

SUMMARY OF THE LAW ON RACE DISCRIMINATION



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 Scotland, England and Wales only.

- PROTECTION AND LIABILITY
- HARASSMENT
- EXCEPTIONS
- REMEDIES
- DISCRIMINATION
- VICTIMISATION
- TRIBUNAL CLAIMS

WHAT DOES THE 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.

WHO IS PROTECTED?

It applies to apprentices, employees working under a contract of employment and workers.

Former employees can also make a race discrimination and/or harassment claim against their former employer, provided that they engage with ACAS Early Conciliation within 3 months after the last act of discrimination/harassment.

WHO IS LIABLE?

Individual employees and the employer are liable for acts of discrimination, harassment and victimisation in the workplace.

The information contained in this booklet is not a substitute for legal advice. You should not rely upon it, and it is strongly recommended that you speak to our specialist employment solicitors to discuss the contents of this booklet.

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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.

WHAT IS POSITIVE ACTION?

The Act allows employers to select someone with an under-represented protected characteristic during the process of recruitment and promotion.

If the employer "reasonably" thinks the person with a protected characteristic was disadvantaged because of that characteristic (or there are fewer people with the characteristic employed), they can choose that person over someone who does not have the under-represented 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 or worker cannot bring a claim because the employer did not apply positive action during the recruitment or promotion process, although they may 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.

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:

- An employee not being promoted because they are of Afro Caribbean origin.
- A worker who is subjected to harassment because their partner is black.
- An employee 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 which puts those of a particular racial group at a particular disadvantage compared to those who do not share the same racial group and 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".

HARASSMENT

This occurs when one person subjects someone else to unwanted conduct related to race that has the purpose and/or effect of violating their dignity or that creates 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 subjected to offensive comments about their black African partner will be protected under the Act.

Unwanted conduct includes the spoken or written word (including social media), jokes, graffiti or other behaviour.

In determining whether the conduct amounts to harassment, the Tribunal will take into account the perception of the person who experienced the harassment. Any compensation for Injury to Feelings will be assessed on how the harassment made the individual feel. It is therefore immaterial if the harassment would have impacted someone else in a different way.

VICTIMISATION

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

A protected act includes:

- Bringing proceedings under the Equality Act 2010
- Alleging that the Equality Act 2010 has been breached
- Giving evidence or information in connection with proceedings that someone else has brought.
- Doing anything else such as 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 their race.

Tribunals are aware that it can be difficult for claimants to provide clear evidence of discrimination so 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 they did not discriminate against them.

This is known as the reversal of the burden of proof. Where, for example, an employee complains that their employer failed to promote them on racial grounds, the evidence may point to the possibility of racial discrimination. If the employer has no explanation, or if the Tribunal finds their explanation inadequate or unsatisfactory, it can infer that the discrimination was on racial grounds.

HOW DO CLAIMANTS GATHER INFORMATION FROM THEIR EMPLOYER?

Workers can no longer use standard forms (the questionnaire procedure) when requesting information from their employer about their complaint. They can still ask their employer to provide them with information, but there is no obligation on the employer to provide it.

It is helpful to identify any documents which could be requested through tribunal procedure at the earliest opportunity.

WHAT TIME LIMITS APPLY?

Tribunal claims must be brought within three months less one day of the discriminatory 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.

When the discrimination has occurred over a long period of time, this may amount to a continuing act extending over a period. A claim must then be brought within three months less one day of the last act in the series of acts.

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 that a worker has been subject to direct discrimination because of their race.

COMPENSATION

Compensation can be awarded for Injury to Feelings and financial losses, if there are any. There is no 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.

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.

If the employer fails to comply with a recommendation, then the Tribunal may order the compensation to be increased.

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