

Race



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People are discriminated against in all walks of life because of the race to which they belong and this discrimination continues despite the fact that it is unlawful.

This booklet is only concerned with race discrimination in employment. It is intended as a guide to alert workers and their union representatives to their rights if they think they are encountering discrimination based on race.

■ **Race Discrimination and employment**

Everyone experiences discrimination at some point in their working lives. Selection for a job or for promotion invariably means one person is chosen in preference to another. But under the Race Relations Act 1976, discrimination in employment on racial grounds is unlawful.

Race discrimination cases are not straightforward. Employers rarely now openly treat people differently because of their race and often genuinely believe that a decision has not been influenced by race.

It is the task of an employment tribunal to decide whether the real reason for different treatment is race.

■ What is race discrimination?

Racial discrimination can arise in any of four ways:

- Direct discrimination
- Race discrimination by way of harassment
- Indirect discrimination
- Victimisation

These four types of discrimination apply in the following circumstances:

- In arrangements for determining who shall be offered employment
- In the terms on which employment is offered
- By refusing or deliberately omitting to offer the person employment
- In the terms of employment provided
- In the way in which access is provided to opportunities for promotion, transfer or training, or any other benefit, facilities or services
- By dismissing or subjecting a worker to any other detriment

Direct discrimination

A person discriminates against someone by treating them less favourably than another person. Where such discrimination is on racial grounds it is unlawful. This apparently straightforward issue creates difficulty for tribunals. Employers will almost always deny that the alleged discrimination had anything to do with race.

In this situation the tribunal has to find the true and effective reason for the employer's action. The motive of an employer is irrelevant.

A local council employed a black road-sweeper who was appointed to a job as a refuse collector. The trade union branch objected on the grounds that he was a bad timekeeper. The council revoked the appointment to avoid industrial action. The court took the view that the worker had been treated differently from how he would have been treated had he been white and that the council had exercised racial discrimination, even though their motive had not been racial discrimination but to avoid industrial action.

Direct discrimination also covers racial harassment. Under the Race Relations Act, being subjected to racial harassment is being "subject to any other detriment".

Segregation

Racial segregation is unlawful direct discrimination under the Race Relations Act, even where a segregated employee has the same access to promotion and training and the same pay and conditions as other employees.

Harassment

Until 19th July 2003 harassment was not expressly outlawed by the Race Relations Act (1976). A worker who had been racially harassed would have brought a claim for direct discrimination.

The new regulations, which were passed on 19 July 2003, only outlaw harassment on grounds of race, ethnic or national origins. So anyone suffering harassment on grounds of colour or nationality will have to bring a direct race discrimination complaint.

Harassment occurs when, on the grounds of race or ethnic or national origins, the harasser engages in unwanted conduct which has the purpose or effect of (a) violating the victim's dignity or (b) creating an intimidating, hostile, degrading, humiliating or offensive environment for the victim. Conduct shall be regarded as having the effect of violating someone's dignity or creating an intimidating environment only if in all the circumstances, including the victim's perception, it could reasonably be seen as having that effect.

The definition of harassment is wide enough to include most types of harassment including abusive language, excessive monitoring of work, excessive criticism of someone's work etc. However, the concept of "reasonableness" may in some cases make it difficult to win such cases. Under the other provisions of the Race Relations Act (1976) the test of whether someone had suffered a violation of their dignity is subjective.

Indirect discrimination

Indirect discrimination is where an employer operates a policy which on the face of it has nothing to do with race but in practice disadvantages ethnic minorities. A person discriminates against another when he applies a provision, criterion or practice which he applies or would apply equally to everyone but which:

- Puts or would put persons from one racial group at a particular disadvantage when compared to other persons
- Which puts that other at that disadvantage, and
- Which he cannot show to be a proportionate means of achieving a legitimate aim

A Liverpool furniture store refused to consider applicants from Liverpool 8, which had a high rate of unemployment, because it said unemployed friends of staff from that district would loiter outside and discourage custom. Fifty per cent of the population of Liverpool 8 were black compared with two per cent in Merseyside as a whole. The tribunal held this to be an unlawful requirement or condition because it applied to one racial group more than another and could not be justified.

The definition of indirect discrimination covers both formal and informal practices and provisions.

It is not necessary to show on a statistical basis that the Claimant has been placed at a disadvantage as tribunals can adopt a more flexible and non-statistical approach.

The definition of indirect discrimination above was implemented by new regulations in July 2003. However in relation to indirect discrimination on grounds of colour and nationality, a Claimant has to show that there has been applied to them a requirement or condition with which:

- A considerably smaller proportion of their relevant "group" than of others can comply, and
- Which is to the Claimant's detriment because they cannot comply with it

Justification

The next requirement for indirect discrimination is that the discriminatory action cannot be justified irrespective of the racial origins of the Claimant. The onus is on the employer to prove that the condition is justified.

A criterion that an applicant for a manual job should be able to read and write English where there is virtually no reading or writing required is unlikely to be justifiable.

■ Victimisation

Anyone involved in bringing proceedings, making allegations or giving information in connection with the Race Relations Act is protected by the Act against victimisation. That means that they must not be subject to any detriment as a result.

Who is liable under the Act?

In the employment field liability for race discrimination usually lies with the employer and/or any other employee who is found to have discriminated.

Employers will be liable for the discriminatory acts of employees where those employees are acting in the course of their employment. This is known as vicarious liability.

The Court of Appeal gives a broad definition to "in the course of employment". It says that the purpose of the law is to eliminate discrimination in employment and to widen the net to make both employees and their employers liable for racial abuse.

Where the acts complained of are done by another employee, it is usually wise to bring the employment tribunal application against both the employee as well as the employer.

Employers have a defence to a complaint of discrimination based on vicarious liability if they can prove that they took all reasonably practicable steps to prevent the discrimination. It is rare for employers to be able to succeed with this defence. Even if they do, the claim can continue against the individual employee.

Who is covered by the Act?

The Race Relations Act protects both applicants for jobs and employees. It may also protect contract workers and self employed workers.

All employees and workers are covered irrespective of their length of service or the number of hours they work each week.

The Act also makes it unlawful to instruct or pressurise a person to act in a way prohibited by the Race Relations Act. So protection extends to a person who has been disadvantaged because they have refused to carry out instructions which they believe will discriminate against someone else on the grounds of their race.

A white manager of an amusement arcade who was dismissed because he refused to carry out a racist instruction was held to have been discriminated against on racial grounds.



■ Meaning of 'race'

Under section 3 of the Race Relations Act 1976, race means colour, nationality or ethnic or national origins.

A person can be a member of several racial groups at the same time.

■ Exceptions under the Act

Overseas employment

The Race Relations Act applies only to establishments in Great Britain.

Private households

Employment in private households is exempted from the provisions of the Race Relations Act except in respect of victimisation.

Training

Under certain circumstances positive action in training is allowed.

Genuine Occupational Qualification (GOQ) or Genuine Occupational Requirements (GOR)

The Race Relations Act provides for specific situations in which race discrimination in employment is allowed. The list of GOQs or GORs includes actors, models, personal welfare services and jobs involving work where food or drink is provided for which a person of a racial group is required for authenticity (such as a Chinese restaurant).

A London borough advertised two managerial posts in the housing department specifying that, as over half of the tenants dealt with by the department were of Afro-Caribbean or Asian origin and the posts provided personal welfare services, the posts would be confined to Afro-Caribbean and Asian applicants.

The council's claim that the advertisement was covered by the GOQ defence failed on two points. First, the EAT held that the racial group in question was not sufficiently identified. Secondly, the EAT held that neither of the posts advertised provided 'personal services' (i.e direct contact).

However, a local authority which advertised for an Afro-Caribbean worker for a play-group was covered by the GOQ provisions. The worker would provide 'personal services' to Afro-Caribbean children in maintaining cultural links, such as reading and talking in dialect.

In effect, however, the courts have made clear that the exceptions under the GOQ provisions cannot be used by employers to implement positive discrimination, however desirable that might appear to be.



■ Proof

It is for the person making the claim to establish that discrimination has occurred. The employee has to prove discrimination by the employer "on the balance of probabilities".

This means that, although a tribunal might have doubts as to whether the employer discriminated, as long as the tribunal more than half believes that they have it must decide in favour of the employee.

Once an employee has established facts from which a Tribunal could conclude that there had been discrimination then the burden shifts to the employer to show that no such discrimination has in fact occurred.

It is unusual to find direct evidence of racial discrimination. Few employers are prepared to admit discrimination and those who are aware of the law may have taken steps to appear to be acting lawfully.

Whether or not discrimination can be proved will often depend on what inferences a tribunal can draw from the primary facts. Where, for example, an employee complains of failure to promote on racial grounds the evidence may point to the possibility of racial discrimination. In those circumstances the tribunal may look to the employer for an explanation that proves there was no discrimination.

If no such explanation is put forward, or if the tribunal finds the supposed explanation inadequate or unsatisfactory, it is open to the tribunal to infer that the discrimination was on racial grounds.

Raising a grievance

From October 2004, unless there are special circumstances (e.g. threats or continuing harassment by the employer) the employee must write to the employer raising a grievance and wait for 28 days before bringing a discrimination claim to an employment tribunal. This is even where the complaint relates to disciplinary action short of dismissal or another grievance. If a grievance is not raised the Tribunal will not have jurisdiction to consider the claim.

The questionnaire

The difficulties of proof have been recognised in the Race Relations Act and provision is made in the Act for a questionnaire to be used by the applicant. A form may be served on the employer asking certain standard questions.

The replies are admissible in evidence and a refusal to reply or failure to reply within eight weeks without reasonable excuse or, evasive replies, permit the tribunal to draw adverse conclusions. An equivocal reply might also lead a tribunal to infer that there has been racial discrimination. A questionnaire will not count as raising a formal grievance.

■ What can the tribunal do?

An employment tribunal can award one or more of three remedies if it finds that an individual has been a victim of race discrimination.

- A declaration which is an order declaring what the rights of the parties are
- Compensation
- A recommendation that the employer should take certain steps to remove or reduce the discrimination

Compensation

There is no ceiling on the amount of compensation a tribunal can award for race discrimination. Compensation normally includes an award for injury to feelings and an award to take into account any loss suffered, for example loss of wages or pension.

Injury to feelings

An award for injury to feelings is not automatically made when discrimination is proved. Injury must be proved but this is relatively easy. Few tribunals need much persuasion that the anger, distress and affront caused by the act of discrimination has injured the employee's feelings.

Awards for injury to feelings vary enormously. Much will depend on the oral evidence of the employee as to how they have been affected. An award of £750 is at or near the minimum, though the Court of Appeal has said awards for injury to feelings should be restrained.

Compensation may be reduced if the applicant failed to follow the statutory grievance procedure.

Aggravated damages

These may be awarded if the circumstances are such that the sense of outrage is increased by the manner in which the discriminatory act was done, the motivation behind it, or the way in which the tribunal process was conducted.

Recommendations

A recommendation must be practical, have a time limit and avoid or reduce the effect on the employee of any act of discrimination to which the complaint relates.

If the employer fails to comply with a recommendation a tribunal may order that compensation be increased or if no original order for compensation was made it may make one.



■ Time limits

The Race Relations Act imposes strict time limits throughout the procedure for bringing a case for race discrimination. Good cases can be lost before they start through hesitation or delay.

If someone suspects they have been or are being racially discriminated against they must take advice immediately, contact their union as soon as possible and raise a grievance under the new statutory procedure.

The time limit for making a claim for racial discrimination to the employment tribunal is three months from the act of discrimination. This time limit is extended by three months to allow the statutory grievance procedure to take place provided a grievance has been raised within three months of the act of discrimination.

A discriminatory act may extend over a period of time so that it may be a continuing act if it takes the form of some policy, rule or practice in accordance with which decisions are taken by the employer. In these circumstances the three month period runs from the end of the continuing act.

Tribunals do have discretion to allow late claims to proceed, but it is not safe to assume that this discretion will be exercised.

The questionnaire is normally sent to the employer before tribunal proceedings start. If so, it must be sent within three months of the facts complained of.

If the questionnaire is sent after tribunal proceedings begin, it must be sent within 21 days of the tribunal application being lodged. Later than that will require permission from the tribunal.

Race Relations Amendment Act

The Race Relations Amendment Act 2000 came into force in April 2001. It imposes a new general duty on all public authorities to promote race equality. Public authorities include organisations such as NHS Trusts, local government, schools and the Civil Service.

In addition, there are new specific duties that came into force on 31 May 2002 which require public authorities to monitor staff, applicants for jobs, promotion and training by ethnic group, and to publish the results each year. For public authorities with at least 150 full-time staff they must also monitor and analyse by racial group grievances, disciplinary action, appraisals leading to benefits or penalties, training and staff leaving. They must also publish Race Equality Schemes setting out their proposals for complying with these duties.

A failure to comply with the Act does not in itself lead to directly enforceable rights to claim race discrimination. Nonetheless the new obligations are far reaching and require employers to address race issues seriously and as a central part of their functions. The obligations will require consultation by employers with unions on race issues. The compulsory monitoring will also provide unions with an important source of information regarding the impact of race in the workplace.

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