

Events Which Give Rise to Discrimination

Events which can give rise to a discrimination claim

Before employment

Advertisements: it is unlawful to publish an advertisement which might reasonably be understood as indicating an intention to discriminate on grounds of sex or race. It is not unlawful to publish advertisements which might reasonably be understood as indicating an intention to discriminate on grounds of sexual orientation, religion, belief or age but the advertisements will nonetheless go to show direct discrimination in the recruitment exercise of which that advertisement formed a part.

Advertisements are not unlawful if they indicate an intention to discriminate in a way that is *lawful*. For example, it will be lawful to advertise for applicants of a particular gender where gender is a genuine occupational qualification for the job.

Advertisements using gender specific job titles such as 'postman' or 'stewardess' will be taken to indicate an intention to discriminate unless it expressly indicates that applicants may be of either gender. Gender neutral job titles, such as 'salesperson', should be used instead.

Some advertisement wording might be evidence of a recruitment policy that is *indirectly* discriminatory. For example, requiring a certain minimum number of years' experience may indirectly discriminate against younger candidates.

Engagement: it is unlawful to discriminate:

- o in the arrangements made for the purpose of determining who should be offered employment, or
- o in the terms on which employment is offered, or
- o by refusing or deliberately omitting to offer employment

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 will have suffered no detriment (ie not have been less favourably 'treated' or put at a 'disadvantage') on account of the rejection.

The way in which questions asked at an interview are 'arrangements', and therefore:

- o different candidates should not be asked different questions according to their gender, race, sexual orientation etc
- o questions asked should not by their content expressly or implicitly show bias towards or against one gender, one religion etc

Any claim based on gender discrimination concerning 'pay that is regulated by the contract' must be brought under EPA 1970 rather than SDA 1975 if it occurs after an employment contract has begun to run.

There is an exception under the Age Regulations: where a person applying for a job:

- o is over 65 **or**
- o will be over 65 within six months of applying **or**
- o is over the employer's normal retirement age (if that age is 65 or over) **or**
- o will be over the employer's normal retirement age within six months of applying **and**
- o the person dismissed is an employee (as defined by the ERA 1996), a person in Crown employment, a relevant member of the House of Commons staff, or a relevant member of the House of Lords staff

it will be lawful to discriminate against that person on grounds of age:

- o in the arrangements made for the purpose of determining who should be offered employment, or
- o by refusing or deliberately omitting to offer employment

During employment

It is unlawful to discriminate on one of the prohibited grounds against a person employed:

- o in relation to the way that person is afforded access to promotion, transfer or training, or any other benefits, facilities or services, or
- o by refusing or deliberately omitting to afford access to those things, or
- o by subjecting such a person to any other detriment

In relation to discrimination on racial grounds, or on grounds of religion, belief, sexual orientation or age, there is also an express prohibition against discrimination in the terms of employment which are afforded to an existing employee.

There is no such blanket prohibition concerning the terms of employment of existing employees in the case of the Sex Discrimination Act because the position is complicated by the EPA 1970 and the provisions relating to women on maternity leave (see below). However, the provisions mentioned above prohibiting discrimination on grounds of gender with regard to access to 'benefits', or subjecting persons to 'any other detriment' would cover anything discriminatory in the contractual terms of an employee which is:

- o not covered instead by the EPA 1970, and
- o not excluded by the provisions relating to those on maternity leave

Where benefits, facilities or services are provided by someone other than the employer but the employer nonetheless has it in their power to facilitate access to those benefits, facilities or services, both the employer and the actual provider can be liable for any sex or race (but not other forms of unlawful) discrimination.

Pay regulated by the contract: any gender discrimination claim occurring after employment has begun concerning 'pay that is regulated by the contract' must be brought under EPA 1970 (see Equal Pay -- overview). This exclusion from claiming under the SDA 1975 applies to all women, including those on Ordinary Maternity Leave or Additional Maternity Leave.

Women on maternity leave: claims brought by women on either Ordinary Maternity Leave or Additional Maternity Leave are covered in Pregnancy and maternity leave.

Subjection to other detriment: there is a catch-all obligation not to subject employees to any other detriment. 'Detriment' need not involve any physical or economic consequences: the employee need only show that a reasonable employee would or might take the view that they had been disadvantaged in the circumstances in which they had to work. An unjustified or unreasonable sense of grievance about an allegedly discriminatory decision cannot amount to a detriment.

An allegation by an employer that an employee has harassed a third party constitutes a detriment, even if the employer ultimately takes no further formal action.

Dismissal

A dismissal on one of the prohibited grounds is unlawful and may well also be unfair dismissal under ERA 1996. A claim may be brought for a discriminatory dismissal both under the relevant discrimination provisions and ERA 1996.

- o to claim unfair dismissal, the claimant must have accrued the requisite period of service, whereas there is no qualifying period to bring a claim under the discrimination provisions
- o claims for compensation for unfair dismissal are subject to a statutory monetary cap, whereas there is no limit on compensation for claims of discriminatory dismissal
- o unfair dismissal claimants may seek reinstatement and re-engagement but these are not available if the claim is brought only as a discrimination claim

The definition of 'dismissal' in the discrimination provisions includes:

- o employees or partners whose employment or partnership comes to an end (and is not immediately renewed on the same terms) because a certain period has expired or because a certain event has occurred (eg the ending of fixed term contracts), and
- o employees or partners who bring their employment or partnership to an end by their own action, where they are entitled to do so by reason of their employer's or fellow partners' repudiatory breach of contract (eg where an employee or partner has been constructively dismissed)

Where:

- o the reason for dismissal is retirement, and
- o the person dismissed is 65 or over, and

- o the person dismissed is an employee (as defined in ERA 1996), or a person in Crown employment, or a relevant member of the House of Commons staff, or a relevant member of the House of Lords staff

that dismissal is not discrimination under the Age Regulations but is instead protected by the unfair dismissal provisions.

Where there has been a dismissal which the claimant alleges is both unfair and discriminatory, it will not be an error of law for a tribunal:

- o to make a finding, for the purposes of the unfair dismissal claim, that the reason or principal reason for the dismissal was a potentially fair one, based on the reasonable belief of the employer, and also
- o to conclude, for the purposes of the discrimination claim, that the reason for dismissal was also a reason that related to discrimination

For instance, a tribunal might:

- o find, for the purposes of the unfair dismissal claim, that the reason for dismissal was a reasonable belief of the employer in the employee's misconduct, and
- o find, for the purposes of a race discrimination claim, that the employer had dismissed the employee for engaging in that misconduct because he was a man of Moroccan origin

After employment

Former employees can bring claims against their former employers after the employment has ended, if that employment gave rise to rights under employment provisions of the discrimination legislation. It is unlawful to discriminate against or to harass a former employee where that discrimination or harassment 'arises out of and is closely connected to' the former employment relationship. A classic example is where a former employer refuses to provide a reference, or provides a poor reference, either:

- o for reasons that relate to the former employee's gender, race etc, or
- o in retribution for the fact that the employee exercised rights under the discrimination legislation while in employment (ie amounting to post-termination victimisation)

It is arguable that under the RRA 1976 **alone**, the post-termination provision (s 27A) restricts its protection to acts of *direct* discrimination or *harassment*, and does not cover acts taking place after termination of employment which amount only to *indirect* discrimination and/or *victimisation*. This is because that section requires that protected post-termination acts be done *on grounds of race or ethnic or national origins*. However, in *Coutinho*, the Court of Appeal has stated that post-termination acts of victimisation can nonetheless be the subject of a claim, on the basis of the principles set out in *Rhys-Harper v Relaxion Group* and *Shoebridge*. It may be that post-termination *indirect* discrimination under the RRA 1976 would be similarly covered by that caselaw, even if it is not covered by s 27A.

Where a tribunal orders reinstatement in an unfair dismissal claim, the employer's failure to comply with that order will not be actionable as post-termination discrimination (note that *D'Souza* pre-dates the amendments made to the discrimination legislation which explicitly allow post-termination discrimination claims).

Equality and Human Rights Commission

The Equality and Human Rights Commission took over the Disability Rights Commission's (DRC's) functions (as well as those of the EOC and CRE) on 1 October 2007. It has duties and/or powers to:

- o promote understanding of the importance of equality and diversity
- o monitor and advise government on equality law
- o undertake research and provide education and training
- o issue Codes of Practice
- o undertake investigations
- o issue unlawful act notices
- o assess the extent to which public authorities have complied with their duty to eliminate discrimination

It can also help would-be claimants bring proceedings in disability cases (and other discrimination cases) where there is an issue of principle or a good reason to provide assistance. It is sometimes able to make representations where it is not a party (but has no absolute right to do so).

Only the EHRC may bring proceedings for publication of discriminatory adverts or for instructing or pressurising someone to discriminate.