

DISCRIMINATION

A GUIDE TO THE RELEVANT CASE LAW

TWENTY-FIFTH EDITION

BY MICHAEL RUBENSTEIN

INDUSTRIAL RELATIONS LAW REPORTS EQUAL OPPORTUNITIES REVIEW

DISCRIMINATION

A GUIDE TO THE RELEVANT CASE LAW

TWENTY-FIFTH EDITION

Michael Rubenstein



Michael
Rubenstein
Publishing

Published by Michael Rubenstein Publishing Ltd

PO Box 61064
Southwark
London
SE1P 5BQ

www.rubensteinpublishing.com
www.eordirect.co.uk
www.eqlr.co.uk

© Michael Rubenstein Publishing Ltd 2012

All rights reserved. No part of this publication may be reproduced in any material form (including photocopying or storing it in any medium by electronic means and whether or not transiently or incidentally to some other use of this publication) without the written permission of the copyright owner except in accordance with the provisions of the Copyright, Designs and Patents Act 1988 or under the terms of a licence issued by the Copyright Licensing Agency Ltd, Saffron House, 6–10 Kirby Street, London EC1N 8TS. Applications for the copyright owner's written permission to reproduce any part of this publication should be addressed to the publisher.

Warning: The doing of an unauthorised act in relation to a copyright work may result in both a civil claim for damages and criminal prosecution.

Crown copyright material is reproduced with the permission of the Controller of HMSO and the Queen's Printer for Scotland. Any European material in this work which has been reproduced from EUR-lex, the official European Communities legislation website, is European Communities copyright.



ISBN: 978-0-9558224-4-5

Printed by Hobbs the Printers Ltd, Totton, Hampshire

CASE INDEX

A v Chief Constable of the West Yorkshire Police	74	Bromley v H & J Quick Ltd	113, 115
Abadeh v British Telecommunications plc	67, 68	Brown v London Borough of Croydon	16
Abbey Life Assurance Co Ltd v Tansell	41	Brown v Rentokil Ltd	76, 77
Abbey National plc v Formoso	79	Brunnhof v Bank der österreichischen Postsparkasse	97, 117
Abdoulaye v Régie Nationale des Usines Renault	101	Bulicke v Deutsche Büro Service GmbH	53
Abdulla v Birmingham City Council	109	Bullimore v Potheary Witham Weld Solicitors (No.2)	47
Abrahamsson v Fogelqvist	86	Bungay v Saini	37, 48
Adekeye v Post Office (No.2)	40	Burke v College of Law	72
Ahmed v Metroline Travel Ltd	66	Burrett v West Birmingham Health Authority	12
Ahsan v Watt	15, 42, 43	Burton v British Railways Board	88
Ainsworth v Glass Tubes & Components Ltd	109	Burton v Higham t/a Ace Appointments	2
Alabaster v Barclays Bank plc (No.2)	101	Bury Metropolitan Council v Hamilton	117, 119, 120, 122, 123
Alabaster v Woolwich plc	101	Busch v Klinikum Neustadt GmbH & Co Betriebs-KG	75
Albion Shipping Agency v Arnold	123	Buxton v Equinox Design Ltd	74
Alexander v The Home Office	47, 49, 50		
Ali v Office of National Statistics	3		
Al Jumard v Clywd Leisure Ltd	50, 74	Cadman v Health and Safety Executive	118, 121
Allaway v Reilly	37	Calder v James Finlay Corporation Ltd	5
Allen v GMB	24, 91	Canadian Imperial Bank of Commerce v Beck (CA)	8
Allonby v Accrington & Rossendale College (CA)	22, 24, 41	Canadian Imperial Bank of Commerce v Beck (EAT)	61
Allonby v Accrington & Rossendale College (ECJ)	96, 99, 105, 109	Canniffe v East Riding of Yorkshire Council	36
Álvarez v Sesa Start España ETT SA	76	Capper Pass Ltd v Lawton	112
Amnesty International plc v Ahmed	13, 16	Carden v Pickerings Europe Ltd	69
Angestelltenbetriebsrat der Wiener Gebietskrankenkasse v Wiener Gebietskrankenkasse	97	Cardiff Women's Aid v Hartup	40
Aniagwu v London Borough of Hackney	3	Carrington v Helix Lighting Ltd	8, 9, 10
Anyia v University of Oxford	18, 40	Cast v Croydon College (CA)	3, 5
Anyanwu v South Bank Students' Union	37	Cast v Croydon College (EAT)	5
Apelogan-Gabriels v London Borough of Lambeth	4	Centrum voor Gelijkheid van Kansen en voor Racismebestrijding v Ferma Feryn NV	80
Arbeiterwohlfahrt der Stadt Berlin eV v Bötzel	101, 102	Chacon Navas v Eurest Colectividades SA	63
Archibald v Fife Council	70, 71	Chagger v Abbey National plc	46, 47
Armitage (1), Marsden (2) and HM Prison Service (3) v Johnson	49	Chapman v Simon	18
Armstrong v Newcastle Upon Tyne NHS Hospital Trust	110, 113, 119	Chattopadhyay v The Headmaster of Holloway School	18
Arnold v Beecham Group Ltd	113	Chatwal v Wandsworth Borough Council	85
Aylott v Stockton on Tees Borough Council	14, 69	Cherfi v G4S Security Services Ltd	85
Aziz v Trinity Street Taxis Ltd (EAT)	32	Cheshire & Wirral Partnership NHS Trust v Abbott	118
		Chief Constable of Dumfries & Galloway Constabulary v Adams	66
B v A	15	Chief Constable of Lincolnshire Police v Caston	4
Badek: application by	87	Chief Constable of Lothian and Borders Police v Cumming	66
Bainbridge v Redcar & Cleveland Borough Council (No.2)	115	Chief Constable of South Yorkshire Police v Jellic	71
Barber v Guardian Royal Exchange Assurance Group	98, 102, 103, 104, 106, 124	Chief Constable of West Yorkshire Police v Khan	32
Barber v Staffordshire County Council	96, 97, 98	Chief Constable of West Yorkshire Police v Vento	15
Barclays Bank plc v Kapur (HL)	5	Chohan v Derby Law Centre	4
Barclays Bank plc v Kapur (CA)	23	City of Bradford Metropolitan Council v Arora	48
Barry v Midland Bank plc (HL)	107, 118	Clark v Metropolitan Police Authority	120, 125
BBC Scotland v Souster	81	Clark v Secretary of State for Employment (CA)	100, 106
Beart v H M Prison Service	71	Clark v Secretary of State for Employment (EAT)	106
Beddoes v Birmingham City Council	110	Clark v TDG Ltd t/a Novacold	72
Benveniste v University of Southampton	122	Clarke v Eley (IMI) Kynoch Ltd	22
Bestuur van het Algemeen Burgerlijk Pensioenfonds v Beune	102	Clarke v Redcar & Cleveland Borough Council	6
Biggs v Somerset County Council	96	CNAVS v Thibault	76
Bilka-Kaufhaus GmbH v Weber von Hartz	104, 105, 118, 123	Cobb v Secretary of State for Employment and Manpower Services Commission	24
Bird v Sylvester	33, 37	Coker v Lord Chancellor's Department	23
Birds Eye Walls Ltd v Roberts	106	Coleman v Attridge Law	63
Blaik v Post Office	52	Coleman v Skyrail Oceanic Ltd	46, 47
BL Cars Ltd v Brown	83	Coloroll Pension Trustees Ltd v Russell	102, 103, 104
Boyle v Equal Opportunities Commission	76	Commission of the European Communities v Kingdom of Belgium	106
BP Chemicals Ltd v Gillick	2, 41	Commission of the European Communities v UK (1984)	86
Bradford Hospitals NHS Trust v Al-Shahib	82	Commissioner of Police of the Metropolis v Locker	8, 9
Brennan v J H Dewhurst Ltd	40	Commissioners of Inland Revenue v Morgan	82
British Airways plc v Grundy (No.2)	118	Community Law Clinic Solicitors Ltd v Methuen	17
British Airways v Starmer	22, 23, 24	Conteh v Parking Partners Ltd	28, 30
British Coal Corporation v Smith (HL)	111	Coomes (E) (Holdings) Ltd v Shields	112
British Coal Corporation v Smith (CA)	119	Cooperative Centrale Raiffeisen Boerenleenbank BA v Docker	13
British Gas Services Ltd v McCaull	4, 71	Coote v Granada Hospitality Ltd (ECJ)	53
British Judo Association v Petty	42, 43	Copple v Littlewoods plc	126
British Leyland Ltd v Powell	112	Cordell v Foreign and Commonwealth Office	69, 73
British Library v Palyza	9	Cornelius v University College of Swansea	32
British Medical Association v Chaudhary	23, 51	Cosgrove v Northern Ireland Ambulance Service	68
British Railways Board v Natarajan	9	Council of the City of Newcastle upon Tyne v Allan	126
British Road Services Ltd v Loughran	120	Council of the City of Sunderland v Brennan	117, 119, 120, 122, 123
British Telecommunications plc v Reid	48	Coventry City Council v Nicholls	117, 119
British Telecommunications plc v Williams	29	CRE v Dutton	80, 81
		CRE v Imperial Society of Teachers of Dancing	38

Croft v Royal Mail Group plc	36, 74	GUS Home Shopping Ltd v Green	79
Cross v British Airways plc	25	Guttridge v Sodexo Ltd	108
Cruickshank v VAW Motorcast Ltd	66		
Cumbria County Council v Dow (No.1)	118, 120, 123		
		Habermann-Beltermann v Arbeiterwohlfahrt, Bezirksverband Ndb/Opf eV	77
Da'bell v NSPCC	49	Hacking & Paterson v Wilson	22, 90
Danosa v LKB Lizings SA	77	Hallam v Cheltenham Borough Council	37
Davies v McCartneys	119	Hall v Woolston Hall Leisure Ltd	3
Davies v Neath Port Talbot County Borough Council	102	Hampson v Department of Education and Science (HL)	7
Dawkins v Department of the Environment	81	Hampson v Department of Education and Science (CA)	23
Degnan v Redcar and Cleveland Borough Council	125	Handels- og Kontorfunktionærernes Forbund i Danmark v Dansk Arbejdsgiverforening (acting for Danfoss)	97, 120, 121
Dekker v VJV-Centrum	53, 75	Handels- og Kontorfunktionærernes Forbund i Danmark (acting for Hertz) v Dansk Arbejdsgiverforening (acting for Aldi Marked K/S)	75, 77
Department for Constitutional Affairs v Jones	4	Hardys v Hansons plc v Lax	23
Dhatt v McDonalds Hamburgers Ltd	81, 82	Harris v Lewisham & Guy's Mental Health NHS Trust	7
Dibro Ltd v Hore	115	Harrods Ltd v Remick	41
Dietz v Stichting Thuiszorg Rotterdam	106	Hartlepool Borough Council v Dolphin	120
Dimtsu v Westminster City Council	19	Hartlepool Borough Council v Llewellyn	125
Din v Carrington Viyella Ltd	18	Hasley v Fair Employment Agency	111
Dodd v British Telecom plc	3	Hayward v Cammell Laird Shipbuilders Ltd	124, 125
Doughty v Rolls-Royce plc	52	Heath v Commissioner of Police for the Metropolis	7
Dresdner Kleinwort Wasserstein Ltd v Adebayo	17	Heinz (H J) Co Ltd v Kenrick	73
Dræhmpehl v Urania Immobilienservice ohG	53	Hendricks v Commissioner of Police for the Metropolis	5
Driskel v Peninsula Business Services Ltd	29	Hennigs v Eisenbahn-Bundesamt	60
D'Silva v NATFHE	10	High Quality Lifestyles Ltd v Watts	69
Dugdale v Kraft Foods Ltd	113, 125	Hill v Revenue Commissioners	98, 121
Dunham v Ashford Windows	65	HK (acting on behalf of Hoj Pedersen) v Fællesforeningen for Danmarks Brugsforeninger (acting on behalf of Kvickly Skive)	100
		HM Prison Service v Beart (No.2)	47
Eagle Place Services Ltd v Rudd	17, 73	HM Prison Service v Johnson	73
Eaton Ltd v Nuttall	112, 113	HM Prison Service v Salmon	48, 50
EBR Attridge Law LLP v Coleman (No.2) (EAT)	19	Horse v Dyfed County Council	14
EFTA Surveillance Authority v Kingdom of Norway	86	Hospice of St Mary of Furness v Howard	64
Eke v Commissioners of Customs and Excise	83	Hounga v Allen	3
Ekpe v Commissioner of Police of the Metropolis	66, 67	Hovell v Ashford and St Peter's Hospital NHS Trust	115
Electrolux Ltd v Hutchinson	112	Howard v Ministry of Defence	105
Elsner-Lakeburg v Land Nordrhein-Westfalen	99	Hoyland v Asda Stores Ltd	79
Emmott v Minister for Social Welfare	53	Hussain v Vision Security Ltd	16
Enderby v Frenchay Health Authority and Secretary of State for Health	117, 120, 123		
English v Thomas Sanderson Blinds Ltd	93	ICTS (UK) Ltd v Tchoula	50
Environment Agency v Rowan	72	Igen Ltd v Wong	12, 15
Essa v Laing Ltd	47	Ingeniørforeningen i Danmark (acting for Andersen) v Region Syddanmark	60
Eversheds Legal Services Ltd v De Belin	79	Insitu Cleaning Co Ltd v Heads	29
Evesham v North Hertfordshire Health Authority	125		
Eweida v British Airways plc (CA)	23, 85	J v DLA Piper UK LLP	64, 65, 67
Eweida v British Airways plc	83	Jaffrey v Department of Environment, Transport and Regions	13
		James v Eastleigh Borough Council (HL)	13, 22, 90
Fareham College Corporation v Walters	71, 73	James v Eastleigh Borough Council (CA)	90
Fearnon v Smurfit Corrugated Cases (Lurgan) Ltd	122	Jämställdhetsombudsmannen v Örebro Läns Landsting	97, 98, 124
Fire Brigades Union v Fraser	42	Jiad v Byford	40
Fisscher v Voorhuis Hengelo BV	106	Jiménez Melgar v Ayuntamiento de Los Barrios	77
Fletcher v Blackpool Fylde & Wyre Hospitals NHS Trust	78	Jivraj v Hashwani	2, 83, 84
Foster v British Gas plc (ECJ)	52	Johnston v The Chief Constable of the Royal Ulster Constabulary	86, 87, 88
Foster v British Gas plc (HL)	52	Jones v Friends Provident Life Office	41
Fu v London Borough of Camden	128	Jones v Tower Boot Co Ltd	36
Fuchs v Land Hessen	58, 59	Jørgensen v Foreningen af Speciallæger	89
		JP Morgan Europe Ltd v Chweidan	70
Garland v British Rail Engineering Ltd	98, 107		
Garry v London Borough of Ealing	83	Kachelmann v Bankhaus Hermann Lampe KG	89
Georgiev v Tehniceski universitet – Sofia, filial Plovdiv	59	Kalanke v Freie Hansestadt Bremen	86
Gerster v Freistaat Bayern	87, 96, 98	Kapadia v London Borough of Lambeth	67, 68
Gibson v Sheffield City Council	117	KB v National Health Service Pensions Agency	99
Gilbank v Miles	31	Kenny v Hampshire Constabulary	70, 72
Gillespie v Northern Health and Social Services Board	100, 101	Kent County Council v Mingo	73
Gillespie v Northern Health and Social Services Board (No.2)	100, 101	Khan v Trident Safeguards Ltd	7
Glasgow City Council v McNab	84	Kingston v British Railways Board	36
Glasgow City Council v Marshall	117, 119	Kirby v Manpower Services Commission	32
Goodwin v The Patent Office	63, 64, 66, 67, 68	Kirton v Tetrosyl Ltd	69
Governing Body of St Andrew's Catholic Primary School v Blundell	48	Komeng v Sandwell Metropolitan Borough Council	18
Governing Body of X Endowed Primary School v Special Educational Needs and Disability Tribunal	65	Kording v Senator Für Finanzen	87
Grainger plc v Nicholson	83, 84		
Grant v HM Land Registry	92, 93		
Greater Manchester Police Authority v Lea	24		
Grundy v British Airways plc	118		

Kowalska v Freie und Hansestadt Hamburg	99, 123	Mowat-Brown v University of Surrey	69
Kraft Foods UK Ltd v Hastie	62	Moyhing v Barts and London NHS Trust	13, 50
Kruger v Kreiskrankenhaus Ebersberg	89	Murphy v Bord Telecom Eireann	114
Kücüdeveci v Swedex GmbH & Co LG	57, 59	Murray v Powertech (Scotland) Ltd	49
Kulikaoskas v Macduff Shellfish	90	Muschett v HM Prison Service	2
Kuratorium für Dialyse und Nierentransplantation eV v Lewark	101		
Kutz-Bauer v Freie und Hansestadt Hamburg	89		
		Nagarajan v Agnew	13, 14
Ladele v London Borough of Islington	85	Nagarajan v London Regional Transport	32, 37, 40
Laing v Manchester City Council	16	Nasse v Science Research Council	8, 9
Land Berlin v Mai	60	National Coal Board v Sherwin	113, 121
Land Brandenburg v Sass	76	National Federation of Self-Employed and Small Businesses Ltd v Philpott	42
Law Hospital NHS Trust v Rush	66	National Power plc v Young	108
Lawson v Britfish Ltd	110	Neath v Hugh Steeper Ltd	103
Leeds City Council v Woodhouse	41	Nelson v Newry and Mourne District Council	18
Leeds Teaching Hospital NHS Trust v Foster	72	Network Rail Infrastructure Ltd v Griffiths-Henry	16, 17
Leonard v Southern Derbyshire Chamber of Commerce	65	Nimz v Freie und Hansestadt Hamburg	99
Leverton v Clwyd County Council (HL)	111, 116	Nixon v Ross Coates Solicitors	29
Lewen v Denda	98, 101	Nolte v Landesversicherungsanstalt Hannover	89
Lewis Woolf Griptight Ltd v Corfield	14	Noor v Foreign & Commonwealth Office	72
Lisboa v Realpubs Ltd	92	North v Dumfries and Galloway Council	111
Littlewoods Organisation plc v Traynor	5	North Cumbria Acute Hospitals NHS Trust v Potter (EAT)	110
Liversidge v Chief Constable of Bedfordshire Police	36	North Cumbria University Hospitals NHS Trust v Fox	108
Lommers v Minister van Landbouw, Natuurbeheer en Visserij	87, 98	North Western Health Board v McKenna	100
London Borough of Hackney v Sivanandan	47, 48	North Yorkshire County Council v Ratcliffe	119
London Borough of Islington v Ladele	12, 14, 84	Nottinghamshire County Council v Meikle	71
London Borough of Southwark v Afolabi	4		
London Borough of Tower Hamlets v Wooster	60, 62	O'Brien v Sim-Chem Ltd	113
London Underground Ltd v Edwards (No.2)	90	O'Donoghue v Redcar & Cleveland Borough Council	58
Loxley v BAE Systems (Munitions & Ordnance) Ltd	61, 62	O'Hanlon v Commissioners for HM Revenue and Customs (CA)	72
Lunt v Merseyside TEC Ltd	6, 7	O'Hanlon v Commissioners for HM Revenue and Customs (EAT)	70, 72
Lycée Français Charles de Gaulle v Delambre	51	Ojutiku v Manpower Services Commission	24
		O'Neill v Buckinghamshire County Council	79
Macarthy Ltd v Smith	109	O'Neill v Governors of St Thomas More RCVA Upper School	78
McClintock v Department for Constitutional Affairs	84	Orlando v Didcot Power Station Sports & Social Club	50
MacCulloch v Imperial Chemicals Industries plc	60, 62	Orthet Ltd v Vince-Cain	50
Macdonald v Advocate General for Scotland (HL)	14, 30	Osborne Clarke Services v Purohit	82
McFarlane v Relate Avon Ltd	84, 85	Owen & Briggs v James	14
McKechnie v UBM Building Supplies (Southern) Ltd	106	Owusu v London Fire & Civil Defence Authority	5
McKinson v Hackney Community College	9	Oxford v Department of Health and Social Security	10, 18
McLoughlin v Gordons (Stockport) Ltd	110		
McNicol v Balfour Beatty Rail Maintenance	64	Page v Freighthire (Tank Haulage) Ltd	7
McWilliam v Glasgow City Council	6, 7	Palacios de la Villa v Cortefiel Servicios SA	58, 59
Madarassy v Nomura International plc	16	Panesar v The Nestlé Co Ltd	24, 25
Madden v Preferred Technical Group Cha Ltd	15	Parmar v East Leicester Medical Practice	32
Magorrian v Eastern Health and Social Services Board	96	Patefield v Belfast City Council	41
Mahlburg v Land Mecklenburg-Vorpommern	75	Patel v Oldham Metropolitan Borough Council	65
Mahood v Irish Centre Housing Ltd	36	Paterson v Commissioner of Police of the Metropolis	66, 67, 68
Maidment and Hardacre v Cooper & Co (Birmingham) Ltd	112, 113	Patterson v Legal Services Commission	43
Mandla v Lee	25, 80	Paul v National Probation Service	70
Marschall v Land Nordrhein-Westfalen	87	Pearce v Governing Body of Mayfield Secondary School	14, 30
Marshall v Southampton and South-West Hampshire Area Health Authority (ECJ)	51, 52, 88	PEL Ltd v Modgill	82
Marshall v Southampton and South-West Hampshire Area Health Authority (No.2) (ECJ)	53	Pensionsversicherungsanstalt v Kleist	88
Martin v Devonshires Solicitors	12, 32	Percy v Church of Scotland Board of National Mission	2
Maruko v Versorgungsanstalt der Deutschen Bühnen	91	Perera v Civil Service Commission	8
Matuszowicz v Kingston upon Hull City Council	4, 71	Petersen v Berufungsausschuss für Zahnärzte für den Bezirk Westfalen-Lippe	57, 59
May & Baker Ltd v Okerago	37	Pickstone v Freemans plc	114
Mayr v Bäckerei und Konditorei Gerhard Flöckner OHG	75	Pointon v The University of Sussex	109
Mecca Leisure Group v Chatprachong	83	Pothecary Witham Weld v Weld	17
Meyers v Adjudication Officer	88	Potter v North Cumbria Acute Hospitals NHS Trust	116
Middlesbrough Borough Council v Surtees	116, 117	Potter v North Cumbria Acute Hospitals NHS Trust (No.2)	108
Millar v Inland Revenue Commissioners	64	Power v Greater Manchester Police Authority	84
Mills v Marshall	4	Power v Panasonic UK Ltd	65
Mingeley v Pennock and Ivory	2	Powerhouse Retail Ltd v Burroughs	108
Ministry of Defence v Cannock	46, 49, 50	Preston v Wolverhampton Healthcare NHS Trust (ECJ)	105, 108, 126
Ministry of Defence v DeBique	23	Preston v Wolverhampton Healthcare NHS Trust (No.2)	108
Ministry of Defence v Fletcher	48	Preston v Wolverhampton Healthcare NHS Trust (No.3)	108
Ministry of Defence v Hay	64	Prigge v Deutsche Lufthansa AG	57, 58
Ministry of Defence v Hunt	57	Project Management Institute v Latif	72
Ministry of Defence v Meredith	48	Pulham v London Borough of Barking & Dagenham	61
Ministry of Defence v Wallis	52		
Ministry of Defence v Wheeler	46, 79	Quinnen v Hovells	2
Morgan v Staffordshire University	65	Quirk v Burton Hospitals NHS Trust	104
Moonsar v Fiveways Express Transport Ltd	29	Qureshi v London Borough of Newham	17
Moroni v Firma Collo GmbH	104		

R v Birmingham City Council ex parte EOC	12	Snoxell v Vauxhall Motors Ltd	119, 121
R v Secretary of State for Employment ex parte Seymour-Smith (ECJ)	88, 89, 107	Somerset County Council v Pike	22
R v Secretary of State for Employment ex parte Seymour-Smith (No.2)	22, 23, 25, 90	Sorbie v Trust House Forte Hotels Ltd	125
R (on the application of Age UK) v Secretary of State for Business, Innovation and Skills	58, 60	Sougrin v Haringey Health Authority	5
R (on the application of Amicus – MSF section) v Secretary of State for Trade and Industry	92	South Ayrshire Council v Milligan	110
R (on the application of E) v Governing Body of JFS	13, 22, 80	South Ayrshire Council v Morton	110
R (on the application of Elias) v Secretary of State for Defence	13, 24, 25, 49, 81	South Tyneside Metropolitan Borough Council v Anderson	111
R (on the application of European Roma Rights Centre) v Immigration Officer at Prague Airport (HL)	13, 14, 82	Specialarbejderforbundet i Danmark v Dansk Industri, acting for Royal Copenhagen	98, 120
R (on the application of the National Council on Ageing) v Secretary of State for Business, Enterprise and Regulatory Reform	57, 58	Springboard Sunderland Trust v Robson	114
Rainey v Greater Glasgow Health Board	118, 119, 123	Stadt Lengerich v Helmig	99
Rankin v British Coal Corporation	106	Stewart v Cleveland Guest (Engineering) Ltd	12
Rank Nemo (DMS) Ltd v Coutinho	33	Swift v Chief Constable of Wiltshire Constabulary	67
Rasul v CRE	8	Swithland Motors plc v Clarke	3
Ratcliffe v North Yorkshire County Council	123	Tarback v Sainsbury's Supermarkets Ltd	71, 73
Raval v Department of Health and Social Security	25	Tattari v Private Patients Plan	43
Redcar & Cleveland Borough Council v Bainbridge (EAT)	118, 122	Tejani v The Superintendent Registrar for the District of Peterborough	81
Redcar & Cleveland Borough Council v Bainbridge (No.2)	114, 119, 120, 122, 126	Tele Danmark v HK (acting on behalf of Brandt-Nielsen)	77
Redfearn v Serco Ltd	19, 81	Ten Oever v Stichting Bedrijfspensioenfonds voor het Glazenwassers- en Schoonmaakbedrijf	102, 104
Reed and Bull Information Systems Ltd v Stedman	28	Tennants Textile Colours Ltd v Todd	116
Rice v McAvoy	17	Thaine v London School of Economics	47
Richmond Adult Community College v McDougall	65	Thomas v National Coal Board	109, 111, 112
Richmond Pharmacology Ltd v Dhaliwal	28, 29	Thomas Sanderson Blinds Ltd v English (No.2)	93
Rihai v London Borough of Ealing	18	Todd v Eastern Health and Social Services Board	100, 101
Rinner-Kühn v FWW Spezial-Gebäudereinigung GmbH	98, 99, 100	Trustees of Uppingham School Retirement Benefit Scheme for Non-Teaching Staff v Shillcock	105
Robertson v Bexley Community Centre	4, 5	Tyagi v BBC World Service	5
Robertson v Department for Environment, Food and Rural Affairs	110	Tyldesley v TML Plastics Ltd	118
Robinson v Post Office	4	United Biscuits Ltd v Young	122
Rolls-Royce plc v Unite the Union	62	Van Den Akker v Stichting Shell Pensioenfonds	103
Römer v Freie und Hansestadt Hamburg	91	Veitch v Red Sky Group Ltd	73
Rosenblatt v Gebäudereinigungsges mbH	59	Vento v Chief Constable of West Yorkshire Police (No.2)	49
Rovenska v General Medical Council	5	Verholen v Sociale Verzekeringsbank Amsterdam	52
Rugamer v Sony Music Entertainment UK Ltd	64	Vicary v British Telecommunications plc	66, 68
Rutherford v Secretary of State for Trade and Industry (No.2)	22, 23	Villalba v Merrill Lynch & Co Inc	32
Sadek v Medical Protection Society	42	Voith Turbo Ltd v Stowe	50
Saini v All Saints Haque Centre	85	Vroege v NCIV Instituut voor Volkshuisvesting BV	104, 105
St Helens & Knowsley Hospitals NHS Trust v Brownbill	125	Vyas v Leyland Cars	8, 9
St Helens Metropolitan Borough Council v Derbyshire	32	Waddington v Leicester Council for Voluntary Services	112, 119
Salford NHS Primary Care Trust v Smith	72	Wakeman v Quick Corporation	83
Sarkatzis Herrero v Instituto Madrileño de la Salud	75	Walker (J H) Ltd v Hussain	50, 54
SCA Packaging Ltd v Boyle	68	Walton Centre for Neurology and Neurosurgery NHS Trust v Bewley	50, 109
Schonheit v Stadt Frankfurt am Main	118	Wardle v Credit Agricole Corporate and Investment Bank	46
Schröder v Deutsche Telekom AG	105	Waters v Commissioner of Police of the Metropolis (EAT)	33
Scott v Commissioners of Inland Revenue	47	Webb v EMO Air Cargo (UK) Ltd (HL)	52, 78
Secretary of State for Health v Rance	108	Webb v EMO Air Cargo (UK) Ltd (ECJ)	75, 77
Secretary of State for Scotland v Wright	52	Webb v EMO Air Cargo (UK) Ltd (No.2) (HL)	78
Seide v Gillette Industries Ltd	14, 81	West Midlands Passenger Transport Executive v Singh	8, 18, 82
Seldon v Clarkson Wright & Jakes (CA)	60, 61	Whiffen v Milham Ford Girls' School	24
Seldon v Clarkson Wright & Jakes (EAT)	60, 62	Wilcox v Birmingham CAB Services	71
Setiya v East Yorkshire Health Authority	53, 97	Wileman v Minilec Engineering Ltd	29
Shackletons Garden Centre Ltd v Lowe	90	Wilson v Health & Safety Executive	121
Shamoon v Chief Constable of the Royal Ulster Constabulary	13, 40	Wolf v Stadt Frankfurt am Main	57
Sheffield City Council v Norouzi	29, 50	Woodcock v Cumbria Primary Care Trust	61
Sheffield Forgemasters International Ltd v Fox	74	Woodrup v London Borough of Southwark	68
Shepherd v North Yorkshire County Council	37	Worringham v Lloyds Bank Ltd	96, 103
Sheriff v Klyne Tugs (Lowestoft) Ltd	46	X v Mid Sussex Citizens Advice Bureau	2
Showboat Entertainment Centre Ltd v Owens	15, 19	Yeboah v Crofton	37
Simon v Brimham Associates	12, 81	Zafar v Glasgow City Council	17
Sinclair Roche & Temperley v Heard	37	Zaiwalla & Co v Walia	48
Singh v Biotechnology and Biological Sciences Research	13		
Sirdar v The Army Board	86		
Skills Development Scotland Co Ltd v Buchanan	119		
Slack v Cumbria County Council	108		
Smith v Avdel Systems Ltd	96, 103		
Smith v Churchills Stairlifts plc	70		
Smith v Safeway plc	90		
Snowball v Gardner Merchant Ltd	29		

INTRODUCTION

The 25th edition of the *Discrimination Guide* has been completely revamped from previous editions.

When we started this Guide, sex, race and equal pay were the only causes of action. As each new strand to the law was added – disability, religion or belief, sexual orientation, age – we added a new chapter to the publication. With the coming into force of the Equality Act 2010, however, this became anachronistic both in form and substance. Not only does the Equality Act standardise most of the definitions across the protected characteristics, but there have also been an increasing number of cases setting out principles which apply to all the discrimination strands. The principles established as to whether a volunteer has employment status for the purpose of discrimination law, as explored in the disability discrimination case of *X v Mid Sussex Citizens Advice Bureau*, for example, apply to all the protected characteristics. It was inappropriate, therefore, for principles of this nature to be found only in the chapter on disability discrimination.

Accordingly, we have totally restructured the Guide, organising it according to cross-strand issues, with separate sections on particular protected characteristics only dealing with principles specific to that characteristic.

We have also used the statutory extracts from the Equality Act 2010, and this has meant dropping a large number of entries from the 24th edition which interpreted words from the old legislation that are not found, or are not repeated sufficiently closely, in the new legislation for us to remain confident that they are still valid.

The Guide covers both cases reported in *Industrial Relations Law Reports* (IRLR) during 2011 and also employment discrimination cases included in *Equality Law Reports* (EqLR). Another major change in the 25th edition is that this incorporates the first full year of cases reported in EqLR. EqLR was launched in part in response to the explosion in recent years in employment law decisions in general and discrimination decisions in particular. This meant that IRLR has been filled to capacity and many discrimination judgments of considerable interest, even if not of major importance, especially at EAT level, were not being reported. EqLR is able to include these cases and the result is reflected in this Guide. Of the 53 cases reported in 2011 from which principles are found in this edition, all were reported in EqLR, whereas only 16 were reported in IRLR as well.

A major purpose of this Guide is to extract from the thousands of discrimination cases decided over the years the main principles concerning employment discrimination that still can be regarded as binding authority. My hope is that this will assist those advising, acting or adjudicating in this jurisdiction on the current approach of the courts to the range of problems of interpretation posed by the statutes.

During 2011, EqLR and/or IRLR reported nine judgments of the Court of Justice of the European Union on discrimination law, one judgment of the Supreme Court, nine employment discrimination law judgments of the Court of Appeal, three from the Court of Appeal in Northern Ireland, two from the Inner House of the Court of Session, two from the High Court, one from the Mayor's and City of London Court, and 42 judgments from the EAT on aspects of discrimination law.

The reported EAT judgments came from courts presided over by 14 different judges: 16 judgments from the outgoing President, Mr Justice Underhill; four judgments from Lady Smith, four from HH Judge Peter Clark, four from HH Judge Richardson, three from HH Judge McMullen QC, two from Mr Justice Keith, Mr Justice Silber, HH Judge Serota QC and HH Judge Birtles, and one judgment each from the incoming EAT President, Mr Justice Langstaff, and from Mr Justice Bean, Mrs Justice Cox, HH Judge Reid QC and Mr Recorder Luba QC.

So far as causes of action are concerned, there was a fairly even split in the areas covered: 16 race discrimination cases, 15 sex discrimination, 14 equal pay, 12 disability discrimination, nine age discrimination, seven religion or belief, and four sexual orientation discrimination cases. Some cases concerned more than one protected characteristic.

Finally, since there has to be a cut-off point in preparing a publication such as this, I have only included cases reported in IRLR or EqLR up to the end of 2011. Inevitably, however, because this area of the law is developing so rapidly, the Guide may include some principles that have overruled by the courts by the time this edition reaches your hands. For those who wish to keep up-to-date, the Guide thus should be seen as an adjunct to *Industrial Relations Law Reports* and *Equality Law Reports*, rather than a replacement for regular perusal of these journals. *Equal Opportunities Review* will continue to provide expert analysis of many of these key decisions.

Michael Rubenstein
January 2012

CONTENTS

1. EXCLUSIONS, EXCEPTIONS AND PRELIMINARY ISSUES

Meaning of “employment”	2
Claim in time	3
Extension	4
Continuing discrimination	5
Examples	5
Contracting out	6
Immunity	7
Death of claimant	7
Bankruptcy of claimant	7
Acts authorised by statute or the executive	7
Discovery and particulars	8
General principles	8
Confidential documents	9
Particulars	9
Obtaining information	10

2. DEFINITIONS OF DISCRIMINATION

Direct discrimination	12
Burden of proof	12
Meaning of “less favourable”	12
Discriminatory treatment	13
Motive	13
Stereotypical assumptions	14
Causation	14
Statutory comparison	14
Evidence	15
Standard of proof	15
Scope of evidence	18
Vicarious discrimination	19
Associative discrimination	19

3. INDIRECT DISCRIMINATION

General principles	22
Provision, criterion or practice	22
Disproportionate impact	22
Pool for comparison	22
Proportionate comparison	23
Whether particular disadvantage to claimant	23
Justifiable	23
Standard of proof	23
Tribunal discretion	25

4. HARASSMENT

Third-party harassment	30
------------------------	----

5. VICTIMISATION

General principles	32
Standard of proof	32
Specific examples	32

6. EMPLOYER LIABILITY

Defence	36
Secondary liability	37
Other unlawful acts	37
Aiding unlawful acts	37
Instructing, causing or inducing contraventions	38

7. DISCRIMINATION BY EMPLOYERS AND NON-EMPLOYERS

Selection arrangements	40
Offer of employment	40
Detrimental treatment	40
Discrimination against contract workers	40
Discrimination by trade organisations	42
Discrimination by qualifications bodies	42

8. INDIVIDUAL REMEDIES

Compensation	46
General principles	46
Aggravated damages	47
Exemplary damages	48
Psychiatric injury	48
Injury to feelings	49
Unintentional indirect discrimination	50
Mitigation	51
Action recommendation	51
Remedies under EU law	51
Direct enforcement	51
Sanctions	53
Time limits	53

9. PROTECTED CHARACTERISTICS

AGE	56
EU age discrimination law	56
Occupational requirements	57
Measures to protect public security and health	57
Direct discrimination	58
Justification	58
General principles	58
Retirement	59
Terms and conditions	59
UK age discrimination law	60
Direct discrimination	60
Discrimination by employers	61
Dismissal	62
Benefits based on length of service	62
Contractual redundancy scheme	62

DISABILITY

EU disability discrimination law	63
UK disability discrimination law	63
Meaning of disability	63
General approach	63
Meaning of impairment	64
Excluded conditions	65
Long-term effects	65
Normal day-to-day activities	66
Recurring conditions	67
Substantial adverse effect	67
Severe disfigurement	68
Effect of medical treatment	68
Progressive conditions	69
Employment discrimination	69
Direct discrimination	69
Duty to make reasonable adjustment	70
Provision, criterion or practice	70
When duty applies	70
Failure to make reasonable adjustment	72

Contents continued

Victimisation	73	Organised religion	91
Disability discrimination by employers	73	Direct discrimination	92
Dismissal	73	Harassment	92
Remedies	74		
Compensation	74		
GENDER REASSIGNMENT	74	10. EQUAL PAY	95
PREGNANCY AND MATERNITY	75	EU equal pay law	95
EU pregnancy and maternity discrimination law	75	Claim in time	96
Pregnancy and sex discrimination	75	Same work	97
Pregnancy and working conditions	76	Burden of proof	97
Pregnancy and dismissal	76	Meaning of “pay”	98
UK pregnancy and maternity discrimination law	78	Legislation	98
Compensation	79	Collective agreements	99
		Overtime	99
		Sick pay	100
		Pregnancy	100
		Maternity pay	100
		Parental leave	101
		Time off	101
RACE DISCRIMINATION	80	Pension schemes	102
EU race discrimination law	80	Scope of Article 141	102
Grounds of race	80	Temporal limitation	104
UK race discrimination law	80	Admission	105
Meaning of race	80	Bridging pensions	106
Vicarious discrimination	81	Notice payment	106
Segregation	82	Redundancy payment	106
Direct discrimination	82	Severance pay	107
Discriminatory treatment	82	Unfair dismissal compensation	107
Motive	82	Travel facilities	107
Stereotypical assumptions	82	UK equal pay law	107
Statutory comparison	82	Claim in time	107
Indirect discrimination	82	Reference by court to tribunal	109
Discrimination by employers	82	Choice of comparator	109
Promotion, transfer or training	82	Common terms and conditions	110
Detrimental treatment	83	Associated employers	111
		Like work	112
RELIGION OR BELIEF DISCRIMINATION	83	Differences of practical importance	112
EU religion or belief discrimination law	83	Responsibility	112
UK religion or belief discrimination law	83	Time of work	113
Meaning of religion or belief	83	Work rated as equivalent	113
Exclusions and exceptions	84	Equal value	114
Occupational requirements	84	Scope for comparison	114
Direct discrimination	84	Job evaluation	114
Statutory comparison	84	Burden of proof	115
Indirect discrimination	85	Work rated unequal	115
Disproportionate impact	85	Independent expert’s report	116
Justifiable	85	Defences	117
Harassment	85	Burden of proof	117
		Grounds for the pay difference	118
SEX DISCRIMINATION	86	Sex discrimination	119
EU sex discrimination law	86	Specific defences	120
Sex as a determining factor	86	Collective agreements	120
Positive action	86	Quality of work	120
Access to jobs	87	Productivity	120
Access to training	88	Additional obligations	121
Working conditions and dismissal	88	Training	121
Discriminatory retirement ages	88	Service payments	121
Indirect discrimination under EC law	88	Protected pay	121
UK sex discrimination law	90	Financial constraints	122
Direct discrimination under UK law	90	Hours of work	123
Indirect discrimination	90	Market forces	123
Disproportionate impact	90	Effect of the equality clause	124
Justifiable	90	Remedies	126
SEXUAL ORIENTATION DISCRIMINATION	91		
EU sexual orientation discrimination law	91		
UK sexual orientation discrimination law	91		

1. EXCLUSIONS, EXCEPTIONS AND PRELIMINARY ISSUES

MEANING OF "EMPLOYMENT"

Employment" means –

(a) employment under a contract of employment, a contract of apprenticeship or a contract personally to do work;

EQUALITY ACT 2010 – s.83

Jivraj v Hashwani [2011] IRLR 827;
[2011] EqLR 1088 Sup Ct

In order to come within the scope of the definition of "employment", the relevant employment relationship must be "employment under" a contract personally to do work. It is not sufficient to ask simply whether the contract was a contract personally to do work, nor is it sufficient to ask what the dominant purpose of the contract was, although the dominant purpose may well be relevant in arriving at the correct conclusion on the facts of a particular case.

Mingeley v Pennock and Ivory [2004] IRLR 373 CA

On the plain words of the statute and the authorities, a claimant has to establish that his contract placed him under an obligation "personally to execute any work or labour".

Jivraj v Hashwani [2011] IRLR 827;
[2011] EqLR 1088 Sup Ct

In *Allonby v Accrington and Rossendale College*, the Court of Justice drew a clear distinction between those who are in substance employed and those who are "independent providers of services who are not in a relationship of subordination with the person who receives the services". There is no reason why the same distinction should not be drawn for the purposes of domestic law between those who are employed and those who are genuinely self-employed. In determining which of these two categories an individual falls into, the essential question to ask is whether, on the one hand, the person concerned performs services for and under the direction of another person in return for which he or she receives remuneration, or whether, on the other hand, he or she is an independent provider of services who is not in a relationship of subordination with the person who receives the services.

Quinnen v Hovells [1984] IRLR 227 EAT

The inclusion in the definition of "employment" of a third limb covering employment under "a contract personally to execute any work or labour" is a wide and flexible concept and was intended to enlarge upon the ordinary connotation of "employment" so as to include persons outside the master-servant relationship.

Muschett v HM Prison Service [2010] IRLR 451 CA

Mutuality of obligation is not a condition of a contract for services.

BP Chemicals Ltd v [1995] IRLR 128 EAT

Gillick

The extended definition of "employment", referring to employment under a contract personally to execute work, must be taken to refer to a contract between the party doing the work and the party for whom the work is done. A contract worker does not enter into an "employment" relationship with the principal.

Burton v Higham t/a Ace Appointments [2003] IRLR 257 EAT

All that the statutory definition of employment requires is for there to be an obligation to do work. In this case, those engaged by an employment agency under a temporary worker's contract fell within the wider definition of "employment", notwithstanding that they provided their services to the client. The obligations set out in their contract corresponded to those envisaged in the statutory definition. The temporary worker's contract required them, when accepting an assignment, to do work. They could not substitute another person to take their place. That the work was performed for the client did not take it outside the scope of the statutory definition.

X v [2011] IRLR 335;

Mid Sussex Citizens Advice Bureau [2011] EqLR 309 CA

Volunteers at the Citizens Advice Bureau who are unpaid and have no binding contract fall outside the scope of the Disability Discrimination Act and the Framework Employment Equality Directive 2000/78. Volunteers do not fall within the meaning "occupation" in Article 2 of the Directive. The concept of "worker" has been restricted to persons who are remunerated for what they do. The concept of "occupation" is essentially an overlapping one, and there is no reason to suppose that it was intended to cover non-remunerated work. Nor could it be held that obtaining a voluntary post was a stepping stone to access to employment and therefore was an "arrangement" made for the purpose of determining who should be offered employment. An arrangement is not for the purpose of determining who should be offered employment if that is not what it is designed to achieve. The purpose of the arrangement in the present case was to secure advisers to provide advice to clients of the CAB; the purpose was not to create a potential pool from which full-time staff could be drawn.

Percy v Church of Scotland Board of National Mission [2006] IRLR 195 HL

An associate minister's relationship with the Church of Scotland constituted "employment" within the meaning of the statutory definition in that she was employed under a contract "personally to execute" work. Accordingly, she was entitled to bring her claim of sex discrimination against the church in an employment tribunal.

Percy v Church of Scotland Board of National Mission [2006] IRLR 195 HL

Holding an office and being an employee are not inconsistent. A person may hold an "office" on the terms of, and pursuant to, a contract of employment.

Hall v Woolston Hall Leisure Ltd [2000] IRLR 578 CA

Where the performance by the employer of a contract of employment involves illegality of which the employee is aware, public policy does not bar the employee, when discriminated against on grounds of sex by dismissal, from recovering compensation. A complaint of sex discrimination by dismissal is not based on the contract of employment. Although the employee must establish that she was employed and was dismissed from that employment, it is the sex discrimination which is the core of the complaint. The correct approach is for the tribunal to consider whether the claimant's claim arises out of or is so inextricably bound up with her illegal conduct that the court could not permit the claimant to recover compensation without appearing to condone that conduct.

Hounga v Allen [2011] EqLR 569 EAT

There is no principle that if an employee does not have the legal right to work in the United Kingdom, he or she cannot bring a discrimination claim. The correct test for dealing with illegality in discrimination cases is the tortious approach set out by the Court of Appeal in *Hall v Woolston Hall Leisure*.

CLAIM IN TIME

(1) *Proceedings on a complaint within section 120 may not be brought after the end of –*

- (a) *the period of 3 months starting with the date of the act to which the complaint relates, or*
- (b) *such other period as the employment tribunal thinks just and equitable.*

(2) *Proceedings may not be brought in reliance on section 121(1) after the end of –*

- (a) *the period of 6 months starting with the date of the act to which the proceedings relate, or*
- (b) *such other period as the employment tribunal thinks just and equitable.*

(3) *For the purposes of this section –*

- (a) *conduct extending over a period is to be treated as done at the end of the period;*
- (b) *failure to do something is to be treated as occurring when the person in question decided on it.*

(4) *In the absence of evidence to the contrary, a person (P) is to be taken to decide on failure to do something –*

- (a) *when P does an act inconsistent with doing it, or*
- (b) *if P does no inconsistent act, on the expiry of the period in which P might reasonably have been expected to do it.*

EQUALITY ACT 2010 – s.123

Dodd v British Telecom plc [1988] IRLR 16 EAT

In order to be a valid complaint sufficient to stop time running, the written application must contain sufficient to identify who is making it and against whom it is made, and must contain sufficient to show what sort of complaint

it is. An application whose contents did not comply with those broad minimum requirements would not be capable of being described as an originating application at all. However, the requirements of rule 1(a), (b) and (c) of the Employment Tribunals Rules of Procedure, which specify that an originating application shall set out the name and address of the claimant and of the person against whom relief is sought and the grounds, with particulars thereof, on which relief is sought, are not mandatory but are directory only. Therefore, where an application indicates that the claimant is making a complaint of discrimination in relation to her rejection for a particular post, a failure to specify whether the complaint is of sex discrimination or race discrimination or both is not fatal to the efficacy of the originating application.

Ali v Office of National Statistics [2005] IRLR 201 CA

Direct discrimination is one type of unlawful act and indirect discrimination is a different type of unlawful act. Accordingly, a claimant who alleged on his originating application that he had been less favourably treated on racial grounds needed permission to amend his claim of race discrimination to add a claim of indirect discrimination since this was a new claim, which was brought out of time.

Cast v Croydon College [1998] IRLR 318 CA

A decision by an employer may be a separate act of discrimination for time limit purposes, whether or not it is made on the same facts as before, providing it results from a further consideration of the matter and is not merely a reference back to an earlier decision. If the matter is reconsidered in response to a further request, time begins to run again. Therefore, the appellant's complaint that the respondents had discriminated against her on grounds of sex by refusing to permit her to work part-time after she returned from maternity leave was not out of time, even though her request to work part-time was first refused prior to her maternity leave, and her originating application was not submitted until after she returned from maternity leave when her further requests to work part-time were again refused. Each decision amounted to a fresh refusal of a fresh request to work part time.

Swithland Motors plc v Clarke [1994] IRLR 276 EAT

An unlawful act of discrimination by omitting to offer employment cannot be committed until the alleged discriminator is in a position to offer such employment.

Aniagwu v London Borough of Hackney [1999] IRLR 303 EAT

A claimant must be able to identify the detriment to which he has been subjected before he can present a complaint. Therefore, the time limit for bringing a complaint of discrimination in respect of an employer's refusal to accept a grievance began to run from the date the decision of a grievance panel was communicated to the employee rather than the date on which that decision was taken.

British Gas Services Ltd v McCaull [2001] IRLR 60 EAT

Time does not run in respect of a discriminatory dismissal until the notice of dismissal expires and the employment ceases. In dismissal cases, it is when the individual finds himself out of a job that he suffers detriment as a result of the discrimination.

Matuszowicz v Kingston upon Hull City Council [2009] IRLR 288 CA

A failure to make reasonable adjustments is an omission, not an act. The time-limit provisions relating to “deliberate omissions” apply even where the failure to make a reasonable adjustment is inadvertent. In such a case, where a person has not done an act inconsistent with making a reasonable adjustment, the tribunal must determine when, if the employer had been acting reasonably, it would have made the reasonable adjustment.

Extension

Robertson v Bexley Community Centre [2003] IRLR 434 CA

An employment tribunal has a very wide discretion in determining whether or not it is just and equitable to extend time. It is entitled to consider anything that it considers relevant. However, time limits are exercised strictly in employment cases. When tribunals consider their discretion to consider a claim out of time on just and equitable grounds, there is no presumption that they should do so unless they can justify failure to exercise the discretion. On the contrary, a tribunal cannot hear a complaint unless the claimant convinces it that it is just and equitable to extend time. The exercise of discretion is thus the exception rather than the rule.

Chief Constable of Lincolnshire Police v Caston [2010] IRLR 327 CA

The statement in *Robertson v Bexley Community Centre* has been latched on to by commentators as offering “guidance”, but in essence is an elegant repetition of well-established principles relating to the exercise of a judicial discretion. What the case does is to emphasise the employment tribunal’s wide discretion.

Mills v Marshall [1998] IRLR 494 EAT

The words “just and equitable” in the discrimination legislation giving power to extend time could not be wider or more general. The discretion to extend time is unfettered and may include a consideration of the date from which the complainant could reasonably have become aware of her right to present a worthwhile complaint.

London Borough of Southwark v Afolabi [2003] IRLR 220 CA

In considering whether it is just and equitable to extend time, a tribunal is not required to go through the matters listed in s.33(3) of the Limitation Act 1980, provided that

no significant factor has been left out of account by the tribunal in exercising its discretion.

Mills v Marshall [1998] IRLR 494 EAT

Where a person was reasonably unaware of the fact that they had the right to bring proceedings until shortly before the complaint was filed, whether it is just and equitable to extend time is for the employment tribunal to determine, balancing all the relevant factors, including whether it is possible to have a fair trial of the issues raised by the complaint. Unawareness of the right to sue might stem from a failure by the lawyers to appreciate that a claim lay, or because the law “changed” or was differently perceived after a decision of another court.

Chohan v Derby Law Centre [2004] IRLR 685 EAT

Delay in bringing a claim in time due to incorrect legal advice ought not defeat a claimant’s contention that the claim ought to be heard. The failure by a legal adviser to enter proceedings in time should not be visited upon the claimant for otherwise the defendant would be in receipt of a windfall.

Robinson v Post Office [2000] IRLR 904 EAT

An employment tribunal was entitled to find that it was not just and equitable to extend the time limit for presenting the claimant’s disability discrimination complaint in respect of his dismissal, notwithstanding that his complaint was out of time because he was pursuing an internal appeal against dismissal. Parliament deliberately has not provided that the running of time should be delayed until the end of the domestic processes. When delay on account of an incomplete internal appeal is relied upon as a reason for failing to lodge a tribunal application in time, it will ordinarily suffice for the employment tribunal to put this into the balance when the justice and equity of the matter is being considered.

Apelogun-Gabriels v London Borough of Lambeth [2002] IRLR 116 CA

The correct law for whether it is just and equitable to extend the time limit for presenting a discrimination complaint which is out of time because the claimant was pursuing internal proceedings was laid down by *Robinson v Post Office* rather than by *Aniagwu v London Borough of Hackney*. The fact, if it be so, that the employee had deferred proceedings in the tribunal while awaiting the outcome of domestic proceedings is only one factor to be taken into account. To the extent that *Aniagwu* lays down some general principle that one should always await the outcome of internal grievance procedures before embarking on litigation, it was plainly wrong.

Department for Constitutional Affairs v Jones [2008] IRLR 128 CA

Although there is no general principle that a person with mental health problems is entitled to delay as a matter of course in bringing a claim, there is an additional factor

in disability discrimination not present when some of the other discretions come to be exercised, which is that the disability must be a 12-month disability as defined in the Act. Any person with a mental condition has therefore to predict whether he is likely to come within the definition. In this case, an employment judge was entitled to exercise his discretion to extend time where the true reason for the delay which occurred in presenting the claim was that the claimant did not want to admit to himself or to others that he was disabled within the meaning of the Act.

Continuing discrimination

Barclays Bank plc v Kapur [1991] IRLR 136 HL

To maintain a continuing regime which adversely affects an employee is an act which continues so long as it is maintained.

Hendricks v Commissioner of Police for the Metropolis [2003] IRLR 96 CA

In determining whether there was “an act extending over a period”, as distinct from a succession of unconnected or isolated specific acts, for which time would begin to run from the date when each specific act was committed, the focus should be on the substance of the complaints that the employer was responsible for an ongoing situation or a continuing state of affairs. The concepts of policy, rule, practice, scheme or regime in the authorities were given as examples of when an act extends over a period. They should not be treated as a complete and constricting statement of the indicia of “an act extending over a period”.

Robertson v Bexley Community Centre [2003] IRLR 434 CA

To establish a continuing act it must be shown that the employer had a practice, policy, rule or regime governing the act said to constitute it.

Cast v Croydon College [1998] IRLR 318 CA

Application of a discriminatory policy or regime pursuant to which decisions may be taken from time to time is an act extending over a period. There can be a policy even though it is not of a formal nature or expressed in writing, and even though it is confined to a particular post or role.

Cast v Croydon College [1997] IRLR 14 EAT

The mere repetition of a request cannot convert a single managerial decision into a policy, practice or rule.

Hendricks v Commissioner of Police for the Metropolis [2003] IRLR 96 CA

The burden is on the claimant to prove, either by direct evidence or by inference from primary facts, that alleged incidents of discrimination were linked to one another and were evidence of a continuing discriminatory state of affairs covered by the concept of “an act extending over a period.”

Tyagi v BBC World Service [2001] IRLR 465 CA

A job claimant cannot complain of a policy of “continuing discrimination” extending over a period. The statutory language relating to selection arrangements, which refers to discrimination in the arrangements which the employer makes “for the purpose of determining who should be offered that employment”, makes it clear that what is being complained about is not employment generally but the particular employment that is being offered.

Examples

Sougrin v Haringey Health Authority [1992] IRLR 416 CA

A grading decision is a one-off act with continuing consequences rather than a continuing act of discrimination.

Rovenska v General Medical Council [1997] IRLR 367 CA

If the General Medical Council’s regime for exemption from a test set for registration as a medical practitioner was indirectly discriminatory, then it would be committing an act of unlawful discrimination on every occasion that it refused to allow the claimant limited registration without first taking the test.

Owusu v London Fire & Civil Defence Authority [1995] IRLR 574 EAT

In alleging a failure by the employers over a number of years to re-grade him and a failure to give him an opportunity to act-up when such opportunities arose, the complainant was alleging a continuing act in the form of maintaining a practice which resulted in consistent discriminatory decisions.

Calder v James Finlay Corporation Ltd [1989] IRLR 55 EAT

By constituting a mortgage subsidy scheme under the rules of which a woman could not obtain benefit, the employers were discriminating against the appellant woman in the way they afforded her “access” to the benefit. It followed that so long as she remained in the employers’ employ, there was a continuing discrimination against her. Alternatively, it could be said that so long as her employment continued, the employers were subjecting her to “any other detriment”. As the rule of the scheme constituted a discriminatory act extending over the period of the appellant’s employment, it was therefore to be treated as having been done at the end of her employment rather than on the last occasion on which she was deliberately refused access to the scheme. Consequently, as her complaint had been presented within three months of leaving her employment, the employment tribunal had jurisdiction to entertain it.

Littlewoods Organisation plc v Traynor [1993] IRLR 154 EAT

A complaint of racial discrimination in respect of alleged racial abuse was not out of time, notwithstanding that the last incident took place more than three months before the complaint was filed, in circumstances in which remedial

measures promised by the employers had not been fully implemented when the respondent resigned and made his complaint to the tribunal. So long as the remedial measures which had been agreed on were not actually taken, a situation capable of involving racial discrimination continued and allowing that situation to continue amounted to a continuing act.

CONTRACTING OUT

(1) A term of a contract is unenforceable by a person in whose favour it would operate in so far as it purports to exclude or limit a provision of or made under this Act.

(2) A relevant non-contractual term (as defined by section 142) is unenforceable by a person in whose favour it would operate in so far as it purports to exclude or limit a provision of or made under this Act, in so far as the provision relates to disability.

(3) This section does not apply to a contract which settles a claim within section 114.

(4) This section does not apply to a contract which settles a complaint within section 120 if the contract –
(a) is made with the assistance of a conciliation officer, or
(b) is a qualifying compromise contract.

(5) A contract within subsection (4) includes a contract which settles a complaint relating to a breach of an equality clause or rule or of a non-discrimination rule.

(6) A contract within subsection (4) includes an agreement by the parties to a dispute to submit the dispute to arbitration if –
(a) the dispute is covered by a scheme having effect by virtue of an order under section 212A of the Trade Union and Labour Relations (Consolidation) Act 1992, and
(b) the agreement is to submit the dispute to arbitration in accordance with the scheme.

EQUALITY ACT – s.144

(1) This section applies for the purposes of this Part.

(2) A qualifying compromise contract is a contract in relation to which each of the conditions in subsection (3) is met.

(3) Those conditions are that –
(a) the contract is in writing,
(b) the contract relates to the particular complaint,
(c) the complainant has, before entering into the contract, received advice from an independent adviser about its terms and effect (including, in particular, its effect on the complainant's ability to pursue the complaint before an employment tribunal),
(d) on the date of the giving of the advice, there is in force a contract of insurance, or an indemnity provided for members of a profession or professional body, covering the risk of a claim by the complainant in respect of loss arising from the advice,
(e) the contract identifies the adviser, and
(f) the contract states that the conditions in paragraphs (c) and (d) are met.

EQUALITY ACT – s.147

Clarke v [2006] IRLR 324 EAT

Redcar & Cleveland Borough Council

Where the parties make a contract that follows any attempt by an ACAS conciliation officer to promote a settlement, the contract is made with the assistance of that ACAS officer. Whether a settlement is effective to preclude a claim being brought before a tribunal depends on whether what the ACAS officer has done corresponds to the functions which a conciliation officer has a duty, or power, to discharge. In determining whether the conciliation officer exercised her functions in order to effect a valid conciliation contract, the following principles apply:

a. The ACAS officer has no responsibility to see that the terms of the settlement are fair on the employee.

b. The expression “promote a settlement” must be given a liberal construction capable of covering whatever action by way of such promotion as is applicable in the circumstances of the particular case.

c. The ACAS officer must never advise as to the merits of the case.

d. It is not for the tribunal to consider whether the officer correctly interpreted her duties; it is sufficient that the officer intended and purported to act under the section.

e. If the ACAS officer were to act in bad faith or adopt unfair methods when promoting a settlement, the agreement might be set aside and might not operate as a bar to proceedings.

Clarke v [2006] IRLR 324 EAT

Redcar & Cleveland Borough Council

An ACAS conciliation officer is not under a duty to give advice, to evaluate the claims or to ensure that the claimants understand the nature and extent of all their potential claims.

McWilliam v [2011] IRLR 568 EAT;

Glasgow City Council [2011] EqLR 554 EAT

The requirement that a compromise contract must relate to a “particular complaint” does not mean that a complaint could only be validly compromised if either it was set out in a pre-existing Tribunal claim or if it had been articulated orally or in writing or in a prior grievance. Giving the words of the statute their ordinary meaning, the term “a complaint” is wide enough to include circumstances where there was nothing more than an expression of dissatisfaction about something. The purpose of the words “particular complaint” are to ensure that there was adequate specification in the compromise agreement itself of the complaint to which it related to so that both parties knew which particular complaint could not be litigated in the future. The employment judge in the present case had correctly concluded that what was required was that the complaint to be compromised should be sufficiently identified either by statutory provision or generically so that the employee was not asked to sign a blanket waiver of all possible claims he or she may have.

Lunt v [1999] IRLR 458 EAT

Merseyside TEC Ltd

The requirement that a compromise agreement “must relate to the particular complaint” is not limited to complaints

that have been presented to an employment tribunal. However, a “blanket” agreement compromising claims which had never been indicated in the past is not permitted.

Lunt v Merseyside TEC Ltd [1999] IRLR 458 EAT
A single compromise agreement can cover claims under more than one statute.

McWilliam v Glasgow City Council [2011] IRLR 568 EAT; [2011] EqLR 554 EAT
The requirement that the employee must have received advice from a relevant independent adviser as to the “terms and effect of the proposed agreement” did not require the relevant independent adviser to offer a view on whether or not the deal on offer was a good one or whether or not the adviser thought that the employee should accept it.

IMMUNITY

Heath v Commissioner of Police for the Metropolis [2005] IRLR 270 CA
Proceedings before a police disciplinary board constituted under the Police (Discipline) Regulations are sufficiently “judicial” to fall within the rule of absolute immunity from suit that attaches to judicial or quasi-judicial proceedings and excludes complaints about unlawful discriminatory conduct in the course of such proceedings to other judicial bodies, including employment tribunals.

DEATH OF CLAIMANT

Harris v Lewisham & Guys Mental Health NHS Trust [2000] IRLR 320 CA
A complaint brought under the discrimination statutes survives the death of the complainant.

BANKRUPTCY OF CLAIMANT

Khan v Trident Safeguards Ltd [2004] IRLR 961 CA
A claim for race discrimination is a “hybrid” claim, since it includes both a claim for pecuniary loss, which is property that is part of the bankrupt’s estate, and a claim for injury to feelings, which is “personal” and does not form part of the bankrupt’s estate, and therefore the whole of the hybrid claim vests in the trustee in bankruptcy in accordance with the decision in *Ord v Upton*. However, there is a public interest in claims of race discrimination being fully examined. Therefore, a bankrupt should be permitted to limit their claim for relief to a declaration and compensation for injury to feelings only. If that is done, the claim ceases to be a hybrid one.

ACTS AUTHORISED BY STATUTE OR THE EXECUTIVE

1(1) This paragraph applies to anything done –
(a) *in pursuance of an enactment;*
(b) *in pursuance of an instrument made by a member of the executive under an enactment;*
(c) *to comply with a requirement imposed (whether before or after the passing of this Act) by a member of the executive by virtue of an enactment;*
(d) *in pursuance of arrangements made (whether before or after the passing of this Act) by or with the approval of, or for the time being approved by, a Minister of the Crown;*
(e) *to comply with a condition imposed (whether before or after the passing of this Act) by a Minister of the Crown.*

(2) A person does not contravene Part 3, 4, 5 or 6 by doing anything to which this paragraph applies which discriminates against another because of the other’s nationality.

(3) A person (A) does not contravene Part 3, 4, 5 or 6 if, by doing anything to which this paragraph applies, A discriminates against another (B) by applying to B a provision, criterion or practice which relates to –

- (a) B’s place of ordinary residence;*
- (b) the length of time B has been present or resident in or outside the United Kingdom or an area within it.*

EQUALITY ACT 2010 – Sch. 23, para. 1

Hampson v Department of Education and Science [1990] IRLR 302 HL
An act is done “in pursuance of” an enactment, order or instrument only if it is specified in the enactment, order or instrument.

Page v Freighthire (Tank Haulage) Ltd [1981] IRLR 13 EAT
The interests of safety are not a justification for discrimination on grounds of sex unless the act was done to comply with a pre-existing statutory requirement.

Page v Freighthire (Tank Haulage) Ltd [1981] IRLR 13 EAT
In order to satisfy the statutory test, an employer does not have to show that debarring a woman from taking up a job was inexorably the only method available to him of satisfying the requirements of the Health and Safety at Work Act to ensure, so far as is reasonably practicable, the health, safety and welfare at work of his employees. It is important to consider all the circumstances of the case, the risk involved and the measures which it can be said are reasonably necessary to eliminate the risk. There may be cases where one course which is suggested as being sufficient may leave open some doubt as to whether it is going to achieve the desired level of protection. In such a case, it may be that an employer is complying with the requirements of the legislation if, in all the circumstances, he thinks it right not to allow an employee, for his (or her) own protection or safety, to do the particular job.