminatory dismissal when she resigned following her employer's instruction to tell black and Asian customers that there were no cars

²⁸ s. 14(1) EqA

²⁹ s. 27 EqA

³⁰ Chief Constable of *West Yorkshire Police v. Khan* [2001] ICR 1065 HL: but for the fact that the claimant had brought proceedings the employer would have provided a reference, but the real reason for refusal was not to prejudice the employer's position in pending race proceedings brought by employee.

available for them to hire³¹. This reflects the level of protection afforded by the European directives from which UK equality law derives, and most recently enunciated by the Court of Justice of the European Union in the disability context.³²

³¹ *Weathersfield Ltd v. Sargent* [1999] IRLR 94 CA

³² See *Coleman v Attridge* [2008] IRLR 722

Contexts

Discrimination does not take place in a vacuum. It is important to identify at the outset the particular context in which it is alleged to have taken place. This will help when dealing with the following issues:

Time limits;

Assessing less favourable treatment and identifying a comparator;

Constructing a pool for comparison in indirect discrimination cases;

Evidence; and

Losses.

Pre-employment

There are three areas covered by the legislation³³:

1. The arrangements made for determining who is employed.

This includes the whole operation of the recruitment process. It covers not merely the arrangements themselves but also the way in which those arrangements are put into practical effect³⁴.

Certain methods of recruitment, e.g. by word of mouth, from unsolicited applications and through internal appointments or transfers, can fall foul of the indirect discrimination provisions if there is a racial imbalance in the potential pool of claimants.

³³ s. 39 EqA; 4(1) RRA; s.6(1) SDA; Reg 6(1) EE(RB)R/EE(SO)R; Reg 7(1) EE(Age)R. Advertisements do not form part of the arrangements as they are policed by the CRE and EOC under separate statutory arrangements although a discriminatory advert may be evidence of other discriminatory arrangements.

³⁴ *Nagarajan v. London Regional Transport* [1999] ICR 877 HL

Recruitment literature can form part of the arrangements. The use of words and images depicting, for example, an all white work force might discourage non-white claimants and is therefore potentially discriminatory.

All selection criteria are by their nature capable of being indirectly discriminatory. Thus, the ordinary requirement for academic qualifications will almost certainly be indirectly discriminatory as the level of academic attainment in some racial groups is disproportionately low relative to other groups. For that reason there must be a very close correlation between qualifications and the duties of a post in order to justify the discriminatory impact of the qualifications requirement.

The effect of discriminatory arrangements may mean that a person loses the chance to apply for a post or is disadvantaged in the recruitment process and loses the chance of being appointed. If the claimant goes further and says that he or she should have been appointed as the best candidate, the claim should also be brought under head 3 below.

2. Terms on which employment is offered.

Normally, a claim under this head will only ever be made where a job offer is turned down. If the terms are accepted the claim should be brought under the provisions relating to being in employment set out below.

3. Refusal or deliberate omission to offer employment.

In employment

There are five areas covered by the legislation³⁵:

³⁵ s.39-40 EqA; 4(2) RRA; s.6(2) SDA; Reg 6(2) EE(RB)R/ EE(SO)R; Reg 7(1) EE(Age)R

i. The terms of employment afforded to the employee.

These are the contractual terms and conditions of employment whether express or implied and cover matters such as pay, hours, holiday entitlement, pension rights and fringe benefits.

ii. The way in which the employee is afforded access to opportunities for;

- promotion;
- transfer;
- training;
- Or to any benefits, facilities or services.

A "benefit" has been held to mean any advantage in the workplace³⁶.

There is a growing tendency for claimants to complain about the way in which their grievances have been dealt with. The right to invoke a grievance procedure and to have it adequately and timeously investigated and heard probably falls under the head of "benefits, facilities and services" (and certainly under the head of "any other detriment" below).

iii. Refusing or deliberately omitting to afford access to opportunities:

- promotion;
- transfer;
- training;
- Or to any benefits, facilities or services.

Under both this and the previous head it is the failure to afford access to opportunities that is the crux of the complaint. The employee does

³⁶ *Peake v. Automotive Products Limited* [1977] ICR 480 CA: Women allowed to leave work 5 minutes earlier than men.

not have to show that he should, in fact, have obtained the relevant benefit (although that will normally follow).

iv. Dismissing the employee

The definition of dismissal includes the non-renewal of a fixed term contract and constructive dismissal³⁷.

v. Subjecting the employee to any other detriment.

This is the safety net provision. There is a detriment if "a reasonable worker would or might take the view that he or she [has] been disadvantaged in the circumstances in which he or she [has] thereafter to work."³⁸ The matter should be assessed from the point of view of the complainant. It is not necessary to demonstrate any physical or economic consequence. An employee can be subjected to a detriment even though he or she was unaware of it³⁹. Rules about dress have been considered under this head. A dress requirement is potentially actionable as indirect discrimination. The cases turn on whether a particular dress rule can be justified. Abuse and harassment cases used to be dealt with under this head.⁴⁰

Post-employment

It is unlawful to discriminate against a former employee or to subject them to harassment⁴¹. The discrimination or harassment must arise out of or be closely connected to the employment relationship. An appeal

³⁷ s. 39(7) EqA; s. 4(4) RRA; Reg 6(5) EE(SO)R/EE(RB)R; Reg7(7) EE(Age)R

³⁸ *Shamoon v. RUC Chief Constable* [2003] ICR 337 HL

³⁹ *Garry v. Ealing LBC* [2001] IRLR 681 CA: Ongoing Investigation into employee for serious fraud unbeknown to employee but well known to her superiors.

⁴⁰ And arguably will continue to be dealt with as a detriment under the old law in the case of claims based on colour and nationality.

⁴¹ s. 108 EqA; s.27A RRA; Reg 21 EE(SO)R and EE(RB)R

against dismissal, the provision of a reference and the return of an employee's effects after dismissal are situations that are covered, a failure to reinstate pursuant to a tribunal order, however, is not covered.⁴²

Employment

The discrimination provisions apply to several types of working relationships⁴³. In the conventional employment context the key relationship is employment under a contract of service or of apprenticeship or a contract personally to do work.⁴⁴ This definition is wider than under the unfair dismissal provisions. There are two questions: does the contract place an obligation on the claimant to carry out work personally? Was that obligation the dominant purpose of the contract?⁴⁵

⁴² *Rhys-Harper v. Relaxion Group plc* [2003] ICR 867

⁴³ There are provisions relating trainees, crown employees, other office holders, parliamentary staff, police, contract workers and trainee/barristers.

⁴⁴ s. 83 EqA; s.78(1) RRA; s.82 SDA; Reg 6 EE(SO)R and EE(RB)R

⁴⁵ *Mirror Group Newspapers v. Gunning* [1986] IRLR 27 CA: contract for distribution of papers did not impose obligation for personal working. *Legal Services Commission v. Patterson* [2004] IRLR 153 CA: legal aid franchisee not contracted to provide personal service.

Less favourable treatment

This is the key concept in the discrimination legislation. To prove direct discrimination it is necessary to carry out a comparison between the claimant and a person who does not possess the same (perceived) characteristic.⁴⁶

It used to be the practice to ask, first, whether there was less favourable treatment and then, second, to ask whether the treatment was on a discriminatory ground⁴⁷. A too rigid application of that approach can cause difficulties in identifying a suitable comparator. This is explained later below.

The test for whether treatment is less favourable is set very low. To set it too high might encroach on the separate question whether the complainant has suffered damaging consequences from the treatment. There must be something about the treatment "that enables the complainant reasonably to complain about it". It is enough if he "can reasonably say that he would have preferred not to have been treated that way"⁴⁸. This limits the scope for an employer's patronising defence that an employee was better off for the differential treatment.

Comparators

Comparators can take two forms: actual, real life ones and the hypothetical variety⁴⁹. If there is no actual comparator the tribunal must assess the complainant's treatment against that which would have been afforded to a hypothetical comparator⁵⁰.

⁴⁶ s. 31 EqA

⁴⁷ The latter is often referred to as the "reason why" issue.

⁴⁸ Per Lord Scott in *Chief Constable of West Yorkshire Police v. Khan* [2001] ICR 1065

⁴⁹ The legislation in each case refers to the way the employers "treat or *would treat*" other persons.

⁵⁰ *Balamoody v. UKCC* [2002] ICR 646 CA: nurse with no criminal offences relating to professional practices, unlike claimant, was not an appropriate actual comparator.

Using the pre-EqA 2010 language, the comparison "must be such that the relevant circumstances in the one case are the same, or not materially different, in the other";⁵¹

Under the EqA 2010, "there must be no material difference between the circumstances relating to each case".⁵² This means that the comparator must be "in the same position in all material respects as the victim, save only that he, or she, is not a member of the protected class"⁵³.

The relevant circumstances include those that the employer took into account when deciding to treat the employee as he did. For example, if a gay man is dismissed for being persistently late, the comparator will be a heterosexual or lesbian who has a similar record of lateness. It will be seen that to determine an appropriate comparator involves asking the "reason why" the employer treated the employee as he did. It has been suggested that the characteristics of a hypothetical comparator should, in appropriate cases, be finally determined at the end of a case once the evidence on the "reason why" has been heard⁵⁴.

Sometimes there is insufficient information about the comparator's circumstances. In such cases the comparator cannot fulfil the statutory test. For example, newspaper reports concerning the treatment of alleged comparators could not found a proper comparison as there was insufficient detail concerning the comparators' circumstances⁵⁵. However, if the evidence does not go so far as to establish the statutory comparator it may still be useful evidence from which an inference can be drawn that the employer discriminated on a protected characteristic.

⁵¹ s.3(4) RRA; s.5(3) SDA; Reg 3(2) SOR and RBR

⁵² s. 23 EqA

⁵³ Per Lord Scott in *Shamoon v. Chief Constable of the RUC* [2003] ICR 337. See also *High Quality Lifestyles Limited v Watts* [2006] IRLR 850 and *Stockton on Tees Borough Council v Aylott* [2009] IRLR 533

⁵⁴ Per Elias J in *Law Society v. Bhal* [2003] IRLR 640

⁵⁵ *Balamoody v. UKCC* [2002] ICR 646 CA

If the circumstances of comparators are not the same as, but merely similar to, those of the complainant they may nevertheless provide valuable evidence as to how the hypothetical comparator would be treated⁵⁶.

Grounds specific treatment

It used to be thought that there was no need for a comparator in the case of grounds specific treatment⁵⁷. Racial abuse and sexual harassment are examples of race-specific and sex-specific treatment respectively. However, the legislation requires a comparison and it should be carried out in every case⁵⁸. Grounds-specific treatment will now more usually be dealt with as a form of harassment.

⁵⁶ *Chief Constable of West Yorkshire Police v. Vento* [2001] IRLR 124 EAT: woman police officer's treatment compared to that of 4 similar comparators.

⁵⁷ See for example, *Porcelli v. Strathclyde Regional Council* [1986] ICR 564 Cl of Sess

⁵⁸ *Macdonald v. Ministry of Defence; Pearce v. Mayfield Secondary School* [2003] ICR 937 HL

Proving discrimination

Direct evidence of discrimination is rarely available. The key question in discrimination cases is whether the treatment of the employee was because of protected characteristic. Sometimes the discrimination may not even be conscious. It need not be the sole or principal reason for the conduct. To answer the question it is necessary to look at the circumstances surrounding the treatment and to draw appropriate inferences. There are a number of tools to assist a Claimant to prove discrimination.

Burden of proof

The burden of proof in a discrimination case is on the complainant. He or she must prove the case on a balance of probabilities. However, under the legislation, where the complainant proves facts from which the tribunal could conclude in the absence of an adequate explanation that the employer has discriminated the tribunal must uphold the complaint unless the employer proves that he did not discriminate⁵⁹. This means that if the complainant establishes a prima facie case of discrimination the burden of proof shifts to the employer to prove the treatment was not on prohibited grounds. The first step is for the claimant to establish a prima facie case drawing what inferences are appropriate from the evidence generally, any failure to deal with a questionnaire or any breach of a relevant code of practice. The Tribunal can also take into account the employer's explanation for the claimant's treatment at this stage.

Prima facie case

1. Evidence generally

⁵⁹ s. 136 of EqA and s.54A of RRA and 63A of SDA. Note that the reversal does not apply in claims of victimisation under the old law; *Oyacre v Cheshire County Council* [2008] EWCA Civ 434, but does in cases of direct discrimination on the grounds of 'colour'; *Abbey National and Hopkins v Chagger* [2009] IRLR 86, EAT.

In the situation where the complainant compares himself to an actual comparator a prima facie case will not normally be established merely because there is a difference in treatment between the complainant and the comparator.

In the case of a hypothetical comparator the notional difference in treatment must first be established. It cannot necessarily be inferred from employer's unreasonable behaviour towards the claimant since the unreasonable employer may well behave badly towards all its employees⁶⁰. In this type of case the proper approach for the claimant is to establish that the employer is generally good towards its employees but not to the complainant.

On the issue whether the employer acted on the prohibited grounds, inferences can be drawn from unreasonable behaviour on the part of the employer⁶¹.

The tribunal should look at the whole course of treatment and not confine itself to the treatment complained of.⁶² This is true even if the treatment is outside the three month time limit⁶³ or, indeed, after the acts complained of.⁶⁴ The treatment must however bear some relation to the matters complained of.⁶⁵

⁶⁰ *Glasgow City Council v Zafar* [1998] IRLR, *Islington LBC v Ladele* [2008] UKEAT/453/08

⁶¹ See paragraph 94 of judgment of *Elias P in Law Society v Bhal* [2003] IRLR 640 EAT. See *Anya v. Oxford University* [2001] ICR 847 CA: And according to Sedley LJ if the employer's explanation is that it treats all its employees in the same unreasonable way then that is a matter that should be proved by evidence. This approach was doubted in *Law Society v. Bahl* [2003] IRLR 640 EAT.

⁶² *Anya* above: tribunal criticised for failing to make findings on claimant's case that interviewer had history of hostility towards him.

⁶³ *Din v. Carrington Viyella Ltd* [1982] ICR 256 EAT

⁶⁴ *Chattopadhyay v. Holloway School* [1981] IRLR 487 EAT: evidence of manager's hostility to claimant after failed interview.

⁶⁵ *Miriki v. Bar Council* [2001] EWCA Civ 1973: alleged discriminator not personally responsible for creating hostile environment.

Tribunals, parties and representatives often get lost in a sea of background detail. It is useful in preparing a case to list the issues to which the evidence goes. In most cases the list will consist of:

- Incidents of different treatment afforded to the claimant or to the group to which he or she belongs;
- Incidents of hostility;
- Examples of stereotypical attitudes;
- Incidents of unreasonable behaviour towards the claimant.

2. Questionnaires

An employee is entitled to serve a questionnaire on the employer seeking information on the reasons for his or her treatment⁶⁶. The questionnaire must be served within three months of the act complained of (or with leave after proceedings are commenced) and must be responded to within 8 weeks.

If the employer fails to reply in time to the questionnaire or the answers are evasive or equivocal the Tribunal may not draw an adverse inference from that fact. The drawing of an adverse inference is not automatic in every case. The Tribunal needs to consider the evidential value of the failure properly to answer questions.⁶⁷ Even where the failure is reprehensible there must still be a causal connection with the act complained of⁶⁸.

A well drafted questionnaire can be a powerful weapon when used properly. They are often prolix but they need not be. Simple questions such as:

⁶⁶ s.138 EqA; s.65 RRA; s.74 SDA; Reg 33 EE(SO)R; Reg 11 EE(RB)R; Reg 41 EE(Age)R

⁶⁷ *Abbey National and Hopkins v Chagger* [2009] IRLR 86, EAT is a good example of a case where an adverse inference was drawn.

⁶⁸ *D'Silva v NATFHE* [2008] IRLR 412 EAT

"Have you said anything in writing or otherwise to anybody about my job application since I made it?" are often the most useful.

3. Codes of practice

The Equality and Human Rights Commission is empowered to issue codes of practice relating to equality at work.⁶⁹ The codes themselves do not give rise to legal liability but regard must be had to them if they are relevant to any question in the proceedings. The codes have provisions relating, amongst other things, to equal opportunities policies, equal opportunities training for decision makers, the conduct of shortlisting and interviews and statistical monitoring. They are therefore capable of being relevant in a great number of cases.

Employer's explanation

The second step is for the employer to provide an adequate explanation for the treatment or failures identified. This must be done on a balance of probabilities and since information is normally in the hands of the employer cogent evidence will be required. It is recognised that an employer can be unreasonable for any number of reasons that have nothing to do with the claimant's perceived membership of a particular group. Often, the employer's unreasonable behaviour is a tit-for-tat reaction to the employee's perceived unreasonable behaviour. In such a case an employer is well advised to accept, in hindsight, that the behaviour is unreasonable to clear the way for the proper handling of its defence that it did not act on the prohibited grounds.

The employer's explanation that he could not have discriminated because of his association with others in the same group as the complainant is not usually strong evidence. The comment, "I've got loads of friends who are black so I couldn't be racist" is of no greater significance than the comment, "I married a woman so I

⁶⁹ s. 43 EqA. Draft codes are currently laid before Parliament.

couldn't be sexist". The tribunals are discouraged from, making findings of discrimination solely on the basis of the alleged discriminator's credibility as cases may otherwise be decided on an intuitive hunch rather on the basis of the picture developed by all the evidence.

Statistics

Statistics showing imbalances in the make-up of the work force or the entitlement to benefits between different groups may provide some evidence of a pattern of treatment against members of a particular group⁷⁰. Monitoring data is commonly sought in questionnaires.

Institutional racism

According to the Macpherson report, institutional racism consists of the "collective failure of an organisation to provide an appropriate and professional service to people because of their colour, culture, or ethnic origin. It can be seen or detected in processes, attitudes and behaviour which amount to discrimination through unwitting prejudice, ignorance, thoughtlessness and racist stereotyping which disadvantage minority ethnic people."

The definition is of little practical use in race discrimination cases where there is a well developed body of case law which recognises the sentiments contained in it and comprehends that collective failures may provide the background to discrimination in individual cases. Of greater importance following the report was the imposition of a duty on public authorities to eliminate race discrimination and to promote race equality⁷¹. It is arguable that a specific failure to comply with the duty to eliminate race discrimination may be taken into account by the tribunal. It is unlikely that such a failure would not be covered by the code of practice.

⁷⁰ *West Midlands Transport Executive v. Singh* [1988] ICR 634 CA

⁷¹ s.71 RRA

Indirect Discrimination

Indirect discrimination occurs when the employer applies a provision, criterion or practice which is discriminatory in relation to a protected characteristic.⁷²

It must be shown that the application of the provision, criterion or practice is applied equally to all persons whether they share the protected characteristic or not; that it puts, or would put, persons who share the protected characteristic at a particular disadvantage when compared to other persons who do not share it and that the employee himself or herself was, or would be, put at that disadvantage. The employer has a defence if he can show that the provision, criteria or practice is a proportionate means of achieving a legitimate aim.

Preventing factors

The first step in an indirect discrimination claim is to identify the benefit that has not been gained. The next step is to isolate the factor or factors that prevented the employee from gaining the benefit. That preventing factor must amount to a provision, criterion or practice. The terms, provision, criterion or practice, do not import the same strictness of the old test for indirect discrimination⁷³. The use of the word "practice" is important as it allows an examination of informal arrangements, for example as to dress codes.

Pools for comparison

Indirect discrimination requires comparisons to be made between different groups of employees. In a sex discrimination claim, for example, the tribunal would look at the impact the relevant provision, criterion or practice on a group of female employees and then compare it with a group

⁷² s.19 EqA; s.1(2)(b) SDA, s1(2)(b); s. 1[1A] RRA; Regs 3(1)(b) of EE(RB)R/ EE(SO)R/ EE(Age)R; Pregnancy and maternity is not a protected characteristic for these purposes.

⁷³ *British Airways plc v. Starmar* [2005] IRLR 862

of males. The circumstances of the individuals in one pool must not be materially different to those in the other group.⁷⁴

The relevant pools must not be so wide as to be meaningless, nor so limited as to be incapable of testing the alleged disadvantage.⁷⁵ In assessing whether there is a disparate impact between the pools a flexible approach is required. The key issue is whether there is a logically discernible disadvantage.⁷⁶

Disadvantage/Detriment

There is a detriment if "a reasonable worker would or might take the view that he or she [has] been disadvantaged in the circumstances in which he or she [has] thereafter to work."⁷⁷ The matter should be assessed from the point of view of the complainant. It is not necessary to demonstrate any physical or economic consequence.⁷⁸

Non-compliance with a PCP is not a condition precedent to bringing a claim. In a religious discrimination case it has been held that a complaint for indirect discrimination could be made out even though the complainant was in fact able to comply with the PCP in question "the concept identifies particular disadvantage resulting from the application of a PCP, but it does not link it specifically to non-compliance with the PCP in issue"⁷⁹.

⁷⁴ s. 23(1) EqA

⁷⁵ *Grundy v British Airways Plc* [2008] IRLR 74

⁷⁶ *Chief Constable of Avon and Somerset Constabulary v Chew* (2002) 701 IDS Brief 5 and that is true even if some other logically chosen pool could produce a different result: See *Grundy*

⁷⁷ *Shamoon v RUC Chief Constable* [2003] ICR 337, HL

⁷⁸ *Shamoon*

⁷⁹ *Eweida v British Airways* [2009] IRLR 78, EAT

Justification

The provision, criterion or practice must be a proportionate means of achieving a legitimate aim.

The burden of proof is upon the employer and cannot be satisfied by reference to generalisations.⁸⁰ The test applied by the Tribunal is an objective one and it has to determine whether the provision, criterion or practice that is applied is appropriate and necessary.⁸¹

There are two sides to the test: the employer's aims and the effect on the group to which the employee belongs. Tribunals must be careful not to dictate what an employer's needs should be. It will be relevant to look at whether there are other ways the employer can fulfil his aims without putting the claimant's group at a disadvantage.

It would seem that the employer's desire to save costs, taken on its own without regard to other factors, does not justify a discriminatory provision, criterion or practice.⁸²

Dress rules

These cases provide good examples of indirect discrimination issues. First, the insistence on uniforms normally amounts to a required practice at work. Second, in assessing disparate impact, the cultural traditions of the claimant's group are relevant to the issue whether or not they can comply with the uniform rule. Third, the

⁸⁰ *Osborne Clarke Service v Purohit* [2009] IRLR 423

⁸¹ The reference to "appropriate and necessary" is taken from Art. 2(2)(b)(i) of the Framework Directive which the Act is designed to implement.

⁸² *Cross v. British Airways plc* [2005] IRLR 423

relevant disadvantage is usually threatened dismissal. Last, sometimes the employer's aims are the overwhelming consideration⁸³ and sometimes they are not.⁸⁴

An obligation to work long or uncertain hours

An example given in the explanatory notes to the EqA 2010 of a case of indirect discrimination is of an employer operating a practice that staff must work in a shift pattern with which a woman is unable to comply because she has to look after her children at particular times of day and no allowances are made because of those needs.

Perceived membership

Unlike direct discrimination a claimant must actually be a member of the group that is indirectly discriminated against as he or she must show that she has been disadvantaged as a member of the group.

⁸³ Health authority's insistence that Sikh woman nurse wear skirt justified in pursuance of employer's legitimate need to follow statutory regulations on dress: *Richmond Area Health Authority v. Kaur* [1981] ICR 631

⁸⁴ Store's insistence that Pakistani Muslim woman wear skirt NOT justified in pursuance of employer's alleged need to ensure staff looked neat and tidy: *Malik v. British Home Stores* ET

Victimisation

In order to make the protection against discrimination more effective workers are provided further protection against reprisals for asserting rights on their own or on another's behalf.

It is therefore unlawful to subject a person to a detriment because he or she does a protected act or it is believed that he or she has done, or may do, a protected act.⁸⁵

The following are protected acts⁸⁶:

- bringing proceedings under the Act; or
- giving evidence or information in connection with proceedings under the Act; or
- doing any other thing for the purposes of or in connection with the Act; or
- making an allegation (whether or not express) that a someone has contravened the Act.

There are a multitude of possible ways to victimise, so it is important to identify which protected act is relied on. There are three steps in a victimisation claim and the higher courts have advised tribunals to approach these cases in distinct stages.⁸⁷

⁸⁵ s. 27(1) EqA

⁸⁶ s. 27(2) EqA

⁸⁷ *Lindsay v Alliance & Leicester plc* [2000] ICR 1234

It is important to note that the burden of proof provisions now apply to all cases of victimisation.⁸⁸

Protected acts

The possible protected acts are very wide ranging and mostly self explanatory. Where the victim alleges he has acted "under" the EqA or the pre-EqA legislation, he or she must be able to point to a specific provision.⁸⁹ An act done "for the purposes of or in connection with" the EqA will probably qualify if it is done "by reference to the [Act] in the broad sense, even though the doer does not focus his mind specifically on any [particular] provision."⁹⁰ As for an allegation of contravention of the legislation, the allegation need not turn out to be true (providing it was made in good faith) but it must amount to a specific contravention.⁹¹

An allegation that is false and not made in good faith does not qualify as a protected act.⁹²

Detrimental Treatment

There is no longer a need for a comparator. The claimant merely has to show that he or she was subjected to a detriment.

Reason for treatment

The victim's treatment and the doing of a protected act must be connected. The

⁸⁸ Including race. See s. 136(2), reversing *Oyacre v Cheshire County Council* [2008] ICR 1179, CA

⁸⁹ *Kirby v. Manpower Services Commission* [1980] ICR420 EAT

⁹⁰ *Aziz v. Trinity Street Taxis Ltd* [1988] ICR 534 CA

⁹¹ *Waters v. Metropolitan Police Commissioner* [1977] ICR 1073 CA: Allegation of sexual assault not said to be in course of employment and therefore no contravention of SDA (but allegation arguably made on wider ground, "by reference" to SDA).

⁹² s.2(2) RRA; s.4(2) SDA; Reg 4(2) EE(SO)R and EE(RB)R

connecting factor used in the legislation is the word "because". Its predecessor, the phrase "by reason that", has been interpreted as creating an issue of fact for the tribunal to decide: was victimisation the "real reason, the core reason, the causa causans, the motive" for the treatment complained of?⁹³ The motive or reason may be a subconscious one.⁹⁴

The Court of Appeal has held that an employer can victimise an employee when it fails to pay a judgment debt owed to that employee following his successful claim for race discrimination.

Burden of proof under the old law

The EAT has held that the reversal of the burden of proof under s.54A RRA does not apply to victimisation claims brought under s.2 RRA⁹⁵. It is available for all other claims brought under the pre- EqA 2010 legislation.

⁹³ *Chief Constable of West Yorkshire Police v Khan* [2001] ICR 1065, HL. But for the fact that claimant had brought proceedings employer would have provided reference, but the real reason for refusal was not to prejudice employer's position in pending race proceedings brought by employee.

⁹⁴ *Nagarajan v London Regional Transport* [1999] ICR 877, HL

⁹⁵ *Oyarce v Cheshire County Council* [2008] ICR 1179, CA

Harassment

There are three four types of harassment identified by the Act. The first concerns harassment related to a protected characteristic.

Related to a protected characteristic

A person harasses another if he engages in unwanted conduct related to a protected characteristic which has the purpose or effect of violating his or her dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for him or her.⁹⁶ The conduct is only regarded as having the effect described above if, having regard to all the circumstances, including in the victim's perception, it can reasonably be considered to have that effect.⁹⁷

Discriminatory grounds

The considerations set out in the section "Discriminatory grounds" are relevant here. Although harassment is a stand alone cause of action the relevant ground for the unwanted conduct must be proved. The provisions in the EqA no longer refer to harassment "on grounds of" a protected characteristic, but merely that it should be "related to" it. This may permit the argument that any ground-specific treatment, such as racial abuse, necessarily constitutes harassment. It also covers harassment by association or perception.

A comparator is not necessary but may be of evidential use in proving the existence of a discriminatory ground.⁹⁸

⁹⁶ s. 26(1) EqA

⁹⁷ s. 26(4) EqA

⁹⁸ It is arguable in the case of race and ethnic origins, and by extension to all the other grounds, that any race-specific conduct, for example racial abuse, would necessarily come within those grounds as Article 2 (3) of the EC Race Directive 2000, under which the race harassment provisions were introduced and must be interpreted, refer to unwanted conduct "related" to racial or ethnic origin

Unwanted conduct

The relevant conduct can take many forms from serious physical or verbal abuse to taunts, offensive jokes, banter, insults taunts, social exclusion, and comments about lifestyles, modes of dress or language etc. The important question is whether it is unwanted. Thus, ordinary acts of friendliness, for example offering a colleague a lift home, can be unwanted if persistent and unwelcome. However, it is not necessary for the victim to manifestly reject the harasser's behaviour, as it is enough that it is "unwelcome" or "uninvited".⁹⁹ It is recognised that victims of abuse do not readily complain.¹⁰⁰ In practice, at this stage of the inquiry into whether there is harassment, it will normally suffice that the claimant genuinely did not welcome the conduct.

Purpose or effect

There are two ways of looking at the character of the unwanted conduct. First, there is the situation where the conduct is deliberate in the sense that its purpose is to violate the dignity of the claimant or to create an unpleasant environment for him or her. Second, is the situation where the conduct, in fact, has that effect.

The first situation requires an examination of the alleged harasser's intentions. As with all forms of discrimination the alleged wrongdoer will not readily admit that he or she meant to harass. It will therefore be necessary for the tribunal to draw inferences from the surrounding circumstances. In this context, persistence in the face of explicit rejections will be a very important consideration. It need not be

⁹⁹ *Reed v. Stedman* [1999] IRLR 299 EAT

¹⁰⁰ Code of Practice, EC Recommendation on the protection of men and women at work (92/131) to which the tribunal must have regard in applying domestic legislation and see *Reed* above.

shown under this head that the harasser was successful in his efforts to violate dignity or to create an unpleasant environment.¹⁰¹

In the second situation, the effect of the harasser's conduct must be assessed from the victim's point of view subject to the important qualification that the conduct must reasonably be considered to have violated the victim's dignity or to have created an unpleasant environment for him or her. The tribunal will effectively judge whether it was reasonable for the victim to take offence. This may cause problems where religion is involved where there is still widespread ignorance about the doctrines and sensibilities of many religions.

Hypersensitivity

In the second situation set out above the victim's perceptions must be judged by objective standards. This prevents successful claims by the oversensitive. No such considerations apply to the first situation, however. Therefore, the harasser may be liable for the deliberate harassment of an oversensitive person even though a person of reasonable fortitude would not have been affected by it.¹⁰²

Sexual harassment

The second type of harassment concerns unwanted conduct of a sexual nature that has the same purpose or effect as in the case of harassment related to a protected characteristic.¹⁰³ Conduct of a sexual nature might include sexual advances, touching, disseminating pornographic material or engaging in sexual banter.

Victimisation for rejecting or submitting to harassment

¹⁰¹ The position is therefore different to the statement in *Thomas v. Robinson* [2003] IRLR 7 that harassment involved targeting a victim (purpose) *and* causing him or her distress (effect).

¹⁰² See *Richmond Pharmacology v Dhaliwal* [2009] IRLR 336 for a useful review of the approach to harassment cases.

¹⁰³ s. 26(2) EqA

The third type of harassment is perhaps more accurately a form of victimisation. An employee may not be subjected to less favourable treatment because he or she has rejected harassment related to gender reassignment or sex, or harassment of a sexual nature, by the employer or another person.¹⁰⁴ It is important to note that the initial harassment may be by a third party. Thus, disciplining an employee for refusing to submit to the sexual advances of a customer would amount to harassment of this type.¹⁰⁵

Third party harassment

There may now be circumstances in which an employer will be liable for the harassment of a third party: for example, a client or customer.¹⁰⁶ Those circumstances are that there must have been harassment on at least two previous occasions that the employer was aware of and he did not take such steps as would have been reasonably practicable to prevent further harassment. The earlier occasions of harassment need not be perpetrated by the same person.¹⁰⁷ So, if a person works in a sector in which abuse is rife, for example, in the case of traffic wardens, the employer will have to take reasonable steps to prevent further harassment. The courts may have to accept that certain forms of harassment by a third party are incapable of being prevented. Between those cases and the other extreme where harassment is easily prevented, there lie difficult fact sensitive situations as to whether the duty to take reasonable steps is complied with or not.¹⁰⁸

Perceived and associative harassment

¹⁰⁴ s. 26(3) EqA

¹⁰⁵ An issue for the award for injury to feelings is whether the employer must pay for the third party's harassment as well as for his subsequent victimisation.

¹⁰⁶ s. 40 EqA

¹⁰⁷ s. 40(3) EqA

¹⁰⁸ See the case of *Burton v. De Vere Hotels Ltd* [1997] ICR 1 EAT: hotel failed to prevent racist abuse of two black waitresses at a banquet by "comedian" (Bernard Manning). The employers responsibility for discrimination by the third party in that case was doubted in *Macdonald v. Ministry of Defence; Pearce v. Mayfield Secondary School* [2003] ICR 937 HL. *Burton* would probably be decided in the same way today, providing there were previous examples of the abuse (of a protected kind) of waitresses.

The definition of harassment under the EqA includes conduct 'related to' the protected characteristic, rather than the complainant's own possession of that characteristic and thus will cover associative and perceived discrimination. This also applies to the pre-EqA legislation, save in the case of disability.

Where the conduct complained of is on the ground of/related to the relevant protected characteristic, the protection against harassment can be relied upon, even if it arises from a false perception of the victim's possession of that characteristic.¹⁰⁹

¹⁰⁹ *English v Thomas Sanderson Ltd* [2008] EWCA Civ 1421, [2009] IRLR 206, CA

Liability

Although reference is made to the employer as the discriminator in this paper, in reality, it is normally an employee of the employer who has committed the wrongful act. The discrimination legislation contains identical provisions for the purpose of fixing the employer with liability for the acts of its employees.

Employer's liability

For employees

The first situation is where the unlawful act is done by an employee of the employer. The employer is liable under the legislation for the discriminatory acts of his employees if they are done in the course of employment whether or not done with the employer's knowledge or approval.¹¹⁰

The problem of whether acts are in the course of employment most commonly arises in cases of "off-duty" conduct. The employer will be liable for such conduct if the occasion on which it occurs can be regarded as "an extension of their employment".¹¹¹ A practical question to ask might be: is the occasion a work related social or a pure social? The importation of the common law test of vicarious liability has been disapproved of.¹¹² Although that was when the test permitted the employer to argue that the more heinous the conduct the more likely it was to be outside the course of employment. The test now is more liberal: was the employee's wrongful conduct so closely connected with his or her employment that it would be fair and just to hold the employer responsible for it?¹¹³ There is no reason why the practitioner should not take guidance from the common law authorities.

¹¹⁰ s.32(1) RRA;s.41(1)SDA;Reg 22(1) SOR and RBR

¹¹¹ *Chief Constable of Lincolnshire Police v. Stubbs* [1999] IRLR 81 EAT: WPC successfully claimed she was sexually harassed by colleague at after-work drinks and at leaving party both held in pubs away from the workplace

¹¹² *Jones v. Tower Boot Co Ltd* [1997] 1CR 254 CA: serious verbal and physical abuse held to be within employment

¹¹³ See *Lister & Ors v. Hesley Hall Ltd* [2001] IRLR 472 HL

The employer is not responsible for the employee's acts, and has a defence to a claim, if he can prove that he took such steps as were reasonably practicable to prevent his employees committing a particular discriminatory act or committing such acts in general.¹¹⁴ The defence is very difficult to establish. There are two questions the tribunal must ask: first, what preventive steps, if any, did the employer take?; and second, what further steps was it reasonably practicable for the employer to have taken?¹¹⁵ The tribunal should not ask whether the further steps would have made a difference to the commission of the unlawful acts.¹¹⁶ The mere fact that the employer has an equal opportunities policy is not enough. To have any hope of establishing the defence it will be necessary to show that there are policies on diversity and awareness; that employees are trained on the policies; that violations of the policies are seriously and consistently dealt with and that there are avenues for reporting harassment including anonymously. In addition the guidance for drawing up and implementing equal opportunities policies contained in the Codes of Practice should have been followed.

For third parties

The employer is liable as a principal for the acts of his agents.¹¹⁷ The defence set out above is not available.

Employee's liability

¹¹⁴ s. 109 EqA; s.32(2) RRA;s.41(3) SDA; Reg 22(3) SOR and RBR

¹¹⁵ *Canniffe v. East Riding of Yorkshire Council* [2000] IRLR 555 EAT: employer with fully disseminated procedures liable for harassment as risk of it occurring known to manager but no action taken.

¹¹⁶ See *Canniffe* above

¹¹⁷ s. 110 EqA; s.32(2) RRA;s.41(3) SDA; Reg 22(2) SOR and RBR

Any person who knowingly aids an act of discrimination is liable for that act.¹¹⁸ In the case of an employee for whose act the employer is responsible under the provisions outlined above, he or she is deemed to have aided the unlawful act.¹¹⁹

The provisions work like this:

1. Employee commits act of discrimination.
2. Employer liable for employee's act.
3. Employee liable for employer's vicariously liable act.

¹¹⁸ s. 112 EqA; s.33(1) RRA; s.42(1) SDA; Reg 23(1) EE(SO)R/ EE(RB)R

¹¹⁹ s. 110(1) EqA; 33(2) RRA; s.42(2) SDA; Reg 23(2) EE(SO)R/ EE(RB)R

Time limits

A claim for discrimination must be brought within a period of three months beginning with the date of the act complained of unless the tribunal allows the claim to proceed because it considers it just and equitable in all the circumstances of the case to do so.¹²⁰

A claim relying on a dismissal taking place on 2nd January 2010, for example, would need to be presented by 1st April 2010.

On 6th April 2009 the Employment Act 2008 came into force which repealed the previous regime relating to extensions of time and grievances under the Employment Act 2002.

Act complained of

As explained in the section "Contexts" it is important to identify the particular act complained of. Where the alleged discriminatory act is dismissal the relevant date is when notice expires¹²¹ or the date the employer's repudiatory breach is accepted in the case of constructive dismissal.¹²² A complaint concerning the outcome of an internal grievance dates back to the time the decision on it was reached and not the date it was communicated to the complainant.¹²³ Time starts to run afresh on each occasion the employer refuses on alleged discriminatory grounds to confer a benefit on an employee¹²⁴ providing it is an occasion on which the matter was reconsidered.¹²⁵

¹²⁰ s. 123(1) EqA; s.68(1) RRA; s.76(1) SDA; Reg 34 EE(SO)R/ EE(RB)R; Ref 42 EE(Age)R

¹²¹ *Lupetti v. Wrens Old House Ltd* [1984] ICR 348 EAT

¹²² *Derby Specialist Fabrication Ltd v. Burton* [2001] ICR 833 EAT

¹²³ *Apelogun-Gabriels v. Lambeth LBC* [2002] ICR 713 CA. Although delay in communication may provide a basis for extending time

¹²⁴ *Rovenska v. GMC* [1998] ICR 85 CA: Time started on last occasion the GMC refused claimant's repeated requests for registration.

¹²⁵ *Cast v. Croydon College* [1998] ICR 500: refusal to permit job sharing.

1. *Continuing acts*

Conduct extending over a period is treated as being done at the end of that period.¹²⁶ Such acts are commonly referred to as "continuing acts".¹²⁷ A course of conduct normally involves the application of a discriminatory regime, rule, practice or principle.¹²⁸ The application of such a policy is not the same as a one off act of discrimination that has continuing consequences.¹²⁹ The distinction seems to be that a discriminatory policy normally affects the workforce or a sector of the workforce generally. The relevant policy may amount to no more than an alleged state of affairs that operates to the general disadvantage of a section of workers and the complainant in particular.¹³⁰

2. *Omissions*

An omission is treated as being done when the person in question decided upon it.¹³¹ There is a continuing omission where the allegation of discrimination involves the employer's failure to take action in breach of a promise to the employee to implement changes in the workplace.¹³²

Extension of time

Time may be extended if in all the circumstances the tribunal considers it just and equitable to do so.¹³³ The test is less strict than in unfair dismissal cases. The Tribunal does not have jurisdiction to hear the claim unless the claimant persuades it

¹²⁶ s. 123(3) EqA; s.68(7)(b) RRA

¹²⁷ But may now be thought of as "continuing conduct"

¹²⁸ *Barclays Bank plc v. Kapur* [1991] ICR 208: Refusal to credit workers pensions for past African service was a continuing act and not a one-off refusal

¹²⁹ *Sougrin v. Haringey Health Authority* [1992] ICR 650 CA: Failure to re-grade with consequent lower pay was one off act.

¹³⁰ *Hendricks v. Metropolitan Police Commissioner* [2003] ICR 530 CA: whilst claimants 100 allegations of discrimination against 50 employees over 11 years might not have amounted to a deliberate policy they represented an allegation that there was an ongoing discriminatory state of affairs that

¹³¹ s.68(7)(c) RRA and equivalent provisions in n.l above.

¹³² *Littlewoods Organisation plc v. Traynor* [1993] IRLR 154 EAT

¹³³ s.123(1)(a) EqA; s.68(6) RRA and equivalent provisions.

otherwise¹³⁴ and it should not extend time without receiving representations from the respondent¹³⁵. The discretion to extend time is wide and its exercise is rarely susceptible to appeal. The Tribunal will normally consider the reason for and the extent of the delay and whether the claimant was legally advised. The fact that the claimant was awaiting the outcome of a grievance or appeal is also a relevant, but not a decisive, factor.¹³⁶ An important factor is the extent to which delay prejudices the possibility of a fair trial in which case the relevant prejudice should be highlighted.¹³⁷

¹³⁴ *Robertson v. Bexley Community Centre* [2003] IRLR 434 CA

¹³⁵ *Shand v. Leicestershire County Council* [2001] EWCA 226 CA

¹³⁶ See *Apelogun-Gabriels* above

¹³⁷ *Southwark LBC v. Afolabi* [2003] ICR 800 CA: Claimant discovered evidence of discrimination 9 years after refusal to re-grade. Exceptionally, claim allowed to proceed as delay equally prejudicial to both parties and respondent did not raise particular difficulties in defending old claim

Remedies

Following a successful claim the tribunal may make a declaration of the claimant's rights, make a recommendation and award compensation.¹³⁸

A declaration, may be of particular use where there has been a finding of unintentional indirect discrimination, and no compensation is awarded, as future claims will attract compensation. A recommendation may be made for the purpose of obviating or reducing the adverse of the effect of the discrimination both in the case of the complainant and, now, any other person.¹³⁹

A recommendation that the respondent apologise for direct discrimination is therefore an acceptable course. Recommending that an employee be appointed to an available post is not acceptable as it positively discriminates in favour of the claimant-and negatively against other potential candidates.¹⁴⁰ A failure to comply with a recommendation may lead to an increase in compensation.¹⁴¹

The primary remedy, however, is compensation.

Compensation

1. Basis for assessment

The amount of compensation should correspond with the damages that could have been awarded in the County Court for a claim in tort: or breach of statutory duty.¹⁴² The claimant "as best as money can do it,... must be put into the position she [or he] would have been in but for the unlawful conduct."¹⁴³

¹³⁸ s. 124(2) EqA; 56 RRA; s.65 SDA; Reg 30 EE(SO)R/ EE(RB)R

¹³⁹ s. 124(3) EqA

¹⁴⁰ *North West Thames Regional Health Authority v. Noone* [1988] ICR 813 CA

¹⁴¹ s. 124(7) EqA

¹⁴² s.56(1)(b) RRA and the equivalent subsections in n.1 above

¹⁴³ *Ministry of Defence v. Cannock* [1994] ICR 918 EAT

2. Causation

There is no application of a test based on reasonable foreseeability of damage or any other limiting policy consideration. The issue is one of pure causation.¹⁴⁴ The claimant is entitled to recover all losses that flow from the discriminatory act.

3. Dismissals and arrangements

There is no maximum to the amount of compensation. If a dismissal is also unfair the compensation should be awarded under the discrimination legislation to ensure the statutory cap in unfair dismissals does not apply.¹⁴⁵ It should be noted that the provisions for recoupment of state unemployment benefits do not apply under the discrimination legislation so compensation should be assessed net of those benefits. Further the Tribunal will need to consider whether or not the Claimant would have been dismissed in any event on non-discriminatory grounds.¹⁴⁶

Future losses can be difficult to assess and are often speculative. The tribunal may be called on to assess the chance that the claimant would have remained in long term employment with the respondent and on what terms as to pay and promotion had that occurred. Statistical evidence is often used but the tribunal are entitled to apply their collective common sense and experience in looking at it.¹⁴⁷

¹⁴⁴ *Essa v. Laing Ltd* [2003] IRLR 346 EAT

¹⁴⁵ s.126 Employment Rights Act 1996 which prevents compensation for losses that have already been taken into account under another head of claim.

¹⁴⁶ *Abbey National v Chagger* [2009] IRLR 86, EAT

¹⁴⁷ *Vento v. Chief Constable of Yorkshire Police (No.2)* 2003 IRLR 102 CA: Statistics suggesting that few women remained long term in police force rightly rejected because claimant could not have taken into account under another head of claim

In cases of discriminatory recruitment arrangements the tribunal often assesses compensation by reference to the lost chance of obtaining the job in question.

4. Mitigation

It is assumed that the claimant has mitigated his or her losses unless the respondent shows otherwise. The respondent should adduce evidence of any failure to mitigate (which should be sought from the claimant) and vague assertions on the issue are unlikely to be accepted.¹⁴⁸ The respondent will be responsible for losses caused by the claimant's decision to retrain or to work on his or her own account rather than to seek employment, providing the decision to retrain or to become self-employed is reasonable.¹⁴⁹

5. Injury to feelings

Compensation for injury to feelings is available for all types of discrimination.¹⁵⁰ The basic rule is that "any injury to feelings must result from the knowledge that [there] was an act of ... discrimination."¹⁵¹

Generally, the following points should be noted about the award for injury to feelings:

- (i) it is designed to compensate, not punish;
- (ii) it should not reflect the tribunal's indignation;
- (iii) it should not be excessive but nevertheless be set at a level that does not diminish respect for the anti-discrimination legislation;
- (iv) it should be broadly similar to personal injury awards;
- (v) its level should command public respect.¹⁵²

¹⁴⁸ *Ministry of Defence v. Hunt* [1996] ICR 554 EAT

¹⁴⁹ *Tchoula v. ICTS (UK) Ltd* [2000] ICR 1191 EAT: security guard retrained in IT because fact of dismissal affected job prospects in security field.

¹⁵⁰ But only on an express statutory footing in the case of race: s.57(4) RRA

¹⁵¹ *Skyrail Oceanic Ltd v. Coleman* [1981] ICR 864 CA

¹⁵² *Armitage v. Johnson* [1997] 1RLR. 162 EAT

Specific guidance for all areas of discrimination was provided in the case of *Vento*¹⁵³, which have recently been updated in *Da’Bell v NSPCC*.¹⁵⁴ Three broad bands of compensation for injury to feelings, as distinct from compensation for psychiatric or similar personal injury, were identified:

- The top band should normally be between £18,000 and £30,000. Sums in this range should be awarded in the most serious cases, such as where there has been a lengthy campaign of discriminatory harassment on the ground of sex or race. Only in the most exceptional case should an award of compensation for injury to feelings exceed £30,000.
- The middle band of between £6,000 and £18,000 should be used for serious cases, which do not merit an award in the highest band.
- Awards of between £500 and £6,000 are appropriate for less serious cases, such as where the act of discrimination is an isolated or one off occurrence. In general, awards of less than £500 are to be avoided altogether, as they risk being regarded as so low as not to be a proper recognition of injury to feelings.

Personal Injury

The tribunal may award damages for personal or psychological injury in a discrimination case as a separate head of compensation.¹⁵⁵ The claim should be supported by medical evidence.¹⁵⁶ The injury must flow from the acts complained of

¹⁵³ *Vento v. Chief Constable of Yorkshire Police (No.2)* 2003 IRLR 102 CA

¹⁵⁴ UKEAT/0227/09/CEA

¹⁵⁵ *Sheriff v. Klyne Tuggs (Lowestoft) Ltd* [1999] ICR 1170 CA

¹⁵⁶ See *Sheriff* above

but it need not be reasonably foreseeable.¹⁵⁷ No reduction is made for any preexisting vulnerability, the respondent takes the claimant as it found him or her¹⁵⁸. The tribunal will normally have regard to the JSB guidelines in assessing quantum. In the case of long term incapacity a multiplier and multiplicand should be applied. The "Ogden tables" should only be used in cases where the claimant will never work again.

Aggravated Damages

Aggravated damages may be awarded for discrimination related claims¹⁵⁹.

¹⁵⁷ *Essa v Laing Ltd* [2003] ICR 1110, EAT

¹⁵⁸ *Essa* above

¹⁵⁹ *Armitage, Marsden and HM Prison Service v Johnson* [1997]IRLR 62