LAW PUNDITS

Who Can Bring a Discrimination Claim

LP Learn Material

DISCRIMINATION CLAIMS BY EMPLOYEES

Work wholly or partly in Great Britain

In general, individuals will not be protected by domestic discrimination legislation if they work wholly outside Great Britain. Note however that there are exceptions to this (see below).

Employees will however be covered by discrimination legislation if they work:

- wholly in Great Britain, or
- partly in Great Britain

In either case, the employment will be deemed to be 'at an establishment in Great Britain', and hence within the territorial scope of the legislation.

This test is of course easy to apply to employees who work *wholly* in Great Britain.

It is less straightforward to determine when an employee will be said to do his work *partly* in Great Britain. For instance, consider the facts of *Saggar v MoD*, in which an employee:

- worked for 16 years in Great Britain, and
- was then posted abroad for the following four years, and
- alleged that discrimination occurred during those latter four years

Will it be considered that such an employee 'does his work partly in Great Britain', so that he is covered by the discrimination legislation?

The answer to this question depends on:

- at what point in time the test should be applied, and
- what overall period of the employment relationship should be considered in applying the test (ie just the part of the relationship when the discrimination occurs, or the whole period of the relationship)

Such guidance as there is from the caselaw tell us that:

- the right to bring a discrimination claim before an employment tribunal has to be addressed by reference to the claimant's situation *at the time of the alleged unlawful discrimination*
  References: Tradition Securities and Futures v X [2008] IRLR 934
- in applying the older statutory formulation (of whether the employee did his work 'wholly or mainly outside Great Britain'), it was appropriate to look at the *whole period of employment*, rather than just the period in respect of which discrimination was alleged
  References: Saggar v MoD [2005] IRLR 618

It would seem therefore that the question of whether an employee does his work partly in Great Britain:

- must be considered on the facts as they stand *as at the time when the discrimination is alleged to have occurred*, but
- in answering the question, it is legitimate to examine the circumstances of *the whole of the employment relationship up until the point in time when the discrimination occurs*

For example, applying this distinction, with reference to facts in *Tradition Securities* and *Saggar*:

- an employee (such as Mr Saggar) who works in Great Britain, is then posted abroad, and then suffers discrimination abroad can probably bring a claim in the UK employment tribunal, because:
  - the question as to whether he does his work partly in Great Britain must be considered in relation to the facts as they were at the point in time when the discrimination occurred, ie during the latter period when he is posted abroad, but
  - it is legitimate to take into account the whole of the employment relationship up until that point in time, and hence the earlier period during which he worked in Great Britain is relevant, and tells us that he *can* be said to do his work 'partly in Great Britain'

- by contrast, an employee (such as the claimant in *Tradition Securities*) who worked in Paris for a period, during which time discrimination is alleged to have occurred, and then afterwards transferred to the London office (but no further discrimination occurs whilst she is there) cannot bring a claim in the UK employment tribunal, because:

  - the question as to whether she does her work partly in Great Britain must be considered in relation to the facts as they were at the point in time when the discrimination occurred, ie whilst she was in Paris, and
  - if one takes into account the whole of the employment relationship up until the point in time when the discrimination occurred, she has worked outside Great Britain throughout that entire period, and hence cannot in any sense be said to do her work 'partly in Great Britain'

In *Mak* the EAT held that *partly* means *more than de minimis* so that employees whose work in Great Britain is more than de minimis are protected from discrimination. In making that assessment the EAT held that tribunals should consider:
References: British Airways v Mak (UKEAT/0055/09/SM)

- the nature of the job
- the proportion of time spent in Great Britain

The legislative wording for the test which determines whether the employment is at an establishment in Great Britain has as its central consideration the question of where the employee 'does his work'. That wording is not well suited to dealing with discrimination in recruitment situations, as the employee is not yet 'doing his work' at all, since he is merely applying for a job. In relation to recruitment, the question should instead be whether the parties, at that time of the recruitment, *con-*

templated that the employment would be wholly in Great Britain, partly in Great Britain, or wholly outside Great Britain.
References: Deria v General Council of British Shipping [1986] IRLR 108

Work wholly outside Great Britain

In certain cases, employees who work wholly outside Great Britain will be covered under domestic discrimination legislation:

- **work done for purposes of an establishment in Great Britain** -- employees will be protected under domestic legislation as regards sex, race, ethnic or national origins (but not colour or nationality), disability, sexual orientation, religion or belief or age even though they in fact do their work wholly outside Great Britain where:
  - the employer has an establishment in Great Britain, and
  - the employee is doing work for the purposes of the business at that establishment, and
  - the employee was ordinarily resident in Great Britain when he applied for the job or at any time during the employment

- **work done in another EU state** -- employees will be protected by domestic discrimination legislation (because to disapply it would be contrary to the free movement of workers provisions in the Treaty on the Functioning of the European Union) where:

  Bossa v Nordstress [1998] IRLR 284

  - the employee applies in the UK for a job, but
  - that job involves working exclusively in another EU state (ie the employee would be working wholly outside Great Britain)

Working on ships, aircraft and hovercraft

Sex, Equal Pay, disability, sexual orientation, religion or belief and age

For an employee who works on an aircraft or hovercraft to be protected by the sex, equal pay, disability, sexual orientation, religion or belief and age legislation, it must be the case that:
References: SDA 1975, ss 10, 85(7)

- the aircraft of hovercraft is registered in Great Britain, and
- the craft:
  - is operated by a person who has his principal place of business in Great Britain, or
  - is operated by a person who is ordinarily resident in Great Britain, or
  - is a UK-Government-owned craft

For an employee who works on a ship, it must be the case that the ship:

- is registered in Great Britain, or
- is a UK-Government-owned ship

In the case of ships, aircraft and hovercraft, it must *also* be the case that the employee does his work:

- wholly or partly in Great Britain, or
- wholly outside Great Britain, **but** one the exceptions above in Work wholly outside Great Britain applies

Race

Under the race legislation, as regards employees who work on a ship, the ship will be deemed to be the establishment, provided that:

- it is registered in Great Britain, and
- the employee does **not** work wholly outside Great Britain

The Race Relations Act 1976 also states that where work is not done from *any* establishment, it shall be treated as being done at the establishment with which it has the closest connection.
References: RRA 1976, s 8(4)

Although the legislation is not very clear on this issue, it would seem to follow from this that:

- if the ship is registered in Great Britain, and the employee can be said to work wholly or partly in Great Britain, he will be protected by the race legislation
- UK-Government-owned ships will *probably* be treated the same as ships which are registered in Great Britain (but because subsection 75(4) refers back to the now repealed subsection 8(2), the position is confused)
  References: RRA 1976, s 75(4)
- if the ship is not registered in Great Britain:
  - the tribunal will have to determine at what 'establishment' the employee works; if the work is not done anywhere which could be called an establishment, it will be deemed to be done at the establishment with which the work has the closest connection
  - taking the relevant 'establishment' into account, the tribunal will have to decide whether the employee does his work wholly or partly in Great Britain: if so, he will be protected by RRA 1976
- whether or not the ship is registered in Great Britain, if the employee does his work wholly outside Great Britain, he will only be protected if one the exceptions above in Work wholly outside Great Britain applies

There are also special exceptions which apply to anyone who is outside Great Britain when they apply (or are engaged) to work on a ship:

Unlike the other discrimination legislation, the relevant section of the Race Relations Act 1976 dealing with territorial jurisdiction (s 8) is now silent about those who work on aircraft or hovercraft. They used to be mentioned in subsection 8(2), but that was repealed on 16 December 1999. Anomalously, they are still mentioned in subsection 75(4), which continues to refer back to the now repealed subsection 8(2).
References: RRA 1976, s 75(4)

Taking this confused statutory position into account, it would seem to be the case that, in respect of such workers:

- the tribunal will first have to determine at what 'establishment' the employee works; if the work is not done anywhere which could be called an establishment, it will be deemed to be done at the establishment with which the work has the closest connection
- secondly, taking the relevant 'establishment' into account, the tribunal will have to decide whether the employee does his work wholly or partly in Great Britain:
    - if so, he will be protected by the RRA 1976
    - if not, ie he does his work wholly outside Great Britain, he will only be protected if one the exceptions above in Work wholly outside Great Britain applies

Employers

An employer may be liable for discrimination:

- on their own behalf
- vicariously, for the acts of their employees
- as principal, for the acts of their agents
- by third parties, in the case of certain harassment under the SDA 1975

Vicarious liability

Employers will be liable for discriminatory acts of their employees in the course of employment. A very broad variety of acts will be treated as being done 'in the course of employment': protection is not restricted just to situations where the employee performs an act that they are required to do as part of their job, and does so in a discriminatory way. The context in which the act was performed matters more than the nature of the act itself, so important considerations will include factors such as whether or not:

- it occurred inside the workplace
- it occurred during working hours
- the employees involved were wearing work uniforms at the time

Defences to vicarious liability

It is a defence for an employer who would otherwise be vicariously liable for the acts of its employees to show that it took such steps as were reasonably practicable to prevent the employee from

doing that act, or from doing that kind of act during the course of his employment. Relevant issues include:

- what the employer did before the event (rather than subsequently)
- whether the employer has a written equal opportunities policy
- whether its managers were given equal opportunities training
- whether it had in the past disciplined employees who committed acts of discrimination

The employer cannot rely on this defence where it did not take steps it would have been reasonably practicable to take, even though taking those steps in this particular case would have made no difference.
References: Canniffe v E Riding Council [2000] IRLR 555

However, it can be argued that it was not reasonably practicable to take steps which were most unlikely in any circumstances to have a significant effect on reducing the incidence of discrimination by fellow employees.
References: Croft v Royal Mail [2003] IRLR 592

Liability for agents

An employer may be liable for an agent's discriminatory act against one of the employer's employees if the agent had authority from the employer to do that category of act. For example, where an employer placed a trainee with another company which later terminated the trainee's contract because she was pregnant, the employer was liable for the other company's discriminatory act because it had given the other company authority to terminate training contracts.

Liability for third parties -- general

Except in cases of harassment on grounds of gender (as to which see below), it will in general be difficult to establish that an employer is liable for discriminatory acts against its employees by someone who is neither an employee nor an agent of the employer:

- it is not sufficient to show that the employer had sufficient control over the circumstances in which the incident occurred to have prevented it from happening
  References: Macdonald v AG for Scotland [2003] IRLR 512
- however, the employer will be directly liable for its failure to intervene (rather than for the third party's action) where:
  - it has an opportunity to intervene to stop the third party's discriminatory act from occurring or continuing
  - but does not intervene for a reason that is itself discriminatory (eg because the employee is a woman)

Liability for third parties -- harassment on grounds of sex

The position is different in relation to harassment under the Sex Discrimination Act 1975, as regards any acts which occurred on or after 6 April 2008 (when amendments to the Act came into force).
References: SDA (Amendment) Regs 2008, SI 2008/656, reg 4

Employers are liable under the amended SDA 1975 if they knowingly fail to protect their employees from repetitive harassment by third parties, such as customers and suppliers.
References: SDA 1975, ss 6(2B), 6(2C)

An employer is deemed to have harassed a woman if:

- a third party harasses a woman in the course of her employment
- the employer knows that the woman has been harassed on at least two other occasions by a third party (although the third party need not be the same on any of these three or more occasions), and
- the employer failed to take such steps as would be reasonably practicable to prevent the third party from doing so

A 'third party' in this context means someone other than:
References: SDA 1975, s 6(2D)

- the employer, or
- another of the employer's employees

Aiding discriminatory acts

Anyone who knowingly helps another to do an act of unlawful discrimination is treated as if they did it themselves.

The only defence for someone aiding another to discriminate is to show that:

- the person they aided to commit the act had told them that the act was lawful, and
- they relied on that statement, and
- it was reasonable for them to rely on it

These provisions are often used to make individual employees personally liable for discriminatory acts -- see below.

If A gives information to B, and B relies on A's information in performing a discriminatory act, then A may attract liability for aiding that discriminatory act. In order to prove aiding, A must have *knowingly* aided B to do an unlawful discriminatory act. Hence where A does not know what act B will do as a result of receiving A's information, A is not aiding B to do any act that B consequentially decides upon. Advising or encouraging another to do an act will not, without more, amount to aiding them to do it.

The expression 'aids' in this context bears no technical or special meaning, and is not used in either an extensive or a restrictive way. A person aids another if he helps or assists him. The word is used

in its ordinary sense, and whilst there is no exact synonym, the words help, assist, co-operate or collaborate, convey more or less the right nuance.

Party X cannot be liable for aiding party Y's discriminatory act if party X has done no more than allow an environment to continue to exist in which such conduct could take place, as this does not amount to the necessary relationship of co-operation or collaboration.

Where a solicitor has given objective legal advice in good faith, this is very unlikely to amount to aiding any discriminatory act done subsequently by their client. Aiding would only be made out in the extreme situation of a solicitor acting out of malice and actively promoting discrimination.
References: Bird v Sylvester [2008] IRLR 232

Employees' liability

It is common practice to bring discrimination claims against both the employer and the individual employee who engaged in the discriminatory act. Technically, individual employees cannot be directly liable for employment-related discrimination: the only accepted means by which they can become personally liable for their own acts of discrimination against fellow employees is:

- where the individual employee is named as a joint respondent with the employer
- the employer is found vicariously liable for the individual employee's act, and
- the individual employee is found liable for knowingly aiding the employer to commit that act. This is a rather odd and circular use of the word 'aid', since in effect he is 'aiding' himself to commit an act he himself did

An employment tribunal has jurisdiction to entertain a claim brought solely against a fellow employee who is not the employer, where that individual is alleged to have committed the discriminatory act in the course of his employment, even though no claim has been brought against the employer. Despite this, generally speaking, it is unwise to bring a discrimination claim against a fellow employee only. Naming the employer as a respondent as well has a number of advantages:

- it is more likely that the employer will have the means to satisfy any monetary award which is made
- the claimant may well want disclosure against the employer
- the employer may well be able to increase the likelihood of certain witnesses over whom it has influence coming to tribunal
- the employer may well have useful input to the debate as to whether or not an act was done by the employee in the course of his employment

Where both the employer and the offending employee are found liable, a tribunal has the power to:

- make individual awards against each respondent, or
- make *all* respondents jointly and severally liable for the award