

## **Race discrimination in Employment Law [Law stated as at February 2010]**

This document outlines the steps to present a claim on race discrimination in the field of employment in Great Britain. It takes into account the Race Discrimination employment law as at February 2010.

We are grateful to Weil Gotshal for preparing this document on a pro bono basis. Their contribution is extremely relevant to disseminating information on equality and anti-discrimination laws.

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### ***I. Legislation***

#### **Basis**

There are two primary sources of legislation on racial discrimination within Britain – domestic and European.

#### **1. European Legislation**

There are two forms of legislation that can emanate from the European Community (EC), directly effective and indirectly effective. Directly effective legislation, such as regulations, does not need legislation at a national level to make it effective. Indirectly effective legislation, such as directives, require implementing legislation from a national legislature before they have effect.

Article 13 of The Treaty of Rome (as amended by the Treaty of Amsterdam) confers a power on the European Union (EU) to legislate to combat discrimination on a variety of grounds including ‘racial or ethnic origin’.

[http://eur-lex.europa.eu/en/treaties/dat/12002E/pdf/12002E\\_EN.pdf](http://eur-lex.europa.eu/en/treaties/dat/12002E/pdf/12002E_EN.pdf)

The Equal Treatment Directive (EC Directive 76/207/EEC) covers all aspects of employment (access to employment, promotion, vocational guidance and training,

working conditions and dismissal). In 2002, the Equal Treatment Directive was amended (by Directive 2002/73/EC).

<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31976L0207:EN:HTML>

On 29 June 2000 the European Council issued the *Race Discrimination Framework Directive (Council Directive 2000/43/EC)* (the “**Directive**”). The Directive gives a general framework for the combating of discrimination on the grounds of racial or ethnic origin with a view to harmonizing the principle of equal treatment across Member States.

<http://www.equalrightstrust.org/ertdocumentbank/Race%20Directive.pdf>

**Centrum voor gelijkheid van kansen en voor racismebestrijding v Firma Feryn NV Case C-54/07 (ECJ)**

**Facts**

The Centre for Equal Opportunities and Opposition to Racism brought the case against Firma Feryn NV on the basis of public statements made by the director of Feryn that his undertaking was looking to recruit fitters, but that it could not employ ‘immigrants’ because its customers were reluctant to give them access to their private residences.

**Merits**

Where an employer declares publicly that it will not recruit employees of a certain ethnic or racial origin it will dissuade certain candidates and hinder access to the labour market and so will constitute direct discrimination.

Such a statement will be sufficient to raise a presumption of direct discrimination which the employer will then need to rebut.

Rules on sanctions applicable to breach of national provisions adopted in order to transpose the directive must be effective, proportionate and dissuasive, even where there is no identifiable victim.

On 27 November 2000 the European Council issued the (Council Directive 2000/78/EC) to establish a general framework for equal treatment in employment and occupation.

<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32000L0078:EN:NOT>

## **2. Domestic Legislation**

Within domestic law, discrimination on racial grounds is made unlawful by the Race Relations Act 1976 ( "RRA"). The Directive was incorporated into UK law by the Race Regulations Act 1976 (Amendment) Regulations 2003 (SI 2003/1626). Part II of the RRA deals with discrimination within employment. For employment purposes, the RRA only covers discrimination in 'Great Britain' and not Northern Ireland, the Isle of Man or the Channel Islands.

<http://www.statutelaw.gov.uk/legResults.aspx?LegType=All+Legislation&title=race+relations&searchEnacted=0&extentMatchOnly=0&confersPower=0&blanketAmendment=0&TYPE=QS&NavFrom=0&activeTextDocId=2059995&PageNumber=1&SortAlpha=0>

[Note. At the time of writing, February 2010, the online version of the RRA is only consolidated up to 2008 so some amendments are not incorporated. The statute law website is in the process of being updated and eventually an up to date consolidation will be available.]

The scope of the RRA is not identical to the Directive.

### **Equality Act**

The Equality Act was published in April 2009 and it is hoped that it will receive Royal Assent in Spring 2010. The Equality Act aims to harmonise the definitions of discrimination across all strands of discrimination. At the date of writing the key changes from a race discrimination perspective are anticipated to include:

- The definition of direct discrimination will replace the phrase "on grounds of" with the phrase "because of", although the explanatory notes state that the intention is not to change the law.
- The concept of justification will be harmonised across all strands of discrimination to be a "proportionate means of achieving a legitimate aim".
- The requirement for a comparator will be removed in victimisation cases.
- The definition of harassment will be harmonised across all strands of discrimination. By defining harassment as "unwanted conduct related to a relevant protected characteristic" the bill will extend to harassment based on

perception and association. The definition will also cover employer liability for third party harassment.

- The bill will introduce an “occupational requirement” defence across all protected characteristics, including discrimination on grounds of nationality, and will remove the “genuine occupational qualifications” defence from the RRA.
- The positive action provisions are broadened to allow employers to take proportionate measures to overcome a perceived disadvantage or to meet specific needs e.g. providing prayer facilities for a minority.
- When the RRA was amended to bring it up to date with the Directive the Government implemented the changes by way of regulations issued under the European Communities Act 1972, which could only amend the RRA insofar as was necessary to implement the Directive. Since the RRA was wider in scope than the Directive (in that it covered colour and nationality) this gave rise to a twin track approach to race discrimination law whereby the RRA as amended was used for discrimination on grounds of race, ethnic and national origin, and the old version of the RRA was used for discrimination on grounds of colour and nationality. This has been addressed in the Equality Act which will apply to all of the grounds of discrimination.
- The definition of race is now non-exhaustive and includes “colour, nationality, ethnic or national origin” but the wording suggests it could also include other factors.

### **Making out a claim for race discrimination in employment under domestic law**

To make a claim for racial discrimination in connection with employment under the RRA, a claimant needs to be able to satisfy a number of steps:

- STEP 1: Show that the treatment in question is due to their race.
- STEP 2: Show that this treatment is discriminatory.
- STEP 3: Show that this discriminatory treatment is connected with employment
- STEP 4: If the respondent can demonstrate that their behaviour falls within one of the exceptions, then the claim will fail.
- STEP 5: If the respondent has a defence, then the claim will fail.

If these grounds can be made out, then the claimant can show they have been unlawfully discriminated against. How a claim can be made is dealt with in further detail below.

### **STEP1 – Treatment on the grounds of race**

#### ***Definition of ‘race’***

The RRA defines race in the context of any discrimination being on ‘racial grounds’ or due to ‘racial group’. ‘Racial grounds’ means any of the following grounds, namely colour, race, nationality or ethnic or national origins. ‘Racial Group’ means a group of persons defined by reference to colour, race, nationality or ethnic or national origins.

#### *Mandla v Dowell Lee* [1983] ICR 385 (HOL)

The House of Lords established that the definition of “ethnic origin” is wider than “racial origin” and encompasses religious and cultural differences as well as strictly racial differences. The case laid down guidelines that in order to constitute an ethnic group the group must regard itself and be regarded by others as a distinct community by virtue of a possession and consciousness of a long shared history and cultural traditions of its own including family and social customs and manners.

In *Seide v Gillette Industries* [1980] IRLR 427(EAT) the EAT held that Jews constituted a racial group, whereas in *Nyazi v Rymans Ltd* it was held that Muslims may not constitute a race as they are a group of persons unified only in their religious beliefs. In *CJH Walker Limited v Hussain* [1996] IRLR 11 17 Muslims employees were disciplined for taking a day off work to celebrate Eid in breach of a new company rule that non statutory holidays would no longer be permitted during the companies busiest months. They were able to claim indirect race discrimination on the basis that they were more likely to be Asian. The EAT held that the employer had failed to satisfy the burden under section 57(3) RRA of proving that the requirement was not implied with the intention of treating the claimant unfavourably on racial grounds”. The court stated that a requirement or condition resulting in indirect discrimination is applied with this intention if, at the time the relevant act is done, the person wants to bring about the state of affairs which constitutes the prohibited result of unfavourable treatment on racial grounds; and (b) knows that the prohibited result will follow from his acts. Section 57(3) is not concerned with the motivation of

the respondent. In addition, a tribunal may infer that a person wanted to produce certain consequences from the fact that he acted knowing what those consequences would be.

## **STEP 2 – Discriminatory treatment**

### ***Direct discrimination***

Section 1(1)(a) RRA prohibits treating persons less favourably on racial grounds.

In order to establish that the claimant has been treated less favourably they must show they were treated differently to a comparator who was in the same position in all material respects as them save that they are not a member of that racial group.

In establishing whether the discrimination is on racial grounds the tribunal must decide whether the racial element was an operative or important cause (*Barton v Investec Henderson Crosthwaite Securities Limited* [2003] ICR 1205). It is not necessary that the discriminatory treatment was consciously motivated by race. The reason for the difference can be subconscious (*Vaseghi v Brunel University* EAT/0757/04/IDA).

The discrimination need not focus on the claimant and direct discrimination will include where an individual is dismissed for failing to follow instructions to discriminate against a colleague based on their race (*Showboat Entertainment Centre Limited v Owens* [1994] ICR 65).

*Showboat Entertainment Centre v Owens* [1984] IRLR 7 (EAT)

#### **Facts**

Mr Owens had been dismissed as a result of his failure to carry out a discriminatory act, namely to prohibit black youths from entering the entertainment centre he was managing. He claimed he had been treated less favourably 'on racial grounds' pursuant to section 1(1)(a) of the RRA.

## Merits

The EAT upheld the claim on the basis that the wording of the RRA did not specifically cover only the race of the complainant, but that the words 'on racial grounds' are capable in their ordinary sense of covering any reason for an action based on race, whether it be the race of the person affected by the action or of others.

### ***Indirect discrimination***

Section 1(1)(b) RRA prohibits the implementation of requirements or conditions that would lead to members of a certain racial group being treated less favourably as a result, even though on their face the criteria are not directly discriminatory. The conditions must be such that less members of a certain racial group can comply with the conditions than the proportion of non-members of that group, are not justifiable in spite of that person's racial group and lead to a person being detrimentally affected.

Section 1(1A) RRA provides that an individual also discriminates if he applies to a person, a provision, criterion or practice which puts or would put persons of the same race or ethnic or national origins as that person at a particular disadvantage when compared with other persons, which puts or would put that person at a disadvantage and which he cannot show to be a proportionate means of achieving a legitimate aim. The decision in *Abbey National Plc and Hopkins v Chagger UKEAT/0606/07* suggests that this will also apply to discrimination on grounds of colour.

The wording "or would put" is intended to protect a person who is deterred by a discriminatory provision, criterion or practice from seeking employment for which they are otherwise qualified.

*Perera v Civil Service Commission* [1983] ICR 428 (COA)

#### Facts

Mr Perera, a Sri Lankan, had unsuccessfully applied to the Civil Service. It was a condition of the employment that the applicant was a solicitor or barrister, which Mr Perera was. The selection criteria also included other factors which would be taken into account such as experience in the UK and command of the English language.

#### Merits

The claimant was unsuccessful as though it could be argued that these factors were at the disadvantage of ethnic minorities, Mr Perera was unable to show that he had been rejected as a result of these factors and that they were 'an absolute bar' to his being selected for the job.

### ***Victimisation***

Section 2(1) RRA prohibits treating a person less favourably than others are treated or would be treated as a result of their having brought proceedings, alleged, given evidence, or done anything in relation to, a complaint of discrimination under any provision of the RRA or is suspected of doing so or intending to do so by the victimising person.

A person will not be protected by this section if they are treated less favourably due to an allegation made by them which was false and not made in good faith.

### ***Harassment***

Section 3A RRA prohibits the engagement by any person on grounds of race or ethnic or national origins (and, since *Chagger*, colour) of unwanted conduct which has the purpose or effect of violating another person's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the victim. The test for this is objective (i.e. whether a reasonable person would find the behaviour intimidating) but having regard to the perception of the behaviour by the victim.

Section 3A RRA does not apply to harassment on grounds of nationality. Section 78 RRA also makes it clear that a section 3A harassment can no longer amount to a detriment under section 4(2)(c). Therefore, in order to bring a claim an employee must establish direct discrimination under section 1(1)(a) RRA.



### **STEP 3 – Connected with employment**

#### ***Racial Discrimination in employment:***

##### ***'Employment'***

'Employment' is defined more widely in the RRA than in some other employment related legislation. It is defined in section 78(1) RRA as being 'employment under a contract of service or of apprenticeship or a contract personally to execute any work or labour'. This includes people working on an 'on demand' basis.

*Chief Constable of Lincolnshire Constabulary v Stubbs* [1999] ICR 547 (EAT)

##### Facts

The claimant had been employed by the defendant Constabulary and had been the victim of sexual harassment. These acts had taken place when attending a pub with colleagues immediately after work and also at the leaving drinks of a colleague. The claimant claimed these acts were in the course of employment and that the Constabulary was liable for the acts of the officer in question.

##### Merits

The Employment Appeals Tribunal (EAT) held the defendant to be liable on the basis that at a social gathering of work colleagues, it is entirely appropriate for the tribunal to consider whether or not the circumstances show that what was occurring was an extension of their employment. This would be a fact sensitive analysis, but the EAT held it was reasonable to hold the Constabulary liable in this case even though the acts were not committed either in the course of the employees duties, within the workplace or within working hours.

#### ***In Great Britain***

For the RRA to apply, there is a requirement that employment be at an establishment in Great Britain. This will be the case when the employee works wholly or partly in Great Britain, or when the employee does his work wholly outside Great Britain but the employer has a place of business in Great Britain and the work is for the purposes of the business carried on at that establishment and the employee was resident in Great Britain when applying for or offered the employment or at any time during the course of

that employment. (See sections 4 and 8 RRA). 'Great Britain' means England, Wales and Scotland.

For Northern Ireland, the Fair Employment (Northern Ireland) Act 1976 applies. Further information can be found at:

<http://www.equalityni.org>

### ***Contract Workers***

A contract worker is a person who does work for a principal but who is employed by another person who supplies them under a contract made with the principal. It is unlawful to harass a contract worker or to discriminate against a contract worker in relation to the terms on which you allow them to work, by not allowing them to work, in the way you afford any benefits or by subjecting him to any other detriment.

### ***Advertisements***

It is also unlawful to publish or cause to be published an advertisement which indicates, or might reasonably be understood to indicate, that the employer is engaged in discriminatory activity. (see section 29 RRA). Proceedings in relation to this section can only be brought by Equality and Human Rights Commission ("EHRC").

The interpretation of the term "advertisement" includes "every form of advertisement or notice, whether to the public or not, and whether in a newspaper or other publication, by television or radio, by display of notices, signs, labels, show cards or goods, by distribution of samples, circulars, catalogues, price lists or other material, by exhibition of pictures, models or films, or in any other way".

Under section 29 RRA it is not only the advertiser or employer who can be liable. The publisher of a discriminatory advertisement can also attract liability. However, section 29(4) provides a defence for a publisher where it published the advert in reliance on a statement made by the advertiser that the publication would not be unlawful, and where it was reasonable for the publisher to rely on that statement.

*Cardiff Women's Aid v Hartup* [1994] IRLR 390 (EAT)

#### Facts

Cardiff Women's Aid advertised a post for "a black or Asian woman" under the RRA, section 38, which allows employers to encourage applications from under represented racial groups. The claimant did not apply for the job but brought a claim for racial discrimination under RRA, section 4(1)

#### Merits

The EAT dismissed the claim on the basis that an advert only showed an 'intention' to discriminate; she could not bring a claim as no actual discrimination had been suffered. The Commission for Racial Equality has power to bring an action for a breach of section 29, but an individual who has not applied for a post cannot.

*Race Relations Board v Associated Newspapers Group Limited* [1978] 3 All ER 419 (COA)

#### Facts

An advert was placed in a newspaper advertising nursing and medical staff positions in a hospital in South Africa, contained the words "All white patients". The Race Relations Board felt that it was discriminatory in that it would indicate that only white nurses would be employed. Therefore it was contrary to Race Relations Act 1968 section 6(1).

#### Merits

The court held that it was not discriminatory because the words could not reasonably be understood to show an intention to employ only white nurses.

### ***Engagement, applications, opportunities and dismissal***

It is unlawful for an employer to either directly or indirectly discriminate in the arrangements he makes for offering employment, or the terms of offers he makes or in refusing an offer of employment. Once a person is employed, this prohibition continues in relation to the terms they are employed upon, their opportunities for promotion and other benefits such as training or the terms upon which the person is dismissed. Dismissal includes the non-

renewal of a contract of employment due to race or ethnic or national origins and also the resignation of the employee in circumstances that entitle him to terminate without notice due to an act of the employer (section 4(4A) RRA).

### ***Other detriment***

Within section 4(2c) RRA there is a general 'catch all' provision for discriminating against a person by causing 'any other detriment' to them. This need not have a physical or economic consequence. If a reasonable employee would have taken the view they had been disadvantaged in the circumstances in which they had to work, then this will be sufficient.

### ***Post employment discrimination***

Under section 27A RRA it is unlawful for an employer to discriminate against a person he formerly employed. The act of discrimination must arise out of or be connected with the employment to fall within the provisions of the RRA and the relationship is deemed to continue for such period as is required for all contractual obligations or any reasonable expectations in relation to the contract to be fulfilled, for example, the failure to provide a reference on discriminatory grounds.

### ***Discriminatory practices***

In addition to acts that result in a specific complaint, the RRA also makes unlawful the application of discriminatory practices which could result in an act of discrimination (e.g. discriminatory requirements for a promotion will not result in direct discrimination if no one who would otherwise be eligible for that promotion falls foul of those requirements but will be caught by this provision).

### ***Instructions or inducements to commit unlawful acts***

It is unlawful to instruct someone who has authority over another person, or who ordinarily gives instructions to another person, to instruct that person to discriminate unlawfully. If the person fails to follow that instruction, it is unlawful to dismiss them. Similarly, it is unlawful to induce, or attempt to induce, someone to commit such an act. The inducement need not be made directly to that person.

### ***Vicarious liability and agency***

If an employee contravenes the provisions of the RRA in the course of his employment, then the act is deemed to be done by the employer whether or not they had approved or were aware of the act. The employer has a defence if he can show that he took such steps as were reasonably practicable to

prevent the employee in question committing such discriminatory acts, e.g. equal opportunities practices and training. The rule for agents is that the principal must have given express or implied authority for the agent to act on his behalf, it need not be authority to discriminate, once the authority the agent has is to do an act which could be carried out in a discriminatory manner.

### ***Assisting an unlawful act***

Under section 33(3) RRA a person will be treated as having engaged in an unlawful act if they have knowingly assisted another in committing that act unless they can show that they acted in reliance on a statement made by the other person that the act would not be unlawful and that such reliance was reasonable.

## **STEP 4 – Does an exception apply?**

### ***Exceptions***

#### ***Skills to be exercised outside Great Britain***

If training is offered to persons not ordinarily resident in Great Britain, in relation to skills which will be exercised wholly outside Great Britain, then there is an exception in the RRA which does not prohibit discrimination in relation to this: (see section 6 RRA)

#### ***Private household***

Discrimination on the grounds of colour is excluded from the RRA by section 4(3) for employment which is 'to a substantial degree' in a private household.

#### ***Sports and competitions***

Discrimination on grounds of nationality, place of birth or length of residence is acceptable when used in relation to whether a person is eligible to be selected to represent a country, place or area in a sport or game.

#### ***Special needs***

Section 35 RRA allows employers to afford persons of a particular racial group access to facilities, or services to meet the special needs of persons in that group in relation to their education, training, welfare or other ancillary benefits.

### ***Persons not resident in Great Britain***

Under section 36 RRA an employer may afford persons not ordinarily resident in Great Britain access to facilities for education, training or any ancillary benefits, where the recipients do not intend to remain in Great Britain. This exception only applies to nationality cases.

### ***Discriminatory training by certain bodies***

Under section 37 RRA a training body may afford only persons of a particular racial group access to facilities for training which would help to fit them for that work, or to encourage only persons of a particular racial group to take advantage of opportunities for doing that work, where it reasonably appears to that person that at any time within the previous 12 months there was nobody from that racial group doing that work in Great Britain, or the proportion of persons of that group doing that work in Great Britain was small in comparison with the proportion of persons of that group among the population in Great Britain. This exception will also apply where these conditions are not met for the whole of Great Britain but are met for an area within Great Britain.

### ***Other discriminatory training***

Under section 38 RRA an employer may afford employees of a particular racial group access to facilities for training which would equip them for particular work, and to encourage only persons of a particular racial group to take advantage of opportunities for doing that work where there are no persons of that racial group doing that work at that establishment or the proportion of persons of that group doing that work at that establishment is small in comparison with the proportion of persons of that group either among all those employed by that employer there or among the population of the area from which the employer normally recruits for work in his employment at that establishment.

## **STEP 5 – Is a defence available?**

### ***Defences***

#### ***Genuine occupational requirement or qualification***

There are two genuine occupational exceptions that provide defences under the RRA. The first, 'genuine occupational requirement', is in relation to discrimination of race, ethnic or national grounds (this is narrower than 'racial grounds', defined above). The second is 'genuine occupational qualification' and can apply in all situations where the first exception does not.

### Genuine occupational requirement (section 4A RRA)

If being of a particular race, ethnic or national origin is a genuine and determining requirement, is proportionate and the respondent reasonably is not satisfied the employee meets the requirements, then the employer has a defence. This only applies in cases where the nature of the job or the context in which it is carried out requires it. This defence is not available for discrimination on grounds of nationality.

*Lambeth London Borough Council v Commission for Racial Equality*  
[1990] IRLR 231 (EAT)

#### Facts

The council advertised for two jobs within the housing benefit department. The council decided that it should be confined to “Afro-Caribbean and Asian applicants”. The Commission for Racial Equality brought proceedings under RRA, section 29 in respect of the discriminatory advertisement, as they felt that the jobs were managerial and administrative, and were not covered by the exemption provided by section 5(2)(d) whereby due to the nature of the services being provided, the ethnic origin of the employee is a genuine occupational requirement.

#### Merits

The tribunal held that the advertisement infringed the RRA, sections 29 and 5(2)(d) did not apply. As the job did not require the person to provide “personal services” where there would be direct contact where language, knowledge and understanding of cultural and religious background was of material importance.

### Genuine occupational qualification (section 5 RRA)

This exception will only apply where section 4A does not and where jobs genuinely require racial qualification. The fair grounds on which it may be claimed there is a genuine occupational qualification are where the requirement is due to the job involving some form of dramatic performance or entertainment, photographic or artistic modelling and such a person is required for purposes of authenticity, in relation to employment in a place where food or drink is served for purposes of authenticity (e.g. an Indian restaurant) or the holder of the job is providing personal services to persons of that racial group,

which can most effectively be provided by a person of that racial group.

### ***Justification***

This defence only applies in relation to a claim of indirect discrimination and must be a 'proportionate means of achieving a legitimate aim' which is unrelated to the racial ground. It is for the employer to show this on objective grounds (i.e. that a reasonable employer would have taken this view) and this will be balanced against the discriminatory effect of the requirement. Whether the discrimination is justified is a question of fact for the tribunal.

*Bilka-Kaufhaus GmbH v Weber Von Hartz* [1996] IRLR 317

The court established that in order to justify indirect discrimination an employer must show that the measures correspond to a real need, are appropriate with a view to achieving the objectives pursued and are necessary to that end.

## ***II Protection***

Below is an outline of the primary bodies in Britain that seek to ensure that people do not suffer discrimination. The Employment Tribunal system exists to deal with employment related claims, including discrimination claims against employers.

### **Employment Tribunals**

The Employment Act 2008 has introduced a new regime for employment tribunal claims in England, Wales and Scotland (not Northern Ireland) from 6 April 2009. The employee should follow the ACAS Code of practice on Disciplinary and Grievance Procedures as failure to do so may affect the level of compensation awarded.

To initiate a grievance the employee should raise the complaint in writing with their employer. A meeting should be held to allow the employee to explain their grievance and how they think it should be resolved. The employee has the right upon a reasonable request to be accompanied by a companion. If the matter needs further investigation the employer should adjourn the meeting and resume it once the investigation has taken place. When the meeting is concluded the employer should communicate its decision in writing without unreasonable delay. The employer should inform



the employee that they have a right of appeal when they communicate the decision. If the employee is not satisfied with the outcome they should appeal in writing, specifying the grounds of appeal. The appeal should be dealt with impartially at a hearing which should be conducted by a manager who was not previously involved. The employer should communicate the final decision in writing without unreasonable delay. Please see <http://www.employmenttribunals.gov.uk> for forms and guidance on a tribunal claim.

The time limit for making a claim is three months from when the act complained of was done.

*Barclays Bank Plc v Kapur* [1991] 2 A.C. 355 (HOL)

#### Facts

The complainants, of Asian origin, were originally employed by the Bank of Africa. In 1970 Barclays Bank employed them on the condition that their previous services to the bank in Kenya would not count towards the Bank's pension scheme in the UK, whereas the services of European employees had counted towards their entitlement. The Bank contended that the claims were time barred.

#### Merits

The House of Lords held that it was unlawful discrimination. The Bank had maintained a continuing regime which adversely affected employees for as long as the act continued. Therefore their lack of pension rights equivalent to their European colleagues amounted to discrimination within RRA, section 4(2)(c). The claims were not time barred as the act of discrimination continued throughout the period their previous service was not credited, rather than simply at the commencement of their employment.

To make a claim at an employment tribunal, a claimant needs to file a Form ET1 (available from the employment tribunal's website). The employer should then file an ET3 in response. The employee and employer can agree to a compromise agreement, which must be on terms specified in the Employment Rights Act, to settle the claim if they so agree.

Individuals who believe that they may have been discriminated against often seek further information by way of a race discrimination questionnaire (section 65 RRA). This is a form presented to the employer enquiring into the reasons for doing a relevant act or any other relevant matter. If the questionnaire relates to an issue involving discrimination on the grounds of

nationality, the employer must respond within a “reasonable period”. If it relates to an issue involving discrimination on grounds of race, ethnic or national origins or harassment, the response must be presented within eight weeks from the day on which the questionnaire was presented to the employer.

For claims in relation to colour, race or ethnic or national origin, it is for the complainant to prove facts from which the tribunal could conclude, in the absence of an adequate explanation from the respondent, that the respondent has committed an act of unlawful discrimination. If the complainant succeeds the burden of proof shifts to the respondent and the tribunal must uphold the complaint unless the respondent disproves it.

For claims in relation to nationality, the claimant must prove primary facts from which a tribunal could in the absence of evidence to the contrary, conclude that the claimant was treated less favourably on the ground of nationality. If the claimant cannot do this the case will be lost. If the claimant proves a prima facie case the tribunal may (but is not obliged to) draw an inference that the respondent has discriminated unless the respondent proves otherwise.

### Awards

The tribunal can make an award of compensation if a person has been discriminated against. This award may be adjusted by 25% for failure to follow the ACAS procedure. If an award is not paid, then enforcement action can be taken in the County Court.

The tribunal can make a declaration of the rights of the complainant and respondent in relation to the act to which the complaint relates (e.g. that the complainant is entitled to be considered for a certain position). It can also recommend that the claimant is re-instated into their old position or re-engaged into a similar position. It will only make these awards if it is suitable in the circumstances (which it often isn't and is often not sought by the claimant) and will generally give an award of compensation.

Finally the tribunal can make a recommendation that the respondent takes action within a specified period to obviate or reduce the adverse affect to the complainant (section 56(1) RRA).

<http://www.employmenttribunals.gov.uk/>

- *Commission for Equality and Human Rights*

The Equality Act 2006 abolished the Equal Opportunities Commission and the Commission for Racial Equality and created the Commission

for Equality and Human Rights. The intention of the Act and the new Commission's mandate is to ensure equal treatment, dignity and respect for all. Its functions, duties and powers are laid out in sections 3–32 of the Equality Act 2006 and include: the power to monitor the law and advise central government on it, provide information and advice, issue codes of practice in connection with various specified statutes which operate within the field of equality, conduct inquiries into and investigate whether unlawful acts have been committed pursuant to such legislation and issue to persons an “unlawful act” notice.

<http://www.statutelaw.gov.uk/legResults.aspx?LegType=All+Legislation&title=equality+act&searchEnacted=0&extentMatchOnly=0&confersPower=0&blanketAmendment=0&TYPE=QS&NavFrom=0&activeTextDocId=2320547&PageNumber=1&SortAlpha=0>

The Commissions website provides further advice and guidance on race discrimination for employers, service providers and those advising the public ([www.equalityhumanrights.com](http://www.equalityhumanrights.com)).