

New Developments in Employment Discrimination Law

The UK Report

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A. Introduction

The UK now has over thirty years of experience of anti-discrimination legislation. The volume of cases continues to rise and the body of statutory rules continues to proliferate. The UK has probably had more influence than almost any other state in shaping EC anti-discrimination law. In this respect it has been involved in a significant dialogue with both the EC institutions, through the legislative process, and the European Court of Justice, often through references funded by the (former) Equal Opportunities Commission.¹ This chapter will begin by outlining the key legislative measures in this field, followed by a discussion of the main principles and remedies available before examining the context in which significant problems are not arising: equal pay.

B. General Description of Employment Discrimination Law

1. Historic Overview

1.1 The Legislation

“An employer may refuse to employ [a worker] for the most mistaken, capricious, malicious or morally reprehensible motives that can be conceived, but [the worker] has no right of action against him”. So said Lord Davey in *Allen v Flood* in 1898.² This was the original common law position, one unmitigated by any constitutional right to equality since, as is well known, the UK does not have a written Constitution. The common law position has gradually been modified, starting with the Sex Disqualification (Removal) Act 1919 which removed restrictions on women (by reason of sex or marriage) from being, for example, solicitors, civil servants, university students, as well as from holding other civil or judicial office. This Act was eventually repealed by the seminal piece of anti-discrimination legislation, the **Sex Discrimination Act (SDA) 1975**.

The SDA 1975 prohibited discrimination on grounds of sex and marital status³ in employment matters not covered by the Equal Pay Act 1970 (see below) (e.g. in respect of recruitment, promotion, non-contractual pay matters, dismissal and other detriment). It therefore adopted the traditional ‘negative’ rights model to achieve equality.

The SDA gave aggrieved individuals the right to complain to employment tribunals, backed up by protection against victimization. Strategic enforcement was entrusted to the

¹ Barnard, ‘A European Litigation Strategy: the Case of the Equal Opportunities Commission’, in: Shaw and Moore (eds) *Dynamics of European Integration*, (Clarendon, Oxford, 1996).

² [1898] A.C. 1 at p.172.

³ S.251 of The Civil Partnerships Act 2004 extends this protection to civil partners.

Equal Opportunities Commission (EOC), now replaced by the Equality and Human Rights Commission (EHRC). Employers are vicariously liable⁴ subject to the defence that the employer took ‘such steps as were reasonably practicable to prevent the employee from doing that act, or from doing in the course of his employment acts of that description’.⁵

The SDA also introduced the concepts of indirect discrimination and positive action. In this way, the legislation went beyond a pure formal equality model and introduced elements of substantive equality, not in the extended notion of equality of results, but rather in its narrower version of equal opportunities: the Act aims to create a level playing field on which everyone can compete on the grounds of merit.

The SDA has been amended a number of times, usually to bring aspects of its provision into line with EC Law.⁶ Most notably it was amended by the Sex Discrimination (Gender Reassignment) Regulations⁷ to give effect to the Court of Justice’s ruling in *P v S*,⁸ extending the protection against discrimination to those who have undergone or are undergoing gender reassignment.⁹ The **Equality Act 1996** imposed a positive duty on public authorities not to discriminate on the grounds of sex and to promote equal opportunities. This positive duty has the potential to achieve much in the gender equality fields (and race and disability– see below) – but to date there is suspicion that there is little more than ‘filing cabinet’ compliance.

The TUC campaigned for over 100 years for equal pay for men and women, but only called for legislation in 1963. Eventually, the **EqPA 1970** was introduced. It required equality in respect of contractual pay matters for men and women in the same employment in two situations: (a) when employed on “like work”, or (b) when employed on “work rated as equivalent” under a job evaluation study (JES) (although there was no obligation to undertake such a study). Although the original Act contained no general right to equal pay for work of equal value, infringement proceedings brought by the EC Commission,¹⁰ resulted in a statutory amendment introduced by the Equal Pay (Amendment) Regulations 1983.¹¹ The EqPA, as re-enacted with amendments in Sched.1 to SDA 1975, came into force on 29 December 1975. It was amended by the **Equal Pay Act 1970 (Amendment) Regulations 2003** to extend the time limit for bringing claims to 6 months and to allow backdated claims for 6 years.

Also relevant for women, although not exclusively, are the EC Part-Time Work Directive 97/81/EC (implemented by the Part-Time Workers (Prevention of Less Favourable Treatment)

⁴ S.41(1) SDA 1975.

⁵ S41(3) SDA 1975.

⁶ The Act was amended by **SDA 1986** as a result of infringement proceedings, *Commission v United Kingdom* Case 165/82 [1984] ICR 192, ECJ, inter alia so as to remove the exclusion in respect of small employers and to amend provisions concerning discriminatory terms in collective agreements, works rules and contracts. SDA 1986, ss.2 and 3, gave effect to *Marshall v Southampton & Southwest Hampshire AHA (No.1)* [1986] IRLR 140, ECJ so as to require equal retirement ages for men and women. The SDA 1986 and the Employment Act (EA) 1989 repealed nearly all legislation which treated men and women differently in employment, and allows sex discrimination only where it necessary to comply with statutory requirements to protect women in relation to pregnancy and confinement and specific health risks. It was amended again by **The Sex Discrimination Act 1975 (Amendment) Regulations 2003** SI 2003/1657 to amend the coverage of the police and to extend the reach of the law to post-termination dismissals.

⁷ SI 1999/1102.

⁸ Case C-13/94 *P v S and Cornwall County Council* [1996] IRLR 347.

⁹ See also the **Gender Recognition Act 2004** which enables transgendered people to apply for a Gender recognition certificate and thereafter a new birth certificate in their reassigned gender.

¹⁰ Case 61/81 *Commission v United Kingdom* [1982] ECR 2601.

¹¹ SI 1983/1794.

Regulations 2000¹²), and the Fixed-Term Work Directive 99/70/EC (implemented by The Fixed-term Employees (Prevention of Less Favourable Treatment) Regulations 2002¹³), which apply the principle of equal treatment – subject to objective justification - to part-time and fixed-term contract workers. Agency workers currently find themselves in an invidious position. The EC has not so far been able to agree a Directive on the equal treatment of agency workers. These workers have therefore been forced to fall back on the (very limited) protection laid down by domestic law. There is no Constitutional right to equal treatment which will help them. Often they find that they do not enjoy even the most basic employment protection rights because, in a ‘triangulated’ situation where control lies with the user but mutuality of obligation (if it exists) lies with the agency, there is no employment relationship for the agency worker with either the user of the agency.¹⁴

Race discrimination was gradually outlawed by a series of statutes in the 1960s culminating in the **Race Relations Act (RRA) 1976** which followed almost exactly the approach, structure and wording of the SDA 1975. It outlawed discrimination on racial grounds, defined to mean colour, race, ethnic or national origins, or nationality. The RRA also created the Commission for Racial Equality (CRE) as well as allowing an individual to complain to employment tribunals. The Race Relations (Amendment) Act 2000 extended the protection of the 1976 Act to the police and other public authorities, and placed a duty on public authorities to have due regard to need to promote equality of opportunity and good relations between persons of different racial groups.

The Disabled Persons (Employment) Act 1944 required employers of a substantial number of employees to employ a quota (normally 3 %) of registered disabled persons, but this was generally thought to have been a failure, either because employers did not comply with it in practice or because the definition of disability was stretched too broadly. The Act was therefore repealed by the **Disability Discrimination Act 1995** which in turn has been significantly amended by The Disability Act 1995 (Amendment) Regulations 2003,¹⁵ implementing the EC Framework Directive 2000/78. **The Disability Rights Commission (DRC) Act 1999** set up the DRC with somewhat more extensive powers than the CRE and EOC. **The Disability Discrimination Act 2005** created a positive duty for disability equality, requiring public authorities to produce a disability equality scheme by December 2006,¹⁶ along the lines of the race equality duty. It also extended the definition of disability.

The **Fair Employment Act 1976** applied the RRA and SDA model to discrimination on grounds of religion or political opinion between the Roman Catholic and Protestant communities in Northern Ireland. There were substantial amendments, and the current legislation imposes positive duties on employers to monitor and review the composition of the workforce and to take affirmative action. In addition, s.75 of the Northern Ireland Act 1998 imposes a positive duty on public authorities to promote equality of opportunity, not only between the Protestant and Roman Catholic communities but also between persons of different racial group, age, marital status or sexual orientation, between men and women generally, between persons with a disability and without, and between persons with dependants and without. The three separate commissions dealing with religion, race and sex were merged, from October 1999, into a single Equality Commission for Northern Ireland

¹² SI 2000/1551.

¹³ SI 2002/2034.

¹⁴ See eg *James v. Greenwich* [2007] IRLR 168 (EAT); [2008] EWCA 35.

¹⁵ SI 2003/1673.

¹⁶ SI 2005/2966 The Disability Discrimination (Public Authorities)(Statutory Duties) Regulations 2005.

(ECNI).

There was no prohibition against discrimination on the grounds of religion and belief in the rest of the UK until the EC's Framework Directive 2000/78 - one of two¹⁷ so-called 'Article 13 Directives' (in reference to the legal basis in the EC Treaty on which they were adopted) - required this situation to be changed. The Employment Equality (Religion or Belief) Regulations 2003 (in force 2 Dec 2003) were implemented as a result. These largely follow the pattern of the SDA 1975 except they contain a wider range of genuine occupational requirements (see below). According to Reg. 2(1) 'religion or belief' means 'any religion, religious belief, or similar philosophical belief'. The Equality Act 2006 extended the prohibition against discrimination on the grounds of religion or belief, to include non-belief.

Directive 2000/78 also outlawed discrimination on the grounds of sexual orientation and age. Both of these obligations have now been incorporated into British law by the Employment Equality (Sexual Orientation) Regulations 2003 (in force 1 December 2003)¹⁸ and the Employment Equality (Age) Regulations 2006 (in force 1 October 2006)¹⁹ respectively. Sexual orientation covers discrimination against heterosexuals, homosexuals and bisexuals. The Regulations also covers discrimination on the grounds of *perceived* as well as actual sexual orientation (ie assuming someone – correctly or incorrectly - is gay/lesbian/heterosexual/bisexual), as well as discrimination on the grounds of the sexual orientation of those with whom a persons associates. However, British law is not consistent across the strands on this point. Some strands cover actual, perceived and associative discrimination (eg race and religion); others do not (eg sex and disability). The fact that disability does not include associative discrimination is currently being challenged before the European Court of Justice in *Coleman v Attridge Law*.

The Equality Act 2006 set up a single equality commission, the Commission for Equality and Human Rights (EHRC), which replaced the CRE, EOC and DRC. The EHRC's remit includes sex, race and disability discrimination as well as the new strands introduced by the Article 13 Directives. It has new powers to intervene in cases 'if it appears to the Commission that the proceedings are relevant to a matter in connection with which the Commission has a function'.²⁰

Finally, the **Human Rights Act 1998** (HRA) 'brings home' rights under the European Convention on Human Rights [ECHR] including Art.14. In fact, because Article 14 does not confer any free-standing right to equal treatment it has been much less influential in shaping the evolution of UK anti-discrimination law than EC law.

1.2 Review

As can be seen, the UK has a complex web of (over 100 pieces of) legislation outlawing discrimination. The reason for this can be found in the gradual accretion of obligations under EC law as well as the fine tuning of rights laid down by domestic law. The SDA and the RRA were, in fact, modeled on the US Civil Rights Act 1964 and the UK legislation, in its turn, provided the inspiration for the EC Directives on Race (2000/43) and religion, belief, sexual orientation, disability and age (2000/78). The government, conscious of the difficulties this plethora of legislation has caused, especially when read in conjunction with the case law of the British and European courts, launched the Discrimination Law Review in February 2005

¹⁷ The other Directive was Dir. 2000/43 on race and ethnic origin.

¹⁸ These Regs were unsuccessfully challenged in *R (Amicus – MSF Section) v. Secretary of State for trade and Industry* [2004] IRLR 430.

¹⁹ See www.dti.gov.uk/er/equality for explanatory notes on the religion and sexual orientation regs.

²⁰ S.31 Equality Act 2006.

with a view to achieving a 'a clearer and more streamlined discrimination legislative framework which produces better outcomes for those who currently experience disadvantage'.²¹ In other words, it is proposing a Single Equality Bill which the Labour government committed itself to in its 2005 manifesto. A consultation paper was published in June 2007. In parallel with the Discrimination Law Review, the Equalities Review, chaired by Trevor Philips, now chair of the EHRC, looked at the broader issues leading to an unequal society. This reported to the Prime Minister in February 2007.²²

2. Typical cases of employment discrimination

It is hard to describe a typical case of discrimination; cases – or at least the reporting of them – seem to go in phases. At present, as can be seen from the statistics (table 1), there are serious issues with equal pay; these are discussed below. There is also an increasing amount of litigation in respect of the new strands of discrimination and this is what we shall discuss. For example, in *Glasgow City Council v McNab*²³ the question was raised whether an atheist teacher employed by a Catholic school maintained by the Council had suffered direct discrimination under the Religion or Belief Regulations 2003 when he was refused an interview for the post of Principal Teacher of Pastoral Care. The EAT upheld the ET's decision that the post was not on the list of posts for which the Roman Catholic Church required a teacher to be Catholic and therefore the Council should not have assumed that the Church would not have approved the appointment. The EAT also upheld the tribunal's finding that there was no genuine occupational requirement (GOR). In particular, it held that a local authority has no religious ethos and therefore could not take advantage of the GOR in regulation 7(3), even in respect of employment in a religious school.

More controversial was the case of *Azmi v Kirkless MBC*²⁴ which concerned a British Muslim classroom assistant who gave maths and literacy lessons to primary school children. She insisted on keeping her face fully veiled when male colleagues were present. The school initially agreed she could wear the veil when a man was present, but the agreement broke down when it was found that the presence of the veil interfered with her ability to be able to communicate effectively with the children.²⁵ She was eventually suspended. She alleged that she had suffered both direct and indirect discrimination on the grounds of her religion, as well as harassment. She lost these claims but the Employment Tribunal did award her £1,100 for victimisation due to the way the dispute was handled.

This was a highly political case which attracted widespread public interest. The employment tribunal amended its judgment at the last minute to rebuke government ministers, including the prime minister, for commenting on the highly controversial issue while it was still sub judice. The EAT upheld the ET's decision. It said there was no direct discrimination since Azmi had not been treated less favourably than another person, not of the Muslim religion, who covered her face for whatever reason. It also said that while the requirement not to teach with her face covered was indirectly discriminatory it could be justified and the steps

²¹ *Discrimination Law Review: A Framework for Fairness: Proposals for a Single Equality Bill for Great Britain*, Communities and Local Government, June 2007, 3. This is discussed by C.McCruden, 'Equality Legislation and Reflexive Regulation: A Response to the Discrimination Law Review's Consultative Paper' (2007) 36 ILJ 255.

²² <http://archive.cabinetoffice.gov.uk/equalitiesreview/>.

²³ [2007] IRLR 476.

²⁴ [2007] IRLR 484.

²⁵ M.Wainwright, *The Guardian*, 20 October 2006.

taken were proportionate because (1) the requirement had not been imposed immediately; (2) the instruction to remove the veil had been confined to those occasions when she had been teaching children; and (3) that the instruction had been given only after her teaching had been observed.

*Reaney v Hereford Diocesan Board of Finance*²⁶ concerns discrimination on the grounds of sexual orientation. In that case the employment tribunal held that where a homosexual was committed to working for the Church of England, he should expect to discuss the perceptions of homosexuality within the Church during a job interview, and that this did not constitute harassment. However, as he had been the preferred candidate after competitive interview, the failure to offer him the job was an act of direct sexual orientation discrimination. The GOR defence was not made out on the facts.

There is also a burgeoning case law on age discrimination. For example, in *Thomas v Eight Members Club and Killip*,²⁷ an employment tribunal awarded £1500 in damages for injury to feelings to an employee who had been discriminated against on the grounds of her age. The employee had been told that she was too young to perform her job and dismissed in breach of contract. In *McCoy v McGregor and Sons Limited and others*,²⁸ a Northern Ireland Industrial Tribunal found that a timber merchant had discriminated against a job applicant on the grounds of his age. Having advertised for a sales representative with 'youthful enthusiasm', the employer rejected the 58 year old claimant with over 30 years' relevant experience and appointed two significantly less experienced applicants, both 15 years younger than the claimant, instead.

The cases we have just considered have, of course, raised some of the fundamental principles of anti-discrimination law. We shall now examine those principles in more detail.

C. The Main Principles of Anti-discrimination Law: Direct and Indirect Discrimination

1. Direct Discrimination

1.1 Defining direct discrimination

Direct discrimination is prohibited under all the strands. For example, s.1(2)(a) SDA provides:

In any circumstances relevant for the purposes of a provision to which this subsection applies, a person discriminates against a woman if –

(a) on the ground of her sex, he treats her less favourably than he treats or would treat a man,

The 'but for' test, laid down by *James v Eastleigh Borough Council*,²⁹ is now the standard test for determining direct discrimination. Eastleigh BC charged 75p admission to its swimming pool but admitted those over 'state pensionable age' for free. Mr and Mrs James were both 61. Due to the discriminatory state pension age, she got into the swimming pool for free; he had to pay. Lord Bridge said that the expression 'pensionable' age was no more than a convenient shorthand for the age of 60 in a woman, 65 in a man. He said the correct test was an objective one: 'would the complainant have received the same treatment from the defendant but for his or her sex' (ie 'would the plaintiff, a man of 61 have received the same treatment as his wife

²⁶ ITS/1602844/2006.

²⁷ ET/2202603/2007.

²⁸ 00237/07IT.

²⁹ [1990] IRLR 288.

but for his sex’). He said that an affirmative answer is inescapable. Therefore, when a gender-based criterion (e.g. state pensionable ages) is used, this is unlawful even if applied with a benign motive. The only *intention* required is to perform the act of less favourable treatment.

Direct discrimination, by definition, involves a comparator who is similarly situated. This has led to problems in the dress code cases, as can be seen in *Smith v Safeway plc*.³⁰ S was employed as a delicatessen assistant in a Safeway supermarket. He was dismissed when his ponytail grew too long to be kept under his hat. Safeway’s dress code for men provided for tidy hair, not below collar-length; women, by contrast, were allowed shoulder length hair but it had to be kept clipped back. Reversing the EAT’s decision that the distinction between men and women’s hair length was self-evidently less favourable and sex-discriminatory, the Court of Appeal said that discrimination is not failing to treat men and women the same. If discrimination is to be established, it is necessary to show not merely that the sexes were treated differently but that the treatment accorded to one is less favourable than that accorded to the other. Philips LJ said that an appearance code which applies a standard of what is conventional adopts an even-handed approach between men and women and not one that is discriminatory. Appearance codes are not discriminatory provided they enforce a common principle of smartness or conventionality, and taken as a whole (and not garment for garment – the so-called ‘package approach’), neither gender is treated less favourably.

But what has happened to the rule in *James v Eastleigh*? The EAT tried to answer that question in *Department of Work and Pensions v. Thompson*³¹ where Jobcentre Plus had a policy of requiring all staff to dress ‘in a professional and businesslike way’ which meant a collar and tie for men with women being required to dress appropriately and to a similar standard. Thompson, an administrative assistant with no contact with the public, refused to wear a collar and tie and received a formal warning. The ET found direct discrimination: men were required to wear clothing of a particular kind; women had a greater choice. The EAT said that the ET had misunderstood *James*: the ‘but for’ test applied only once less favourable treatment has been established. Otherwise, the EAT said, differences in treatment between men and women will always be regarded as less favourable treatment. It said that the issue which the employment tribunal should have addressed was whether the requirement for male members of staff to wear a collar and a tie, while no particular form of dress was required for female members of staff, meant that male members of staff were being treated less favourably than female members of staff.

1.2 GOQs/GORs

According to the orthodoxy while indirect discrimination can be saved by an open-ended defence of justification, direct discrimination can be saved only by a specific provision of the Act (i.e. a genuine occupational qualification (GOQs), or an explicit statutory exception from the coverage of the equal treatment principle). GOQs are an exhaustive list of exceptions found in the SDA and RRA 1976. For example, s.7 SDA lists a number of GOQs in which discrimination is lawful provided that the employer has taken *reasonable steps* to avoid imposing the GOQ. Eight grounds are covered including authenticity (eg in dramatic performance), privacy and decency.

The EC Directives originally intended to follow the structure found in the British law. However, the final version of the Directives used the language of genuine occupational *requirements* (GORs) rather than qualification. They also differ in an important respect from

³⁰ [1996] IRLR 456.

³¹ [2004] IRLR 348.

GOQs: although they are narrowly construed, they are in fact potentially open-ended. For example, Reg. 7(2) of the Sexual Orientation Regulations provides:

- (2) *This paragraph applies where, having regard to the nature of the employment or the context in which it is carried out-*
- (a) *being of a particular sexual orientation is a **genuine and determining occupational requirement**;*
 - (b) *it is proportionate to apply that requirement in the particular case; and*
 - (c) *either*
 - (i) *the person to whom that requirement is applied does not meet it, or*
 - (ii) *the employer is not satisfied, and in all the circumstances it is reasonable for him not to be satisfied, that that person meets it,*
- and this paragraph applies **whether or not the employment is for purposes of an organised religion.***

Thus, the employer needs to show a ‘genuine and determining occupational requirement’ but the statute does not spell out what that requirement might be. There is one further striking feature about Regulation 7(2): it gives priority to the Religion and Belief Regulations priority over the sexual orientation regulations.

The Religion and Belief Regulations contain two forms of GORs:

- the general GOR in Regulation 7(2) which applies whether or not the employer has an ethos based on religion or belief. This follows the model laid down in the Sexual Orientation Regulations;
- the broader GOR in Reg 7(3) which is available to an employer which does have an ethos.³² This GOR could not be invoked in *McNab* (considered above) because the employer was, in fact the local authority, not the school, and the local authority did not have an ‘ethos’.

The Age Discrimination Regulations also contain a GOR drafted in similar terms to the sexual orientation GOR. However, it is anticipated that it will be little used because the Age Regulations, consistent with the Directive but unlike all other strands, allow both direct *and* indirect discrimination to be objectively justified. This can be seen in *Seldon v Clarkson Wright and Jakes*³³ where an employment tribunal held that the compulsory retirement of a partner in a law firm was direct age discrimination. However, the tribunal said that the discrimination could be objectively justified in that a compulsory retirement age was a proportionate means of achieving a legitimate aim. The tribunal accepted the firm’s argument that it needed a compulsory retirement age for partners in order to ensure that associates stayed with the firm and were given the opportunity of partnership after a reasonable period. It also said that a compulsory retirement age was necessary for the maintenance of a congenial and supportive culture within the firm by avoiding confrontation with underperforming partners who are close to retirement.

³² (3) *This paragraph applies where an employer has an ethos based on religion or belief and, having regard to that ethos and to the nature of the employment or the context in which it is carried out -*

(a) *being of a particular religion or belief is a genuine occupational requirement for the job;*
(b) *it is proportionate to apply that requirement in the particular case; and*
(c) *either -*

(i) *the person to whom that requirement is applied does not meet it, or*

(ii) *the employer is not satisfied, and in all the circumstances it is reasonable for him not to be satisfied, that that person meets it.*

³³ ET/1100275/2007.

1.3 Positive Action

Nothing in British law either requires or permits “reverse discrimination” in favour of the protected groups.³⁴ However, *positive action* is allowed. It can be used to encourage people from particular age/sex/racial groups to take advantage of opportunities for training or work experience schemes, or encourage them to apply for particular employment. It can only be done when a particular group has been identified as under-represented in a certain area of employment. Positive action may include introducing fair selection procedures, training programmes or targeting job advertisements at a particular group.³⁵ Positive action is not the same as positive discrimination, and does not involve treating particular groups more favourably when recruiting; employers must make sure that employees are hired or promoted on merit alone.³⁶ EC Law may well allow states to go further - and possibly engage in some very limited positive discrimination - but the UK has not taken advantage of this possibility in respect of, for example, sex, race and ethnic origin, colour and nationality, sexual orientation, religion and belief.

Disability does, however, deserve special attention in this context. All the other strands are drafted symmetrically (eg discrimination against women applies equally to men). Disability is different because it is drafted asymmetrically (i.e. the rights can be enforced only by the disabled; not by the able-bodied). Therefore, while the disabled can always argue that they are being treated less favourably than the able bodied, the able bodied cannot argue they are being treated less favourably than the disabled. This means that there is, in fact, scope in UK law for positive discrimination in favour of the disabled. Similarly, because direct age discrimination can be objectively justified there may well be scope under the Age Regulations to engage in positive discrimination.

1.4 Harassment

Prior to the EC Directives of 2000, it used to be the case that unwanted sexual attentions and racial insults only fell within the SDA and RRA if they constituted a “detriment”.³⁷ This approach was much criticized because it depended on the woman showing that she had been treated less favourably than a man. If she could not show this, she lost her claim. The damaging effect of this approach can be seen in *Stewart v Cleveland & Guest Engineering Ltd*³⁸ where the Court ruled that a display of female pin-ups did not constitute less favourable treatment of a woman since she had not shown that a hypothetical male would have been differently treated had he complained. These problems have now been eased by the fact that, as a result of EC Law, harassment is a not a form of discrimination but a separate, freestanding unlawful act. This can be seen, for example, in s.3A RRA 1976 in respect of race and ethnic origin (the old rules still apply to harassment on the grounds of colour or nationality):

3A.(1) A person subjects another to harassment in any circumstances relevant for the purposes of any provision referred to in section 1(1B) where, on grounds of race or ethnic or national origins, he engages in unwanted conduct which has the purpose or

³⁴ e.g. *Jepson v The Labour Party* [1996] IRLR 116 but now see Sex Discrimination (Election Candidates) Act 2002 which excludes political parties from Parts II and III of the SDA and enable them to reduce inequality by women-only lists.

³⁵ See eg see SDA, ss.47 and 48, RRA. ss.37 and 38, and the EOC Code of Practice paras.37-40 and CRE Code of Practice paras.1.33 to 1.37.

³⁶ <http://www.equalityhumanrights.com/en/yourrights/equalityanddiscrimination/age/pages/age.aspx>.

³⁷ SDA s.6(2)(c); RRA, s.4(2)(c).

³⁸ [1994] IRLR 440.

effect of –

(a) violating that other person's dignity, or

(b) creating an intimidating, hostile, degrading, humiliating or offensive environment for him.

(2) Conduct shall be regarded as having the effect specified in paragraph (a) or (b) of subsection (1) only if, having regard to all the circumstances, including in particular the perception of that other person, it should **reasonably** be considered as having that effect.

The definition has a subjective and an objective element: subjective in that it takes account, for example, the ‘offensive environment for him (ie the complainant)”; objective by virtue of the reference to ‘reasonably’.

2. Indirect discrimination

Indirect discrimination has had a long and turbulent history in English law. The original test was strict and often depended on the use of statistics to show disparate impact.³⁹ This original test still applies to all areas of discrimination with the exception of employment matters. The Article 13 directives introduced a more relaxed test for indirect discrimination and this has now been extended to sex discrimination as well. The test is:

(b) he applies to her a provision, criterion or practice which he applies or would apply equally to a man, but –

(i) which puts or would put women at a particular disadvantage when compared with men,

(ii) which puts her at that disadvantage, and

(iii) which he cannot show to be a proportionate means of achieving a legitimate aim.

Breaking this test down into its component parts, the first limb is to show that the employer has applied to the woman a provision, criterion or practice (PCP) which he applies or would apply to a man. This is much broader than the original criteria of ‘requirement or condition’. In *British Airways v Stamer*⁴⁰ a BA pilot challenged BA’s decision to reject her request to work 50% of full time hours. This ad hoc management decision was deemed to be a PCP but probably would not have been a ‘requirement or condition’.

The second limb is to show that the PCP applies or would apply equally to a man but which puts the woman at a *particular disadvantage*. The language of ‘particular disadvantage’ is intended to be broader than the original statutory language of a requirement or condition ‘which is such that the proportion of women who can comply with it is *considerably smaller* than the proportion of men who can comply with it’. Nevertheless, the language of ‘particular disadvantage’ still implies some comparative element. Therefore, there is still a need to define the pool of people in which the woman is particularly disadvantaged and then

³⁹ 1. - (1) In any circumstances relevant for the purposes of any provision of this Act, other than a provision to which subsection (2) applies, a person discriminates against a woman if –

(b) he applies to her a requirement or condition which he applies or would apply equally to a man but –

(i) which is such that the proportion of women who can comply with it is **considerably smaller** than the proportion of men who can comply with it, and

(ii) which he cannot show to be justifiable irrespective of the sex of the person to whom it is applied, and

(iii) which is to her detriment because she cannot comply with it.

⁴⁰ [2005] IRLR 862.

to show her disadvantage in that pool. The consultation document says that the ‘particular disadvantage’ provision recognises that ‘it is not always possible or necessary to use detailed statistical calculations. However, ETs will still need to consider whether a PCP causes disadvantage to a particular group of people. Statistics could be helpful in establishing evidence of particular disadvantage, however such evidence could also come from experts or other witnesses’.

The problems of defining the pool and disadvantage in that pool can be seen in *Rutherford (No.2) v. Secretary of State for Trade and Industry*.⁴¹ Rutherford was dismissed on the grounds of redundancy but, at 67, could not claim unfair dismissal/redundancy because the Employment Rights Act 1996 prevented employees who had reached the age of 65 from bringing a claim. This statutory bar was, he argued, indirectly discriminatory against men on the grounds of *sex* contrary to Article 141 EC on equal pay. (He could not argue age discrimination - which this case more naturally concerned - because the prohibition against age discrimination, introduced by Directive 2000/78, did not come into force until 2006.)

In the House of Lords, Lord Walker adopted the most conventional discrimination law analysis. He accepted the pool advocated by the Secretary of State ie those aged between 16 and 79 with one year’s continuous service. On the question of disparate impact, he embarked on a careful analysis of the thorny question of whether this can be shown through the ‘advantage-led’ or ‘disadvantage-led’ approach. The advantage-led or ‘success rates’ approach considers whether the proportion of one group who *can* comply with the requirement is considerably smaller than the proportion of the other group, while the disadvantage-led or ‘failure rates’ approach focuses on the question whether the proportion of one group who *cannot* comply with the requirement is considerably larger than the proportion of the other group. The disadvantage-led approach tends to favour the applicant.

While not ruling out the disadvantage-led approach, Lord Walker did say that the more extreme the majority of the advantaged in both pools - here 13.5 million men to 12.5 million women, a gender ratio of 1.08:1 (or 1:1.004 if taken as a proportion of the whole pool) - the more difficult it was to pay much attention to the result of the disadvantage-led approach - here 195,200 men to 124,9000 women, a ratio of 1.56:1 (or 1.44:1 as a proportion of the whole pool). Thus, even though he admitted that the disadvantage ratio did, arguably, constitute a ‘considerable difference’, he said that it was irrelevant on the facts of *Rutherford* since the advantage-led ratio was the only relevant figure and that did not constitute a considerable difference. Since no disparate impact was found, he did not need to consider the question of objective justification.

Lord Nicholls, while claiming that he agreed with Lord Walker in fact appeared to apply the disadvantage-led approach. He held that a ratio of women and men who were adversely affected of 1:1.4 was not sufficient to establish the necessary degree of disparate impact as between men and women and so he too, in a short speech, found no disparate impact.

The speeches of the other three Law Lords (Scott, Rodger and Baroness Hale) were less clear. It seems that it was the choice of pool - to include those under 65 – that particularly stuck in the majority’s craw: according to Baroness Hale ‘one should not be bringing into the comparison people who have no interest in the advantage in question’. Beyond that, as Lord Walker curtly noted, it is not ‘easy to extract from their opinions a single, easily-stated principle’. The essence of the majority’s view seemed to be that since everyone over 65 was treated in the same way there was no discrimination, despite the fact that the Secretary of

⁴¹ [2006] UKHL 19, [2006] IRLR 551.

State had conceded that ‘a considerably higher proportion of men over 65 than of women over 65 work’.

This case shows just how hard it can be to show disparate impact. Assuming, the claimant overcomes this hurdle, she must then show that she has indeed put at a disadvantage. Assuming that she can do this, the burden then shifts to the employer to show that the PCP is a ‘proportionate means of achieving a legitimate aim’. This new version of the justification contrasts with the earlier test requiring the employer to show that the provision, criterion or practice was justifiable *irrespective of the sex* of the person to whom it is applied. There is a dispute as to how different the two tests are in practice. The classic formula used by the Court of Justice in *Bilka-Kaufhaus*⁴² has been incorporated into British case law. For example, Sedley LJ said in *Allonby v. Accrington & Rosendale College*⁴³ that:

Once a finding of a condition having a disparate and adverse impact on women has been made, what was required was at the minimum a critical evaluation of whether the college’s reasons demonstrated a real need to dismiss the applicant; if there was such a need, consideration of the seriousness of the disparate impact of the dismissal on women including the applicant; and an evaluation of whether the former were sufficient to outweigh the latter.

If the British courts continue to apply this formula, the differences between the two tests may not be as great as would first appear.

3. Disability Related Discrimination

There is no prohibition against indirect discrimination as such in the DDA 1995. Instead, the more difficult concept of ‘disability related discrimination’ (DRD) is used in its place. S.3A(1) provides:

.. a person discriminates against a disabled person if:

(a) for a reason which relates to the disabled person’s disability, he treats him less favourably than he treats or would treat others to whom that reason does not or would not apply, and

(b) he cannot show that the treatment in question is justified

Thus, an employer’s treatment of a disabled person amounts to discrimination if (1) it is for a reason related to his disability but is not the disability itself; (2) the treatment is less favourable than the way in which the employer treats or would treat others to whom that reason does not apply (ie the comparator for DRD is a person to whom the disability related reason does not apply whereas the comparator in direct discrimination is a person without the disability but whose relevant circumstances are the same); and (3) the employer cannot show that the treatment is justified.

DRD can best be understood through an example taken from the DRC’s code of practice. A disabled man is dismissed for taking six months’ sick leave which is disability-related. The employer’s policy, which has been applied equally to all staff (whether disabled or not), is to dismiss all employees who have taken this amount of sick leave. The disability-related reason for the less favourable treatment of the disabled person is the fact of having taken six months’ sick leave, and the correct comparator is a person to whom that reason does not apply – that is, someone who has not taken six months’ sick leave. Consequently, unless the employer can show that the treatment is justified, it will amount to disability-related discrimination because

⁴² Case 170/84 *Bilka-Kaufhaus* [1986] ECR1607.

⁴³ [2001] IRLR 364.

the comparator would not have been dismissed. However, the reason for the treatment is not the disability itself (it is only a matter related to it, namely the amount of sick leave taken). So there is no direct discrimination.

There is an additional, unique feature of disability law: the duty of reasonable accommodation. This is a free standing claim found in s.3A(2) DDA which says that ‘a person also discriminates against a disabled person if he fails to comply with a duty to make reasonable adjustments imposed on him in relation to the disabled person.’⁴⁴ There is no possibility of the employer objectively justifying its failure but the adjustments have to be reasonable only (ie not unreasonable – an objective test).

4. Equal Pay

Under Article 141 EC, the European Court of Justice tends to focus on the question of whether the national rule directly or indirectly discriminates against the woman, applying principles similar to those outlined above. While indirect discrimination can be objectively justified, the absence of any express derogation to the principle of equal pay in Article 141 has generated difficulties. This problem has been overcome in the British Equal Pay Act 1970 due to its different structure.

Under the Equal Pay Act, the complainants have to establish three conditions: there must be (1) a comparator of the opposite sex who is, or has been, (2) engaged in equal work or work of equal value and (3) that the comparator had to be employed in the same establishment or service) and then the burden shifts to the employer to show objective reasons for the pay differential unrelated to sex (the so-called genuine material factor defence). In *Rainey*⁴⁵ the House of Lords applied the *Bilka* test to the GMF defence. Thus, all pay differentials between men and women can be objectively justified. No account is taken of whether those differentials are directly or indirectly discriminatory; no reference is made in the statute to discrimination.

However, in *Strathclyde v. Wallace*⁴⁶ Lord Browne-Wilkinson tried to reconcile the Equal Pay Act model with the Article 141 approach – and ended up with a highly convoluted result. However, he did make clear that when the reason for the difference in pay is not ‘sex tainted’ then the high *Bilka* test did not need to be satisfied; it was enough that the reason given was significant and material in a causative sense rather than in a justificatory sense.⁴⁷ This can be seen on the facts of the case itself. Nine teachers carried out the duties of a principal teacher but none of them received the higher grade salary. They were among a group of 134 unpromoted teachers, 81 were men and 53 women. Lord Browne-Wilkinson therefore noted that the disparity in pay had nothing to do with gender.

⁴⁴ See also *s.4A(1)* which details when the duty of reasonable accommodation arises: *Where-(a) a provision, criterion or practice applied by or on behalf of an employer; or (b) any physical feature of premises occupied by the employer, places the disabled person concerned at a substantial disadvantage in comparison with persons who are not disabled, it is the duty of the employer to take such steps as it is reasonable, in all the circumstances of the case, for him to have to take in order to prevent the provision, criterion or practice, or feature, having that effect.*

⁴⁵ *Rainey v Glasgow Health Board* [1987] IRLR 26.

⁴⁶ [1998] IRLR 146.

⁴⁷ See also *Glasgow City Council v Marshall* [2000] IRLR 272, HL.

D. Structure of Proof and Remedy of Employment Discrimination

1. Proof of discrimination

The burden of proof is essentially reversed in discrimination cases. In the field of sex discrimination this was achieved by The Sex Discrimination (Indirect Discrimination and Burden of Proof) Regulations 2001,⁴⁸ implementing the EC Burden of Proof Directive. The same has been achieved through the Article 13 Directives. Section 63A(2) SDA now provides that-

Where on the hearing of the claim, the claimant proves facts from which the tribunal could, apart from this section, conclude in the absence of an adequate explanation that the respondent-

(a) has committed an act of discrimination against the complainant which is unlawful by virtue of Part 2 [discrimination in the employment field], or

(b) is by virtue of section 41 or 42 to be treated as having been committed such an act of discrimination against the complainant,

the tribunal shall uphold the complaint unless the respondent proves that he did not commit, or, as the case may be, is not to be treated as having committed, that act.

The case law has fleshed out the application of these tests.⁴⁹ In *Igen* the Court of Appeal, noting that the change in the burden of proof altered the pre-existing position in respect of the burden of proof, envisaged a two stage approach. Once the claimant has proved facts from which the tribunal can conclude, in the absence of a proper explanation, that the respondent has committed an unlawful act of discrimination, the second stage requires the respondent to prove that it did not commit the unlawful act.⁵⁰

⁴⁸ SI 2001/2660.

⁴⁹ *Barton v Investec Henderson Crosthwaite Securities* [2003] IRLR 332 (the so-called *Barton guidelines* as revised by the Court of Appeal in *Igen v Wong* [2005] IRLR 258.

⁵⁰ The Court said:

STAGE ONE (1) Pursuant to section 63A of the SDA, it is for the claimant who complains of sex discrimination to prove on the balance of probabilities facts from which the tribunal could conclude, in the absence of an adequate explanation, that the respondent has committed an act of discrimination against the claimant which is unlawful by virtue of Part II or which by virtue of s. 41 or s. 42 of the SDA is to be treated as having been committed against the claimant. These are referred to below as "such facts".

(2) If the claimant does not prove such facts he or she will fail.

(3) It is important to bear in mind in deciding whether the claimant has proved such facts that it is unusual to find direct evidence of sex discrimination. Few employers would be prepared to admit such discrimination, even to themselves. In some cases the discrimination will not be an intention but merely based on the assumption that "he or she would not have fitted in".

(4) In deciding whether the claimant has proved such facts, it is important to remember that the outcome at this stage of the analysis by the tribunal will therefore usually depend on what inferences it is proper to draw from the primary facts found by the tribunal.

(5) It is important to note the word "could" in s. 63A(2). At this stage the tribunal does not have to reach a definitive determination that such facts would lead it to the conclusion that there was an act of unlawful discrimination. At this stage a tribunal is looking at the primary facts before it to see what inferences of secondary fact could be drawn from them.

(6) In considering what inferences or conclusions can be drawn from the primary facts, the tribunal must assume that there is no adequate explanation for those facts.

(7) These inferences can include, in appropriate cases, any inferences that it is just and equitable to draw in accordance with section 74(2)(b) of the SDA from an evasive or equivocal reply to a questionnaire or any other questions that fall within section 74(2) of the SDA.

2. Enforcement and Remedies

Two principal methods of enforcement are utilized: first, strategic enforcement by the EHRC which deals with discriminatory practices by industries, firms and institutions combined with the power to fund individual cases, intervene in other cases and hold investigations, although compliance is generally encouraged by voluntary means. Secondly, individuals can bring complaints to an employment tribunal.

2.1 Remedies under the anti-discrimination legislation

Where a tribunal finds that a complaint of unlawful discrimination is well-founded it must make such of the following orders as it considers just and equitable:

- a declaration of the rights of the parties;
- recommendation: this may be made only in respect of the individual complainant and cannot be a general one that a discriminatory practice should cease. Nor can the tribunal recommend promotion to the next suitable vacancy.⁵¹
- compensation. As a result of the ECJ's decision in *Marshall (No.2)*,⁵² implemented in the UK by the Sex Discrimination and Equal Pay (Remedies) Regulations 1993,⁵³ there is no longer any upper limit on awards for sex discrimination, and the tribunal is allowed to award interest. The upper limit on awards of compensation under the RRA was removed by the Race Relations (Remedies) Act 1994, and there are regulations allowing the award of interest. In fact, levels of compensation are remarkably low (see tables 2-4).

The compensation is awarded on a tortious - not contractual - basis.⁵⁴ The following is an outline of the principles which apply:

- financial compensation must be adequate to enable the loss sustained to be made good;
- this includes an award for injury to feelings; this should not be based on a deterrent basis but should be just to both parties with some similarity to general damages in

(8) Likewise, the tribunal must decide whether any provision of any relevant code of practice is relevant and if so, take it into account in determining, such facts pursuant to section 56A(10) of the SDA. This means that inferences may also be drawn from any failure to comply with any relevant code of practice.

(9) Where the claimant has proved facts from which conclusions could be drawn that the respondent has treated the claimant less favourably on the ground of sex, then the burden of proof moves to the respondent.

STAGE TWO (10) It is then for the respondent to prove that he did not commit, or as the case may be, is not to be treated as having committed, that act.

(11) To discharge that burden it is necessary for the respondent to prove, on the balance of probabilities, that the treatment was in no sense whatsoever on the grounds of sex, since "no discrimination whatsoever" is compatible with the Burden of Proof Directive.

(12) That requires a tribunal to assess not merely whether the respondent has proved an explanation for the facts from which such inferences can be drawn, but further that it is adequate to discharge the burden of proof on the balance of probabilities that sex was not a ground for the treatment in question.

(13) Since the facts necessary to prove an explanation would normally be in the possession of the respondent, a tribunal would normally expect cogent evidence to discharge that burden of proof. In particular, the tribunal will need to examine carefully explanations for failure to deal with the questionnaire procedure and/or code of practice.

If the second stage is reached and the respondent's explanation is inadequate, it is 'necessary' for the tribunal to conclude that the complaint must be upheld.

⁵¹ *British Gas v Sharma* [1991] IRLR 101.

⁵² [1993] IRLR 445.

⁵³ SI 1993/2798.

⁵⁴ See eg SDA s.65(1)(b), RRA s.56(1)(b), DDA s.8.

personal injury cases ; see *Vento (No.2) v. Chief Constable of West Yorkshire Police* indicating a lower category of £500-£5,000 for less serious cases where the act of discrimination was an isolated or one off occurrence, a middle band of £5-15,000 for serious cases, a higher category of £15,000-£20,000 in severe cases eg where there has been a lengthy campaign of discriminatory harassment; only exceptionally should the award exceed £25,000);

- the award for injury to feelings may include aggravated damages where the respondent has acted in a high-handed, malicious or insulting or oppressive way;⁵⁵
- exemplary damages may be awarded where servants of the government act unconstitutionally or oppressively or the respondent's conduct has been calculated to make a profit;⁵⁶
- past and future loss of earnings are based on an evaluation of loss of a chance;
- the complainant is under duty to mitigate her loss, but burden of proving failure to mitigate is on party alleging it;
- the ordinary principles of causation and remoteness apply;
- where there is a discriminatory unfair dismissal the award should be made under the discrimination legislation (no limit) .

The Sex Discrimination and Equal Pay (Miscellaneous Amendment) Regulations amended SDA s.66(3) so as to allow an Employment Tribunal to award damages for unintentional indirect discrimination (thus giving effect to EC law).⁵⁷ No similar amendment has been made to RRA s.57(3).

Finally, a term of a contract which provides for unlawful discrimination is void, except that as against the person who is the subject of the discrimination it is merely unenforceable.⁵⁸ In the case of sex discrimination, this applies to collective agreements, employers' rules and the rules of professional bodies in the same way as it applies to contracts.⁵⁹ However, the SDA 1986 took away the jurisdiction of the Central Arbitration Committee (CAC) under the EqPA, s.3 to revise (directly) discriminatory collective agreements. This is considered further below.

2.2 Equal Pay Act

Every contract of employment is deemed to include an "equality clause".⁶⁰ In practice this means that that each *term* in the woman's contract must be not less favourable than the equivalent term in the male comparator's contract where the man is employed in like work, work rated as equivalent or work of equal value to the woman.⁶¹ In *Murphy v Bord Telecom Eirean*⁶² the Court ruled that if a woman's work is worth more than the man's in an equal value claim she is entitled to the same pay as the man.

⁵⁵ *Alexander v Home Office* [1988] IRLR 190.

⁵⁶ *Kuddus v Chief Constable of Leicestershire* [2001] 3 All ER 193.

⁵⁷ SI 1996/438.

⁵⁸ See g SDA s.77, RRA s.72.

⁵⁹ SDA 1986, s.6.

⁶⁰ EqPA s.1(1).

⁶¹ *Hayward v Cammell Laird Shipbuilders (No.2)* [1988] IRLR 464. In *Barber v Guardian Royal Exchange Assurance Group* Case C-262-88 [1990] IRLR 240 the ECJ held that "the principle of equal pay [under Art.141 EC] applies to each of the elements of remuneration granted to men and women".

⁶² Case C-157/86 [1988] ECR 673.

Tribunals may also make a declaration of rights as well as an award for payment of arrears of remuneration or damages. The original EqPA imposed certain procedural limitations in particular that the award may not be in respect of a time earlier than two years before the date on which proceedings were instituted. However in *Levez*⁶³ the European Court of Justice held that this was contrary to the principle of effectiveness under EC law. When applying the ECJ's decision, the EAT held that the 6-year limitation period for breach of contract had to be applied under the EqPA 1970.⁶⁴ The Equal Pay Act (Amendment) Regulations 2003 gave effect to this ruling. Women can now claim arrears back six years.⁶⁵ This has contributed to some of the many problems currently facing local authorities in respect of north-east equal pay litigation which is considered in the final section.

E. Relationship between Employment Discrimination Law and Employment Policy

The link between anti-discrimination law and employment policy has not always been clearly articulated. The moral case for anti-discrimination legislation was made in the *Discrimination Law Review*:⁶⁶

Our aim is for every single individual to have the chance to realise their potential – to be able to bridge the gap between what they are and what they have it in themselves to become. Equality is a fundamental part of a fair society in which everyone can have the best possible chance to succeed in life. There is a clear moral imperative for this – there is no place in twenty-first century Britain for homophobia, racism and other aspects of discrimination which can destroy lives, poison communities and weaken the fabric of our national life. We all want to live in a society where everyone's rights are properly respected. These are basic decent values in our democratic society.

Yet even the moral case for non-discrimination is tied up with macroeconomic benefits: the chance for all to fulfil their potential and be able to succeed in life with the social and economic consequences this might entail. However, the government is acutely aware of the need to make an economic case for equality. It therefore continues that:

But there is also a clear business case for equality. In a rapidly changing world we cannot as a nation afford to waste potential talent and skills of all individuals in our increasingly diverse society. We want a flourishing economy in which all have equal opportunities to thrive and contribute. The Confederation of British Industry has argued: "Employers recognise the benefits of effective diversity and inclusion policies, and the business community supports positive action. The one resource that in today's knowledge economy gives sustainable competitive advantage is the skills, understanding and experience of people. Discrimination in employment, wherever it exists, squanders effort, ideas and, ultimately, business sales. It leads to wasted potential, wasted labour and wasted revenues".

The government also points to the wider package of measures it has put in place to create a fairer and more equal society. Included in this list is:

- The introduction of the National Minimum Wage which has contributed to a 2% drop

⁶³ C-326/96 *Levez v. T.H. Jennings (Harlow Pools) Ltd.* [1998] ECR I-7835.

⁶⁴ *Levez (No. 2)* [1999] IRLR 764.

⁶⁵ s.2ZB(3).

⁶⁶ P.8.

in the pay gap since 1997;

- Over 2 million more people are in work than in 1997, with lone parent employment at a record high.
- Nearly 2 million pensioners have been lifted out of absolute poverty, and the government says it is spending £11bn extra each year in real terms on pensioners;
- The introduction of ‘the biggest ever package of support for working families, including a doubling of paid maternity leave and pay, paid paternity leave for new fathers, and the right to request flexible working for parents of young and disabled children and for carers of adults’.
- The government also says that it has ‘joined up action across government on key issues such as equality for ethnic minorities, disability equality, domestic violence, and the pay gap between women and men.’

The government also notes that it has ‘begun to think in terms not just of prohibiting unfair discrimination, but also of promoting equality and cohesion in more positive ways, especially in how we design and deliver our public services.’⁶⁷ Here the racial, disability and gender equality duties have a significant role to play. Take, for example, the case of the gender equality duty (GED) introduced into the SDA by the Equality Act 2006. This places a statutory duty on all public authorities to eliminate unlawful discrimination and harassment and promote equality of opportunity between men and women. It applies to all government departments, county, borough and district councils, local education authorities, state school governing bodies, higher education establishments, police authorities, probation boards, NHS trusts and the armed forces. The GED requires public authorities to draw up a gender equality scheme setting out how the authority intends to meet its obligations under the general gender duty. This scheme must be implemented following consultation with employees, service users and others (including trade unions) who appear to have an interest in the way it carries out its functions. The listed authority must report annually on the steps it has taken to implement the scheme, and must revise the scheme every three years.

Talking of the race equality duty, Arden LJ said in *R (Elias) v. Secretary of State for Defence*⁶⁸ that the clear purpose of the duty is to require public bodies to give ‘advance consideration to issues of race discrimination before making any policy decision that may be affected by the decision. This is a salutary requirement and this provision must be seen as an integral and important part of the mechanisms for ensuring the fulfillment of the aims of anti-discrimination legislation’.

F. The Important Issues Facing Employment Discrimination Law Today

1. Introduction

The gravest problem currently facing the government and the tribunal service is equal pay. As table 1 shows, cases lodged before the tribunals have risen significantly (from 8,000 in 2004-5 to over 44,000 in 2006-7). Some predict that this figure could spiral to 150,000 this year, arguing that a situation ‘already described as a “crisis” is in danger of reaching a meltdown’.⁶⁹ This is largely attributable to one man: Stefan Cross who has single handedly

⁶⁷ P.9.

⁶⁸ [2006] IRLR 934.

⁶⁹ Trevor Philips, ‘Present day Jarndyce’, *The Guardian*, 15 January 2008.

launched thousands of equal pay claims against local councils, primarily in the North East of England.⁷⁰

The background to the many disputes is as follows. Traditionally there were three groups of workers employed by local authorities: manual workers employed in accordance with White Book terms and conditions; administrative, professional, technical and clerical (APTC) employed in accordance with purple book terms and conditions; and craft workers employed in accordance with red book terms and conditions. Each group had separate collective bargaining. There was concern that this collective bargaining, as well as long established pay practices led to discrimination against women. As a result, in 1997 a so-called 'single status agreement' was concluded nationally (the 'Green Book') under which all manual and APTC jobs were to be placed on a single spine following job evaluation studies (j.e.s) which were to be carried out locally with agreement between the local authority and the trade unions. Prior to the j.e.s being conducted, the white and purple books were to remain in force.

A number of local authorities started to negotiate with trade unions and concluded agreements which aimed to strike a balance between (1) recompensing the women who had historically not received equal pay for work of equal value. Under EC - and now national law – they can claim 6 years of back pay; (2) phasing in the principle of equality so that (usually) the men on the higher pay had their wages protected for a number of years before it was reduced (so-called protected pay); and (3) protecting the council taxpayer from excessively high increases in council tax to pay for this settlement and/or cutting jobs.

Redcar and Cleveland (R&C) was the first council to implement an equal pay agreement in January 2004.⁷¹ It undertook a job evaluation process and single status was put into effect in accordance with the Green Book terms from 1 April 2004. The agreement cost £1.8 million, leading to a 4.5% increase in council tax. In addition £3.5 million was paid ex gratia out of council funds which R&C had already set aside for the purpose. This covered hurt feelings over perceived sex discrimination and compensation for employees' patience in not making claims against the council. 1600 jobs had their pay reduced but over a period of three years where a tapering pay protection scheme applied.

140 staff (cleaners, care assistants and dinner ladies) had already brought equal pay claims against the Council, using gardeners and refuse collectors as a comparator. The ET ruled in February 2004 that these women were entitled to bonuses of 40% a week paid to gardeners and attendance allowance of £34.88 a week paid to refuse workers.⁷² The effect of this decision was that the women were now being paid more than the men which the EAT in *R & C v. Degnan*⁷³ said was 'on no view' the aim of the Equal Pay Act or of Article 141'. The remedy issue fudged and this decision was upheld by Court of Appeal.⁷⁴ The council estimated that this judgment saved it £2 million.⁷⁵

Redcar v Bainbridge (No.1),⁷⁶ a case affecting 1,440 applicants, presented further problems. It concerned two groups of claimants, manual workers and white collar workers. In

⁷⁰ See his own take on the cases, see Cross, 'What good are no-win, no-fee lawyers?' (2008) 174 *Equal Opportunities Review* 18.

⁷¹ Press Release issued by Redcar and Cleveland Borough Council 'First fair deal for Town Hall workers', 29 January 2004.

⁷² 'Council workers win equal pay battle', *BBC news online*, 7 Feb 2004.

⁷³ [2005] IRLR 179.

⁷⁴ [2005] EWCA 726.

⁷⁵ Press release, 'Second landmark decision for Council's equal pay strategy', 17 June 2005.

⁷⁶ [2007] IRLR 91.

the first group, female manual workers (caterers and care workers) compared themselves with male manual workers (street sweepers, gardeners and refuse collectors). Both groups received the same basic pay but different bonuses (as in *Degnan*, the gardeners received a fixed bonus of 40%, refuse workers received a 36% bonus each week and an attendance allowance of approximately £34.00). In the second group, female white collar workers (teaching assistants and youth workers) compared themselves with male manual workers who were placed on a lower grade in the job but nevertheless received more pay.

Considering the white collar workers first, the Court of Appeal⁷⁷ extended the ECJ's decision in *Murphy v Bord Telecom Eireann* and said that equal pay claims include claims for the same pay where the work has been rated of higher value. The women therefore won their case because the council had conceded that there was no genuine material factor (GMF) defence.

In the second case, the Employment Tribunal (ET) found that the GMF defence failed in the case of gardeners because the incentive bonuses had become wholly unrelated to any genuine productivity benefits to the employer. This was not subject to appeal. By contrast, the ET found that the bonuses paid to the refuse collectors did genuinely reflect increased productivity. The EAT said that once the ET had reached this conclusion this was sufficient. The fact that the disparity had existed for some time did not affect the GMF defence. On the other hand, the ET found that the employers had failed to establish a GMF defence in respect of the attendance allowances paid to the refuse collectors. The allowances could not be objectively justified because they operated as an addition to salaries without any corresponding benefit to the employers, and there were other ways of managing absenteeism which did not involve favouring a male dominated group over a female dominated group. The EAT upheld this aspect of the decision.

The EAT also had to consider the pay protection arrangements. It ruled that although budgetary considerations could not be the sole justification for failing to give effect to equal pay they could be a factor weighed with other considerations in determining whether the difference in pay could be objectively justified. The Court said that transitional arrangements to cushion the pay of those moving to lower pay would sometimes be appropriate. However, the EAT upheld the ET's finding that, on the facts, the employers had not shown that it was objectively justified to provide pay protection to the comparators while not providing the benefits pay protection would have conferred to the claimants once they had established a right to equal pay.

The issue of pay protection arrangements for those whose pay was to be reduced under the job was also raised in *Middlesborough v Suretees*.⁷⁸ In that case there was full protection in year one; 75% of the difference in year 2; and 50% in year 3. In year 4 there was pay protection but only if there was a loss over £2000. There was no protection after that. The women claimed that they suffered on going pay discrimination. The EAT ruled that proof of a non-sex-based reason would be a complete answer to any discrimination claim direct or indirect. It said that the arguments on justification were very finely balanced. It noted that it was legitimate to protect the salary stream of employees from the potentially disastrous effects of a sudden drop in pay and to distinguish between two employees on that basis. It was also legitimate to have as an objective the introduction of a job which would eliminate discriminatory pay for the future.

⁷⁷ [2007] EWCA Civ 929.

⁷⁸ [2007] IRLR 869.

Suretees has been joined with *Redcar v Bainbridge* and they are both on appeal to the Court of Appeal (see below). In a further strand of the case law, the EAT held in *Bainbridge v Redcar & Cleveland*⁷⁹ that the six year backdated pay rule applied only to like work and equal value claims; it did not apply to work rated as equivalent claims. The EAT said that ‘It is simply wrong to say that somebody in the period prior to the job evaluation study coming into effect has had their job rated as equivalent under a job evaluation study. Plainly they did not.’⁸⁰ In reaching this conclusion, the EAT pointed out that jobs rated as equivalent were not necessarily of equal value because a job evaluation exercise might fix wide grade boundaries covering jobs of different value. So women who have had their jobs rated as equivalent can bring equal value claims in respect of earlier periods and the j.e.s may be given in evidence, but it is not conclusive.

The trade unions had troubles of their own. When negotiating agreements with the council they were also struggling to balance the competing interests of (1) the women, (2) the men whose pay was likely to be reduced; (3) the need to improve pay for future of all of its members; and (4) recognising that the council did not have unlimited resources. The trade unions decided to prioritise (2) and (3). Therefore in some agreements they settled for only 25% of back pay; 75% less than the women might otherwise have received. The women therefore sued the trade union and won before ET. However, in *GMB v Allen*⁸¹ the EAT said that there was indirect discrimination against the women but that it could be objectively justified: the legitimacy of policy was not disputed; the trade unions were entitled to determine their own priorities. The question was whether the union’s action were proportionate. The EAT said that once it was accepted that the objective or aim was legitimate, then it was difficult to see how it could be alleged that the means were inappropriate. Even though some women might have been misled, that did not suggest that other more proportionate means could have been used to achieve the same objective. Nevertheless, 3,000 negligence claims have now been brought against Unison, GMB, Unite T&G and Royal College of Nurses by Stefan Cross.⁸²

The volume of these cases are rising exponentially. So how is all this going to be resolved? As we have seen *Redcar and Cleveland v Bainbridge (No.1)* went to the Court of Appeal in January on the question of transitional arrangements: to what extent can men’s pay be protected while employers put their house in order. On the eve of the hearing, the EHRC withdrew its backing for the women’s case. According to the *Times*,⁸³ ‘The Commission’s sudden change of position is because of the “mess” on equal pay caused by the deluge of discrimination cases pursued by no-win, no-fee lawyers – even though it is accepted that many town halls have dragged their heels on equality’. Trevor Philips, chair of the EHRC, is reported as saying that to continue backing the case would be like ‘pouring petrol on to this legal forest fire’. The Commission requested to act as an intervenor instead in order to argue for a limited transitional period of two to three years so that women’s pay can be raised in a negotiated settlement with employers without leading to job cuts or savage pay cuts for men. The EHRC recognises that ‘it is not possible to deliver equal pay in government over night.

⁷⁹ [2007] IRLR 494.

⁸⁰ Para. 36.

⁸¹ [2007] IRLR 752.

⁸² J.Robins, ‘Who’s best at getting equal pay for women?’, *Observer*, 12 August 2007.

⁸³ ‘Equality watchdog drops its backing for low-paid women’s legal challenge’, *The Times*, 14 January 2008.

The total bill to councils will, it is thought, come to £3bn'.⁸⁴ Trevor Philips is therefore arguing that the EqPA 1970 should be replaced. In particular, the EHRC is advocating the introduction of representative actions which could reduce the number of equal pay claims by 90%.

Others have suggested that consideration should be given to reviving and strengthening the original s.3 EqPA 1970 jurisdiction of the CAC as a more cost-effective route to the implementation of the equality principle than individual claims.⁸⁵ They have also argued that further thought should also be given to prioritising implementation of the equality principle through collective or, where applicable, workforce agreements. The model used in the context of parental leave rights, for example, which allows collective and workforce agreements to 'adjust' the terms of statutory labour standards (so-called 'bargained statutory adjustments'), could be used in the equal pay context to provide a 'safe harbour' for agreements negotiated between employers and trade unions, as long as they satisfied certain requirements which safeguarded the interests of the workers affected.

The government's *Discrimination Law Review* did consider the possibility of an equal pay moratorium. This would mean that 'where an employer carries out an equal pay review and identifies gender inequalities in their pay systems, they would have a set period free from legal challenge, within which to rectify discriminatory pay policies and practices.' However, the government notes that while this would have the advantage of encouraging employers to address the issue of equal pay, in practice there may be considerable drawbacks. 'Protection from legal challenge for the employer could restrict an individual's access to adequate compensation or reparation. As such, it is not clear whether such an arrangement could meet European legal requirements. Also, there remain questions about what would happen to an individual's rights if any pay inequality was not properly addressed during the moratorium.' The debate is live and ongoing.

⁸⁴ 'Present day Jarndyce', *The Guardian*, Tuesday 15 January 2008.

⁸⁵ Barnard and Deakin, Response to the *Discrimination Law Review*.

Table 1: Claims accepted/ rejected by Employment Tribunals

Apr 06 to Mar 07			
	2004/05	2005/06	2006/07
Total Claims Accepted	86,181	115,039	132,577
Total Claims Initially Rejected		12,258	10,762
Of the total, those that were resubmitted and subsequently accepted		4,897	3,861
Of the total, those that were resubmitted and not accepted or never resubmitted		7,361	6,901
JURISDICTION MIX OF CLAIMS ACCEPTED			
NATURE OF CLAIM	2004/05	2005/06	2006/07
Unfair dismissal	39,727	41,832	44,491
Unauthorised deductions (Formerly Wages Act)	37,470	32,330	34,857
Breach of contract	22,788	26,230	27,298
Sex discrimination	11,726	14,250	28,153
Working Time Directive	3,223	35,474	21,127
Redundancy pay	6,877	7,214	7,692
Disability discrimination	4,942	4,585	5,533
Redundancy - failure to inform and consult	3,664	4,056	4,802
Equal pay	8,229	17,268	44,013
Race discrimination	3,317	4,103	3,780
Written statement of terms and conditions	1,992	3,078	3,429
Written statement of reasons for dismissal	1,401	955	1,064
Written pay statement	1,076	794	990
Transfer of an undertaking - failure to inform and consult	1,031	899	1,108
Suffered a detriment / Unfair dismissal – pregnancy	1,345	1,504	1,465
Part Time Workers Regulations	561	402	776
National minimum wage	597	440	806
Discrimination on grounds of Religion or Belief	307	486	648
Discrimination on grounds of Sexual Orientation	349	395	470
Age Discrimination	n/a	n/a	972
Others	5,459	5,219	5,072
Total	156,081	201,514	238,546

Source: Employment Tribunal Service Annual Report 2006-7.

Table 2: Compensation awarded by tribunals – cases with race discrimination jurisdictions

No.	%	No.	%		
<£500	1	1.05	£10000-£12499	10	10.53
£500-£999	6	6.32	£12500-£14999	2	2.11
£1000-£1999	11	11.58	£15000-£19999	9	9.47
£2000-£2999	9	9.47	£20000-£29999	6	6.32
£3000-£3999	7	7.37	£30000-£39999	4	4.21
£4000-£4999	6	6.32	£40000-£49999	0	0
£5000-£5999	5	5.26	£50000+	6	6.32
£6000-£6999	2	2.11	All	95	100
£7000-£7999	6	6.32	Maximum award	£123,898	
£8000-£8999	2	2.11	Median award	£7,000	
£9000-£9999	3	3.16	Average award	£14,049	

Source: Employment Tribunal Service Annual Report 2006-7.

Table 3: Compensation awarded by tribunals –cases with sex discrimination jurisdictions

No.	%	No.	%		
<£500	4	2.06	£10000-£12499	17	8.76
£500-£999	5	2.58	£12500-£14999	7	3.61
£1000-£1999	12	6.19	£15000-£19999	17	8.76
£2000-£2999	16	8.25	£20000-£29999	15	7.73
£3000-£3999	19	9.79	£30000-£39999	6	3.09
£4000-£4999	15	7.73	£40000-£49999	3	1.55
£5000-£5999	15	7.73	£50000+	2	1.03
£6000-£6999	15	7.73	All	194	100
£7000-£7999	11	5.67	Maximum award	£64,862	
£8000-£8999	6	3.09	Median award	£6,724	
£9000-£9999	9	4.64	Average award	£10,052	

Source: Employment Tribunal Service Annual Report 2006-7.