
37 Racial Discrimination

(See also DE leaflet ‘The Race Relations Employment Advisory Service. A specialist service for employers’ (PL 748).)

- 37.1 Discrimination on racial grounds is made unlawful by the *Race Relations Act 1976 (RRA)* which repealed and replaced the *Race Relations Acts 1965 and 1968*. Its provisions are similar to those relating to SEX DISCRIMINATION (44) in the *Sex Discrimination Act 1975 (SDA)*, and readers should refer to decisions under that Act as well as to the *RRA*.

The Commission for Racial Equality (CRE) was established by the 1976 Act to replace the Race Relations Board. The purpose and powers of the Commission are considered in 37.24-37.32 below.

37.2 MEANING OF DISCRIMINATION

Discrimination may take place in any one of three ways: direct discrimination, indirect discrimination and discrimination by way of victimisation. In deciding whether a person has been discriminated against, his position will be compared with that of someone of similar ability and qualifications in similar circumstances: like must be compared with like. [*RRA s 3(4)*; cf. 44.2 SEX DISCRIMINATION –]. Hence in *Dhatt v McDonalds Hamburgers Ltd [1991] ICR 238* it was not discriminatory to treat potential employees differently according to whether they were or were not free to work in the United Kingdom without permission, and hence it was legitimate to require evidence of such permission only from those who were not British or EC citizens.

37.3 Direct discrimination

A person discriminates directly if, on racial grounds, he treats one person less favourably than he treats or would treat other persons. [*RRA s 1(1)(a)*; cf. 44.3 SEX DISCRIMINATION]. To apply a criterion which is not itself racial, but whose fulfillment depends directly upon a person’s race will normally amount to direct discrimination, but will not do so if its application is compelled or sanctioned by statute (*Dhatt*, above). See also *R v Birmingham City Council, Ex parte Kaur [1991] COD 21*.

37.4 Indirect discrimination

A person discriminates indirectly if, on racial grounds, he applies to one person a requirement or condition which he applies or would apply equally to persons not of the same racial group as that person but

- (a) which is such that the proportion of persons in that racial group who can comply with it is considerably smaller than the proportion of persons not of that racial group who can comply with it; and
- (b) which he cannot show to be justifiable irrespective of the colour, race, nationality or ethnic or national origins of the person to whom it is applied; and
- (c) which is to the detriment of that other person because he cannot comply with it.

[*RRA s 1(1)(b)*; cf. 44.4 SEX DISCRIMINATION –].

Thus, if an employer capriciously and for no good reason required applicants for a clerical job to be wine Connoisseurs, that requirement may be considered discriminatory against Moslems who are forbidden by their religion to drink alcohol. Such a requirement may not be discriminatory in considering applicants for the job of a wine waiter whose duties include the tasting of wine.

An upper age limit of 32 for applicants for the post of administrative trainee was considered to be unlawful indirect discrimination where evidence established that the proportion of 'coloureds' in the complainant's office who could comply with the limit was zero. (*Perera v Civil Service (No 2)* [1982] ICR 350). However, Mr Perera's complaint of direct and indirect discrimination in failing to appoint him as a legal assistant was rejected. ([1983] ICR 428). It was held in *Perera* that, in order to establish unlawful indirect discrimination, the requirement or condition relied upon must be mandatory, so that failure to comply with it constituted (in that context) an absolute bar to employment. This was applied in *Meer v Tower Hamlets London Borough Council* [1988] IRLR 399, with the result that one criterion amongst several used in shortlisting for a job could not be relied upon to found a successful claim.

The importance of properly identifying the racial group for the purpose of ascertaining whether indirect discrimination has taken place was emphasised by the EAT in *Tower Hamlets London Borough Council v Qayyum* [1987] ICR 729. 'Racial group' can be defined by 'colour' so that a racial group may be of more than one ethnic origin. (*London Borough of Lambeth v Commission for Racial Equality* [1990] ICR 768) and see 37.7 below.

Whether a person 'can' comply with a condition or requirement is to be judged by what he can in practice do when the condition is invoked. (*Commission for Racial Equality v Dutton* [1989] IRLR 8).

In order to establish the defence of justification set out in (b) above, a respondent has to show not that the Condition which he seeks to apply is a necessary condition but that it is justifiable without regard to the ethnic origins of the person to whom it is applied. This involves striking an objective balance between its discriminatory effect and the reasonable needs of the respondent. (*Ojutiku v Manpower Services Commission* [1982] ICR 66); *Hampton v Department of Education and Science* [1989] ICR 179). In *Board of Governors of St Matthias Church of England School v Crizzle* [1993] ICR 40] the EAT held that there were three questions to be asked: was the respondent's objective legitimate, were the means used to achieve it reasonable in themselves, and were they justified when balanced against their discriminatory effect on principles of Proportionality?

The question of whether indirect discrimination is justifiable is one of fact for the industrial tribunal (*Singh v British Rail Engineering* [1986] ICR 22), but the tribunal must identify the standards by which it tests justification. (*Hampton*). The majority decision in the Court of Appeal in *Hampton* was overturned by the House of Lords (see [1990] ICR 511) on grounds other than justification, which was not argued in the I-house of Lords.

For requirements or conditions that Sikhs who wear turbans should wear safety helmets on construction sites, see 24.29 HEALTH AND SAFETY AT WORK - I.

37.5 **Discrimination by victimisation**

'A person ("the discriminator") discriminates against another person ("the person victimised") If any circumstances relevant for the purposes of the Act if

he treats the person victimised less favourably than in those circumstances he treats or would treat other persons. and does so by reason that the person victimised has -

- (a) brought proceedings against the discriminator or any other person under [the] Act; or

- (b) given evidence or information in connection with proceedings brought by any person against the discriminator or any other person under the Act:
- or
- (c) otherwise done anything under or by reference to [the] Act in relation to the discriminator or any other person; or
- (d) alleged that the discriminator or any other person has committed an act which . . . would amount to a contravention of [the] Act,

or by reason that the discriminator knows that the person victimised intends to do any of those things, or suspects that the person victimised has done, or intends to do, any of them.’ [RRA s 2(1); cf. 44.5 SEX DISCRIMINATION- I].

In *Aziz v Trinity Street Taxis Ltd* [1988] ICR 534 the Court of Appeal dealt with a number of points arising out of the construction of *Sec 2(1)*, and held in particular that it was necessary for a complainant under (c) to show that it was the very fact that his act had been done under or by reference to the race relations legislation that had influenced the unfavourable treatment (on the facts, the respondent association would have expelled any member who covertly recorded conversations, irrespective of whether that was done to support an allegation of racial discrimination, and therefore the complaint of victimisation failed).

A person is not protected under (d) above where it is established that the allegation made by him was false and not made in good faith. [RRA s 2(2)].

37.6 Racial grounds

Discrimination is only unlawful pursuant to *RRA* if it is on racial grounds.

‘Racial grounds’ are defined in *RRA s 3(1)* as any of the following grounds: colour, race, nationality or ethnic or national origins. A distinction is drawn between racial origin and citizenship. (*Ealing London Borough Council v Race Relations Board* [1972] AC 342; *Tejani v Superintendent Registrar for Peterborough* [1986] IRLR 502).

Discrimination is on racial grounds if the substantial or effective, though not necessarily the sole or intended, reason for the discriminatory treatment was the person’s race, colour or ethnic origin. (See *R v Commission for Racial Equality Ex pane Westminster City Council* [1984] ICR 770; affirmed in part [1985] ICR 827.)

An employee may be discriminated against on racial grounds whether the racial characteristics in question are those of the person concerned or of some other person. The only question in each case is whether the unfavourable treatment afforded to the claimant was caused by racial considerations (see *Showboat Entertainment Centre Ltd v Owens* [1984] ICR 65 at p 7]H in which a white manager of an entertainment centre was dismissed for refusing to obey an instruction to exclude all black customers; and also *Zarczynska v Levy* [1979] ICR 84; see also 37.19 below).

In *Simon v Brimham Associates* [1987] ICR 596 the Court of Appeal reached the somewhat surprising conclusion that an industrial tribunal was entitled to find that a Jew who had withdrawn a job application, when he learned that to be Jewish might preclude his selection, was not discriminated

against, in circumstances in which the interviewer had merely asked him the same question about his religion as he would have asked any candidate, not knowing whether or not he was Jewish.

37.7 FURTHER DEFINITIONS

'Racial group' means a group of persons defined by reference to colour, race, nationality or ethnic or national origins and references to a person's racial group refer to any racial group into which he falls. [*RRA s 3(J)*]. The House of Lords in *Mandla (Sewa Singh) v Dowell Lee* [1983] ICR 385 held that 'ethnic. . . origins' in the definition of 'racial group' meant a group which was a segment of the population distinguished from others by a sufficient combination of shared customs, beliefs, traditions and characteristics derived from a common or presumed common past, even if not drawn from what in biological terms was a common racial stock. On that basis, it held that Sikhs were a racial group entitled to the protection of the *RRA*.

Jews are members of a racial group (see, for example, *Seide v Gillette Industries Ltd* [1980] IRLR 427). So are gypsies in the sense of those who belong to the Romany race, though mere habitual wanderers are not. (*Commission for Racial Equality v Dutton* [1989] IRLR 8). Rastafarians are not an ethnic group (*Crown Suppliers (PSA) v Dawkins* [1993] IRLR 284; the House of Lords has given leave to appeal). The language factor alone cannot be decisive. Thus Welshmen are not divided into two racial groups according to whether or not they are Welsh-speaking. (*Gwynedd County Council v Iones and another* [1986] ICR 833).

Sec 3(1) provides that 'racial group' can be defined by colour so that a racial group, e.g. black people, may be of more than one ethnic origin. (*London Borough of Lambeth v Commission for Racial Equality* [1990] ICR 768).

Segregating a person from other persons on racial grounds is treating him less favourably than they are treated. [*RRA s 1(2)*]. Thus, it is not open to an employer to argue that the provision of segregated facilities for his black employees is not discriminatory even though the facilities provided for black workers are equal to if not better than those provided for his white employees.

37.8 DISCRIMINATION IN EMPLOYMENT

An employer is prohibited from discriminating on grounds of race at every stage of employment *at an establishment in Great Britain*. 'Establishment' is not defined by the Act (see 37.9 below). 'Employment' is defined in *RRA s 78(1)* as employment under a contract of service or of apprenticeship or a contract personally to execute any work or labour, and thus carries a broader meaning than usual (cf. 44.6 SEX DISCRIMINATION - 1). A sub-postmaster who was responsible for seeing that the work of the Post Office was carried out but was not obliged to carry out the work himself was also held not to be an employee even within the extended meaning of the Act. (*Tanna v The Post Office* [1981] ICR 374). A person working under the Youth Opportunities Programme was also held not to be employed within the meaning of *RRA s 78*. (*Daley v Allied Suppliers Ltd* [1983] ICR 90) (but see 37.15(d) below). A special constable is not employed under a contract to execute work or labour but is deemed to be in employment by virtue of *Sec 16(1)* and thus enjoys the protection of *RRA*. (*Sheikh v Chief Constable of Greater Manchester Police* [1989] ICR 373). No qualifying period of employment is necessary in order to bring a claim based on discrimination in employment.

37.9 'At an establishment in Great Britain'

Employment is to be regarded as being at an establishment in Great Britain unless the employee does his work wholly or mainly outside Great Britain. [RRA s 8(1)]. Where work is not done at an establishment as in the case of plumbers who are sent out on assignments, it is treated as done at the establishment from which the workers are sent out.

If employees neither work at nor from a particular establishment, such as market researchers who work from their homes, the work will be considered to be done at the establishment with which it has the closest connection. [RRA s 8(4)].

Employment on board a British registered ship, aircraft or hovercraft which is operated by a person who has his principal place of business in, or is ordinarily resident in, Great Britain (other than an aircraft or hovercraft which is so operated in pursuance of a contract with a person who has his principal place of business outside, or is ordinarily resident outside, the United Kingdom) is to be considered employment at an establishment in Great Britain, unless the employee does his work wholly outside Great Britain. [RRA s 8(2)(3)].

Employment on the continental shelf may, by statutory instrument, be deemed employment at an establishment in Great Britain. [RRA s 8(5)]. The *Race Relations (Offshore Employment) Order 1987 (SI 1987 No 929)* has been made pursuant to this power.

(Cf. 44.2](a) SEX DISCRIMINATION-I.)

37.10 Advertisements

An employer may not cause to be published an advertisement which indicates, or might reasonably be understood as indicating, an intention to discriminate unlawfully. [RRA s 29; cf. 44.7 SEX DISCRIMINATION – 1].

If the discrimination would be lawful, for example on the grounds that being of a particular race is a genuine occupational qualification for the job (see 37.14 (d) below), the advertisement may lawfully be placed. Therefore, a restaurateur may lawfully advertise for Chinese waiters for his Chinese restaurant.

The restrictions on discriminatory advertisements do not apply to an advertisement for employment outside Great Britain which discriminates otherwise than by reference to colour, race, or ethnic or national origin. [RRA s 29(3)]. Thus, an employer may not advertise for English applicants only for employment overseas, although he may lawfully advertise for applicants with a public school education (which might well be indirectly discriminatory) and may lawfully select only English applicants for such employment.

37.11 Engagement

An employer may not discriminate on racial grounds in relation to

- (a) the arrangements he makes for the purpose of determining who should be offered employment; or
- (b) the terms Of Which he offers employment; or
- (c) refusing or deliberately omitting to offer employment.

[RRA s 4(1)]. (See, for example, *Owen and Briggs v James* (1982] ICR 618; cf. 44.8 SEX DISCRIMINATION – 1.)

37.12 **Training and other facilities**

An employer may not discriminate on racial grounds in the terms of employment he affords an employee, or in the way he affords him access to Opportunities for promotion transfer or training, or to any other benefits facilities or services, or by refusing or deliberately omitting to afford him access to them (RRA s 4(2)(a)(b)). (*Ojutiki v Manpower Services Commission* [1982] ICR 661; cf. 44.9 SEXDISCRIMINATION -1).

37.13 **Dismissal or subjection to any other detriment**

It is unlawful for an employer to discriminate, on racial grounds against an employee of his by dismissing him, or subjecting him to any other detriment. [RRA s 4(2)(c); cf. 44.10, 44.11 SEX DISCRIMINATION - I]. Dismissal on racial grounds is also almost certainly unfair. See UNFAIR DISMISSAL - II(55). In order to bring a claim under this section an applicant needs no qualifying period of employment unlike in the case of most claims for unfair dismissal.

In De Souza v The Automobile Association [1986] ICR 514, the Court of Appeal held that the Employment Appeal Tribunal had correctly Concluded that Mrs De Souza had not been Subjected to a ‘detriment’ within the meaning of RRA s 4(2)(c) as a result of overhearing a manager say to another manager, about her, to get his typing done by ‘the Wog’. The Court held that before an employee can be said to have been subjected to a ‘detriment’ it must be found that by reason of the acts complained of, a reasonable worker would or might take the view that he had thereby been disadvantaged in the circumstances in Which he had thereafter to work. (See also *B L Cars Ltd v Brown* (1983] ICR 143.) The EAT in *Barclays Bank PLC v Kapur* [1989] ICR 142 (appeal allowed, [1989] ICR 753) suggested in a passage which was not a necessary part of its decision, that the words ‘any other detriment’ related to acts in connection with dismissal or disciplinary proceedings and were not wholly general in their scope. The correctness of this construction is, with respect, doubted. It is also open to argument whether *De Souza* was correctly decided, bearing in mind more recent cases dealing with sexual harassment (see 44.11 SEX DISCRIMINATION - I).

For dismissal of an employee *for* refusing to comply with unlawful instructions to discriminate see 37.18 below.

37.14 **EXCEPTIONS**

As a matter of Principle, these exceptions ought to be narrowly or strictly construed (*London Borough of Lambeth v Commission for Racial Equality* [1989] IRLR 379; upheld on appeal ([1990] ICR 768) although the Principle of construction was not referred to in the judgments of the Court of Appeal.)

(a) **Employment Outside Great Britain**

With the exception of advertisements indicating direct discrimination the provisions relating to discrimination do not apply where the employee does his work wholly or mainly outside Great Britain or on a British registered ship, aircraft or hovercraft, wholly outside Great Britain. [RRA ss 4, 8(1)(2); cf. 44.2](a) SEX DISCRIMINATION – 1]. In deciding whether an employee does his work wholly outside Great Britain, a court will consider whether it was within the contemplation of the parties that his duties would be performed wholly outside Great Britain. (*Deria v General Council of British Shipping* [1986] ICR 72).

(b) **Private household**

Except for discrimination by way of victimisation, the provisions relating to discrimination do not apply to employment for the purposes of a private household. [RRA s 4(3)]. Sec 4 (3) deals with employment which is for the purposes of a private household *to a substantial degree*. Thus, an applicant for a job as a chauffeur whose primary task was to drive a car for a company chairman could bring a complaint of racial discrimination. (*Heron Corporation Ltd v Commission for Racial Equality [1980] ICR 713*).

(c) **Facilities provided to public**

The provisions relating to discrimination in the giving of benefits, facilities or services [RRA s 4(2)] do not apply if the employer is concerned with the provision (for payment or not) of benefits, facilities or services of that description to the public, or to a section of the public comprising the employee in question, unless

- (i) that provision differs in a material respect from the provision of the benefits, facilities or services by the employer to his employees; or
- (ii) the provision of the benefits, facilities or services to the employee in question is regulated by his contract of employment; or
- (iii) the benefits, facilities or services relate to training.

[RRA s 4(4)]

Thus, a bank which provides loans to members of the public and to most employees on the same terms may not be taken to an industrial tribunal by an employee who is denied a loan on racial grounds if the employee is not entitled to the loan under his contract of employment. However, it will be liable to an action by that employee in the county court under the provisions of *RRA s 20* (discrimination in provision of goods, facilities or services).

(Cf. 44.18 SEX DISCRIMINATION - I.)

(d) **Genuine occupational qualification**

An employer may lawfully discriminate in the arrangements he makes for selecting employees for a job where being a member of a particular racial group is a genuine occupational qualification for the job. (This also applies to training and promotion or transfer.) [RRA s 5].

Being of a particular racial group is a genuine occupational qualification for a job only where

- (i) the job involves participation in a dramatic performance or other entertainment in a capacity for which a person of that racial group is required for reasons of authenticity; or
- (ii) the job involves participation as an artist's or photographic model in the production of a work of art, visual image or sequence of visual images for which a person of that racial group is required for reason of authenticity; or
- (iii) the job involves working in a place where food or drink is (for payment or not) provided to and consumed by the members of the public or a section of the public in a particular setting for

which, in that job, a person of that racial group is required for reasons of authenticity (thus an employer may lawfully discriminate in selecting waiters for an Indian or Chinese restaurant); or

- (iv) the holder of the job provides persons of that racial group with personal services promoting their welfare, and those services can most effectively be provided by a person of that racial group. The scope of this exception was discussed in *Tottenham Green Under-Fives' Centre v Marshall* [1989] ICR 214 and in *London Borough of Lambeth v Commission for Racial Equality* [1990] ICR 768. In *Lambeth*, the Court of Appeal held that the use of the word 'personal' in Sec 5(2)(d) indicates that the identity of the giver and the recipient of the services is important. The Court agreed with the Employment Appeal Tribunal that the RRA appears to contemplate direct contact between the giver and the recipient - mainly face to face or where there would be susceptibility to personal, physical contact. [RRA s 5(2)].

The exception applies where some of the duties fall within (i) to (iv) above as well as where all of them do, and even where those duties are merely ones which it is desirable that the post-holder should carry out and are not fundamental to the post. However, it does not apply where the duties are too trivial to be taken into account or where they have been deliberately put into the job description as a sham or smokescreen (*Tottenham Green Under Fives' Centre v Marshall (No 2)* [1991] ICR 320).

However, where an employer already has employees of a particular racial group who are capable of carrying out the duties of a vacant post and whom it would be reasonable to employ on those duties and whose numbers are sufficient to meet his likely requirements in respect of those duties without undue inconvenience, then he may not discriminate by giving the job to a person of that particular racial group, despite the fact that the vacancy may fall within (i) to (iv) above. [RRA s 5(4)].

- (e) **Acts done under statutory authority**

The Act does not prohibit acts of discrimination carried out pursuant to any enactment, Order in Council or statutory instrument, or in order to comply with a ministerial condition or requirement imposed pursuant to statute. [RRA s 41(1)].

The scope of this provision was considered by the House of Lords in *Hampson v Department of Education and Science* [1990] ICR 511. It held that the application of the defence was restricted to acts done in the necessary performance of an express obligation contained in an instrument, and did not extend to discretionary acts carried out by the Secretary of State even in circumstances where he had a positive public duty to exercise his discretion.

- (f) **Skills to be exercised outside Great Britain**

The Act does not prohibit discriminatory training of a person not ordinarily resident in Great Britain where he is being trained in skills intended to be exercised wholly outside Great Britain. [RRA s 6].

- (g) **Seamen recruited abroad**

Seamen recruited abroad for employment on any ship may lawfully be discriminated against, except if their work is concerned with exploration of the sea bed or subsoil (or the exploitation of their natural resources) on the continental shelf, save for those parts of the continental shelf in which the law of Northern Ireland applies. (RRA s 9(1)(3)).

(h) **Positive discrimination**

Positive discrimination in favour of a particular racial group, in affording access to training and encouragement to apply for particular work, is permitted to employers if at any time within the twelve months immediately preceding the doing of the act

- (i) there were no persons of that group among those doing that work at that establishment; or
- (ii) the proportion of persons of that group among those doing that work at that establishment is small in comparison with the proportion of persons of that group among
 - (A) all those employed by the employer there; or
 - (B) the population of the area from which that employer normally recruits persons for work in his employment at that establishment. [RRA s 38(1)(2)].

(Cf. 44.14 SEX DISCRIMINATION - I.)

For advice on the use of the provisions, see the booklet 'What is Positive Action?', published by the Race Relations Employment Advisory Service, 11 Belgrave Road, London SW].

Certain persons concerned with the provision of vocational training may also discriminate in favour of racial groups in similar circumstances. [RRA s 37].

Positive discrimination is also permitted to encourage membership of and postholding in trade unions and employers' organisations where there are no or proportionally few postholders or members of the relevant racial group. [RRA s 38(3)(4)].

However, positive discrimination is not a general purpose of the RRA (*London Borough of Lambeth v Commission for Racial Equality* [1990] ICR 768).

37.15 NON-EMPLOYERS COVERED BY THE EMPLOYMENT RULES

(a) **Partnerships**

It is unlawful for a firm consisting of six or more partners, in relation to a position as partner in the firm, to discriminate against a person

- (i) in the arrangements they make for the purpose of determining who should be offered that position; or
- (ii) in the terms on which they offer him that position; or
- (iii) by refusing or deliberately omitting to offer him that position; or
- (iv) in a case where the person already holds that position

- (A) in the way they afford him access to any benefits, facilities or services, or by refusing or deliberately omitting to afford him access to them; or
- (B) by expelling him from that position, or subjecting him to any other detriment.

[RRA s 10; cf. 44.23 SEX DISCRIMINATION - I].

A partnership may nevertheless lawfully discriminate in the arrangements it makes for determining who should be offered the job or by refusing or deliberately omitting to offer a person a position, where, if the partnership were employment, being of a particular racial group would be a genuine occupational qualification for the job. [RRA s 10(3)].

(b) **Trade unions etc.**

Trade unions, organisations of workers and employers' organisations may not discriminate against a person who is not a member of the organisation

- (i) in the terms on which they are prepared to admit him to membership; or
- (ii) by refusing, or deliberately omitting to accept, his application for membership.

[RRA s 11].

Such organisations may not discriminate against a member

- A) in the way they afford him access to any benefits, facilities or services, or by refusing or deliberately omitting to afford him access to them; or
- (B) by depriving him of membership, or varying the terms on which he is a member; or
- (C) by subjecting him to any other detriment.

[RRA s 11(3)].

(Cf. 44.24 SEX DISCRIMINATION -I.)

(c) **Bodies conferring professional or trade qualifications**

It is unlawful for an authority or body, which can confer an authorisation or qualification which is needed for or facilitates engagement in a particular profession or trade, to discriminate against a person

- (i) in the terms on which it is prepared to confer on him that authorisation or qualification; or
- (ii) by refusing or deliberately omitting to grant his application for it; or
- (iii) by withdrawing it from him or varying the terms on which he holds it.

This provision does not extend to the mere awarding of a contract, even by a body or authority which has a *de facto* monopoly in the particular trade (*Malik v Post Office Counters Ltd [1993] ICR 93*).

It is not possible to complain to an industrial tribunal under this provision if the act complained of is one in respect of which an appeal, or proceedings in the nature of an appeal, may be brought under any contract [RRA s 54(2)]. The scope and effect of this provision were considered in *R v Department of Health, Ex parte Gandhi* [1991] ICR 805 and *Khan v General Medical Council* [1993] IRLR 378

(d) **Persons concerned with provision of vocational training**

It is unlawful, in the case of an individual seeking or undergoing training which would help fit him for employment, for any person who provides, or makes arrangements for the provision of, facilities for such training to discriminate against him

- (i) in the terms on which that person affords him access to any training course or other facilities concerned with such training, or
- (ii) by refusing or deliberately omitting to afford him such access, or
- (iii) by terminating his training, or
- (iv) by subjecting him to any detriment during the course of his training.

[RRA s 13, substituted by EA 1989,s 7(2); cf. 44.26 SEX DISCRIMINATION - I].

These provisions apply to persons concerned with the provision of vocational training. They do not apply to the provision of training by employers to their employees to whom *RRA s 4(1) and (2)* apply to prohibit *inter alia* discrimination in access to training.

(e) **Employment agencies**

It is unlawful for an employment agency to discriminate against a person

- (i) in the terms on which the agency offers to provide any of its services; or
- (ii) by refusing or deliberately omitting to provide any of its services; or
- (iii) in the way it provides any of its services.

[RRA s 14; cf. 44.27 SEX DISCRIMINATION - I].

Nevertheless, an employment agency can discriminate lawfully if the prospective employer could lawfully refuse employment, for example, on the ground that being of a particular racial group is a genuine occupational qualification for the job.

37.16 **CONTRACT WORKERS**

It is unlawful for the hirer of contract labour to discriminate against a contract worker

- (a) in the terms on which he allows him to work; or
- (b) by not allowing him to work or continue working; or

- (c) in the way he affords him access to any benefits, facilities or services or by refusing or deliberately omitting to afford him access to them; or
- (d) by subjecting him to any other detriment.

[RRA s 7(1); cf. 44.22 SEX DISCRIMINATION – I].

The hirer of contract labour can lawfully discriminate in the same circumstances as can an employer. [RRA s 7(3)(5)].

37.17 OTHER UNLAWFUL ACTS

Discriminatory practices

The application of discriminatory practices, namely the application of any requirement or condition which results in any act of discrimination made unlawful by the provisions of the Act relating to employment, is in itself unlawful.

[RRA s 28].

37.18 Instructions to discriminate

It is unlawful for one person who has authority over another, or in accordance with whose wishes that other person is accustomed to act, to instruct him to do any act which is unlawful under the Act or to procure or attempt to procure the doing by him of any such act. [RRA s 30; cf. 44.29 SEX DISCRIMINATION – I].

37.19 Pressure to discriminate

It is unlawful to induce, or attempt to induce, a person to do anything which is unlawful by virtue of the Act. [RRA s 31(1); cf. 44.29 SEX DISCRIMINATION – I]. An attempted inducement is not prevented from being unlawful because it is not made directly to the person in question, if it is made in such a way that he is likely to hear of it. [RRA s 31(2)]. Thus if A, a managing director, tells B, one of his employees, that another employee, C, will be promoted if C discriminates against X in selecting applicants for a job, A is guilty of an unlawful act. In *Commission for Racial Equality v Imperial Society of Teachers of Dancing [1983] ICR 473*, the Employment Appeal Tribunal held that a prospective employer was in breach of *Sec 31* for telling the head of careers at a school that he would prefer that the school did not put forward any coloured applicants.

37.20 Liability for unlawful act of employee

Any unlawful act (other than a criminal offence) under *RRA* committed by an employee in the course of his employment is treated as also having been done by his employer whether or not it was done with the employer's knowledge or approval [RRA s 32(1)]. (See, for example, *Kingston v British Railways Board [1982] ICR 392*, and contrast *Irving and Irving v Post Office [1987] IRLR 289*; and see VICARIOUS LIABILITY (57); cf. 44.28 SEX DISCRIMINATION –1.)

The employer will have a defence if he can prove that he took such steps as were reasonably practicable to prevent his employee from doing that act, or from doing that kind of act during the course of his employment. [RRA s 32(3)]. In deciding whether an employer has taken such steps, an industrial tribunal and the CRE may have regard to such matters as whether the employer has issued a written

policy to employees on race discrimination, whether it has given its managers training in such matters and whether it has taken steps to discipline employees if they have been guilty of race discrimination.

37.21 **Liability for unlawful act of agent**

Any unlawful act committed by an agent with the express or implied authority (whether precedent or subsequent) of his principal is treated (except as regards offences under *RRA*) as also having been done by his principal. (*RRA* s 32(2); cf. 44.28 SEX DISCRIMINATION – I].

37.22 **Aiding unlawful acts**

A person who knowingly aids another to do an act made unlawful by the Act is treated as if he himself did that unlawful act. [*RRA* s 33(1); cf. 44.29 SEX **DISCRIMINATION - I**]. It is a defence for a person to show that

- (a) he acted in reliance on a statement made to him by that other person that the act would not be unlawful; and
- (b) it was reasonable for him to rely on that statement.

[*RRA* s 33(3)].

If a person found liable under the provision is an individual acting in the course of his employment, it may be proper for any award of compensation to be made only against the employer, who will generally be liable on the principles set out in 37.20 above (*Deane v Ealing London Borough Council* [1993] *ICR* 329).

37.23 **False or misleading statements**

A person who knowingly or recklessly makes a statement mentioned in 37.22 (a) above, which in a material respect is false or misleading, commits an offence and is liable on conviction in a magistrates' court to a fine not exceeding level 5 on the standard scale. [*RRA* s 33(4); see also *RRA* ss 14(6), 29(5) and 1.10 Introduction; cf. 44.29 SEX DISCRIMINATION - I].

37.24 **COMMISSION FOR RACIAL EQUALITY**

The Act established a Commission for Racial Equality (the CRE) whose members are appointed by the Secretary of State to

- (a) work towards the elimination of discrimination;
- (b) promote equality of opportunity, and good relations, between persons of different racial groups; and
- (c) to keep under review the working of the Act.
[*RRA* s 43(1)].

37.25 Codes of practice

The CRE may issue codes of practice containing practical guidance for

- (a) the elimination of discrimination in the field of employment; and/or
- (b) the promotion of equality of opportunity in that field for persons of different racial groups.

[RRA s 47(1)].

The CRE issued a code of practice entitled *Code of Practice on Race Relations* in 1984. A breach of the Code does not of itself render a person liable to proceedings, but any relevant provision of the Code may be taken into account by an industrial tribunal. [RRA s 47(10)].

Further information and assistance is to be found in various CRE publications, including the booklets 'Racial Discrimination and Grievance Procedures', 'Indirect Discrimination in Employment', 'A Measure of Equality', 'Why keep Ethnic Records?' and 'Training - implementing Racial Equality at Work'.

37.26 ENFORCEMENT

except as specifically provided by the Act, no civil or criminal proceedings may be taken against any person. [RRA s 53(1)]. This provision does not restrict the making of an order of *certiorari*, *mandamus* or *prohibition* (which are remedies obtained against public bodies upon an application for judicial review). [RRA s 53(2)]. The CRE alone may issue non-discrimination notices (see 37.29 below) and take certain other action to enforce the provisions of RRA ss 29-31.

37.27 Enforcement by an individual: application to an industrial tribunal

A person may present a complaint to an industrial tribunal that he has been discriminated against in relation to any of the provisions relating to employment. [RRA s 54(1)]; for an exception in the case of bodies conferring qualifications, see 37.15(c) above; by virtue of RRA ss 54(2), 75(8) (9) complaints by members of the armed forces are dealt with under separate statutory provisions. The time limit for the presentation of such a complaint is three months from the time that the act complained of was done. [RRA s 68(1); cf. 45.2 SEX DISCRIMINATION- II]. The tribunal may nevertheless consider a complaint which is out of time if, in all the circumstances of the case, it considers that it is just and equitable to do so [RRA s 68(6)].

For the purposes of deciding when an act was done, in calculating the time limit

- (a) where the inclusion of any term in any contract renders the making of the contract an unlawful act, that act shall be treated as extending throughout the duration of the contract; and
- (b) any act extending over a period shall be treated as done at the end of that period; and
- (c) a deliberate omission shall be treated as done when the person in question decided upon it.

If the cause for complaint is an omission rather than an act, the omission will be considered to have been decided upon when a person does something inconsistent with the omitted act or when the period within which he would reasonably have done the act has expired. [RRA s 68(7)].

In *Barclays Bank Plc v Kapur* [1991] ICR 208, the House of Lords held that the bank's stipulation that service in Africa would not count for pension purposes, although originally made years before the complaints were brought, subjected the applicant employees to a continuing disadvantage which by virtue of *Sec 68(7)(b)* was to be treated as an act done when the employees retired. It was necessary to distinguish a continuing rule such as this from an act which merely had continuing consequences. In *Sougrin v Haringey Health Authority* [1992] ICR 650 a pay regrading was held to fall into the latter category, but in *Littlewoods Organisation plc v Traynor* [1993] IRLR 154 the failure to take the remedial measures promised after an earlier act of discrimination was held to be a continuing act.

In the case of a single act, time starts to run when the course of action is complete, that is when a complaint to a tribunal could first be made (*Clarke v Hampshire ElectroPlating Co Ltd* [1992] ICR 312; see also *Adekeye v Post Office* [1993] ICR 464).

See also *Dimitsu v Westminster City Council* [1991] IRLR 450.

In pursuing a claim before an industrial tribunal, an applicant may ask for the disclosure of documents by his employer or prospective employer. However, in *Vyas v Leyland Cars* [1979] ICR 921, the House of Lords held that tribunals should not order the disclosure of reports or references given and received in confidence except when it is necessary for disposing fairly of the proceedings that the confidence should be overridden. In *West Midlands Passenger Transport Executive v Singh* [1988] ICR 614 the Court of Appeal upheld an industrial tribunal's order for discovery of a schedule of statistics showing the ethnic origins of candidates for promotion and those actually promoted during the period preceding the alleged discrimination. The decision also gives guidance as to when discovery should be refused because, although relevant, it would be oppressive. The Court of Appeal further held that it might be possible firstly to infer from statistics that there had been discrimination against members of a racial group in general, and then to infer (in the absence of a satisfactory explanation in the particular case) that the applicant as a member of that group was discriminated against.

However, an industrial tribunal does not have the power to require a schedule of statistics to be produced where the necessary information is not already in existence. In such circumstances, the questionnaire procedure should be used. (*Carrington v Helix Lighting Ltd* [1990] ICR 125— see also 37.32).

The courts have recognised that direct evidence of discrimination will be rare, and that the industrial tribunal must be allowed to draw inferences from the particular circumstances. (*Owen and Briggs v James* [1982] ICR 618; *Khanna v Ministry of Defence* [1981] ICR 653; cf. 45.2 SEX DISCRIMINATION-II). Evidence of events prior to or subsequent to the alleged act of discrimination is admissible if there is a real probability that it will affect the outcome of the complaint. (*Chattopadhyay v Headmaster of Holloway School* [1982] ICR 132; *North West Thames Regional Health Authority v Noone* [1989] ICR 813; *King v Great Britain-China Centre* [1991] IRLR 513). But these cases should not be taken to mean that the burden of proof shifts to the employer in such circumstances. Ultimately, it is always the claimant who must prove conscious or subconscious discrimination on the balance of probabilities. (*Barking and Dagenham London Borough Council v Camara* [1988] ICR 865; *British Gas plc v Sharma* [1991] ICR 19). Discrimination ought not to be confused with mere incompetence (*Qureshi v Newham London Borough Council* [1991] IRLR 264).

The conciliation officer (see 2.3 ADVISORY, CONCILIATION AND ARBITRATION SERVICE) may consult both parties to the complaint with a view to bringing about a settlement. [RRA s 55]; and see 37.33 below.

Remedies available from industrial tribunals. If an industrial tribunal finds that a complaint is well-founded, it will make such of the following orders as it considers just and equitable.

- (a) *Declaratory order* - an order declaring the rights of the complainant and the respondent in relation to the act complained of.
- (b) *Compensation* - an order requiring the respondent to pay to the complainant compensation. This may include damages for injured feelings, and compensation for loss of Opportunity in the labour market going beyond actual loss of wages. For decisions relating to the assessment of compensation see *Alexander v The Home Office* [1988] ICR 685, *North West Thames Regional Health Authority v Noone* [1988] ICR 813 and *Sharifi v Strathclyde Regional Council* [1992] IRLR 259. Exemplary damages are not available in discrimination cases, but there may be an award of aggravated damages if the respondent's behaviour has been malicious or insulting (*Deane v Ealing London Borough Council* [1993] ICR 329).
- (c) *Recommending remedial action* - a recommendation that the respondent take, within a specified period, action appearing to the tribunal to be practicable for the purpose of obviating or reducing the adverse effect on the complainant of any act of discrimination complained of. This does not give the tribunal power to recommend that an applicant for promotion who was discriminated against be promoted to the next open post (*British Gas plc v Sharma* [1991] ICR 19).

[RRA s 56(1)].

Where statutory rules govern an appointment, a tribunal cannot recommend an applicant's appointment. It can merely recommend that the appointing body be made aware of the need to comply with RRA and of other relevant matters. (*North West Thames Regional Health Authority v Noone* [1988] ICR 813).

The maximum amount of compensation is that imposed by EPCAS 75(1). [RRA s 56(2); EPCA 16 Sch 25]. The present limit is £11,000. [*Unfair Dismissal (Increase of Compensation Limit) Order 1993 (SI 1993 No 1348)*]. Where compensation is awarded both under the *Sex Discrimination Act 1975* and the *Race Relations Act 1976* in respect of one act of discrimination, the aggregate amount of compensation cannot exceed the limit above. [RRA s 56(3)]. It is likely that the government will be forced to raise or abolish the limit upon awards of compensation in sex discrimination cases, and to allow tribunals to award interest in such cases, following the decision of the ECJ in *Marshall v Southampton and South West Hampshire Area Health Authority (No 2)* [1993] IRLR 445 (see 45.7 SEX DISCRIMINATION - II); it remains to be seen whether it will voluntarily make the same changes in race discrimination cases.

If, without reasonable justification the respondent to a complaint fails to comply with a recommendation by an industrial tribunal that he take certain action then, if it thinks it just and equitable to do so, the tribunal may increase the amount of compensation to an amount up to the maximum, or, if no order for compensation previously been made, make such an order. [RRA s 56(4)].

(Cf. 45.7 SEX DISCRIMINATION - II.)

37.28 Enforcement by the CRE: investigations

The CRE may conduct investigations into alleged discriminatory practices and for that purpose may compel persons to attend to give evidence and may order the production of documents. [RRA s 48]. These may be general investigations or investigation into the activities of persons named in the terms of reference ('named persons investigations'). Before embarking on a named person investigation, the CRE must have already formed a suspicion that the persons named might have committed some unlawful act of discrimination and had at least some grounds for so suspecting. If they do not, the investigation and any nondiscrimination notice based upon it may be challenged. (*Commission for*

Racial Equality v Prestige Group plc [1984] ICR 473; *R v Commission for Racial Equality, Ex parte Hillingdon London Borough Council* [1982] AC 779). A person named in the terms of reference of the investigation may be represented by counsel or solicitor or another suitable person. [RRA s 49(4)]. The CRE prepare a report from their findings and make recommendations. [RRA s 51].

37.29 Issue of non-discrimination notices

If the CRE during the course of a formal investigation (see 37.28 above) becomes satisfied that a person is committing, or has committed an unlawful discriminatory act, an unlawful discriminatory practice, or has been guilty of placing or publishing an unlawful discriminatory advertisement, given instructions or applied pressure to discriminate unlawfully, or as an employer or principal is liable for the discriminatory act of his servant or agent, it may serve a non-discrimination notice on him requiring him

- (a) not to commit any such acts; and
- (b) where, in order to comply with the notice he has to change any practices or arrangements, to inform the CRE that he has made those changes and what those changes are, and to take such steps as may be reasonably required by the notice for the purpose of affording that information to other persons concerned.

[RRA s 58(2); cf. 45.10 SEX DISCRIMINATION - II].

The CRE may also require information to verify compliance with the notice, which must be supplied within a specified time not later than five years from the date the notice became final. [RRA s 58(4)].

Before serving a non-discrimination notice the CRE must first

- (a) give the person concerned notice that they are minded to issue a non-discrimination notice in his case, specifying the grounds on which they contemplate doing so; and
- (b) offer him an opportunity of making oral or written representations within a period of not less than 28 days specified in the notice; and
- (c) take account of any representation made by him.

[RRA s 58(5)].

The persons concerned are not entitled to cross-examine witnesses. (*R v Commission for Racial Equality, Ex parte Cottrell & Rothern* [1980] 1 WLR 1580).

Appeal. After a non-discrimination notice has been served on him, the employer has six weeks to appeal to an industrial tribunal. [RRA s 59(1)]. The Court of Appeal in *Commission for Racial Equality v Amari Plastics Ltd* [1982] ICR 304 approved a procedure formulated by the EAT to be adopted on such appeals. The CRE ought to state the facts on which they relied, and the employer, in answer, ought to say which of those findings of fact are challenged. On appeal, the tribunal may quash or vary the notice. [RRA s 59(2)(3)].

The procedure regulating such appeals is set out in the *Industrial Tribunals (Non-discrimination Notices Appeals) Regulations 1977* (SI 1977 No 1094). In appropriate cases a non-discrimination notice may be challenged by way of application for judicial review using the procedure of Order 53 of the Rules of the Supreme Court (*Hillingdon London Borough Council v Commission for Racial Equality* [1982] ICR

799; *R v Commission for Racial Equality, Ex parte Westminster City Council* [1984] ICR 770; [1985] ICR 827).

A register is kept of non-discrimination notices which have become final. [RRA s 61]. A non-discrimination notice or a finding by a court or tribunal becomes final when an appeal against the notice or finding is dismissed, withdrawn or abandoned or when the time for appealing expires without an appeal having been brought. [RRA s 78(4)].

37.30 **Persistent discrimination**

If during the period of five years beginning on the date on which a nondiscrimination notice or a finding by an industrial tribunal became final, it appears to the CRE that unless restrained any person is likely to commit an unlawful act, it may apply to a county court for an injunction restraining that person from doing so. [RRA s 62(1); cf. 45.1] SEX DISCRIMINATION - II].

37.31 **Enforcement of sections 29-31**

Unlawful acts relating to discriminatory advertisements are dealt with in Sec 29, instructions to discriminate in Sec 30, and pressure to discriminate in Sec 31 (see 37.10, 37.18 and 37.19 above). The CRE may make an application to an industrial tribunal for a decision that a contravention of any of Sec 29-31 has occurred. [RRA s 63(2)]. Such an application must be made before the end of the period of six months, beginning when the act to which it relates was done. [RRA s 68(4)]. After an industrial tribunal has made such a finding, the CRE may also apply to a county court for an injunction if it appears that further unlawful acts will be done. [RRA s 63(4)]. An application under Sec 63(4) must be made before the end of the period of five years, beginning when the act to which it relates was done. [RRA s 68(4)]. A court may nevertheless consider any such complaint, claim or application which is out of time if, in all the circumstances of the case, the Court considers that it is just and equitable to do so. [RRA s 68(6)]. Sections 29-3] may be enforced only by the CRE; cf. 45.12 SEX DISCRIMINATION - II.

37.32 **HELP FOR PERSONS SUFFERING DISCRIMINATION**

The Secretary of State has prescribed forms which complainants can use to obtain information from employers relating to alleged discrimination [RRA s 65; cf. 45.4 SEX DISCRIMINATION - II]. The forms and procedure governing the service of the forms (known as questionnaires) are set out in the *Race Relations (Questions and Replies) Order 1977 (Si. 1977 No 842)*. In proceedings before an industrial tribunal, a questionnaire will only be admissible as evidence under *RRA S 65(2)(a)*

- (a) where it was served before the presentation of a complaint, if it was served within the period of three months beginning when the act complained of was done;
- (b) where it was served when a complaint had been presented, either if it was so served within the period of 21 days beginning with the day on which the complaint was presented, or if it was so served later with leave of the tribunal, within the period specified by the tribunal.

[Article 5].

If it appears to a court or tribunal that a respondent deliberately, and without reasonable excuse, omitted to reply within a reasonable period or that his reply is evasive or equivocal, the court or tribunal may

draw any inference from that fact that it considers just and equitable to draw, including an inference that he committed an unlawful act. [RRA s 65(2)(b)].

A questionnaire may be obtained from offices of the Department of Employment or the CRE. The EAT has suggested that, where a complainant wishes to obtain further information, an application for leave to serve a further questionnaire should be made to the tribunal (*Carrington v Helix Lighting Ltd [1990] ICR 125*).

The CRE may give advice or assistance to complainants in difficult or important cases. [RRA s 66]. Their address is The Commission for Racial Equality, Elliot House, 10/12 Allington Street, London SW1E 5EH. tel. 071-828 7022.

37.33 NO CONTRACTING OUT

A term in a contract which purports to exclude or limit any provision of the Act is unenforceable by any person in whose favour the term would operate. [RRA s 72(3)].

Contracts settling a complaint. Contracts settling a complaint relating to discrimination in employment are enforceable only where the contract is made with the assistance of a conciliation officer, or where the content is a compromise contract meeting certain statutory conditions, including a condition that the complainant has had qualified legal advice (see 27.16 INDUSTRIAL TRIBUNALS). [RRA s 72(4) as amended by *TURERA 6 Sch 2*]. It is most important to comply with these provisions when settling such a complaint, otherwise, despite a sum to settle the complaint having been paid, a complainant may still pursue his application to an industrial tribunal; cf. 45.14 SEX DISCRIMINATION - II.