

Race discrimination

The rights of employees to equal treatment and respect regardless of their race



Overview

Discrimination, victimisation and harassment of individuals because of their race is prohibited by the Equality Act 2010 ('The Act').

The definition of race

Race includes colour, nationality, and ethnic or national origins. Colour means any colour, white, black or brown. An ethnic group must have a long shared history and its own cultural tradition. There may also be other relevant characteristics that assist in establishing an ethnic group, such as: shared language, geographical descent or religion. Sikhs and Jews have established that they are an ethnic group, whereas Rastafarians and Muslims have not. Rastafarians and Muslims would however be protected by the provisions on religious discrimination.

At present, 'caste' does not come under the notion of race although there is provision under The Act' to allow caste to be added. Arguably, caste should be read into The Act' by virtue of European law.

The protection provided by 'The Act'

Who is protected? - In the employment sphere, 'The Act' applies to recruitment, employment and vocational training. It is unlawful to discriminate against someone because of race, from the initial job application process through to dismissal. Under 'The Act', 'employment' is widely defined to include workers, those working under apprenticeships,

Crown employees and members of the House of Commons and House of Lords. If you are supplied by your employer to work for another employer (contract workers), or are an office holder (company directors and members of some independent public bodies) you will also be protected. 'The Act' extends still further to the police, barristers, partnerships, providers of vocational training, employment agencies and trade organisations, among others. There is no opt-out clause for small employers.

What is prohibited? - The Act' outlaws direct and indirect discrimination, victimisation and harassment. The prohibited behaviour does not have to be directly committed by the employer and employers may be responsible for the acts of their employees .

Importantly, 'The Act' also extends in limited circumstances to discrimination after the working relationship has ended. For instance, if a former employer provides a discriminatory reference, or refuses to provide a reference at all, because of a person 's race, this could amount to unlawful discrimination.

Discrimination, victimisation and harassment

Direct discrimination - It is unlawful to treat a person less favourably

because of race. In order to succeed in a claim of direct discrimination, you must show:

- That you have been treated less favourably because of race
- That you were subject to disadvantage or detriment as a result of that treatment.

'The Act' requires that 'like must be compared with like', so the less favourable treatment must be compared with that of someone of a different race, known as a comparator. Your comparator must be a person who in all other respects is in a similar or 'not materially different' position to you. The comparator can be a real person or hypothetical.

There is no need to show motive or intention behind the discriminatory treatment as it is accepted that discriminatory treatment can be unconscious. Further, it does not matter if the discriminator shares the race of the individual being discriminated against.

The less favourable treatment does not necessarily have to be because of your race. For example, someone who is treated less favourably because of his wife's or parents' race would be protected. 'The Act' also protects those who are treated less favourably because of their perceived race. One example of this is where someone who is non-white is treated less favourably because he is perceived not to be British.

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Indirect discrimination - 'The Act' provides that a person also discriminates if an arrangement or feature relating to the employment (technically known as a provision, criterion or practice (PCP)) is applied or would be applied equally to all employees, but:

- Puts people of a particular race at a particular disadvantage when compared with people of another race
- Puts the complainant at that disadvantage; and is not a proportionate means of reaching a legitimate aim (in other words the PCP is not objectively justified).

The PCP must have been applied universally to all. For example, a requirement that all couriers must wear motorcycle helmets could disadvantage Sikh men wearing turbans who may be unable to wear helmets. This requirement would be unlawful, unless it could be justified by the employer.

Victimisation - The law protects people who seek to enforce their rights under 'The Act'. It is unlawful to treat a person unfavourably because they have been involved in a complaint of discrimination under 'The Act'. Discrimination by way of victimisation occurs when you are treated unfavourably because you have done, you are about to do, or you are suspected of doing a 'protected act'. A protected act includes:

- Bringing proceedings against the discriminator or any other person under 'The Act' or the RRA; or
- Giving evidence or information in connection with proceedings against the discriminator or any other person under 'The Act' or the RRA; or
- Doing anything in relation to the discriminator or any other person under or by reference to 'The Act' or the RRA; or
- Making allegations that the discriminator or any other person

has committed an act which contravenes 'The Act' or the RRA.

So for example, if you have made a complaint about race discrimination and are later treated unfavourably for doing so, you should be covered by 'The Act'. A protected act must be done in good faith.

Victimisation following termination of employment is also unlawful.

Harassment - Harassment related to race is a form of discrimination. It is defined as being:

- 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.

An essential characteristic of the behaviour is that it is unwanted. In considering the effect of the conduct, the Tribunal will consider the individual's own subjective experience together with whether it was reasonable for the conduct to have had that particular effect.

A claim can also be brought if harassment occurs because of an association with someone of a particular race, or if someone is perceived to be of a particular race.

Burden of proof

It has long been recognised as difficult for those bringing discrimination claims to find evidence to support their case. To combat this, 'The Act' provides that if the claimant can establish clear facts which could enable the Tribunal to conclude that discrimination has occurred, it is then for the respondent to provide evidence for the reason why the claimant was treated in that way. In the absence of an adequate non-race based explanation from the respondent, the Tribunal must draw an inference of discrimination.

The Equality Act 2010 applies to recruitment, employment and vocational training.

Where an employer has failed to comply with relevant statutory Codes of Practice, the Tribunal may also draw inferences from this failure. For example, an employer may have failed to follow the Codes of Practice in relation to the way in which they have investigated the employee's grievance or recruited an individual to a post.

Questionnaire

You can serve a questionnaire on your employer to obtain information relating to your complaint. ACAS have prepared guidance on 'asking and responding to questions of discrimination in the workplace' which is available on their website at www.acas.org.uk.

Time limits and the correct legislation

Most claims will need to be brought in the Employment Tribunal within three months less one day of the treatment you are complaining about. Where that treatment amounts to a continuing course of conduct by your employer, the claim may be brought within three months less one day from the end of the conduct.

You may also need to follow the ACAS Code of Practice on Discipline and Grievance Procedures (which can be downloaded from the ACAS website). This is aimed at assisting parties to resolve disputes within the workplace.

If your claim is successful but the Tribunal considers that you have failed to comply with the Code, your compensation could be reduced by up to 25%. (There are also penalties on the employer if they do not comply with the Code). Please note that the time limit for bringing a claim is not affected by compliance with the ACAS Code.

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Executive dismissal

If you have been dismissed and you feel that dismissal was on grounds of discrimination, again you must lodge your claim in the Employment Tribunal within three months less one day of the date of dismissal. Again you will need to follow the ACAS Code of Practice on Discipline and Grievance Procedures and the same penalties for non-compliance will apply as set out above.

An act of discrimination which extends over a period of time is treated as having been 'done' at the end of that period. An act may extend over a period of time if it takes the form of some policy, rule or practice. It can sometimes be possible to argue that a continuing campaign of harassment, or a continuing regime of discriminatory conduct, amounts to one act extending over a period of time. However these are complex arguments and it is wise to err on the side of caution in calculating the time limit. A Tribunal does have the power to consider a claim that is brought out of time, if in all the circumstances of the case it considers it is just and equitable to do so. However you should not rely on this.

If you are thinking about making an employment tribunal claim, you will first need to notify details of your claim to ACAS, who will then offer early conciliation to try to resolve the dispute. The conciliation period can be up to one month. If the claim does not settle, ACAS will issue a certificate confirming that the mandatory conciliation process has concluded.

There are changes to time periods within which to lodge claims to allow for the period during which a claim is with ACAS. The period within which a claim is with ACAS will not count for calculation of time limits; and if the time limit would usually expire during that period, or within the month after the certificate is issued, then you will have up to one month following receipt of the conciliation certificate in which to lodge a claim.

The process makes the calculation of time limits in employment tribunal cases more complicated. Claimants are advised to be aware of limitation issues and seek legal advice promptly. For further information on the ACAS early conciliation process visit: www.acas.org.uk.

Remedies

If a complainant is successful in their complaint of unlawful discrimination, the Tribunal may grant whichever of the Following remedies it considers 'just and equitable':

- A declaration on the rights of the parties
- A recommendation that the Respondent takes a particular course of action
- Compensation (plus interest)
- Reinstatement or re-engagement (where an individual has succeeded in a claim for unfair dismissal).

Compensation may include awards for injury to feelings, aggravated damages, loss of congenial employment, and any actual and/or future financial loss, for example loss of earnings and pension losses. There is no limit on the amount of compensation that can be awarded in respect of financial losses, but a complainant will only be compensated for the losses which they can show were directly caused by the unlawful discrimination as found by the Tribunal.

Service provision

'The Act' also prevents a service provider from refusing to provide a product or service to a person because of race, or providing something of a lower quality or on inferior terms compared to that provided to others of another race.

Claims relating to service provision are brought in the County Court. The time limit For bringing a claim

is six months from the date of the discrimination (or the last of a series of acts of discrimination). The Court has the discretion to allow a claim that is out of time, but you should not rely on this discretion. The Court can award both financial and non-financial remedies - monetary compensation or an injunction that 'rights the wrong'. Monetary compensation by way of injury to feelings is usually in the region of £600 - £6,000. You can also bring claims against a service provider for harassment related to race.

You can serve a questionnaire to obtain information relating to your complaint. For advice on asking questions covering goods and services visit the Government Equalities Office website: www.gov.uk/government/organisations/government-equalities-office.

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