



Direct Discrimination



Direct discrimination

Treating someone less favourably

A person directly discriminates against another person where:

- o he treats him less favourably than he treats or would treat others, and
- o he does so because of a protected characteristic (sex, race etc)

A claimant who applies for a job in which he has no genuine interest, in the sense that he would not accept it were it offered to him, cannot succeed in a claim for discrimination where his application was rejected on discriminatory grounds, because he cannot be said to have been (comparatively) unfavourably 'treated' (ie he will have suffered no detriment) on account of the rejection.

The need to make a comparison

Merely treating a worker unreasonably will not amount to direct discrimination. If it can be shown that the employer would have treated all workers similarly badly, then there will have been no 'less favourable treatment' and, therefore, no direct discrimination. It will often be far more difficult for the employer to explain blatantly unreasonable treatment of a worker, and it might be inferred from the absence of an adequate explanation that discrimination has occurred.

Different treatment is not the same as 'less favourable treatment': it must be shown objectively that the treatment of the prospective claimant was worse than that of the comparator.

Comparators

A claimant may compare their treatment with that of a real comparator or ask the Employment Tribunal to infer that the employer would have treated a hypothetical comparator more favourably. The burden (at this stage in the process) is on the claimant to show that they were or would have been treated less favourably than their actual or hypothetical comparator.

The circumstances relating to the case of a claimant and that of his chosen comparator (real or hypothetical) must not be materially different. Comparators may be different from the claimant, provided the difference is not 'material'. Hypothetical comparators do not need to be an exact clone of the claimant in every respect (apart from gender, race, age etc but including personality and personal characteristics).

Madden v PTG [2005] IRLR 46

Performing the comparison with an actual comparator will usually be straightforward. The task is more difficult with hypothetical comparators. Approaches that might be helpful where there is no actual comparator are:

- o looking at how other workers were treated in situations that were not identical but bore some similarity with the claimant's circumstances (ie where the other workers could not be comparators due to 'material differences', but there is sufficient similarity to draw inferences as to how a hypothetical comparator might have been treated), and
- o looking at other behaviour in the workplace that tends to make the possibility of discrimination more likely; eg if the workplace is rife with sexist comments against women, it is arguable that this shows a probability that a male worker would have been treated more favourably

The House of Lords observed in *Watt v Ahsan*:

- o it is probably uncommon to find a real person who qualifies as a statutory comparator (ie someone whose circumstances are not, even to a small degree, materially different from the

complainant's). Furthermore, the question of whether the differences between the circumstances of the complainant and those of the putative statutory comparator are materially different is often likely to be disputed

- o in most cases, however, it will be unnecessary for the tribunal to resolve this dispute, because it should be able, by treating the putative comparator as an 'evidential comparator' (rather than a statutory comparator, who must have no material differences), and having due regard to the alleged differences in circumstances and other evidence, to form a view on how the employer *would* have treated a *hypothetical* person who was a *true statutory comparator*
- o if the tribunal is able to conclude that the respondent would have treated such a person more favourably because of a protected characteristic (race, or sex, or sexual orientation etc -- see Protected characteristics -- overview), it would be well advised to *avoid deciding* whether any *actual* person was a statutory comparator

Comparison in disability cases

In a direct disability discrimination case, the circumstances relating to the case of a claimant and that of his chosen comparator (real or hypothetical) which must not be materially different include the **abilities** of the two persons being compared.

Comparison in sexual orientation cases

When undertaking the comparison in a direct sexual orientation discrimination case, the fact that one person is a civil partner while another is married is deemed **not** to be a material difference between the two individuals, and hence that factor should be ignored (ie by treating being in a civil partnership as being the same as being married).

Because of a protected characteristic

It is not enough to show that someone has been less favourably treated: you must also show that it happened because of a protected characteristic (race, or sex, or sexual orientation etc -- see Protected characteristics -- overview).

The legislation which preceded the Equality Act 2010 defined direct discrimination as being done 'on grounds of' the relevant protected characteristic, whereas the wording in the Act reads 'because of a protected characteristic'. The Equality Act Explanatory Notes state that 'this change in wording does not change the legal meaning of the definition, but rather is designed to make it more accessible to the ordinary user of the Act'. Of course the Explanatory Notes do not have the force of law, and hence it will be up to the Courts and Tribunals to decide whether or not the change in wording has in fact changed the law. However until any caselaw to the contrary appears, the notes immediately below will work on the assumption that the law is unchanged in this respect and hence that the previous caselaw on the meaning of 'on grounds of' will be equally applicable to the phrase 'because of'.

Pre-Equality Act 2010 caselaw re 'on grounds of'

It must be established whether the protected characteristic is the cause of the treatment. There has been significant debate as to the best test to use to answer this question:

In *James*, a council adopted a policy under which, although it generally charged an entrance fee for its swimming pool, it allowed pensioners to use it for free. At that time, the pensionable age for women was 60, but that for men was 65. The House of Lords held that this policy would therefore, eg in the case of a 61 year old male who wanted to swim, involve deciding whether to charge on the basis of gender, and hence was directly discriminatory on grounds of sex. Some readings of *James* might suggest that the discriminator's subjective reason for doing what he did was wholly irrelevant, and instead all that was required was that the

but-for test be satisfied: eg would the 61 year old man be charged an entrance fee but for the fact that he is male?

References: *James v Eastleigh* [1990] IRLR 288

Subsequently, a different reading of *James* has been suggested (see *Nagarajan* and *Martin*). Properly understood, *James* was saying no more than that the discriminator's *subjective motivation* for adopting a practice which discriminated on prohibited grounds was irrelevant, ie:

- o the council's motive or intention in adopting its policy of not charging pensioners was irrelevant: no amount of non-discriminatory intention will prevent such a scheme from being directly discriminatory
- o the policy was however one which, viewed objectively, introduced a charging scheme which operated according to a discriminatory gender-based criterion, and hence directly discriminated on grounds of sex

A further good example of where the subjective motivation and intentions of the alleged discriminator were irrelevant in determining whether or not it had discriminated on prohibited grounds is found in the House of Lords judgment in *Watt v Ahsan*. In that case:

- o there had been various corruption allegations associated with Pakistani councillors and the Pakistani community
- o the Labour Party selected a white candidate to stand for a particular ward in preference to a candidate of Pakistani origins
- o the Labour Party's intention in selecting as it did was to choose a candidate who would not be perceived by the electorate as tainted with the corruption allegations. Arguably, these intentions were *not* racially motivated
- o however part of the reason for selecting the chosen candidate, and rejecting the Pakistani origin claimant, was that the former was not of Pakistani origins, whereas the latter was
- o this therefore amounted to direct discrimination on racial grounds, whatever the intention and subjective motivation of the Labour Party had been in selecting as it did
- o the House of Lords observed that any claim that the discriminator should be absolved, because its *intentions* were not racially motivated, was 'nothing more than the old plea that you have nothing against employing a black person, but the customers would not like it'

When the House of Lords examined the issue in *Nagarajan*, they emphasised that *James* was **not** support for the proposition that the discriminator's state of mind is irrelevant when answering the causation question 'Did the less favourable treatment occur on prohibited grounds?' In fact:

(*Nagarajan v LRT* [1999] IRLR 572)

- o in cases where the issue is whether an employer's less favourable treatment of a worker was done on prohibited grounds (eg sex, race etc), it will be *essential* to enquire why the employer acted as he did, a question which, once answered, will usually show whether there has been any unlawful discrimination
- o however that essential enquiry must be distinguished from a wholly different question, namely: if the discriminator treated the complainant less favourably on prohibited discriminatory grounds (race, sex etc), why did he do so? This latter question **is** irrelevant to the determination of whether direct discrimination has occurred

In *Amnesty International*, the EAT concluded that there was no real difficulty in reconciling the principles in *James* and *Nagarajan*:

- o in some cases, such as *James*, the ground, or reason, for the treatment complained of is inherent in the act itself, eg where a sign 'no blacks' is put up, the ground of the action is inherent in the act itself -- in this example, race:
References: *James v Eastleigh* [1990] IRLR 288

- no further inquiry is needed
- someone who has treated someone less favourably on the grounds of his or her race cannot escape liability because he had a benign motive
- o in other cases, like *Nagarajan*, the act is not in itself discriminatory but is rendered so by a discriminatory motivation, ie by the mental process (conscious or unconscious) which led the putative discriminator to do the act:
 - the subject of the inquiry is the ground of, or reason for, the action, not the motive
 - a benign motive is irrelevant (just as in a *James* type of case)
- o in both cases the ultimate question is, necessarily, what was the ground of the treatment complained of (or put another way, the reason why it occurred); the difference between them simply reflects the different ways in which conduct may be discriminatory
- o there is no 'two stage approach':
 - the 'but for' test in *James* is a useful gloss on the statutory test but should not be used as a substitute for the statutory language
References: *James v Eastleigh* [1990] IRLR 288
 - the fact that a claimant's race (or sex) is part of the circumstances in which the treatment complained of occurred, or of the sequence of events leading up to it, does not necessarily mean that it formed part of the ground or reason for that treatment
References: *Martin v Lancehawk* (UKEAT/0525/03/ILB)

Seide v Gillette Industries [1980] IRLR 427
- o *Amnesty* was a *James*-type case -- Amnesty's decision not to appoint the worker to a post was explicitly based on the fact that she was of Northern Sudanese origin; any further enquiry into the mental process was unnecessary
- o even if the case was a *Nagarajan*-type case -- the relevant mental processes did not include any reason or motive, however legitimate or laudable, which Amnesty may have had for not wanting to appoint someone of Northern Sudanese ethnic origin

In conclusion:

- o in some cases (such as *Birmingham CC* and *James*), the subjective reason of the alleged discriminator will not be of assistance in establishing whether discrimination was on prohibited grounds. In those two cases (neither of which was an employment case), the but-for test (would the treatment have occurred if she were not a woman?) was sufficient to establish that less favourable treatment on grounds of sex had occurred. This is because the words 'on the ground of sex' in the Sex Discrimination Act 1975 (and the equivalent words in the other pre-Equality Act 2010 discrimination statutes and regulations) do not refer *only* to the reason why the discriminator acted as he did, but also cover situations in which a prohibited-grounds-based (eg gender-based, race-based) criterion is the basis on which the complainant is selected for less favourable treatment (see Lord Goff in *James* at paragraph 36)
- o however in general, in the employment context, it will usually be *essential* to enquire why the employer acted as he did in order to establish if that treatment was on prohibited grounds. In such cases the but-for test is of no assistance in determining whether or not the treatment amounted to direct discrimination

Whilst the reason why a person acted as she did is a question of fact, it is not open to a tribunal to accept the subjective reason put forward by the alleged discriminator as a matter of fact and then to impute some different reason to her based on the tribunal's objective assessment of a remark and its meaning.

In relation to what constitutes 'on grounds of', in relation to religion and belief, a distinction must be drawn between treatment on the grounds of a person's beliefs, and treatment on the grounds of the manifestation of those beliefs. Dismissing an employee for inappropriately promoting a religious belief in the workplace does not necessarily amount to direct discrimination, as a distinction can be drawn between a worker's religious belief and the worker inappropriately promoting that belief.

References: *Chondol v Liverpool CC* UKEAT/0298/08/JOJ

Thus, the EAT in *McFarlane* held that dismissing a Christian counsellor for failing to give an unequivocal commitment to counsel same-sex couples was not direct discrimination on grounds of religion or belief, as there was a genuine basis for the employer distinguishing between the employee's belief and the manifestation of that belief, and it was conduct which amounted to a manifestation which was the reason for the dismissal. Indeed, a dismissal based even *in part* on the manifestation of a belief will not be direct religious discrimination.

Worked example: workplace relationships

One apparently simple and commonplace situation which has caused more difficulty than might at first glance have been expected is sex discrimination claims which have arisen out of the aftermath of workplace relationships. If a male heterosexual employer has an affair with a female heterosexual worker which breaks up, and he dismisses her because the relationship has ended, is this direct sex discrimination? The answer is 'no':

(*Martin v Lancehawk* (UKEAT/0525/03/ILB)

B v A [2007] IRLR 576

- o the dismissal occurred because of relationship breakdown
- o in those circumstances the fact that the dismissed worker was a woman was irrelevant to the grounds of dismissal. Hence the less favourable treatment was not 'because of sex', and so did not constitute direct sex discrimination

Another way of looking at this is to examine the question of who the appropriate comparator would be:

- o it is not appropriate to ask whether the male employer would have treated a male worker in the same way. Clearly such a situation would never have arisen, since the male employer was heterosexual and hence would not have been having a relationship with a male worker
- o rather, in order to satisfy the requirement that 'there must be no material difference between' the relevant circumstances in the complainant's case and those involved in the comparison she chooses, that comparison would have to involve a homosexual male employer having a relationship with a homosexual male worker. Given that comparator, it is clear that the employer would have behaved no differently when the relationship broke up, and so the gender of the worker was indeed irrelevant to the decision to dismiss

Justification of direct age discrimination

Where the relevant protected characteristic in a given case is disability, gender reassignment, marriage and civil partnership, pregnancy and maternity, race, religion or belief, sex or sexual orientation, a justification defence will only be available to claims of indirect discrimination.

By contrast, in cases of age discrimination, uniquely, the justification defence can be used both:

- o in cases of direct age discrimination, and
- o in cases of indirect age discrimination

As is the case with the other prohibited grounds however, it is not available for cases of victimisation or harassment on the grounds of age (see Victimisation and Harassment).

An employer will succeed in establishing the justification defence in a claim of direct age discrimination where it can show that its treatment of the claimant was 'a proportionate means of achieving a legitimate aim'. For further information on the justification defence.

Direct sex discrimination by virtue of a contractual term

Note that as regards direct workplace sex discrimination, the direct discrimination provision of the Equality Act 2010 (section 13) does not cover discrimination arising from the contractual terms of the complainant if the 'equality of terms' provisions (ss 64-80) would apply

Where a sex equality clause or rule (under the 'equality of terms' provisions at ss 64-80) applies to a term in an employee complainant's contract (or would apply were it not the case that a relevant equality of terms defence is made out):

- o references to 'sex discrimination' in the Act mean only direct or indirect sex discrimination
References: EqA 2010, ss 25(8), 13, 19
- o where one of an employee complainant's terms is less favourable to her than a corresponding term of her comparator's is to him, this is deemed **not** to be 'sex discrimination', ie not to amount to direct or indirect discrimination where the relevant protected characteristic is sex
References: EqA 2010, ss 70(2)(a), 66(2)(a), 70(3), 39(2)(a)
- o likewise, where an employee complainant does not have a term which corresponds to a term of her comparator's that benefits him, the failure to include that term in the complainant's terms is deemed not to be 'sex discrimination', ie not to amount to direct or indirect discrimination where the relevant protected characteristic is sex
References: EqA 2010, ss 70(2)(b), 66(2)(b), 70(3), 39(2)(a)

The purpose of these deeming provisions is to ensure that where the 'equality of terms' provisions do apply, the same set of facts cannot also give rise to a direct sex discrimination claim, ie the action can **only** be brought as an equality of terms claim.

This 'division of business' between the direct discrimination provision and the equality of terms provisions is further illustrated in the Equality Act Explanatory Notes.

By contrast, where an employee complainant's contract has a term in it that relates to pay, but a sex equality clause or rule would have no effect on it, ie the equality of terms provisions would **not** provide a viable means of bringing a claim, then a claim of direct sex discrimination may still be brought.

This means that where there is no comparator doing equal work (see Equality of terms: equal work and comparators), and an equality of terms claim would not assist the claimant, a direct sex discrimination claim may be brought instead.

The Equality Act Explanatory Notes provide an example of where this might be useful:

- o an employer tells a female employee 'I would pay you more if you were a man'
- o in the absence of any male comparator the woman cannot bring a claim for breach of an equality clause, but she can bring a claim of direct sex discrimination against the employer

More favourable treatment re pregnancy or childbirth

It is not unlawful to afford special treatment to a woman in connection with pregnancy or childbirth.

Men are not entitled to bring claims of direct sex discrimination in relation to special treatment which would be, or has been, afforded to a woman in connection with pregnancy or childbirth.

However, only to treatment accorded to a woman so far as it constitutes a proportionate means of achieving the legitimate aim of compensating her for the disadvantages occasioned by her pregnancy or her maternity leave will be covered. So, for example, it is unlawful direct sex discrimination automatically to give a woman on maternity leave a maximum score against a redundancy selection criterion if there are alternative ways of removing the maternity-related disadvantage to her without unfairly disadvantaging the other (male) candidate.

Pregnancy and maternity discrimination

There are separate provisions with regard to discrimination against a worker which occurs because of her pregnancy or in connection with her maternity leave.

In such cases, the worker must bring her claim under section 18, and may not also claim direct discrimination under section 13.

Racial segregation

Segregating a person from others because of race is deemed to be less favourable treatment, and hence always amounts to direct discrimination.

More favourable treatment of disabled persons

It is not unlawful for an employer to treat disabled persons **more** favourably than those who are not disabled.

An individual who is not disabled may not claim direct disability discrimination on account of the fact that his employer treats or would treat disabled persons more favourably than it treats that non-disabled individual.

Protected characteristics of third parties: associative discrimination

Under the Equality Act 2010:

- o the unfavourable treatment must be done 'because of a protected characteristic' (sex, race etc -- see Protected characteristics -- overview), but
- o the claimant does not have to possess the relevant protected characteristic himself

Rather, the relevant protected characteristic can belong to some relevant third party.

For instance, a worker might claim that she had been less favourably treated on account of the fact that she is the primary carer for her disabled child (she might, for example, have been taking time off to care for the child). Such a claim may be brought as a direct disability discrimination claim, even though the disability is that of the child rather than the claimant.

Direct discrimination claims brought in relation to the effect of a protected characteristic possessed by someone other than the claimant are sometimes called 'associative discrimination' claims (ie the unfavourable treatment is done because of the claimant's association with a person who possesses that characteristic).

The Equality Act Explanatory Notes confirm that direct discrimination protection is intended to cover associative discrimination. It gives the (non-employment) example of a Muslim shopkeeper who refuses to serve a Muslim woman because she is married to a Christian, and states that this would be direct religious or belief-related discrimination on the basis of her association with her husband.

Direct marriage and civil partnership discrimination

By way of exception, in cases of direct discrimination in the workplace where the relevant protected characteristic is marriage or civil partnership, claims may only be brought against an employer where:

- o the claimant who is bringing the proceedings, who was the victim of the discrimination, is in fact himself married or a civil partner, and

- o the unfavourable treatment complained of was done because of the fact that that claimant is married or is a civil partner

Hence claims of associative direct discrimination are not available where the relevant protected characteristic is marriage or civil partnership: the person bringing the claim must have been discriminated against because of the fact that he is **himself** married or a civil partner.

Perceived rather than real protected characteristics

Under the Equality Act 2010:

- o the unfavourable treatment must be done 'because of a protected characteristic' (sex, race etc -- see Protected characteristics -- overview), but
- o there is no express requirement imposed that the claimant or anyone else actually possess the relevant protected characteristic

This is a change from the pre-Equality Act 2010 law. For instance, the Disability Discrimination Act 1995 required in a direct discrimination case that:

- o the claimant victim be disabled, and
- o the less favourable treatment be done on grounds of the disabled claimant's (actual, real) disability

This gave rise to caselaw discussion as to whether the legislation protected a victim of less favourable treatment where:

J v DLA Piper UK [2010] IRLR 936

- o the victim claimant was not in fact disabled, but
- o the discriminator thought that he was disabled, and treated him less favourably because of that belief

This is sometimes called discrimination on the basis of perception, ie where the protected characteristic is perceived rather than real.

The Equality Act Explanatory Notes confirm that direct discrimination protection is intended to cover discrimination on the basis of perception. It gives the example of an employer who rejects a job application form from a white man who he wrongly thinks is black, because the applicant has an African-sounding name, and states that this would constitute direct race discrimination based on the employer's mistaken perception.

Although there is as yet no caselaw on the point, it seems in all the circumstances very probable that discrimination on the basis of perception **is** covered by the direct discrimination provision of the Equality Act 2010, because where a worker is perceived as possessing a protected characteristic, treated less favourably as a result, but does not in fact possess that characteristic, it can nonetheless properly be said that the less favourable treatment is being done 'because of' the protected characteristic.

Direct marriage and civil partnership discrimination

By way of exception, in cases of direct discrimination in the workplace where the relevant protected characteristic is marriage or civil partnership, claims may only be brought against an employer where:

- o the claimant who is bringing the proceedings, who was the victim of the discrimination, is in fact himself married or a civil partner, and
- o the unfavourable treatment complained of was done because of the fact that that claimant is married or is a civil partner

Hence claims of direct discrimination on the basis of perception are not available where the relevant protected characteristic is marriage or civil partnership: the claimant against whom the discrimination has been perpetrated must **actually** be married, or a civil partner.

Gender reassignment: absence from work

Where a transsexual person is absent from work because of gender reassignment, the employer will discriminate against him if it treats him less favourably than it would treat him were his absence because of sickness or injury; ie employers ought to treat absences from work on account of gender reassignment in the same way that they treat absences due to sickness or injury.

The employer will also discriminate in such circumstances if:

- o it treats him less favourably than it would treat him were his absence for some reason other than sickness, injury or gender reassignment, **and**
- o it is not reasonable to treat him less favourably

A person's absence will be considered to be because of gender reassignment if it is because the person is proposing to undergo, is undergoing or has undergone a process (or part of a process) for the purpose of reassigning the person's sex by changing physiological or other attributes of sex.