

Discrimination Law: the Essentials

Presented for LawWorks

By John Sprack

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Introduction

- Some features of discrimination claims
- No service requirement
- No maximum compensation limit
- Prospect of damaging publicity
- Costs can be considerable
- Complexity

Scope of Protection

- It extends to those working under a contract of employment
- Or apprenticeship
- Or a contract personally to do work
- Or Crown employment
- Or as agency workers

Protected characteristics (1)

- Generally, we are entitled to discriminate and we do so every day
- What is forbidden is discrimination on grounds of a protected characteristic
- The protected characteristics are set out in the Equality Act 2010, s 4

Protected characteristics (2)

- Age
- Disability
- Gender reassignment
- Marriage and civil partnership
- Pregnancy and maternity
- Race
- Religion or belief
- Sex
- Sexual orientation

Discrimination: the main forms

- Direct discrimination
- Indirect discrimination
- Victimisation
- Harassment

NB the pattern is somewhat different for disability, which is dealt with later

Direct discrimination (1)

A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others

[Equality Act 2010, s 13]

Direct discrimination (2)

- Less favourable treatment
- “Because of”
- Compare e.g. a man and a similarly placed woman
- “There must be no material difference between the circumstances relating to each case” – Equality Act 2010, s 23
- Comparison may be hypothetical
- Examples of real and hypothetical comparators
- “Because of” covers both perception and association

Direct Discrimination (3)

- Reversal of the burden of proof
- Employee must prove facts from which the tribunal could infer discrimination in the absence of any other explanation
- Employer then has to prove that the act was unrelated to sex etc
- Igen Ltd v Wong [2005] IRLR 258 CA

[Equality Act 2010, s 136]

Indirect Discrimination

It involves:

- Application of a provision, criterion or practice (PCP) by A to B
- Which is applied both to those with and without the protected characteristic
- Puts or would put those with whom B shares the characteristic at a particular disadvantage when compared with those with whom B does not share it
- Puts or would put B at that disadvantage
- A cannot show it to be a proportionate means of achieving a legitimate aim

Victimisation

It is based on a protected act (see Equality Act s 27)

A victimises B if he subjects B to a detriment because B has done (or A believes he has done) a protected act

Protected acts are:

- Bringing proceedings under the Equality Act
- Giving evidence in connection with such proceedings
- Doing anything in connection with the Act
- Making an allegation (whether or not express) that A or another person has contravened the Act

NB false evidence or a false allegation is not protected if made in bad faith

Harassment

Equality Act s 26

A harasses B if A

- Engages in unwanted conduct
- Which is related to a relevant protected characteristic and
- Which has the purpose or effect of
- Violating B's dignity or
- Creating an intimidating, hostile, degrading, humiliating or offensive environment for B

Discrimination: when is it unlawful?

Discrimination on grounds of a protected characteristic is unlawful

- in the recruitment process
- during employment
- after employment if it arises out of and is closely connected with former employment

Disability (1)

- P is disabled if she has
- A physical or mental impairment which has
- An effect upon her ability to carry out normal day to day activities which is
- Substantial
- Long-term and
- Adverse
- See Equality Act 2010 sch 1 for definition

Disability (2)

Is it long term? It is if it has

- Lasted for at least 12 months
- Is likely to last for at least 12 months
- Is likely to last for P's lifetime
- It must be treated as continuing if it is likely to recur

What about corrective measures, medication etc? We have to look at what the effect would be without the treatment (except for spectacles and contact lenses!)

Forms of disability discrimination

- Direct discrimination
- Indirect discrimination
- Discrimination arising from disability (s 15 EA)
- Failure to make reasonable adjustments (s 20,21,22)
- Victimisation
- Harassment

Comparing disability with other forms of discrimination

- It is only disabled people (and those associated with them) who are protected cf. men, whites, straights with respect to other protected characteristics
- Disabled people are entitled to preferential treatment – reasonable adjustments which might include
 - Alteration of premises
 - Altering working hours
 - Offering another job
 - Changing the place of work
 - Acquiring new equipment etc

Liability

- Employers are liable for the acts of employees “in the course of their employment”
- Defence if they have taken all reasonable steps to prevent the discrimination
- Course of employment can include unauthorised acts and some out of work activity: CC of Lincolnshire Police v Stubbs [1991] IRLR 81 EAT
- Individual employees can also be held liable – joint and several liability, or separate awards

Remedies

The Tribunal should consider:

1. A declaration
2. Compensation
3. Recommendations

Compensation

- The tribunal will award what it considers just and equitable
- It should cover pecuniary loss
- It can include compensation for personal injury including physical and psychiatric damage: *Sheriff v Klyne Tugs (Lowestoft) Ltd* [1999] IRLR 481
- For financial loss and personal injury, interest is payable from the halfway point between the act of discrimination and the date of hearing (currently @8%)

Injury to Feelings

- Vento v Chief Constable of West Yorkshire (No 2) [2003] IRLR 162
- Three bands for compensation:
 - Top £27,000 - £45,000 for most serious cases
 - Middle £9,000 - £27,000 for serious cases not in top band
 - Lower £900 - £9,000 for less serious cases e g one off
- Interest for injury to feelings runs from the date of discrimination (currently @8%).
- Limits in each band now increased for inflation annually. Above figures apply to claims presented on or after 6 April 2020

Questions?

Contact details

www.johnsprack.co.uk