

"I am very impressed with the book. The authors explain the complexities clearly and present legal material with some contextual discussion... [The] text covers a wide range of topics and represents a good introduction for non-law students."

Dr Graeme Lockwood, King's College London



FOURTH EDITION

Employment Law in Context

An Introduction for HR Professionals

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Employment Law in Context

- 3.3.3** Some weeks after the transfer of a security company the transferee receives correspondence from an employment tribunal citing it as respondent employer in a race discrimination complaint involving harassment. The single incident of harassment is said to have occurred several weeks before the transfer date when the complainant and the perpetrator were employed by the transferor.
- 3.3.4** A company which manages parks and gardens is to acquire staff who work at a large, privately-owned country house. Some of the staff to be transferred are permanent employees, some are on seasonal contracts (working between March and October) and some are called self-employed (although they work most of the year in the park). The HR manager of the transferee questions whether these 'self-employed' staff should be transferred; and also how the contract staff should be dealt with.

Feedback on these exercises is provided in the Appendix to this textbook.

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Useful websites

Department for Business, Innovation and Skills www.bis.gov.uk
 Chartered Institute of Personnel and Development www.cipd.co.uk
 European Commission ec.europa.eu
 HM Revenue and Customs www.hmrc.gov.uk
 UK Statistics Authority www.statistics.gov.uk

Visit www.mylawchamber.co.uk/willey to access study support resources including realistic HR documentation to accompany the case studies in the book, an online chapter on collective labour law, interactive multiple choice questions, annotated weblinks, a glossary, glossary flashcards, key case flashcards, a legal newsfeed and legal updates.



Chapter 4

The context of discrimination at work

Learning objectives

- To understand the key concepts used in equal opportunities
- To appreciate the importance of historic and contemporary patterns of discrimination
- To understand the population and labour market profiles of various groups within society
- To understand the social and economic factors affecting discrimination
- To examine the degree of overall success of the statutory framework of discrimination and equality law

Structure of the chapter

- *General concepts*: discrimination; equal opportunities and equal treatment; managing diversity; institutional discrimination; positive action; positive discrimination; 'political correctness'
- *The social and economic context of discrimination*: the population profile; the incidence of discrimination at work; the context of discrimination on the grounds of sex, race, disability, age, sexual orientation, and religion and belief
- *The state of the law*: grounds of discrimination; complexity and 'bureaucratisation' of equal opportunities; extending limits of law; covert discrimination; the 'tie-break' and positive action; multiple discrimination; monitoring; weak enforcement

Introduction

The extensive framework of discrimination law covering employment and the wider society was enacted from the early 1970s to deal with a wide range of employment and other policies and practices founded on stereotyping, prejudice and in some instances, hatred. The genesis of such discriminatory behaviour, for many different reasons, is, generally, in the past. This historical origin means that many of the attitudes are deeply embedded in our culture, have often formed part of socialisation and so can be difficult to challenge and eradicate. This chapter is designed to consider the key concepts that arise in discrimination law; and set out the social and economic context of discrimination. The law relating to the various strands of discrimination, now covered by the Equality Act 2010, is examined in Chapter 5, and employment policies and practices are outlined in Chapter 6.

General concepts in equal opportunities

These concepts are central to any examination of discrimination across all ‘protected characteristics’ as defined in the Equality Act.

► Discrimination

Discrimination occurs widely both within employment and within society at large. It is about the exercise of choice – for example, in recruitment or in promotions. Implicit in this exercise of choice is the fact that action can be taken *in favour* of one person and *against* another. The critical issue is the grounds on which that discrimination or choice is made. So, for example, when a manager appoints a person to a post, the key question is: ‘What were the grounds for making that choice and rejecting other applicants?’ Were the applicants considered against **objective criteria** for the position – e.g. experience, skills and qualifications? Was there evidence that **unlawful criteria** were used – e.g. avoiding the recruitment of a pregnant woman or a disabled person?

The concept of discrimination, of course, encompasses wider patterns of social, economic and political behaviour whereby particular groups of people are stereotyped, victimised and discriminated against on the presumption that they possess certain characteristics. Various social and employment barriers can reinforce unfair discrimination and prevent a person achieving equal treatment. For example, the social role of caring for children which is, traditionally, ascribed to women has been found to be a considerable obstacle in the attainment of promotion, career progression and equal pay.

► Equal opportunities and equal treatment

Anti-discrimination measures are invariably discussed in the context of equal opportunities and equal treatment policies. ‘Equal opportunities’, as a concept, derives from the United States of America and was imported into British law in the 1970s. Less common in usage is the term ‘equal treatment’ originating from European Union discrimination law. Differentiating between these two terms is difficult and, probably, pointless. In practice – in the thinking of managers, in the experience of working people and, usually, in the interpretation of the law – they have become synonymous. Superficially, ‘equal opportunities’ is an attractive term because it is aspirational. It seems to go beyond the present situation to consider access to improved conditions and circumstances, the provision of better standards and the encouragement of those who are disadvantaged. Nevertheless, it is important to note that it is EU equal treatment law that has facilitated an expansion of opportunities for women. In terms of outcomes, there may be little that is preferable in either term.

► Managing diversity

In some literature in the early 1990s (Kandola *et al.* 1994), ‘managing diversity’ was seen as a concept *opposed* to ‘equal opportunities’. The latter was seen as restrictive and relying on piecemeal compliance with separate pieces of legislation. Managing diversity was seen as more inclusive, business-related and strategic. However, ‘managing diversity’ has been a controversial concept. As originally conceived, it individualises equal opportunities, so distracting attention from the group basis of discrimination. However, when promoting

the concept in Britain, from the mid-1990s, the Chartered Institute of Personnel and Development saw it as an evolutionary step in the development of equal opportunities. It saw equal opportunities and managing diversity as 'complementary', 'interdependent' and 'not alternatives'. In the CIPD's view, managing diversity was related to management strategy and it encompassed the entire employment relationship. It was seen as helpful in making 'the business case' for equal opportunities.

Diversity management can now be characterised as follows:

- It provides *a coherent approach* integrating both business and personal needs with ethical standards and equal treatment law. It is 'based on the concept that people should be valued as individuals for reasons related to business interests, as well as for moral and social reasons' (CIPD, 1996).
- It provides *a strategic approach* to equal opportunities. So, it is associated with such strategic business and human resource issues as quality management, productivity and cost effectiveness, empowerment, performance management and continuous development. It has an explicit economic focus in respect of labour cost-effectiveness.
- It is *inclusive*. It embraces all corporate policies and working practices and expects that they are tested against the criteria of diversity management. Such policies and practices should be assessed when formulated, implemented, audited and revised.
- The essential focus is on *the individual employee*. It is concerned with his or her characteristics, needs, aspirations and differences. The success of the policy is, then, determined by the extent to which the interests of individuals are accommodated by corporate policies. (Having said that, there must be acknowledgement that discriminatory treatment also has a group base. Stereotyping of individuals arises because they are presumed to have the same characteristics as similar people. Unlawful discrimination can only be tackled effectively by addressing both the individual and the group dimensions.)
- It is *management driven*. Line managers, team leaders and human resource managers are responsible for establishing the ways in which both legislative requirements and individual needs result in corporate action. The human resource department or individual equality officers should not be left as the isolated 'guardians' of equal opportunities. There must be a clearer and wider management responsibility.

► Institutional discrimination

In the report of the Stephen Lawrence Inquiry (1999), institutional racism was reported as a characteristic of the Metropolitan Police Service. It was defined as: 'the collective failure of an organisation to provide an appropriate and professional service to people because of their colour, culture or ethnic origin. It can be seen or detected in processes, attitudes and behaviour which amount to discrimination through unwitting prejudice, ignorance, thoughtlessness and racist stereotyping which disadvantage minority ethnic people.'

This useful definition of one type of discrimination can be generalised. It is possible for organisations to be institutionally discriminatory across many, if not all, 'protected characteristics', in their employment practices, service delivery and how they deal with suppliers and contractors. Recognition that this may be a characteristic of organisations has resulted in two related initiatives: the 'mainstreaming' of equal treatment; and the enactment of a statutory public sector duty to promote equal opportunities (see Chapter 5).

► Positive action and positive discrimination

These two concepts are, theoretically, defined separately. However, in practice, they can be blurred. **Positive action** is provided for in relation to all ‘protected characteristics’ (Equality Act 2010, s 158–9). Largely, it is conceived as encouragement for under-represented groups to apply for posts and promotion and to participate in training opportunities. However, the decisions to appoint or promote must be made against objective criteria. **Positive discrimination**, by contrast, is sometimes referred to as ‘reverse discrimination’. Essentially, it is preferential treatment on the grounds of a particular characteristic, for example, sex or race. Apart from a House of Lords ruling on the duty to make reasonable adjustments under disability discrimination law (see Exhibit 5.14), it is unlawful under British equality law. However, in practice, there may be no clear-cut theoretical distinction. For example, preferential access to training and development opportunities may be both positive action and positive discrimination – particularly if the course is ‘rigidly confined’ to the disadvantaged group (Pitt 1992: 283).

As a general comment, Deakin and Morris (1998: 592) state that ‘as part of an equal opportunities policy it is arguable that an employer may legitimately decide to employ or promote, for example, a woman, who is found to be *equally well-qualified* with a male applicant or colleague with the aim of improving the balance of women and men in particular parts of its workforce’. This practice reflects the ‘tie-break’ situation which has been ruled upon by the European Court of Justice (see Exhibit 5.4). A measure similar to the ‘tie-break’ has been enacted under the Equality Act 2010 (s 159) (see Chapter 5).

The arguments for and against positive action are various. Two in favour are particularly compelling:

- **Eradication of historic patterns of disadvantage.** This argument is based on the view that historic patterns are still influential today in framing social attitudes and expectations towards women, members of various ethnic groups and religions, disabled people, and homosexual and transgender people. Various historic obstacles to equal opportunities have included male social dominance; the legacy of colonialism, slavery and racism; the social marginalisation and low expectations held of disabled people; and the legacy of criminality and ‘perversion’ influencing opinions about sexual orientation. So, ‘the point of positive discrimination is to give them [disadvantaged people] the capacity and the confidence to decide their goals for themselves, to empower them, to remove their existential marginality and to assure them that no area of life is necessarily and inherently inaccessible to them’ (Parekh 1992: 270).
- **Compensatory action.** ‘Social justice’ implies compensatory action for past systematic breaches of fair treatment. Such action can take various forms (public training courses for women or different ethnic groups; assistance with childcare; appointing people from disadvantaged groups to public office as both representatives of particular interests and as role models; and, in employment, setting quotas for the recruitment or promotion of particular under-represented groups). This action helps avoid social exclusion, promote social cohesion and the moral obligations and rights of a liberal democracy.

Arguments against positive discrimination are that it is inappropriate to compensate for the past wrongs experienced by previous generations; and that it is, potentially,