

Summary of the
law on

RACE DISCRIMINATION



The Race Relations Act 1976 (RRA) outlaws discrimination on the ground of race in employment, education, transport and the provision of goods and services.

This booklet is solely concerned with the employment aspects of the RRA.

- DIRECT DISCRIMINATION
- INDIRECT DISCRIMINATION
- VICTIMISATION
- HARASSMENT
- TRIBUNAL CLAIMS
- REMEDIES

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Who does it apply to and when?

The RRA (Race Relations Act 1976) covers anyone who works wholly or partly in Great Britain. It applies to all employees and workers (including job applicants), apprentices, contract and agency workers, office holders, the police, the self-employed and members of the armed forces irrespective of their length of service or the number of hours they work each week.

Ex-employees can also make a claim against a former employer, if they are complaining about something that was closely connected to that period of employment, such as something detrimental that was said in a reference.

It also protects anyone who has refused to carry out an instruction which they believe is contrary to the Act. For instance, a white amusement arcade manager who was dismissed because he refused to carry out a racist instruction was held by the Tribunal to have been discriminated against on racial grounds.

There is no qualifying period of service required under the Act, so a worker is protected from the time they apply for a job.



What protection does the Act provide?

The RRA (Race Relations Act 1976) protects against discrimination on the basis of race, ethnic or national origins, colour or nationality. Although the legislation applies to white people, the vast majority of claims are made by people from ethnic minorities.

It does not, however, protect people discriminated against on the ground of their religion (although Jews and Sikhs have been accepted as racial groups). Instead, these claims have to be brought under the Employment Equality (Religion or Belief) Regulations 2003.



Who is liable?

Liability for race discrimination usually lies with the employer but they will also be liable for the discriminatory acts of employees where those employees were acting in the course of their employment. This is known as vicarious liability.

If the alleged discrimination was carried out by another employee, it is sensible to name them in a Tribunal application, as well as the employer.

Employers can defend a complaint of discrimination if they can prove that they took all reasonably practical steps to prevent the discrimination (although it is rare for this defence to succeed). Even if they do, claimants can still pursue their claim against the individual employee.



What is race discrimination?

Race discrimination can arise in one of four ways:

- Direct discrimination
- Indirect discrimination
- Harassment
- Victimisation

It applies:

- To arrangements for deciding who should be offered employment
- To the terms on which employment is offered
- To situations in which an employer refuses or deliberately does not offer someone a job
- To the way in which access to opportunities for promotion, transfer or training, or any other benefit, facilities or services is provided
- To dismissal or where someone has been subjected to any other disadvantage



What is direct discrimination?

Direct discrimination is when an employer treats one person less favourably than someone else on racial grounds.

The onus is initially on the worker bringing the claim to show that they were treated differently to someone else of a different racial group (either actual or hypothetical). This can often be very difficult as employers will almost always deny that the alleged discrimination had anything to do with race. It is irrelevant whether or not the employer intended to discriminate against them.

The onus then shifts to the employer to produce evidence that they would have behaved in a similar way to someone who was not of the same racial group. A vague argument that they would behave the same way with everyone is unlikely to be good enough. The Tribunal then has to decide the true reason for the employer's action.

Once the person has shown that the employer did discriminate against them directly, employers cannot offer a defence as none exists for these claims.



What is indirect discrimination?

Indirect discrimination occurs when the employer operates a “provision, criterion or practice” which, on the face of it, seems neutral in relation to race, but in practice, works to the disadvantage of one (or more) racial group.

To prove a case of indirect discrimination, the claimant has to show that the practice had a detrimental effect on them, or put them at a particular disadvantage, in comparison to people of other races.

As with direct discrimination, employers do not have to have intended to discriminate, to be caught by the legislation. But, unlike direct discrimination, they can justify it if they can show that the provision, criterion or practice they applied is, when looked at objectively, proportionate to the aim they were trying to achieve. This involves balancing the interests of the employer against those of the worker.

For instance, 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.



What is harassment?

Unlawful harassment occurs when someone is subjected to unwanted conduct that has the purpose or effect of violating their dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment and the treatment is on the grounds of race, national or ethnic origin.

Conduct will only be regarded as harassment when all the circumstances are taken into account (including the perception of the person at the receiving end) and if it is reasonable to conclude that it could have had this effect.

The law gets complicated in this area because parts of the RRA have been amended and other parts have not. The result is that some harassment claims cannot rely on this definition and have to be presented as direct discrimination claims. The safest approach is to mention both grounds for all claims.

The definition of harassment is wide enough to include abusive language, excessive monitoring of work and excessive criticism of someone's work.



What is victimisation?

Some workers may be deterred from exercising their rights under the RRA or from supporting others who wish to exercise their rights in case they are victimised by their employer.

The RRA guards against this by making it unlawful for an employer to victimise an individual because they have brought a discrimination claim, given evidence in a discrimination case or made an allegation of race discrimination (whether it has been upheld or not).

To succeed in a victimisation case, the person has to show that they were treated less favourably than someone who had not taken any of these steps, and that their treatment was because they had pursued a discrimination case, had given evidence or had made allegations of discrimination.



What are the exceptions?

Again, the RRA can be complicated because some parts have been amended and others have not. The result is that there are now two main types of exceptions – these are called genuine occupational requirements (GORs) and genuine occupational qualifications (GOQs).

For a GOR exception to apply, employers have to show that the reason for wanting someone of a particular race or ethnic or national origin is a genuine and decisive requirement for that job; that the requirement is proportionate; and that the person either does not meet the requirement, or the employer is not satisfied that they do

For a GOQ exception, employers just have to show that they need someone of a particular colour or nationality, for example, to play a certain part in a play or to provide personal welfare services.

Employers cannot rely on GOQ exceptions if they already have enough staff from the specific racial group who could take on the duties of the job without too much inconvenience.

For instance, 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 Employment Appeal Tribunal held that the racial group in question was not sufficiently identified. Secondly, that neither of the posts involved 'personal services'.

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.



Proving race discrimination

Proving race discrimination is not straightforward. The onus is on the person making the claim to prove, on the balance of probabilities, that their employer discriminated against them to establish that discrimination has occurred.

This means that the Tribunal does not have to be certain, but it has to think it more likely than not that the treatment was on the grounds of the person's race.

Once the claimant has established facts from which a Tribunal could conclude that there has been discrimination then the burden shifts to the employer to prove otherwise.

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.



Questionnaires

Because of the difficulties in proving a claim of race discrimination, under the Race Relations Act, employees can serve a Questionnaire on their employer to obtain information or documents in order to ascertain the strength of their claim and to establish as far as possible, what the facts are and the reasons for their treatment.

If the employer fails to reply within the eight week time limit without providing a reason, or delays doing so or provides an inadequate response, then the Tribunal may draw an inference of discrimination from that.

Serving a Questionnaire does not count as raising a formal grievance.



Tribunal claims and time limits*

Claimants must complain to a Tribunal within three months of the act complained of. This time limit is extended by three months, however, to allow the statutory grievance procedure to take place.

Where the action complained of started before 6 April 2009 and unless there are special circumstances (such as 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 a Tribunal. This applies even if the complaint relates to disciplinary action short of dismissal or another grievance. If they do not do that, the Tribunal will not be able to hear the claim. Where the action complained of started on or after 6 April 2009, the employee should still raise a grievance but even if they do, the time limit is not extended.

There are also time limits that apply to serving the Questionnaire. If it was lodged before the Tribunal proceedings started, then it must be served on the employer within three months of the act complained of. If it was sent to the employer after the Tribunal proceedings started, then it must be sent within 21 days of the Tribunal application being lodged. If the claimant misses these time limits, they can still serve their Questionnaire but they will need the Tribunal's permission to do so.



*REFERS TO LEGAL CHANGES EFFECTIVE FROM 6 APRIL 2009.

What remedies are available?

There are three remedies available to a Tribunal:

- Declaration
- Compensation
- Recommendations

Declaration

A declaration states the rights of the claimant and sets out how the employer and/or any employee involved has acted unlawfully.

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 which takes into account any loss suffered, for example loss of wages or pension.

Tribunals do not automatically make an award for injury to feelings once the claimant has proved discrimination, but very few need to be persuaded that the anger, distress and affront caused by the act of discrimination has injured the employee's feelings.

The amount varies enormously - much will depend on the verbal evidence of the employee as well as their age and vulnerability and the



extent of the discrimination. An award of £750 is about the minimum, though the Court of Appeal has said awards for injury to feelings should be restrained.

The Tribunal may award aggravated damages if the employer has acted in a high-handed way which aggravated the injury to feelings, such as refusing to apologise or not investigating the grievance seriously.

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

Recommendations

The Tribunal's powers to make recommendations are limited to actions that will benefit the individual employee and lessen the effect of the discrimination on them. They must be practical, have a time limit and avoid or reduce the effect of the discrimination that they complained about.

For instance, they might include a requirement for all members of management to be trained in equal opportunities, or for the employee who has been discriminated against to be provided with additional training or mentoring, or to be invited to interview in relation to future job applications.

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



What is the race equality duty?

The RRA imposes a general statutory duty on public authorities (such as NHS Trusts, local government, schools and the civil service) to promote race equality. That means they have to monitor, by ethnic group, their existing staff as well as applicants for jobs and staff who apply for promotion or training and then publish the results every year.

In addition, public authorities with at least 150 full-time staff have to monitor and analyse their staff, by racial group in terms of grievances, disciplinary action, appraisals that confer benefits or penalties and staff who leave.

Employers also have to publish race equality schemes setting out how they will comply with these duties.

Although individuals cannot enforce a claim of race discrimination if a public authority fails to comply with the duty, the new obligations are nonetheless far reaching and require employers to address race issues seriously and as a central part of their functions. The obligations also require employers to consult with unions on race issues.

The fact that public authorities are required to monitor staff, provides unions with an important source of information regarding the impact of race in the workplace.







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- Sex Discrimination
- Sexual Orientation Discrimination
- Disability Discrimination
- Race Discrimination
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- Stress at Work
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- Accidents at Work
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