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STANDING UP FOR YOU

Summary of the law
on race discrimination

Our pledge to you

Thompsons Solicitors has been standing up for the injured and mistreated since Harry Thompson founded the firm in 1921. We have fought for millions of people, won countless landmark cases and secured key legal reforms.

We have more experience of winning personal injury and employment claims than any other firm – and we use that experience solely for the injured and mistreated.

Thompsons will stand up for you by:

Staying true to our principles – regardless of how difficult our job is made by government, employers or the insurance industry

Remaining committed to the trade union movement, working closely with them and with professional associations for the benefit of working people everywhere

Thompsons pledge that we will:

Work solely for the injured or mistreated

Refuse to represent insurance companies and employers

Invest our specialist expertise in each and every case

Fight for the maximum compensation in the shortest possible time

standing up for you

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The Spirit of Brotherhood
by Bernard Meadows

About this booklet

This booklet sets out the basic employment rights to which workers are entitled under the race discrimination provisions of the Equality Act 2010.

These apply in England, Wales and Scotland (except where indicated) only.

- Protection and liability.
- Discrimination.
- Harassment.
- Victimisation.
- Exceptions.
- Tribunal claims.
- Remedies.

What does the Equality Act cover?

The Act covers all forms of discrimination in the workplace, including; selection for a job, training, promotion, work practices, dismissal or any other disadvantage because of race.

The government has the power to introduce caste discrimination as a form of race discrimination but has not yet exercised the power to do so. Until then case law has held that caste may be protected where the individual's descent was a significant factor.

Who is protected?

It covers all forms of employment and applies to apprentices, those working under a contract of employment and the self-employed working under a contract personally to do the work.

Who is liable?

The employer is generally liable for acts of discrimination, harassment and victimisation in the workplace. However, individual employees may also be liable, for example, if they have subjected a colleague to harassment related to race.

When can race discrimination arise?

Race discrimination can arise in relation to:

- The arrangements made for deciding who should be offered employment such as shortlisting and interviews.
- The terms upon which employment is offered.
- Refusing or deliberately omitting to offer employment.
- The ways in which access to opportunities for promotion, transfer, training or other benefits, facilities or services are offered.
- Dismissal or any other detriment.



What is the public sector equality duty?

Public bodies such as local government, the NHS and those carrying out public functions are under a duty to consider equality when making day-to-day decisions both in terms of service delivery and employment. This consists of a general duty and specific duties.

The general duty has three aims and requires public bodies to have due regard to the need to:

- Eliminate unlawful discrimination, harassment and victimisation and other conduct prohibited by the Act.
- Advance equality of opportunity between people from different groups.
- Foster good relations between people from different groups.

The specific duties are designed to help public bodies comply with the general duty. Broadly these require specified public bodies to publish information on how the general duty is being met and to prepare and publish one or more equality objectives.

The specific duties for devolved public authorities are different in England, Wales and Scotland. Trade unions should therefore check that the employer is complying accordingly.

What is positive action?

The Act allows employers to treat someone with a protected characteristic more favourably during the process of recruitment and promotion.

If they think that the person with a protected characteristic has a reasonable chance of being disadvantaged because of that characteristic (or there are fewer people with a particular protected characteristic employed), they can choose that person over someone who does not have the protected characteristic, provided that:

- The person is as qualified as the other candidate.
- The employer does not have a recruitment or promotion policy of treating people of the underrepresented group more favourably.
- The more favourable treatment is a proportionate means of achieving a legitimate aim (the legitimate aim being encouraging participation and overcoming disadvantage).

These provisions are voluntary. An employee cannot bring a claim because the employer did not apply positive action during the recruitment or promotion process, although they may still be able to bring a claim if they were discriminated against during it.



What does the Act outlaw?

Direct discrimination

This means treating a person less favourably than someone else because of race.

In order to determine whether someone is directly discriminated against, a comparison has to be made with someone of a different race whose circumstances are the same or not materially different.

The definition is wide enough to cover those who are also discriminated against because they are perceived to be of a particular race or because they are associated with someone of a particular race.

Examples of direct discrimination include:

- Someone who is not promoted because they are of Afro Caribbean origin.
- Someone who is subject to harassment because their partner is black African.
- Someone who is prevented from attending training because they are thought to be of Asian origin.

Indirect discrimination

Indirect discrimination arises where an employer applies a provision, criterion or practice (PCP) which puts those of a particular racial group at a particular disadvantage compared to those who do not share the same racial group, which the employer cannot justify.

Employers can only justify indirect discrimination if they can show that it was "a proportionate means of achieving a legitimate aim".

For instance, when a Liverpool furniture store refused to consider applicants from Liverpool 8 (where 50 per cent of the population are black compared with two per cent in Merseyside as a whole), the Tribunal held that a requirement

for candidates not to be from Liverpool 8 amounted to an unlawful requirement or condition.

This is because the requirement put those of a particular racial group at a disadvantage when compared with others not of that racial group.

Harassment

This occurs when one person subjects someone else to unwanted conduct related to race, that has the purpose or effect of violating a person's dignity or of creating an intimidating, hostile, degrading, humiliating or offensive environment.

The definition of harassment also applies to those subjected to unwanted conduct because of another person's race. So, for example, an employee who is subject to offensive comments about their black African partner will be protected under the Act.

Unwanted conduct includes the spoken or written word, jokes, graffiti or other behaviour.

In determining whether conduct amounts to harassment, a Tribunal will take into account the perception of that person and whether it was reasonable for them to consider the comments or behaviour to be offensive.

Victimisation

This occurs when an employer subjects a person to a detriment because they have done or may do a protected act.

A protected act includes:

- Bringing proceedings under the Act or previous discrimination legislation.
- Making allegations of a breach of the Act or previous discrimination legislation.
- Giving evidence or information in connection with proceedings that someone else has brought.
- Raising a grievance or giving evidence in someone else's grievance.

The person complaining of victimisation does not need to show they are of a particular race in order to bring a claim. However, they do have to have acted in good faith when doing a protected act. A false allegation will not amount to a protected act.



Are there any exceptions?

The Act does not apply when the employer can show that there is an occupational requirement (OR) to do with the nature or context of the work, which means they need to recruit someone of a certain race, as long as they can show it is a proportionate means of achieving a legitimate aim.

The OR applies only to direct discrimination in recruitment, promotion, transfer and training and not to the way in which an employer affords access to benefits, facilities or services.

Case law has established that the OR provisions cannot be used by employers to implement positive discrimination, however desirable that might appear to be.

Is it easy to prove a claim?

Someone complaining of discrimination has to prove, on the balance of probabilities, that their employer discriminated against them because of race. Tribunals are aware that it can be difficult for claimants to provide clear evidence of discrimination.

As a result, Tribunals often have to decide cases on the basis of whether an inference of discrimination should be made from the primary facts. Those inferences are governed by section 136 of the Equality Act 2010 (EqA), which has a two-stage process of proving discrimination.

- At the first stage, the Tribunal must consider whether there are “facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision [of the EqA 2010] concerned.” If there are such facts, “the court must hold that the contravention occurred.” (Section 136(2)).
- At the second stage, that finding could be rejected “if A shows that A did not contravene the provision” (section 136(3)). Therefore, the burden shifts to the respondent, who will have to show that there is a wholly non-discriminatory explanation.

So, for example, where an employee complains that their employer failed to promote them because of race, the evidence may point to the possibility of racial discrimination. If the employer has no explanation, or if the Tribunal finds their explanation is inadequate or unsatisfactory, it can infer that the discrimination was because of race and therefore unlawful.

How do workers gather information from their employer?

Workers can use the ACAS (Advisory, Conciliation and Arbitration Service) guidance, 'Asking and responding to questions of discrimination in the workplace', to request information from the employer which is relevant to a potential claim of discrimination.

It is important in most cases for claimants to submit a written grievance in order to comply with the ACAS code of practice on disciplinary and grievances.

What is Early Conciliation?

Early Conciliation is the requirement to contact ACAS before lodging an employment tribunal claim. This can be done over the phone or by completing an Early Conciliation notification form on line on the ACAS website (www.acas.org.uk).

Early Conciliation must begin before the time limit for lodging a tribunal claim expires. It usually lasts for up to four weeks, after which a conciliation certificate is issued.

The Early Conciliation certificate number must be put on the employment tribunal claim form (ET1).

If it is not, the claim form will be rejected and the claim may go out of time.

What time limits apply?

Claims must be brought within three months less one day of the act of discrimination that the person is complaining about. If the discrimination has occurred over a long period of time, this may amount to a continuing act. A claim must then be brought within three months less one day of the last act.

In exceptional circumstances, the three month time limit may be extended if a Tribunal believes that it is just and equitable to do so.

What remedies are available?

There are three remedies available to a Tribunal:

- Declaration
- Compensation
- Recommendations.

Declaration

A declaration is a statement of the rights at the end of a claim, for instance where a claim succeeds a statement that a worker has been subject to direct discrimination.

Compensation

Compensation can be awarded for injury to feelings and financial losses, if there are any. This will vary from case to case and depends on the individual circumstances. There is no statutory limit to the amount of compensation which can include loss of earnings (past and future), loss of pension, interest and any other outlays associated with the discrimination. The amount of compensation for injury to feelings can vary enormously. The person's age and vulnerability may be considered, and also the severity of the discrimination.

Aggravated damages (not applicable in Scotland) can also be awarded if the Tribunal is satisfied that the employer has behaved in a high-handed, malicious or insulting way which has aggravated the injury to the claimant's feelings.

Claimants can also ask for compensation for personal injury if they have been seriously affected by the discrimination, particularly in harassment cases, which can lead to illness and depression. If so, claimants need to produce a medical report to support their claim.

Recommendations

The Tribunal can make recommendations for the purpose of preventing or reducing the effect of the discrimination on the claimant of any matters to which the proceedings relate. This means that recommendations will not normally be made if the claimant has resigned or has been dismissed, which is often the case.

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