

Handling a discrimination case

Session 1 - identifying claims

presented by John Sprack for LawWorks September 2023

Useful resources

- I am not going to deal in any detail with the substantive law on discrimination
- For those of you wishing to brush up on the framework, there is a useful summary provided by Citizens Advice here
- <https://www.citizensadvice.org.uk/work/discrimination-at-work/discrimination-at-work/taking-action/taking-action-about-discrimination-at-work/>
- All of us, whether we need to revise the basics or not, will need to have access to the following
- <https://www.legislation.gov.uk/ukpga/2010/15/contents>: the Equality Act 2010
- <https://equalityhumanrights.com/sites/default/files/employercode.pdf>: the Statutory Code of Practice on Employment
- Other references will crop up as we go through the various sessions

Handling the initial interview (1)

- Get background information about C's employment: job role, company, length of employment
- What actions of the employer does C complain about?
- Does C think this is because of race, sex, religion etc?
- Why?
- What is C's race, religion etc?
- Is there an actual comparator?
- Who made the decisions which C is complaining about?
- Is there any way in which their other actions showed prejudice?

Handling the initial interview (2)

- Is there a consistent pattern?
- Is there a non-discriminatory explanation for the events complained of?
- Did C make any allegations of discrimination to the employer or co-workers?
- Consider all acts of discrimination in the past three months
- Consider such acts and evidence of prejudice throughout C's employment
- What witnesses, documents etc are available?
- What additional info is needed
- What is C seeking ?

Handling the initial interview (3)

Sexual harassment: additional points

- Does C wish to have the option of speaking to an adviser of the same sex?
- Your attitude is important: friendly but formal
- What are the details of the harassment? Consider whether C should have the chance to write details down before discussing them to minimise embarrassment
- Did C say to the harasser that she did not welcome the advance and what did they say?
- Has C been treated less favourably as a result?
- Has the harasser done the same to others?
- Have complaints been made to management and with what results?

Decide on the claims (1)

Working out how to proceed

- What has been revealed by the interview?
- How strong do the prospective claims seem to be at first sight?
- Consider time limits - more later
- Are some of the allegations better treated as background: *Anya v University of Oxford* [2001] EWCA Civ 405
- Avoid a kitchen sink approach - quality rather than quantity is the key

Decide on the claims (2)

Pinning down the legal basis for the claims

- What protected characteristics are involved?
- What form of discrimination?
- Direct, indirect, harassment, victimisation
- If disability, consider also reasonable adjustments, something arising
- Make sure the protected characteristic carries protection from the form of discrimination involved
- eg not direct/indirect sex discrimination or harassment where pregnancy, not harassment where marriage/civil partnership (s 18 and 26)

Time limits (1)

The usual time limit

- Three months less one day for contacting Acas Early Conciliation [First deadline]
- Then one calendar month after Acas certificate sent, or expiry of original time limit (whichever is later)
- When does time begin to run? eg after the decision not to promote is made
- Not from the conclusion of the grievance procedure unless that itself was discriminatory

Time limits (2)

‘Conduct extending over a period’

- In discrimination cases, s 123EqA 2010 may be relevant: is it ‘conduct extending over a period’ - sometimes called ‘continuing discrimination’?
- A failed promotion which results in financial loss does not result in continuing discrimination during the period of reduced wages (continuing consequences not continuing act)
- But a discriminatory policy in relation to promotion would be continuing discrimination: *Owusu v London Fire and Defence Authority* [1995] IRLR 574 EAT; *Cast v Croydon College* [1998] IRLR 318 CA
- Is there a continuing discriminatory set of affairs? A general link between the incidents is needed: *Hendricks v Commissioner of Police for the Metropolis* [2003] IRLR 96 CA

Time limits (3)

Omissions

- What if the discriminatory act is an omission to do something?
- EqA 2010 s 123(3)(b) as read with s 123(4)(a): when was the decision made to do something inconsistent with doing the omitted act?
- Or if there was no inconsistent act, when might the employer reasonably have been expected to do what was necessary to avoid discrimination? s 123(4)(b)
- Important to think this one out in a reasonable adjustments case
- To be safe, count from when the employer should have become aware of the need for the adjustment
- A series of failures to make an adjustment may be conduct extending over a period
- But it may be difficult to prove the link in practice so play safe if possible

Just and equitable (1)

Limitation Act 1980 s 33

- The ET has power to allow claims outside the time limit if just and equitable to do so: s 123(1)(b) EqA 2010
- The overall consideration is whether the ET's decision would cause prejudice to either of the parties
- The ET should consider the checklist under Limitation Act 1980, s33 of factors to which particular consideration should be given [tailored to ET cases]
 - A. the length of and reasons for C's delay
 - B. the extent to which the evidence of either party might be affected by the delay
 - C. employer's conduct after the claim arose, including responses to requests for relevant information or documents
 - D. the extent to which C acted promptly and reasonably after knowing of the potential claim
 - E. the steps taken by C to get expert advice, and what advice was received

Just and equitable (2)

Applying the Limitation Act

- No one factor is decisive
- An important point is whether the employer is prejudiced by the delay - did they know about the possibility of a claim? witnesses or documents lost? [see B on the list above and the overall test in s 33(1)]
- What if C tried to resolve the matter through the grievance procedure, or by making representations to the employer? [see D above]
- What if C has a mental disability? [see A above]
- What if C was misled by advice which they received? [see E above]
- Does the strength of the case count? *Palihakkara v English Sport Council* [2023] EAT 27 re late appeal
- Where some acts of discrimination are in time, an ET may be more inclined to allow in earlier acts via its discretion
- Consider whether earlier acts should be treated as actual claims, or background evidence, and make that clear

Dealing with time limits: summary

- Check/ensure the primary time limit is met in relation to each potential claim
- Where some are out of time and some in time, can an argument based on “extended course of conduct” be put forward?
- If not, what are the chances the ET will decide it is just and equitable to admit further instances of discriminatory behaviour?
- If that is not possible, can those prior instances be treated as evidence?

Multiple respondents (1)

The law and procedure applying

- The liability of the employer is dealt with in s 109 EqA
- The liability of the employee is set out in s 110
- It is contingent upon the employer's liability (disregarding the 'reasonable steps' defence in s 109)
- So where the individual discriminating employee can be identified, you can add them as respondents to the claim
- If so, separate notification and certificates for Early Conciliation is required (EC Rules r4)
- Failure to do so may be remedied by amendment but better not to take the chance

Multiple respondents (2)

Tactics involved

- All of that begs the question, is it worth naming R2, R3 etc?
- If C is successful liability for any award is joint and several: *Hackney LBC v Sivanandan* [2013] IRLR 408
- If employer pursues a reasonable steps defence, R2 etc may still be liable
- R2 etc would normally be witnesses if they are named respondents
- They would have to be present during all proceedings (what about the alleged harasser?)
- If they are separately represented then a longer hearing would result
- A settlement may prove more difficult with multiple respondents
- If the employer is likely to go into liquidation R2 etc may still have assets

**Any
Questions?**