



mylawchamber
unrivalled support for legal education

Fourth Edition

Employment Law for Business Students

Janice Nairns

Employment Law for Business Students

THE FIXED-TERM EMPLOYEES (PREVENTION OF LESS FAVOURABLE TREATMENT) REGULATIONS 2002 AND THE PART-TIME WORKERS (PREVENTION OF LESS FAVOURABLE TREATMENT) REGULATIONS 2000

The Fixed-term Employees (Prevention of Less Favourable Treatment) Regulations came into force in October 2002 (under the Employment Act 2002). Under the regulations a worker on a fixed-term contract has the right not to be discriminated against just because they are not a permanent employee. It is unlawful to discriminate against a fixed-term worker in this way. A fixed-term worker is classed as being one who works under a contract for a specific fixed time, for a specific task, or a contract which will terminate on the happening or not happening of some future event.

An employer does have a possible defence to a claim of less favourable treatment if he can show that his actions were objectively justified. The Regulations state that a fixed-term contract will automatically become a permanent contract of indefinite length after four years. The start date for this provision was 10 July 2002 meaning that the first automatic conversion could not take place until 10 July 2006. They also remove the ability of an employer to ask an employee to waive their right to a redundancy payment at the end of the fixed term. They also provide that the 'completion of a task' contract is seen as a dismissal for the purpose of an unfair dismissal claim.

Similarly, the Part-time Workers (Prevention of Less Favourable Treatment) Regulations 2000 (as amended) are designed to ensure that part-time workers are given the same rights as full-time employees in relation to their terms and conditions of work. The Regulations came into force from 1 July 2000. Before this time an employer was able to treat an employee less favourably just because they were not a full-time employee. Again, the Regulations state that less favourable treatment will not be unlawful if an employer can objectively justify their actions. They state that less favourable treatment would be justified if it was necessary and appropriate in order for the employer to achieve a legitimate business objective. These regulations were amended in 2002 by the Part-time Workers (Prevention of Less Favourable Treatment) Regulations 2000 (Amendment) Regulations 2002. These regulations made changes mainly relating to the role of the comparator and on pensions.

If a part-time or fixed-term worker feels that they have been discriminated against they are able to make a complaint to the Employment Tribunal. Such a claim should be made within three months of them having encountered 'less favourable treatment'.

MAKING A DISCRIMINATION CLAIM TO THE EMPLOYMENT TRIBUNAL

Any job applicant or employee who feels that he has been discriminated against is able to make a complaint to the Employment Tribunal. The courts do not deal with discrimination cases and claims are made to the tribunal in the manner outlined in Chapter 10.

Complaints of sex, race or disability discrimination must be made within three months of the alleged discriminatory act. This time limit also applies to complaints involving sexual orientation, religion or belief and age discrimination. Where there are a continuing set of discriminatory acts, the three-month time limit begins to run from the date of the most recent act. There is no time limit relating to a claim brought under the Equal Treatment Directive.

Discrimination is not often easy to prove. Evidence of discrimination is not always readily available. It is unlikely that employers will admit to have discriminated in the selection or treatment of

their workforce. In some situations employers may not believe that their actions amounted to discrimination. In *Khanna v Ministry of Defence* (1981) it was stated that 'it is highly improbable that a person who has discriminated is going to admit the fact, quite possibly even to himself'.

Burden of proof

The Sex Discrimination (Indirect Discrimination and Burden of Proof) Regulations 2001 and the Race Relations Act 1976 (Amendment) Regulations 2003 outline the way in which the burden of proof operates in sex and race discrimination tribunal claims. Similar rules exist in relation to disability, sexual orientation, religion or belief and age discrimination claims. The claimant (job applicant/employee) must establish the facts of their claim. They may produce any available evidence to support their claim. This could include documents and witness statements from colleagues.

Once the claimant has established the facts the burden then shifts to the employer to show (on the balance of probabilities) that they did not discriminate or that they had some justification for their actions. If the employer is unable to do this the tribunal will find that they have unlawfully discriminated against the claimant. An award will then be made in favour of the claimant.

Questionnaire procedure

This procedure is designed to help the person making the complaint to find out more about the reasoning behind the employer's actions. There are standard questionnaires designed for differing types of discrimination claim. A questionnaire must be sent to the employer within three months of the alleged discriminatory act.

If the complainant has already lodged a tribunal claim, he will then have 21 days from that date to send the questionnaire to the employer. If the claim relates to disability discrimination he will then have 28 days from that date to send the questionnaire to the employer. Employers do not have to answer questionnaires. They may not return it at all or may answer some but not all of the questions.

However, any failure to answer, or providing any evasive or inaccurate answers, may be taken into account in tribunal proceedings. As the tribunal is able to draw adverse inferences from any failure to assist, it is in an employer's interests to complete the questionnaire as fully as possible.

Remedies and awards

After hearing all of the evidence, the tribunal will make its decision. If it finds in favour of the complainant stating that discrimination did occur, it can then make an award.

The tribunal may:

- make a declaration of the rights of the complainant and the employer;
- make a recommendation that the employer do something, for example provide the complainant with a reference; or
- make an award of compensation with no statutory limit and including an award for injury to feelings.

Declarations

A declaration may be made alongside an award for compensation. The tribunal declares the rights of the complainant and the employer. This remedy is often used to prevent further acts of discrimination.

Recommendations

In issuing a recommendation the tribunal orders the employer to do something.

Example

Possible recommendations include:

- the employer making a full written apology to the employee;
- the employer removing discriminatory documents, advertisements;
- the employer removing adverse notes from any employee file and noting that the employee has been discriminated against in the past.

If an employer refuses to comply with a tribunal recommendation and can show no justification for his inaction, the tribunal may increase any compensatory award. The tribunal cannot recommend that a person who was discriminated against during the recruitment and selection process be offered a job when other vacancies become available. Any such vacancies would still have to be advertised in the normal way.

Compensation

This is the most common award. The tribunal can award damages based on, for example, loss of wages or future wages and injury to feelings. Any expenses such as counselling or medical bills incurred as a result of the discrimination may also be reimbursed.

Until November 1993 there was a ceiling on tribunal awards which meant that often the amounts awarded were relatively low compared to the discrimination suffered. However, following the case of *Marshall v Southampton & South West Area Health Authority (No. 2)* (1993), there is now no limit on the amount of compensation that can be awarded. The ceiling was removed by the Discrimination and Equal Pay (Remedies) Regulations 1993 and the Race Relations (Remedies) Act 1994.

Following this, tribunals have made substantial compensatory awards. In *Ministry of Defence v Cannock* (1994) armed service women who were forced to leave the service when they became pregnant were awarded damages of over £300,000. In *Armitage v Johnson* (1997) the EAT awarded a prison officer £28,000 – £21,000 of the award being for injury to feelings. It has been said that some awards in relation to injury to feelings have become excessive. The Court of Appeal set down guidelines as to how compensation for injury to feelings should be assessed in *Chief Constable of West Yorkshire v Vento (No. 2)* (2002). Here it was stated that awards of between £15,000 and £25,000 should be given only in the most serious cases, such as where there has been a lengthy campaign of discriminatory harassment. Awards of between £5,000 and £15,000 should be given in serious cases, which do not merit an award in the highest band. In less serious cases where the act of discrimination is an isolated or one off occurrence it was said that awards of between £500 and £5,000 should be made. In the recent case of *Da'Bell v NSPCC* (2010) the EAT held that the three bands for injury to feelings (as originally set out in *Vento*) should be increased in line with inflation. They stated that the limit on the top band should increase to £30,000, the middle band to £18,000 and the lower band to £6,000.

Other examples of large compensation payouts include the following cases. In *Miles v Gilbank & anor* (2006) Ms Miles was awarded £25,000 for injury to feelings after she endured a sustained campaign of bullying at work. Having told her manager that she was pregnant, she was subjected to a campaign of serious harassment. In *Browne v Greater London Magistrates Courts Authority* (2005) an Employment Tribunal awarded £206,415 to a disabled employee

who resigned after 3 years of trying to get her employer to make reasonable adjustments to her workplace.

Many high-profile compensation payouts result from claims from those working in large investment banks in the City of London, often referred to as 'London's square mile'. In 2006 Deutsche Bank Group was ordered to pay Helen Green, a former employee, over £1 million following her successful claim for sex discrimination. She had suffered a long period of harassment and bullying at work. In 2003 Steven Horkulak, a broker at the firm Cantor Fitzgerald, won £1 million damages after bullying and harassment caused him to resign from his job. In 2009 top city lawyer Gill Switalski was awarded £13.4 million in compensation following her claim for sex discrimination and harassment. Allowing discrimination to exist within their work environment can prove to be a very costly mistake for employers.

See also: *Coleman v Skyrail Oceanic Ltd* (1981), *Orlando v Didcot Power Station Sports and Social Club* (1996), *Virdi v Commissioner of Police of the Metropolis* (2000), *Reaney v Hereford Diocesan Board of Finance* (2007).

Indirect discrimination

The rules on indirect discrimination are slightly different. In the case of indirect race discrimination, if it can be shown that the act of indirect discrimination was unintentional, no damages can be awarded. In relation to indirect sex discrimination, a new section was inserted into the Sex Discrimination Act 1975 in 1996. This states that no compensatory award should be made in cases of indirect discrimination where the employer did not intend to discriminate unless the tribunal deems that it would be 'just and equitable' to do so.

THE USE OF EQUAL OPPORTUNITIES POLICIES

All employers should formulate and use an equal opportunities policy. The policy should deal with all forms of equality issues and provide details on complaints procedures, training courses and queries. Often this awareness of equal opportunities issues can prevent acts of discrimination from occurring. All employees should be provided with information on any such policy.

The Equality and Human Rights Commission publishes a vast amount of guidance on how to draft and implement such policies. This is available on the Commission's website.

WHAT NEXT FOR DISCRIMINATION LAW? FUTURE REFORM

There have been several recent developments in the field of discrimination law. Perhaps the most significant change in recent years has been the launch of the Equality and Human Rights Commission. The role of the Commission is discussed in Chapter 1. The Commission took over the work of the Equal Opportunities Commission, Commission for Racial Equality and the Disability Rights Commission.

A further important development is the Equality Bill that has now received Royal Assent. The Bill was introduced into the House of Commons on 24 April 2009. It received its third reading in the House of Commons in March 2010. The new legislation is a quite lengthy and complex document and so, even though the government has stated that it is likely to become law in late 2010, it is unlikely that all sections of the new Act will be brought into force at the same time.

In summary, the Bill states that the existing discrimination legislation will be consolidated into a single Equality Act. If legislated in its present form the Bill:

- defines discrimination as 'less favourable treatment';
- standardises the definition of 'indirect discrimination', meaning that the test will be based on there being a particular disadvantage arising from the application of a 'provision, criterion or practice';
- provides for dual discrimination claims in relation to direct discrimination;
- provides for a general exception where, e.g., being of a particular sex is a requirement for the work and the person to whom it is applied does not meet it;
- standardises the law on harassment;
- provides for positive action;
- creates a single equality duty.

The EHRC has recently issued two draft codes of practice. In January 2010 it launched a consultation on codes of practice on 'employment' and 'equal pay'. At the time of writing the consultation is still open. Information on the Equality Act 2010 is available on the EHRC website. The website companion to this text details relevant updates on the new legislation.

SUMMARY CHECKLIST

- Discrimination on the grounds of sex, race and disability are the most widespread.
- The Equality and Human Rights Commission plays a significant role in the enforcement of anti-discrimination law.
- The main anti-discrimination statutes are the Sex Discrimination Acts of 1975 and 1986, the Race Relations Act 1976 and the Disability Discrimination Act 1995.
- The main anti-discrimination regulations cover sexual orientation, religion/belief and age.
- European law has had a major impact in the area of sex discrimination, mainly through the implementation of the Equal Treatment Directive and the Amsterdam Treaty.
- The law recognises three forms of discrimination: direct, indirect and victimisation.
- Direct discrimination occurs when a person is treated less favourably because of, e.g., his sex, marital status, race or disability.
- Indirect discrimination occurs where an employer imposes a provision, criterion or practice which on the face of it applies to all people but which actually discriminates against a group of people. In relation to indirect racial discrimination claims based on colour/nationality, this occurs when an employer imposes a requirement or condition.
- Victimisation occurs where a person is treated less favourably because of his current or previous involvement in any complaint.
- Sex discrimination can be based on sex or marital status.
- It is unlawful for a person to discriminate against another on the basis of colour, race, nationality, ethnic or national origin.
- A person is only protected by the Race Relations Act 1976 if he is from a particular racial group.

- The employer's motive is irrelevant.
- Discrimination may take place in the arrangements made for the purpose of deciding who should be employed, on the terms on which a person is offered a job, when refusing to employ a person because of his sex/marital status or race, by refusing access to opportunities at work or when dismissing a person or subjecting him to any other detriment.
- There can be no defence to a claim of direct discrimination.
- In claims of indirect discrimination, an employer may be able to show that his actions were justified – they were a proportionate means of achieving a legitimate aim.
- In relation to recruitment, transfers and training, an employer may be able to favour a person from a particular sex/race because there is a genuine occupational qualification.
- The legislation also recognises other discriminatory acts, such as the use of discriminatory job advertisements.
- Employers may be vicariously liable for the discriminatory actions of their employees.
- It is generally unlawful to positively discriminate.
- Sexual and racial harassment can amount to direct discrimination.
- It is unlawful to discriminate on the grounds of sexual orientation.
- Under the Disability Discrimination Act 1995 an employer has a duty to make 'reasonable adjustments' to the work premises.
- The DDA 1995 recognises four forms of discrimination: direct, failure to make reasonable adjustments, disability-related discrimination and victimisation.
- The DDA 2005 widened the definition of what will be classed as a disability.
- It is unlawful to discriminate on the grounds of religion or belief.
- It is unlawful to discriminate on the grounds of age.
- It is unlawful to discriminate on the grounds of trade-union involvement or non-involvement.
- It is unlawful, subject to certain excepted categories, to discriminate against a person with a criminal conviction if that conviction is 'spent'.
- Regulations prohibit discrimination against part-time employees or those on fixed-term contracts.
- Discrimination claims are made to the Employment Tribunal.
- Claims must be made within three months.
- The tribunal may make a declaration, recommendation or award compensation.
- The Equality Act received Royal Assent in 2010.

SELF-TEST QUESTIONS

- 1 What is 'direct' discrimination?
- 2 What is 'indirect' discrimination'?
- 3 What is 'victimisation'?
- 4 What are the stages at which discrimination may take place?
- 5 In what ways might an employer defend a discrimination claim?