EQUAL JUSTICE GUIDE –

Race Discrimination Law for Police Officers

Innovative, fearless, powerful, with an unrelenting commitment to justice and a proven track record of taking down big organisations

– Carol Howard

The law stated in this document is stated as known at 10 October 2018. The law changes from day to day and the reader is advised to take timely legal advice if s/he has any legal problem. Hence, while every attempt has been made to ensure the accuracy of the contents of this document, the author(s) and this firm cannot accept any responsibility for advice given, or steps taken, in reliance on its contents.

Introduction

1. There are several key components to maximising your chances of success when you experience problems at work. The most important of which is **funding**. You need legal representation in order to have a better chance of winning. Only 5% of litigants in person "win" (win or settle) their Employment Tribunal ("ET") claims. To put it another way, you have a 95% chance of losing your discrimination claim unless you have legal representation.
2. You therefore need to secure sufficient funding to pay for your solicitor to run the claim to trial and for your barrister or advocate to argue that claim for you at trial.
3. The next key component is to take **early legal advice**. The sooner you take legal advice and put into play a litigation strategy the better your chance of success. This is particularly so because employment law is complicated and the **time-limits** for claims are very severe. If you miss your time-limit, you may have already lost your claim before you begin. Indeed, employers often delay processes in order to place you out of time.
4. It is important to know that you only have **three months less one day** of your dismissal or last detriment to register your prospective discrimination with ACAS. Hence, if you were racially abused at work on 14 October 2018 you would only have until 13 January 2019 to register your claim with ACAS. After that your claim would be out of time, and you would need a "just and equitable" time extension to proceed with the claim. If the ET does not extend the time-limit, you have already lost.
5. You also need to take advice from an expert lawyer, and preferably a specialist employment law firm, with a proven successful track-record. Employment law is much more complicated than almost every other area of law and it changes much more frequently. Solicitors often make mistakes in this area of law as a result. It is not an area of law that you can dabble in. Even the time-limits require careful consideration.
6. The next component is to understand that most difficult work situations are **created by design** rather than by accident. This consciousness should occur further to the initial legal advice but the important thing to take on board is that

your difficult work situation, although possibly a surprise to you, has, more often than not, been planned in advance. This is because employers take legal advice, and management take HR advice, very early on in a prospective dispute or where they have decided to dismiss a worker. The key question for the manager at that time will be whether they want to retain the worker or to transfer or to dismiss them. A litigation strategy is then put into place by their legal adviser to achieve that objective.

7. There are six standard ways to set up a worker for a dismissal: by creating a redundancy situation through a restructure; by accusing the worker of misconduct (being "stuck on"); by (micro-) managing them out for alleged poor performance; by creating a hostile work environment causing the worker to resign (eg: in the City, this is achieved by paying the worker a low or no bonus); by the worker becoming ill with work-related stress and then accusing them of a lack of capability due to ill-health; or, in the absence of any other option, by asserting that trust and confidence has broken down irretrievably. In the police, the normal managing out process is achieved by the officer being stuck on or making the officer too ill to continue at work.
8. From your legal advice you should be able to know what your rights are, what your chances of successfully exercising those rights are, what the likely value of that claim is, and from that, what outcome you are able to achieve.
9. Assuming your claim has merit (a 51% chance of success), the likely **value of the claim** will be a big factor in what outcome you can achieve.
10. Disappointingly, although the remedy for discrimination claims is technically unlimited, the average injury to feelings award for significant discrimination over an extended period (in a case in which the worker is not dismissed) is about £13,000.
11. The Presidents of the Employment Tribunals in England & Wales and Scotland have issued joint Presidential Guidance updating the bands of awards for injury to feelings, known as the Vento bands. These are updated from time to time in accordance with the Retail Price Index. In respect of claims presented on or after 6 April 2018, the Vento bands are as follows: a lower band of **£900 to £8,600** (less serious cases); a middle band of **£8,600 to £25,700** (cases that do not merit an award in the upper band); and an

upper band of **£25,700 to £42,900** (the most serious cases), with the most exceptional cases capable of exceeding £42,900.

12. The higher awards involve dismissal cases and/or those in which the claimant had become long-term ill (or disabled, or more severely disabled) and therefore was unlikely to work again for a longer period of time and/or would have achieved promotion during that period. For example, in 2014, in *Horler v Chief Constable of South Wales Police*, the ET ordered South Wales Police to pay £230,215 for disability discrimination to a police officer who was required to retire because his knee injury meant that he was unable to carry out front-line duties. The tribunal found that the police force had not met its duty to make reasonable adjustments because it had failed to consider alternative posts for him. Similarly, in *Bahra v Chief Constable of Bedfordshire Police*, a long-serving police officer of Sikh origin successfully claimed that Bedfordshire Police committed race discrimination against him after he was passed over for promotion. He was awarded £209,188. However, the vast majority of claimants received much lower awards (or lost).
13. If you are dismissed, and you win that dismissal claim, you are also entitled to your net loss of earnings arising out of that loss of work, in addition to an injury to feelings award. ETs, however, rarely award more than **one year's net salary,** partly because they assume that you will find equivalent paid work within that period (unless you are long-term ill).
14. In 2016 / 2017 there were 2,240 race discrimination claims issued in the Employment Tribunal. Of these only 3% win at the final hearing. 36% settle before trial.
15. You also need to factor in what the claim will cost you to run. This is because in the ET there is no costs regime. This means that if you win your claim the Respondent does not have to pay your costs. Hence, if your case costs say £30,000 to run and you win and are awarded £12,000 you actually end up £18,000 worse off by winning (and £30,000 worse off if you lose).
16. The last component to maximising your chances of success is to have and to retain **realistic expectations**. This is particularly important given the relatively low awards (and high costs) of running an ET claim.
17. Normally, and given the likelihood of a low award, as respects out of court settlements, we say that 12 months' net monies would be a good outcome,

and 18 months' monies is a very good outcome. In practice, only 2% of claims achieve 2 years' monies or more. Our record so far is 14 years' net monies. Our highest award for injury to feelings is £47,500 which is probably the highest (un-appealed) discrimination award this century.

18. In the end, your ability to successfully transition to a new role is the most likely path to a good outcome. This is normally achieved by a termination agreement and you securing **a new role** away from the hostile working environment. This new role is invariably with a new employer.

Police officers

19. For police officers the work terrain is different.
20. Historically, in the 1970s, the standard reaction within the MPS to a race complaint was to refer the officer to OH for a mental health assessment. S/he would be mad to complaint etc. So things have improved, because the officer is not now assumed (or deemed) to be insane, but not by much. These days the most common retaliation for a race complaint is being marginalised and in more serious cases being "stuck on" (targeted for a disciplinary/dismissed).
21. However, because police officers are not employees, they cannot be dismissed for fair reasons other than gross misconduct. This means that they are stuck on for gross misconduct.
22. One horrible way of sticking the officer on is to accuse them of committing a criminal offence and arresting them, and when the CPS states that there should be no further action, removing them from their office through the misconduct process. For a salutary tale, it is worth reading the Sultan Alam or Carol Howard cases, for how bad the retaliation can be. In 2012, Sultan Alam received more than £800,000 compensation from Cleveland Police over claims he was racially abused by colleagues, then set up and jailed for a crime he did not commit.
23. Much depends on the integrity and professionalism of the department managing the misconduct process. At the MPS, the misconduct process is managed by the DPS (or PSD), which is nicknamed the "departure lounge". This is because the DPS is perceived to whatever management wants them

to do, and to do so without question. The DPS appear to believe that they are empowered to do anything which protects the reputation of the police ie: from their perspective, that which prevents the exposure of discrimination and corruption or anything that will cause an embarrassment to senior officers.

24. The DPS has recently itself been exposed by an ET decision to employ corrupt officers. In the Carol Howard case they admitted to having a policy to subvert equality law. They admitted that no officer would ever be permitted to win a FAW (grievance) for discrimination. This policy has now been ended. However, the corrupt DPS senior officers who devised it, managed it and implemented it have not been identified or disciplined and presumably remain in the department (or in the MPS).
25. It has to be remembered that the MPS is seen as the market leader by other police forces. Cleveland police force, for example, which has significant racism problems recently took advice from the MPS about how to manage such cases.
26. Unfortunately, the MPS was overseen by the toothless and ineffective IPCC. Hence, they do not believe themselves to be accountable. And power without accountability leads to a working culture in which corruption is likely to occur.
27. To put it another way, none of the officers who broke the law in the Carol Howard case have been disciplined almost three years on, even with IPCC involvement.
28. It is hoped that the IOPC (which replaced the IPCC) will be a more effective and independent organisation.
29. The other workplace disadvantage faced by officers is that they are much more likely to suffer retaliation if they complain of racism than workers in other employments. Further, they are much more likely to face a closed ranks opposition and stigma thereafter than other workers.
30. This means that their psychological health is more likely to be adversely affected and clinical (reactive) depression and PTSD is a more likely consequence. In severe cases, an advantage that officers have is that their pension and ill-health retirement rights (and injury award rights) are much better than those of other workers. This means that the medical retirement route is often the most financially beneficial route of exiting the organisation.

That said, this is a benefit in a worst case situation because an officer has to be “permanently disabled” to achieve medical retirement.

31. The one major advantage that officers have relative to other workers is that most are members of the PFEW and so they (theoretically) have no funding issues for their internal advice and external ET claims.

Funding

32. Without a legal representative, you have a 95% chance of losing your ET discrimination claim.

33. The average cost of a discrimination case (solicitor and barrister) that runs to a 15 day trial is about £100,000 plus vat. Most workers cannot afford to fund such claims. We practice “affordable representation”, which means that we try to find a way to trial which the claimant can afford. This is achieved by fixed costs agreements, lower hourly rates, writing off time spent, and no win, no fee agreements. Most law firms, however, charge by the hour (or more accurately by 6 minute units) on a pay as you go basis and when your money runs out they have no obligation to continue to act for you.

34. Given that most workers cannot afford to fund ET claims privately they must look to external forms of funding. For most police officers, the PFEW, will be the first port of call for support, advice and funding.

35. To obtain legal advice from a panel law firm, you must submit a C2 application form. On this form, you must identify the nature of your claim, the facts, what you want as an outcome, and when the last act of which you are complaining occurred.

36. It is important to complete this form accurately. It is advisable to seek expert legal advice before completing this form. This maximises your chance of demonstrating the merit and worth of your potential claims.

37. You should also state which panel firm you would like to take on your case on the C2 form, and that preference will be factored into the final decision.

38. The form then goes through an initial filter to see if the claim is identifiable, arguable and within time.

39. It will then normally be sent to a panel law firm and your preference should be taken into account. Occasionally, the Fed's in-house legal team may decide to retain it to obtain more information about the claim or run it at the initial stages.

40. The panel law firm will then provide an advice to the funding committee as to whether the claim has merit, the cost of running it and what its likely value is.

41. All being well, the panel lawyer will then be given the go ahead to run the claim. The ET claim should then be funded and supported by the PFEW to trial unless it settles or it begins to lack merit (cases can regress as well as improve over time) or the **cost-benefit analysis** means its value (the amount you are likely to be awarded by the ET) is far less than the cost of running it.

42. It is therefore important to factor in that PFEW funding is discretionary and may be discontinued during the course of the litigation journey.

43. When considering funding, and the continuation of funding, the PFEW must consider certain factors when exercising its discretion:
    (a) the likely success of the case;
    (b) the likely costs of providing the legal assistance;
    (c) the potential benefit to the member;
    (d) the benefit of the case to the membership as a whole;
    (e) the existence of alternative procedures; and, the nebulous,
    (f) any other relevant matters.

44. The exercise of this discretion will often involve the PFEW having to balance the above factors in making any determination as to the extent to which, if at all, they will fund legal assistance.

45. The big advantage of utilising the PFEW support is that they can fund the case to trial. You then do not have to worry about the cost of running the claim. You are also much more likely to achieve a good outcome (a win (and a net of costs win)).

46. The PFEW can also represent you at internal meetings and hearings (eg: at a misconduct panel) which external lawyers cannot do.

47. Home contents (legal expenses) insurance funds 15% of our firm's claims. If you have a protected characteristic (or believe that you would whistle-blow about unlawful conduct if you witnessed it) it is advisable to take out Legal Expenses Insurance ("LEI"). The amount of cover is from £25,000 to £100,000. Some policies operate from day one whereas others have a 90 day waiting period (incidents in that initial period are not covered).

48. One other point to bear in mind is that some insurance policies only apply to "employment" disputes and therefore they only cover employees. Police officers are office-holders and not employees. That said, many insurers deem officers to be employees or fail to draw that distinction. You should check if the insurance policy you take out covers you as a police officer, as many only apply to employees ie: workers working under a contracts of employment.

Procedure

Time-limits

49. A discrimination claim must be initiated within 3 months less one day of the last act of detriment or dismissal. It is initiated by being correctly registered with ACAS under its early conciliation procedure within that time-limit.

50. Once ACAS early conciliation has ended, it will issue a Certificate. The claimant has one calendar month from the date of the ACAS certificate to issue the ET claim. The calendar month extension under s207B ERA, follows the 'corresponding date' rule (e.g. from 30th June to 30th July). This has been confirmed by the EAT in **Tanveer v East London Bus and Coach Company Limited,** which dismissed the Claimant's appeal against a decision barring his unfair dismissal claim as out of time.
51. Hence, if the last detriment occurs on 6 October 2018, you have until 5 January 2018 (ie: 3 months less one day – NB: 6 January 2019 would be out of time) to register the claim with ACAS.
52. Once the ACAS certificate is then issued you have one calendar month from that date to issue your ET claim.
53. However, there is a small trap to be wary of. You only have one month after the issue of the ACAS certificate to issue your ET claim. Therefore if you enter ACAS conciliation very early you may be restricted to a time-limit of three months less one day of the last act and do not receive any additional time extension for entering into ACAS.
54. Normally you should receive the benefit of the timer spent in the ACAS process in addition to the calendar month but some Respondents are challenging that. Hence, you should always issue the claim within the calendar month of the ACAS certificate.
55. There are normally earlier detriments prior to the last one. Some (or all) of these detriments are likely to have occurred more than 3 month or more before the ACAS early conciliation process was initiated and therefore they are as individual and discrete detriments out of time.
56. The worker will want to claim that they are all part of a continuing course of conduct which led up to the last act of detriment. If the worker can show that the detriments are connected to the last act, they will all be brought back into time provided the last act of detriment is of itself in time; s123(3) EA 2010.
57. It is often difficult to determine which detriments are linked prior to the evidence being heard (and in particular that of the Respondent's witnesses, including its disclosure) and the ET should be encouraged to await that conclusion before considering time points.

58. The most useful time-limit case is **Hendricks v Commissioner of Police of the Metropolis** [2003] IRLR 367, CA. In Hendricks, the claimant was arguing that over 100 acts of discrimination over an 11 year period were part of a continuing act. The Court of Appeal said that if she could show that they were part of a "continuing discriminatory state of affairs" that would be sufficient; they did not have to comprise a rule, policy, regime or practice to be "continuing".
59. To prove a continuing course of conduct, evidence of linkage or of a pattern of behaviour is very useful. The claimant should look for an organised and or concerted conduct by the employer and whether or not there was a common motive or common inferred motive of the aggressors. It is not necessary to prove a "conspiracy", which is a much higher burden, and any attempt by the Respondent's Counsel to suggest that it is a "conspiracy" should be rebutted, unless the claimant has overwhelming documentary evidence of such a conspiracy.
60. If there is a continuing course of conduct, the continuing act is not broken by absences; on holiday or maternity leave during which time there is no detrimental conduct towards the claimant; **Spencer v HM Prison Service** (UKEAT/0812/02).
61. It is not clear if the rule in **Spencer** applies to absences due to ill-health. The safer approach is to assume that it does not, and to identify negative treatment during the sickness period; for example, a failure to comply with the sickness/attendance management policy eg: a failure to refer to OH within 28 days etc.
62. It should be noted that it is often difficult to identify the last act of detriment, where it is not a dismissal. Further, if you only have one act in time, the Respondent will try to knock that one out, to then argue that the whole claim is out of time.
63. The case of **CLFIS (UK) Ltd v Reynolds** [2015] IRLR 562 has unfortunately made it more difficult to bring a discrimination claim in time. In that case, R was dismissed by a manager (Y) who unwittingly based his decision on a disciplinary investigatory report by another manager (X) who had a discriminatory motivation. The Court of Appeal held that the employer and the decision-maker were not liable because they did not have a

discriminatory motivation. The discriminatory motivation of Y could not be attached to X. In terms of time-limits, the claim should have been brought within three months less a day of the conduct by X.

64. Helpfully, the EAT has stated that an act should be extended over the period of an internal process (in that case, a disciplinary process) and claimants should not be required to bring additional claims during that process; **Hale v Brighton & Sussex University Hospitals HNS Trust.**

65. Where a case is based on a continuing omission, it is more difficult. For example, you issue a grievance and there is an unreasonable delay in the processing of that grievance. An unreasonable delay is a potential detriment but when is the start date for the time-limit? The answer is complicated. A deliberate omission takes place on the date the discriminator decided not to act on that matter. If that date is not clear or admitted, the omission takes place on the date on which it was actually dealt with (ie: the date on which the discriminator did something inconsistent with the omission) and failing that, the date by which s/he would have been reasonably expected to have dealt with that omission; s123 (3) and (4) EA 2010. In **Matuszowicz v Kingston upon Hull City Council** [2009] IRLR 288 the omission to transfer a claimant from August 2005 was said to take place on the date he was transferred (the act inconsistent with the omission) in August 2006.

66. With continuing omissions, it is therefore good to continue to chase an employer to address something, because once they do, the start date is crystallised on that date.

67. Previously, the ET would almost always wait until the final hearing to determine if a claim was out of time, where the last act or acts were within time and the claimant was asserting a continuing course of conduct. In recent years, they have been listing such cases for an Open Preliminary Hearing ("OPH") and considering time-points at the beginning; the argument being that if a lot of the acts are struck out for being out of time (ie: because they are found to not be part of a continuing course of conduct) that will save ET time (ie: the final hearing will be considerably shorter).

68. If however some, or all, of the detriments are out of time, the ET has a discretion to extend time when it is "just and equitable" to do so. It is a broad discretion.
69. Unlike other forms of discrimination where Tribunals have a very wide discretion to extend time for "just and equitable" reasons.
70. The **Keeble** factors are considered when the ET is considering a "just and equitable" time extension. These factors include: the length of, and reasons for, the delay; the extent to which the delay will affect each party's evidence (the balance of prejudice); the extent to which the employer was responsible for that delay; the extent to which the claimant acted promptly once s/he was aware of the time-limit; the steps taken by the claimant to obtain legal advice and the nature of that advice (not what the advice was, as that is privileged, but what it concerned eg: "were you advised about time-limits?".
71. The so-called balance of prejudice point, which is often interpreted at how far the employer is prejudiced by the delay (rather than both parties), is important; **Osaje v Camden LBC** [1997] EAT/317/96.
72. The claimant's efforts to resolve the matter internally (and so to avoid legal proceedings) is also a relevant factor; **Apelogun-Gabriels v Lambeth LBC and anor** [2002] IRLR 116, CA.
73. Where the claim was delayed because the necessary material fact emerges after the event, provided it is reasonable to have awaited that evidence, it could be just and equitable to extend time; **Clarke v Hampshire Electro-Plating Co Ltd** [1991] IRLR 490, EAT. **Clarke** also suggested that a claim may not "crystallise" until a future event occurred, and therefore may not be out of time at all.
74. The ET will consider the claimant's explanation for the delay. A poor explanation is an important factor but not the only factor to be considered; in **Rathakrishnan v Pizza Express (Restaurants) Ltd** [2016] IRLR 278, the ET rejected the claimant's explanation for bringing the claim late and held that it had not been shown that it was just and equitable to extend time. The EAT said that the ET's "wide discretion" in respect of discrimination time limits involves a "multi-factorial approach" and that "no single factor is determinative." It accepted that if the claimant advances no case to support an extension of time, "plainly, he is not entitled to one" but added that where an

unsatisfactory explanation is given for the delay, the ET must still take into account the balance of prejudice in allowing the claim to be heard and the potential merit of the (reasonable adjustment) claim.

75. Where the legal advice on time-limits was wrong, and the claimant relied upon that, it is normally just and equitable to extend time; **Chohan v Derby Law Centre** [2004] IRLR 685.
76. Ignorance of these complicated time-limits is a factor to be taken into account, but is not decisive.
77. When arguing for a just and equitable extension you should make it clear that a fair trial is still possible and (in an appropriate case) that the evidence that supports the claims threatened with a striking out will be used as background evidence in any event; so there will be no significant time saving.
78. Even if the Claimant's reasons for the delay are not accepted, s/he does not have to prove a good reason in order to obtain a just and equitable time extension; **Abertawe Bro Morgannwg University v Morgan**.
79. If the claim is clearly out of time, one way to bring it back into time is to issue a grievance about all of the historic complaints. The employer will normally process it because there are no time-limits on grievances and will not wish to appear to be ignoring a grievance. In practice, 99% of grievances are rejected. You can then use the rejection of your grievance as the last act of detriment and register that detriment with ACAS within 3 months less one day of that decision.
80. If a claim is struck out for being out of time, the worker may have a negligence claim against their legal adviser for issuing the claim too late.
81. Alternatively, where a race claim is out of time, you may still be able to run the same claim as a negligence or harassment claim in the High Court because issue estoppel and res judicata do not apply to a claim struck out for being out of time claim; see **Nayif v High Commission of Brunei Darussalam** [2015] IRLR 134.
82. Helpfully, you do not need a further ACAS certificate to amend an existing ET claim. For example, you may wish to add another Respondent or a new related cause of action (subject always to time-limits). In **Science Warehouse Limited v Mills** [2016] IRLR Ms Mills resigned her employment with her employer whilst on maternity leave. She presented an employment tribunal

claim form (ET1) complaining of discrimination on account of pregnancy or maternity contrary to the Equality Act 2010. This was defended by the employer. The employer also said in its ET3 that, had she not resigned, the Claimant would have been subject to an investigation and potential disciplinary action in relation to a conduct issue. When the Claimant received that response, she made an application to amend her claim to include a complaint of victimisation in respect of the employer's allegation against her in the ET3. The EAT held that as she was applying to amend to add a new, but related, claim, this was a matter for the employment tribunal's general case management powers and a fresh application for early conciliation was not necessary.

Grievance (FAW) and Carol Howard

83. Historically, prior to bringing a claim you had to exhaust the internal option first; you had to bring a grievance. That precondition has been abolished. However, the ET may reduce your compensation by 25% if it believes that you have failed to comply with the ACAS Code (ie: to bring a grievance before issuing your claim) without good reason. The ACAS Code sanction of a 25% reduction does not apply to workers who are not employees (and therefore does not apply to police officers).
84. The reality is that 99% of grievances fail and the sooner you lodge your ET1 claim the better, for time-limit purposes. Further many employers simply use the grievance process as a method of gathering evidence to defeat the expected ET claim.
85. Once you issue the ET claim, the employer loses control of the situation and of the outcome.
86. In Carol’s case she brought a FAW for sex and race discrimination and the internal investigator found that she had been discriminated against.
87. Once the draft report was finished it had to be “quality assured”. The QA process was introduced further to a previous independent investigation which had discovered that the initial investigator was covering up discrimination.

However, the DPS subverted the QA system to ensure that a proper investigation was never allowed to lead to a finding of discrimination.

88. Hence, and ironically, in the QA process the draft report was then re-written by the DPS (with the support of HR) to remove the discrimination findings. The final report stated that there was no discrimination or misconduct. It was a deliberate perversion of the outcome and the MPS admitted that it had the ET hearing in mind.
89. When challenged about this at the remedy hearing, the MPS stated that it had a written policy to prevent discrimination claims from being successful in FAWs. This astonishing admission that it was subverting the EA 2010 led to the EHRC formal investigation.
90. The question was who introduced this policy which the two corrupt DPS officers implemented.
91. The main thing we wanted the EHRC to do was to identify and question the DPS acting chief inspector and sergeant that re-wrote the FAW report and tried to dupe the judge. We said that if they were not identified and made accountable these corrupt officers may remain within the FAW system and therefore whatever new system that is introduced can be similarly subverted by corrupt officers. We said that by questioning them the EHRC would find out who authorised the corrupt policy and who managed it. It was suspected that the policy must have been introduced and managed by the head of the DPS or a more senior officer or indeed a Gold Group.
92. Astonishingly, the EHRC failed to ask the question of the MPS and failed to identify or question those officers. It was a white-wash.
93. The EHRC concluded that officers had an expectation of being victimised, but did not investigate why. It suggested yet another new grievance process.
94. However, we already have cases in which the new “high-touch” advisers have covered up discrimination and exonerated wrong-doers.
95. Another issue has developed further to Carol’s case. The MPS stated that the DPS had been removed from the FAW process which would be run thereafter by HR. The removal of the DPS made sense and was necessary. However, the HR department was culpable in the original report re-write, and has always been subservient to the DPS.

96. Once excluded from the FAW process, the DPS immediately re-asserted control of it in the following manner. When an officer brought a complaint of discrimination, the DPS determined that that was an allegation of misconduct and activated the statutory misconduct process. Once that process is commenced, any FAW is frozen. To make matters worse, it is settled law that any ET claim is stayed, to allow a reasonable period of time for the statutory misconduct process to conclude; see **Ashurst v MPS** and **Rose v MPS**.
97. The DPS investigator then spends 8 hours cross-examining the victim of discrimination and tries to investigate (de-construct) the discrimination complaint.
98. The resulting disciplinary outcome is invariably that there is no gross misconduct and no misconduct. Almost always none of the wrong-doers receive anything other than management action. In our cases, most of the alleged wrong-doers have been promoted and one has secured a role at the IPCC.
99. One factor to bear in mind when you are informed of the disciplinary outcome is that the unreasonable delay in its conclusion and the failure to properly investigate and to discipline a discriminator are all detriments which can be relied upon. In **Bone v North Essex Partnership NHS Foundation Trust** [2016] IRLR 295 (a trade union detriment case) the Court of Appeal found that the employer's failure to properly investigate the matter and discipline the wrong-doers was a detriment, and was fuelled by its desire for a "quiet life" and to marginalise the union member being targeted.
100. Once the DPS conclude that no further action is warranted, the frozen grievance is forgotten and not re-activated (NB: this is also a detriment).
101. This begs the question as to whether it is actually now advisable to boycott the grievance process altogether, to avoid being drawn into a lengthy delay and the lengthy misconduct process.

Tribunal Procedure

102. The claim is duly registered with ACAS within three months less one day of the last detriment. ACAS issues its certificate. The ET claim ("ET1") is duly issued within a calendar month of the date of the certificate.

103. No fees are now payable in the ET.

104. Once the ET claim is issued it will follow the following path:

102.1 The employer must file a defence ("ET3") within 28 days of receiving the ET1 claim from the ET. The employer will almost always ask for further details about your claim in an attempt to understand (aka – deconstruct) it;

102.2 Claims may require amendment. To amend the claim you have to apply to the Tribunal. You should try to obtain the Respondent's consent. The rules on amendment were set out in **Selkent**. Effectively there are two types of amendment. The first is a change of label. This does not involve consideration of time-points. The second is something more than that which does require a time-limit check – ie: if the amendment is out of time, on the date of the amendment, should it be permitted? In **Reuters v Cole** (2018) it was held that when additional claims are added to the claim which involve additional facts, such as comparators, being relied upon that change would probably go beyond a mere re-labelling. Hence, the addition of a claim of direct discrimination would not be a mere re-labelling exercise. It is probably not now not necessary for the Tribunal to conclusively determine the time points of an amendment before the final hearing; **Galilee v Commissioner of Police for the Metropolis** (2018). The claimant would just have to show a prima facie case to extend time or that the claim is within time.

102.2 A time-table (or directions) will be set for the claim and a final hearing listed. The directions are normally be set at a Closed Preliminary Hearing ("CPH"). The ET will expect the parties to agree a List of Issues beforehand (or at the CPH) which will set out (and thereby potentially limit) the claimant's claims. It is important to agree the List of Issues correctly as it is very hard to change thereafter**; Scicluna v Zippy Stitch** (2018). The parties will be asked how many witnesses they are to call and from that a trial will be listed with a sufficient number of days to accommodate the witnesses, closing submissions, the judgment and (in shorter discrimination claims) remedy. In longer

discrimination claims, the final hearing is normally limited to liability only with a separate remedy hearing if the claimant wins;

102.3 If both parties agree the ET may set up a Judicial Mediation before any significant work is done in preparing the claim for trial;

102.4 The claimant will be asked to prepare a Schedule of Loss and to update it before trial;

102.5 Where the employer can show your claim is very weak (misconceived) or weak, or where there are time-limit issues, it may apply for an Open Preliminary Hearing ("OPH") to strike out part of, or all of, the claim or to seek Deposit Order against the claimant. Due to the fact that discrimination cases are fact-sensitive, and the public policy/legislative intent to tackle the "social evil" of discrimination, it should be rare for an ET ever to strike out a complaint based on discrimination without a full hearing of the facts; see **Anyanwu v South Bank Students Union and South Bank University** [2001] IRLR 305 (HL).

103 The EAT has ruled that a **deposit order** should not be used to "impair access to justice". In ***Hemdan v Ishmail*** [2017] IRLR 228, the claimant, who alleged that she had been trafficked, made three allegations of unlawful race discrimination against the respondents. The employment judge required her to pay £75 each in respect of the allegations in order to pursue her claim, even though the claimant was on Employment Support Allowance, because he considered that the allegations had little reasonable prospect of success. Allowing an appeal and reducing the deposit orders to £1 per allegation, the EAT says that the purpose of a deposit order is to identify at an early stage claims with little prospect of success and to discourage the pursuit of those claims by requiring a sum to be paid and by creating a risk of costs ultimately if the claim fails. "The purpose is emphatically not … to make it difficult to access justice or to effect a strike out through the back door." Therefore, "it is essential that when such an order is deemed appropriate it does not operate to restrict disproportionately the fair trial rights of the paying party or to impair access to justice." As Mrs Justice Simler explains: "An order to pay a deposit must accordingly be one that is capable of being complied with. A party without the means or ability to pay should not therefore be ordered to pay a sum he or she is unlikely to be able to raise … If a deposit order is set at a level at which the

paying party cannot afford to pay it, the order will operate to impair access to justice."

103.2 Disclosure with a list of documents followed by the production of requested copy documents. The employer will often fail to disclose relevant documents for one reason or another. These can be obtained through an Order for specific disclosure.

103.3 It is useful to make a Data Protection Act 1998 subject access request (before (or during) the ET claim. This often reveals relevant documents which the disclosure process fails to uncover.

103.4 Employers often fail to disclose relevant documents, so you will probably have to make an application for an Order for specific disclosure. Given the evidential difficulties in discrimination cases, the EAT has stated that the ET should be generous in orders for disclosure; see **Enfield LBC and others v Sivanandan** [1999] EAT 450/98/102. It can also order the disclosure of relevant statistics; see **West Midlands Passenger Transport Executive v Singh** [1998] IRLR 186.

103.5 Another issue is likely to be that the employer over-redacts documents, allegedly on the grounds of confidentiality or Data Protection Act 1998 ("DPA") requirements. This should be challenged as a failure to comply with the order for disclosure (by the failure to disclose relevant evidence in a use-able form) and therefore the denial of a fair trial (a breach of Article 6). Confidentiality is not a good reason to refuse or redact disclosure; the test is simply whether the evidence is relevant to the determination of the issues in the case;

103.6 The worker should be careful not to gather evidence illegally. All illegal acts can be regarded as gross misconduct. Workers may secure documents which they obtain without the employer's authority or make recordings without consent. If they are discovered to have done that, they may be fairly dismissed. If they are discovered to have done that after their employment has ended, their misconduct may lead the ET to reduce any award they win by up to 100% for contributory fault. This situation becomes more complicated when the worker secures the evidence because s/he believes that it may be destroyed by the employer and/or when it shows evidence of illegal conduct about which the worker would be entitled to whistle-blow and thereby obtain protection from

any misconduct penalty. In this regard, the worker should bear in mind the following salutary decisions of **Aziz v Trinity Street Taxis** [1988] ICR 534 (the worker made an unauthorised recording of the racist language and was fairly dismissed) and **Bolton School v Evans** [2007] IRLR 140 (CA) (the worker hacked into the employer's computer to prove the data protection risks and was fairly dismissed).

103.7 The simultaneous exchange of witness statements. You should never agree to the sequential exchange of witness statements (unless the Respondent agrees to go first (which never happens)); and

103.8 The final hearing. The final hearing is heard in public and therefore may be attended by, and reported by, the media. A party may ask for a Reporting Restriction Order ("RRO") and these are normally made when the allegations involve sexual misconduct. The RRO will normally last until the ET issues its judgment. However, they may be granted on a permanent basis in an extreme case. The Judge must weigh up the need for open justice against the human right to privacy.

National security cases

105. In our case of X v MPS, the ET established its procedure for hearing a discrimination case which involved national security issues.

106. Such cases are now governed by rule 94 of the 2013 Tribunal rules of procedure.

107. Only London Central ET has security cleared (develop vetted) judges. If your case is listed at another tribunal it will be transferred there.

108. Due to the fact that the Claimant (and her solicitor) cannot read national security evidence without being security cleared, a barrister who is so cleared (called a "Special Advocate"), is appointed.

109. Initial advice and assistance can be obtained from Special Advocates Support Office (SASO). Their fees will normally be paid for by the Respondent.

110. The Respondent, as the Information Holder of the closed material, will normally apply for an order under rule 94 for a Special Advocate to be appointed.

111. In such circumstances, the Respondent will have to pay for the costs of the Special Advocate and SASO.

112. Cases that involve national security issues and the Official Secrets Act require expert and careful legal consideration.

113. In **Kiani v Secretary of State for the Home Department** [2015] IRLR 837 the Court of Appeal considered again how national security considerations could (or should) restrict a claimant's rights in an employment tribunal. The claimant was employed as an immigration officer until he was suspended, his security clearance withdrawn and he was dismissed. He claimed discrimination because of race or religion. The respondent said that the decisions had been taken for reasons of national security and that he was dismissed because he did not have security clearance. The employment judge ordered that Mr Kiani and his representatives should be excluded from the hearing of his claim, which would be regarded as closed, and that secret material should not be disclosed to him or his representative. An application for a “gist” of the evidence was also refused. An appeal to the EAT was unsuccessful, as is the appeal to the Court of Appeal. The Court of Appeal holds that it is not contrary to EU law for an employee to be prevented from knowing the full gist of a case against him because of national security. The tribunal can also withhold disclosure and prevent a party from giving instructions.

114. In practice, a Special Advocate should be appointed to ensure that the claimant has a better chance of a fair trial.

115. The current ET procedure is as follows:

115.1 A develop vetted Judge (and panel) is appointed to hear the final hearing. They are only based at London Central ET so your case will be transferred there;

115.2 The Judge will hold a CPH and consider what orders need to be made under rule 94;

115.3 The information holder of the national security (closed) evidence (the Respondent) will apply for a special advocate to be appointed or at least should do so. If they do not, you should ask the Judge to appoint one;

115.4 The Respondent should pay for the special advocate;

115.5 SOSA will then send the Claimant a list of special advocates and five will be chosen as preferences by the Claimant. The Attorney General then appoints one of the list to the ET claim;

115.6 A conference is arranged in which the special advocate is briefed on the case;

115.6 After the conference the special advocate goes into closed mode and may not contact the Claimant thereafter. However, the Claimant may continue to update the Special Advocate (ie: there can be a one way flow of information);

115.7 At the trial the secret evidence is heard. The Claimant may not attend.

115.8 The Special Advocate for the Claimant puts the case for the Claimant;

115.9 The ET hearing then begins as normal. Once it concludes and closing submissions have occurred, the parties leave.

115.10 The Special Advocates give their closing submissions;

115.11 An ET Decision is promulgated and the secret part of it is redacted.

116. If you want to challenge the refused security vetting, you can also appeal to the Security Vetting Appeal Panel ("SVAP"). SVAP had to create an appeal procedure to accommodate the claimant's challenge to the security clearance decision.

Misconduct hearings and Judicial Proceedings Immunity

117. Fortunately, the Supreme Court decided in **P v Commissioner of Police for the Metropolis** that police officers can bring employment tribunal proceedings challenging the decision of a Police Misconduct Panel constituted under the Police (Conduct) Regulations 2008. In that case, the

claimant was a police constable, who experienced post-traumatic stress disorder following an incident in which she was assaulted. The following year, as the EAT put it, “whilst in drink”, she was involved in an incident which led to her arrest and the decision by the Police Misconduct Panel to dismiss her for gross misconduct. She sought to bring a claim of disability discrimination in respect of the disciplinary proceedings, but her claim was struck out by the employment tribunal on grounds that the Police Misconduct Panel is a judicial body and as such enjoys immunity from suit. The EAT dismissed an appeal against that decision, as did the Court of Appeal. The case largely turned on the effect of two previous Court of Appeal decisions, **Heath v Commissioner of Police of the Metropolis** and **Lake v British Transport Police**. In **Heath**, the Court of Appeal held that the police disciplinary panel was “a judicial body acting judicially” and therefore had absolute immunity. The Court of Appeal rejected the claimant's argument that **Heath** no longer applied in light of **Lake** (a whistle-blowing case) as being “entirely hopeless”. **Heath** was binding on the Court of Appeal in **P** and could not be distinguished.

118. **P** however may be restricted to old style misconduct panels. If so, the only challenge to a misconduct panel decision is to appeal that decision. This process can be successful. We won the appeal for PC Ricky Haruna that led to her being reinstated to the MPS.

119. What **P** means for the new style misconduct panel decisions is that the ET claim must be issued at the beginning of the misconduct process and the officer must not wait until it is concluded.

120. The officer should also allege discrimination in the process at the misconduct hearing if it is a relevant factor.

121. This also begs another question. Should an officer who is managed out on a false misconduct process, and who has no faith in the independence of the misconduct panel, resign before the misconduct panel hearing and claim constructive dismissal?

The Law

122. The Equality Act 2010 (EA 2010) prohibits discrimination, harassment and victimisation in relation to “protected characteristics”. It became law on 1 October 2010. It covers gender, pregnancy and maternity, disability, race, age, religion and belief, marital status, civil partnership status, and sexuality.

Protected characteristic

123. “Race” is one of the protected characteristics under the EA 2010 (section 9). It includes colour, nationality, ethnic and national origins.

124. It is for the claimant to define her/his own race.

125. To be deemed to be an “ethnic group”, the group must have a long shared history, its own cultural tradition; a common language; literature; religion; a common geographical origin; and is a minority or oppressed group within a larger community - see **Mandla v Lee** [1983] IRLR 209 (HL).

126. In law, Jewish and Sikh people are considered to be to an ethnic minority but Muslim people (**Nyazi v Rymans** [1988] EAT) are not. Muslim claimants have to rely on religious discrimination protection which was introduced in 2003.

127. Gypsies are considered to be an ethnic group but “travellers” are not. Rastafarians are also not considered to be an ethnic group.

128. More recently Cornish people have been declared to be an ethnic group.

129. At present, discrimination on the basis of “caste” is not unlawful. However, on the facts, there may be circumstances in which “caste” may be within the term “ethnic origins”; **Chandhok and anor v Tirkey** [2015] IRLR 195, EAT.

130. On 2 February 2015, the Government answered a Parliamentary Question on this in the House of Lords by saying that it was considering the implications of **Chandhok**, that it has “no immediate plans to incorporate caste into legislation”, and that “because of a number of delays, there is no longer sufficient time before the election” to put through the promised consultation process. Nothing has happened on this point since the election.

131. There have been a number of cases in which staff have been told not to speak their own (first) language in the workplace. In **Kelly v Covance Laboratories Ltd** [2016] IRLR 338, the EAT found it is was not race discrimination to instruct a Russian national not to speak Russian in the workplace. The employer's operations involve animal testing and they had security concerns about activists infiltrating the workplace. The EAT holds that the employment tribunal was entitled to find that there was no direct race discrimination because the same instruction would have been given to a hypothetical other employee of a different national origin “speaking some language other than English”.

EU law and the EHRC

132. The EA 2010 is under-pinned by EU legislation.

133. For example, the EU Race Discrimination Directive 2000/43 prohibits direct or indirect discrimination based on “racial or ethnic origin”. Although EU law is normally broader than UK equality law unlike British equality legislation, however, the Race Directive expressly does not cover differences in treatment because of nationality or national origins.

134. At present, and pending Brexit, the EA 2010 must be interpreted consistently with the under-pinning EU anti-discrimination law. Where the UK law is inconsistent, workers can rely on EU law directly as respects public sector employers and possibly also in relation to private sector employers (**Mangold v Helm** [2006] IRLR 236 and **Kucukdeveci v Swedex GmbH & Co** [2010] IRLR 346).

135. A particularly useful provision is article 47 of the Charter of Fundamental Rights; see **Benkharbouche and Janah v Governments of Sudan and Libya** which removed sovereign immunity (now before the Supreme Court).

136. The general view on Brexit is that EU law will be incorporated into UK law when we leave, albeit, previous ECJ judgments on the interpretation of that EU law may be ignored. There will then be a review of that law and a decision will be taken about which laws the UK wishes to keep, in what form and with what limitations.

137. It is likely that the Government will seek to remove article 47 from UK Law after 19 March 2019.

138. The Equality and Human Rights Commission ("EHRC") oversees the EA 2010. It has produced Codes of Practice on Employment and Equal Pay respectively. It has also produced useful guidance on the definition of "disability". It can provide funding for ET claims but prefers to target EAT appeals for funding.

What work is covered?

139. Police officers are covered by the EA 2010 by virtue of section 42. They are treated as being employed by the Commissioner (or Chief Constable, outside the MPS).

140. ET claims for discrimination can be brought by those who fail to secure work, by those currently in work, and by those who have been dismissed. It can also be relied upon in relation to events after the work has ended, such as bad references.

141. To put it another way, a worker can bring a claim for being refused a job, being treated badly at work, being dismissed, or being treated badly after the employment has ended.

142. In terms of being treated badly, the worker will have to show that they have been harassed or put at a disadvantage (or detriment) by the conduct complained of. A detriment would include a financial loss (for example, a low bonus or a failure to promote), an event that causes emotional distress or physical damage, a disciplinary warning, the rejection of a grievance, and anything that reasonably causes offence to the worker; **Shamoon v Chief Constable of the RUC** [2003] IRLR 285 (HL). Most negative treatment constitutes a disadvantage unless it is "trivial"; **Jeremiah v Ministry of Defence** [1979] IRLR 436 (CA). However it is important not to list too many minor negative experiences as discriminatory acts because that may lead the ET to find that the worker is over-sensitive and unreasonable in their opinion that they have suffered disadvantage. The Respondent's barrister will

normally attack the weaker acts complained of first so as to discredit the case in general.

143. A broader view of detriment was adopted by the Court of Appeal in **Deer v University of Oxford** [2015] IRLR 481. In this case, a discrimination claim by the claimant had been compromised and she then brought various claims contending that she had been subsequently victimised in respect of the failure to provide her with a reference. She also brought an internal grievance and further victimisation claims as to how her grievance was handled. These claims were struck out on the grounds that there had been no detriment, since the grievance would have failed however it had been conducted. The Court of Appeal took a wide view of what amounts to detrimental treatment. Lord Justice Elias stated that "*if the appellant were able to establish that she had been treated less favourably in the way in which the procedures were applied, and the reason was that she was being victimised for having lodged a sex discrimination claim, she would have a legitimate sense of injustice which would in principle sound in damages*. *The fact that the outcome of the procedure would not have changed will be relevant to any assessment of compensation, but it does not of itself defeat the substantive victimisation discrimination claim*."

144. In terms of former workers, under section 108 EA 2010, they can bring direct discrimination claims (provided they are closely connected to and arise out of the former employment), harassment claims and victimisation claims; **Rowstock Ltd v Jessemey** [2014] IRLR 368. These rights are useful in respect of bad references, negative appeal against dismissal decisions and other negative treatment experienced post-employment, such as abuse of restrictive covenants, malicious gossip and a failure to return personal property.

Who to sue?

145. The worker can sue the employer for discriminatory acts committed by the employer (such as dismissal) or by its staff or agents at work.

146. The employer is responsible ("vicariously liable") for the discriminatory conduct of its staff at work, even if they did not know of, or approve of, the discrimination. However, where the employer will have a defence where it can show it took all reasonable preventative steps to prevent the discrimination; section 109, EA 2010. In practice, this defence is almost always cited but very rarely successful because the fact that the discriminatory event took place at work is strong evidence that all necessary preventative steps were not taken and because, as a matter of public policy, the employer should be responsible for discriminatory acts which occur at work.

147. For example, even if the employer had a properly implemented equal opportunities procedure, carried out regular equality training, promptly sacked the wrong-doing manager (which almost never happens) and opposes discrimination would very probably not be sufficient to allow it to avoid vicarious liability for discrimination which occurs at work.

148. Moreover, and arguably, the burden is greater on the public sector employer (and those employers performing a public function). This is because those employers have the additional public sector equality duty (section 149, EA 2010) with which to comply. This duty obliges those employers to eliminate discrimination, foster good relations in that regard and advance equality of opportunity. This includes positive action and equality impact assessments. Hence, for example, it should be more difficult for a public sector employer to say that it took all preventative steps regarding a discriminatory redundancy if it failed to carry out an equality impact assessment, whereas the same argument could not be made against a private sector employer.

149. Care needs to be taken when the discrimination occurs outside work or working hours. In general terms an employer will be responsible for discriminatory acts at work parties but not for events which occur at social events they do not organise or for example, assaults which occur after such work parties have concluded.

150. It is technically possible to sue the individual alone; to not sue the employer; **Barlow v Stone** [2012] IRLR 899 (EAT). Such claims are rare. They normally occur where the employer has been sued but the resulting

settlement agreement with the employer mistakenly fails to prohibit the Claimant from suing a co-worker personally thereafter; eg: **Hurst v Kelly** 0167/13 (EAT).

151. Another way to add co-Respondents in addition to, or instead of the employer, is to use the provisions at section 110-111 EA 2010. These provisions allow the worker to sue workers who knowingly help (section 110) the employer or followed the instructions of the employer (section 111) to commit the act of discrimination or harassment.

152. Section 111 prohibits the employer from instructing, causing or inducing (directly or indirectly) a worker to discriminate against them. It however only applies if the person instructed could themselves sue the employer/principal under the EA 2010, if the discrimination was done to them; the person instructed has to be a worker or agent of the employer/principal.

153. One example would be where a manager instructs a receptionist not to admit BAME customers. However, assuming the receptionist works for the manager, s/he could claim direct discrimination or harassment in the same situation, so it is difficult to see what it section 111 adds to the pot.

154. These provisions are complicated and rarely used but can prove to be useful.

155. In general, caution should be exercised before suing Respondents other than the employer or a co-worker employed by that employer.

What conduct is discriminatory, harassing or victimising?

156. There are four main types of conduct prohibited by the EA 2010 in relation to the protected characteristics – direct discrimination, indirect discrimination, harassment and victimisation. However, disability discrimination is more complicated and includes two further forms of conduct – discrimination arising from disability and the failure to make reasonable adjustments.

157. Indirect discrimination cases are expensive and difficult to run (they involve complicated comparisons of statistics) and, as a result, they are relatively rare. Unhelpfully, indirect discrimination does not concern biased discriminatory conduct that occurs indirectly or remotely. It concerns a neutral

rule or practice at work which is neutral in its application, but not in its effect. The provision, criterion or practice ("PCP")) has the effect that disproportionately few staff of a protected characteristic (eg: gender) can comply with it and the particular worker suffers a disadvantage as a result. For example, an employer seeks to apply an essential job qualification that means that only staff under 40 can apply for a role. It applies to all staff so it is "neutral" in its application but it would have the effect of disproportionately disadvantaging older staff and therefore would potentially be indirect discrimination.

158. The test for indirect discrimination was recently addressed by the Supreme Court. In ***Essop v Home Office (UK Border Agency)*** **and** ***Naeem v Secretary of State for Justice*** [2017] IRLR 558, the Supreme Court ruled that in order to establish a prima facie claim of indirect discrimination, it is sufficient to show that a provision, criterion or practice results in a particular disadvantage to those sharing the claimant's protected characteristic and to the claimant personally. Contrary to the view expressed by the Court of Appeal, it is not necessary to show why the PCP resulted in that disadvantage and that it was causally linked to the claimant's protected characteristic. As Lady Hale explains, giving the only reasoned decision allowing both appeals on whether prima facie indirect discrimination had been established, "in order to succeed in an indirect discrimination claim, it is not necessary to establish the reason for the particular disadvantage to which the group is put. The essential element is a causal connection between the PCP and the disadvantage suffered, not only by the group, but also by the individual. This may be easier to prove if the reason for the group disadvantage is known but that is a matter of fact, not law."

159. Most bad treatment at work which the worker believes is, or may be, discriminatory is not neutral in its application. The worker is targeted precisely because of her/his protected characteristic. There is nothing neutral about it, although the wrong-doing manager will claim s/he is not badly motivated; proving the bias can be difficult because managers mask their intentions (ie: they do not advertise or admit that their actions are discriminatory), but such prejudice is the heart of discrimination.

160. It is also difficult in practice to argue that an employer is biased (eg: direct discrimination or harassment) and also neutral at the same time. Logically, if on the one hand you claim that the employer is neutral and only discriminatory inadvertently by effect, it is then harder to prove that the same employer is targeting staff due to prejudice.

161. The other main issue with indirect discrimination is that the EA 2010 provides a defence for the employer, whereas there is no defence available in respect of direct discrimination. The employer can defend such a claim is the PCP was objectively justified. The defence is broad and ETs are sympathetic to PCPs that employers believe to be in the company's best interests. However, the PCP has to be a "proportionate means of achieving a legitimate (business) aim" and still appears to require more than merely stating that the PCP will save the employer money.

162. If you are considering bringing an indirect discrimination claim (or the similarly complicated equal pay (based on gender) claim) you should definitely take legal advice beforehand.

163. Most claims brought by individual workers involve the other three types. The easiest to prove of the three is victimisation. Harassment is easier to prove than direct discrimination. Hence, for example, where there is potentially harassment and direct discrimination at play the claim should centre on the harassment.

164. The truth is that the Equality Act 2010 is unnecessarily complicated and its rights have been unduly (and probably deliberately) restricted. These restrictive complications have had the effect of deterring and preventing successful ET claims.

Victimisation

165. Victimisation occurs when the worker is treated negatively because they have carried out a "protected act" (eg: complained of discrimination); section 27 EA 2010. It concerns retaliatory treatment by the employer because of the previous protected act by the worker.

166. It should be noted that retaliatory action by an employer because a worker has complained of sexual harassment is also specifically covered by section 26(3) EA 2010 (see below at). The worker may sue under either section 27 and/or section 26(3) in those circumstances.

167. Victimisation is normally easier to prove than direct discrimination and harassment for several reasons. The first is that ETs are more likely to believe that an employer retaliated against the worker after the worker complained of discrimination because most people become angry when accused of discrimination.

168. The second is that any worker can do a protected act. You do not have to have a protected characteristic (and hence, have to prove that you are say, disabled) to claim.

169. The third is because the EA 2010 helpfully removed the need for comparator evidence. Previously, to prove victimisation you had to show that you were being treated less favourably than another worker (who had not carried out a protected act) in the same (or very similar) situation. This is difficult to prove because there is rarely a comparator worker in the same work situation as the worker. Without the actual comparator, you had to rely on a hypothetical comparator, which weakened the claim still further.

170. To prove victimisation, you have to show that you have: (1) carried out a protected act; (2) been subjected to a detriment; and (3) the reason why the worker was subjected to the detriment is because s/he did the protected act.

171. A “protected act” includes: issuing an ET claim for discrimination/harassment; bringing a grievance for discrimination/harassment; giving evidence to support such a claim or grievance by another worker; making an allegation that the employer or someone else has breached the EA 2010; and doing any other thing for the purpose of or in connection with the EA 2010. The standard initial protected act is a complaint of discrimination (or harassment) made in a grievance or written/verbal communication to HR/management.

172. The worker is also covered if s/he can show that the employer suspected that the worker has done or may do a protected act. This is however difficult to prove.

173. The employer will try to deny that the worker has carried out a protected act (and that it suspected the same) wherever possible. In practice, most workers do not complain of discrimination until they have no choice (ironically, due to the fear of victimisation) and that may not occur until near to or after a dismissal decision. Indeed, many workers hesitant about burning their bridges will normally do whatever they can to avoid using the term "discrimination" etc even when they issue a formal complaint about bad treatment.

174. The worker (having taken legal advice and acting in accordance with that) should try to put such complaints in writing and keep copies of any emails or letters sent.

175. The employer will use any delay to make time-limit points and any failure to label the incidents as discriminatory to deny protected acts and to try to make credibility points. It will say that either no grievance was issued at the time of the alleged act of discrimination or that a grievance was issued but it did not refer to discrimination (so there could not have been any discrimination etc). It will try to run the argument that the worker does not genuinely believe that the incidents were discriminatory. Fortunately, most experienced ETs are aware that most workers do not complain at the time of the discriminatory act and are afraid to do so.

176. Any negative treatment at work before the protected act cannot be argued to be victimisation.

177. The exact scope of doing something "connected to" the EA 2010 is not clear. It certainly covers a complaint about matters not connected to employment but which are otherwise covered by the EA 2010 such as a complaint about discrimination in the provision of a good or service. A complaint to the EHRC would also be covered. However, a complaint about discrimination or harassment not covered by the EA 2010 is not covered; **Waters v Commissioner of Police of the Metropolis** [1997] IRLR 589 (which concerned an assault by one employee on another which occurred outside the course of employment).

178. A worker will not be able to rely on a protected act where the protected act is done in "bad faith". Bad faith would include making a false and/or malicious allegation of discrimination or providing false evidence to back-up

an allegation. This defence almost never succeeds. However, employers tend to deny everything and try to argue the worker's complaints are not genuine and are made in bad faith. Further, a worker may be mistaken in her/his beliefs, or have them rejected by a grievance decision or ET decision, but will still be accepted as having acted in good faith, absence dishonesty and/or malice.

179. What constitutes a "detriment" is not defined by the EA 210. However a "detriment" meaning putting the worker at a disadvantage; **Jeremiah v Ministry of Defence** [1979] IRLR 436 (CA).

180. A detriment could include (among other things): the rejection of a grievance; a disciplinary warning; an unreasonable delay in a grievance or disciplinary process; demotion; a negative appraisal; offensive remarks; shouting at/berating/micro-managing the worker; excluding the worker from meetings or work functions; making false allegations against the worker; a failure to provide career development; any unreasonable financial disadvantage (eg: the worker receives an unjustified pay-cut or no (or a low) bonus or pay-rise); any threat made by the employer against the employee; being dismissed; the rejection of the appeal against dismissal; and being given no reference or a bad reference by the employer.

181. However, a trivial or minor disadvantage is unlikely to constitute a detriment.

182. A detriment can occur after the employment has ended (eg: by a bad reference or rejection of an appeal against dismissal), provided it is sufficiently closely connected to the employment; **Rowstock Ltd and anor v Jessemey** [2014] IRLR 368. The worker can also rely on a protected act against a future employer is that is the reason for the adverse treatment. As respects bad references which lead to a worker being refused a new job, the worker can sue the previous employer and/or the prospective employer (provided there is sufficient evidence); **Bullimore v Pothecary Witham Weld solicitors and anor** [2011] IRLR 18. The difficulty is obtaining the bad reference (or evidence as to its contents), as both employers will claim it is confidential and it may also be verbal. One solution is to make a DPA subject access request of both employers and, if they are a public sector employer, a FOI request.

183. Many detriments will also constitute harassment. The problem is that if it does, the EA 2010 insists that harassment must be claimed; s212 EA 2010. In practice, the safest course is to claim “harassment” and further and in the alternative “victimisation” and/or direct discrimination. This is because if the ET does not accept the adverse treatment was harassment, at that stage it is still open to them to accept that it was victimisation and only the employer knows why it subjected the worker to negative treatment.

184. The detriment is assessed from the perception of the worker but it is also objectively assessed; would the reasonable worker have regarded the event as a detriment?

185. One trap occurs regarding proving detriment where the worker anticipates the victimisation and does not therefore act. For example, the worker suspects that they will not get the promotion or role (even though they are qualified to do it) and so does not apply. The ET will be likely to say that they have not suffered a detriment because having not applied they have not lost anything. It is almost always better to seek whatever role or benefit to which you believe that you are entitled and then use the rejection as the basis for your detriment. It is important to make the employer work to disadvantage you (they are then forced to justify their decisions and may make mistakes) rather than simply withdrawing.

186. The last key element is to prove the link between the protected act and the detriment. The closer in time that they occur the easier it is to prove. For example, if the worker says, “I think that you (the manager) have discriminated against me”, and the manager then replies, “well in that case, you are sacked”, you are very likely to show the link. If however the manager says nothing in reply and selects that worker (along with others) for redundancy two years later, it will be much harder to prove.

187. However, there is no time-limit between the protected act and the detriment. If there is a link between the two that is sufficient. One way to close the time-gap is to resurrect the protected act by repeating it in a grievance or disciplinary process which is current, provided that can be done in good faith.

188. The protected act need not be the sole reason for the detriment (or dismissal). It can be the principal reason of several reasons. The EHRC Code goes further and states that you only need to prove that it was one of the

reasons; EHRC at para 9.10. It is unclear how important the protected act needs to be in the reasons for the detriment or dismissal before an ET will accept it was a sufficient reason.

189. Once the ET claim has begun, it is normally not possible to claim that the employer is victimising the Claimant in the way in which the proceedings are run or in the documents produced in that process, due to judicial proceedings immunity (parties and witnesses cannot be sued under the EA 2010 for what they do or say in tribunal proceedings). One exception which would allow a Claimant to sue the employer for victimisation once proceedings have begun would be where the employer improperly pressurises staff to give evidence against the Claimant; **Singh v Governing Body of Moorlands Primary School and anor** [2013] IRLR 18.

190. Also, when the employer refuses to appraise the worker or produce a reference for her/him, due to the fact that their performance is the very thing in dispute in ET proceedings, the House of Lords have held that is not victimisation because the reason for the refusal is the need to preserve their defence in the proceedings, rather than due to the protected act; **Chief Constable of West Yorkshire Police v Khan** [2001] IRLR 830.

191. That said, any detrimental treatment at work further to the commencement of an ET claim under the EA 2010 (other than the limited **Khan** exception) can be claimed as victimisation.

192. Where the worker supports the protected act by another worker or group of workers, and s/he is retaliated against, this may constitute actionable associative victimisation. In **Thompson v London Central Bus Company Ltd** [2016] IRLR 9 the claimant claimed that he was dismissed for telling a manager about a conversation which he heard alleging that there had been a deliberate targeting by the respondent's predecessor company of some members of his trade union who were active in opposing racism. His victimisation claim was struck out at first instance on grounds that the link between the claimant and the individuals concerned, based on membership of the same trade union, was so tenuous that it could not be regarded as within the scope of associative victimisation. The EAT allowed the appeal and stated the association did not have to be in a particular form; “The question was whether the claimant's treatment was by reason of the protected acts done by

others". The EAT adopted a purposive approach and re-wrote section 27(1)(a) EA 2010 so that a claimant is protected if s/he is treated negatively because of a protected act rather than because s/he carried out a protected act.

Harassment

193. Harassment is covered by section 26 EA 2010.

194. It is distinguished from sexual harassment which is considered separately below.

195. Harassment is unwanted treatment *related to* a protected characteristic. The unwanted conduct must have the *purpose or effect* of either violating the worker's dignity or creating a negative (that is hostile, intimidating, degrading, humiliating or offensive) environment for the worker.

196. Harassment and detriment are mutually exclusive concepts; s.212(1) EA 2010 provides that "detriment does not…include conduct which amounts to harassment".

197. A dismissal can constitute an act of harassment. In ***Urso v Department for Work and Pensions*** [2017] IRLR 304 the claimant was dismissed because of incapacity following a period of sickness absence arising out of work-related stress. Among her claims was that the act of dismissal amounted to unlawful harassment. The employment tribunal held that an actual dismissal is not capable of amounting to harassment within the meaning of the Equality Act 2010. Mr Justice Supperstone in the EAT does not agree. He takes the view that there is "no good reason for excluding an actual dismissal from the harassment jurisdiction."

198. Harassment related to the protected characteristics of marital status, pregnancy, maternity and civil partnership are not covered. They must probably be claimed as direct discrimination.

199. "Unwanted" means uninvited or unwelcome; EHRC Code at para 7.8. You do not have to expressly object to the conduct before it becomes unwanted.

200. The unwanted "conduct" concerned may be physical, verbal or contained in documents such as emails. Normally, harassment will occur over

a period of time. However, a serious one-off act can be sufficient to constitute harassment; EHRC Code at para 7.8.

201. "Related to" a protected characteristic means connected to it. Therefore, you do not need to show that the unwanted conduct was caused by the protected characteristic.

202. It is normally easier to prove that the harassment had the "effect" of creating an adverse working environment for the worker rather than demonstrating that the environment was created deliberately. To show "purpose" the worker will have to show that the wrong-doer intended that consequence. It can be very difficult to prove motive or intent, where it is not admitted. However, if there is clear evidence of intent, one small advantage of that path is that you do not then have to show that the worker's perception of the unwanted conduct was reasonable.

203. By contrast, to prove "effect" you merely need to show that the unwanted conduct had the consequence of violating the worker's dignity or creating a negative working environment (and that it was reasonable for it to have that effect). You do not have to prove intent or motive. Hence, an innocent remark which nevertheless has the effect of violating the worker's dignity could be covered.

204. However, with the "effect" route one still has to show that it was reasonable for the unwanted conduct to have that effect; section 26(4) EA 2010. Over-sensitive workers complaining about a minor incident will not be protected. The ET will place a great deal of importance in how the Claimant viewed the incident(s), but will also see if it was reasonable for the unwanted conduct to have that effect.

205. The key "effect" case is **Richmond Pharmacology v Dhaliwal** [2009] IRLR 336 (EAT) in which the EAT held it was reasonable for the ET to find that Ms Dhaliwal had been harassed when her manager made the following comment, "We will probably bump into each other in future, unless you are married off in India". It was accepted that the manager had not intended the remark to be offensive. It was nevertheless found to have had the effect of violating her dignity.

206. In short, the "effect" route is normally easier to prove and preferable unless there is clear evidence of intent by the wrong-doer.

207. However, unhelpfully, in ***Henderson v General Municipal and Boilermakers Union*** [2017] IRLR 340 Lord Justice Underhill quoted the statutory definition of harassment – "unwanted conduct related to a relevant protected characteristic", which has "the purpose or effect of … creating a hostile … environment" for the claimant and then added that "it will be clear that both the element of purpose … and, at least in a case of this kind, the question of whether the conduct complained of 'is related to' the protected characteristic, will require a consideration of the mental processes of the putative harasser." This suggests that motivation could be applied to "effect" cases, albeit the appeal was a "purpose" case.

208. Helpfully, an unwanted act does not become accepted simply because the worker does not challenge the conduct at the time, or fails to bring a grievance against the perpetrator, or fails to formally report the incident. That would place the bar too high. Most workers are too wary of being victimised to confront the wrong-doer or to complain about them to a manager or HR. Similarly, many workers try to laugh off or pretend not to care about a harassing remark, even though they find it offensive. Again, this should not make stop that conduct being unwanted or the conduct objectively having the effect of violating their dignity etc. However, appearing to be too unconcerned, or regrettably engaging in such banter to fit in or retaliate, can lead an ET to find that the worker was not offended and that employee losing their claim.

209. However, the unwanted conduct must be of a serious nature. Conduct that merely upsets a worker but does not violate their dignity or create a hostile working environment will not be sufficient; **Grant v HM Land Registry** [2011] IRLR 748.

210. The scope of harassment protection is wide. The harassment need not be directed at or related to the particular worker. For example, in one case a wrong-doing male worker downloaded pornographic images at the office for his male colleagues to view in the presence of a female employee who found the material to be offensive; **Moonsar v Fiveways Express Transport Ltd** [2005] IRLR 9 (EAT).

211. Further, harassment only needs to relate to a protected characteristic and it need not be related to the protected characteristic of the worker

concerned. Hence, a male worker could take offense at a sexist joke about women told in his presence in the workplace. Similarly, an Asian worker (or indeed a white worker) could take offense at a racist joke told in the workplace about say African people because the joke relates to a protected characteristic (race (being African)).

212. Harassment can also occur when the victim is targeted because of their perceived connection with someone else; harassment by association. For example, a worker has a disabled child and is taunted at work about their child's protected characteristic.

213. It can also potentially occur when the worker is abused for being related to a protected characteristic which in fact they are not. Such false perception cases would include situations in which, for example, a Sikh Asian man is negatively targeted at work for being Muslim or a male employee is taunted for being believed to be gay (whereas in fact, he was not **English v Thomas Sanderson Ltd** [2009] IRLR 206 (CA)).

214. An issue may arise when the Claimant was not physically present when the harassing event occurred. For example, a worker makes a racist comment at work, but the Claimant only learns of it later from someone who was present at the time it was made. Can they complain that they were harassed by the unwanted racist remark? It will depend upon whether that remark can reasonable be said to have had the effect of creating the proscribed working environment for the Claimant (or violating their dignity) and that in turn probably depends on how serious the incident was and how proximate or connected the Claimant is to the actual remark made.

215. Unfortunately, there is an historic, incorrect but still binding decision of the Court of Appeal, that states that the victim has to be present and the subject of the harassing remark to sue for that act. In that case, the manager asked a worker to pass the typing to the "wog" (referring to a black secretary, who was not present and whom the manager did not intend to hear, or learn of, the remark) but the BAME worker in question heard about the comment later and sued. She lost. The Court of Appeal disgracefully found that the then definition of harassment did not cover her as she was too remote from the incident itself; **De Souza v Automobile Association** [1985].

216. The employer will be vicariously liable for the unwanted conduct committed by its staff that occurs at work; **Jones v Tower Boot Co Ltd** [1997] IRLR 168 (CA). In that case the employer tried to argue that it did not employ its staff to racially assault or abuse the worker. However the Court of Appeal said that any conduct that occurs "in the course of employment" was covered, whether or not it was known of, or approved, by the employer.

217. The employer can escape such liability if it can prove that it took all reasonable preventative steps but this is very unlikely and almost never happens in practice.

218. The "course of employment" will cover incidents at work, at work functions, at social functions organised by the employer (eg: staff Christmas party or leaver's drinks) and possibly at social gatherings of staff after work.

219. However, harassment which occurs between staff outside of work is probably not covered by the EA 2010; see **Chief Constable of Lincolnshire Police v Stubbs** [1999] IRLR 81 (EAT) and **Waters v Commissioner of Police of the Metropolis** [1977] IRLR 589 (CA).

Third party harassment

220. Third party harassment was made unlawful by section 40(2) of the EA 2010. This occurs when a customer/client of the employer, member of the public, or independent contractor harasses the worker at work. Unfortunately, the Government's anti-worker's rights approach led to it abolishing that protection and repealing section 40(2) with effect from 1 October 2013.

221. This means that it is very unlikely that the employer can be held liable for the unwanted conduct of the third party. The position has returned to that which existed before the EA 2010; see **Pearce v Governing Body of Mayfield Secondary School** [2003] IRLR 512 (HL). **Pearce** concerned a secondary school employer which had failed to protect a teacher against discriminatory taunts. The House of Lords held that the failure to take reasonable steps to prevent an employee from racial or sexual abuse was unlawful only where the reason for that failure to act itself amounted to discrimination (or harassment).

222. Hence, the current position is that the unwanted third party conduct can be reported, or grieved, to the employer. The employer may then fail to take

appropriate steps to prevent further harassment or generally fail to deal with the issue. If so, you could consider bringing a claim for harassment under section 26 EA 2010 on the basis that the failure of the employer to duly investigate the matter and/or to protect you, is of itself (discriminatory or) unwanted conduct related to a/your protected characteristic that creates a hostile working environment for you (or violates your dignity).

223. There is also an argument that such claims can be brought under EU Law.

224. An alternative approach is to consider the option of legal proceedings in the Court under the Protection from Harassment Act 1997 ("PHA"). There is a 6 year time-limit. The PHA requires a course of conduct involving two or more acts of harassment.

Direct discrimination

225. Direct discrimination occurs when the worker is treated less favourably than another worker due to a protected characteristic; section 13 EA 2010.

226. It requires evidence of the different treatment (which disadvantages the worker). It is all about the comparative treatment, rather than proving negative treatment. Hence, if the wrong-doing employee shouts at the BAME worker and demotes her/him for failing to complete a task, that evidence is irrelevant unless the Claimant can show that a white worker in the same role who has failed in the same task, was not shouted at and/or demoted.

227. The focus on less favourable treatment causes some confusion because, for example, a BAME worker wants to complain about being shouted at and demoted is understandably not particularly interested in what the same manager may have done to other workers in the same situation, whatever their protected characteristic (and always assuming s/he knows of any other worker having had the same situation). S/he will simply wish to assert that s/he was treated badly due to her/his race. However, regrettably, the law is not interested in the adverse or unreasonable treatment suffered by the worker. The law requires the BAME worker to prove that s/he was treated (or would be treated) worse than a white worker (the "comparator") in the

same (or very similar) situation. If that can be shown, then the ET will then and only then become interested in the negative treatment.

228. Regrettably, identifying a suitable comparator is very difficult and there may be no such comparator within the worker's knowledge or at all. Further, there must be "no material difference" in the situation of the worker and the comparator; section 23 EA 2010. So even when and if you identify a potential comparator, the employer will argue that the workers' situations have a material difference and that any suggested comparator is not suitable.

229. Without an actual comparator the claim becomes weaker and, as a last resort, you have to rely on a hypothetical comparator. Constructing the hypothetical comparator is invariably a contested and difficult exercise. In deciding how a hypothetical comparator would be treated, the evidence that comes from how real workers were actually treated in reasonably similar circumstances to those of the worker concerned, the stronger the evidence. Essentially though, the argument on the race claim becomes - if the employer had a white clone of the BAME worker, the BAME worker would have been treated worse than the white clone who would not have been shouted at and demoted. This method of proving discrimination by comparison with an imaginary worker of a different protected characteristic is of course absurd, unnecessarily complicated, very speculative and, as a result, very difficult. By way of example, it was stated that "even the hypothetical circumstances of the hypothetical comparator must not be materially different from those of the complainant"; **Shomer v B and R Residential Lettings Ltd** [1992] IRLR 317 (CA).

230. There was no good reason for the law to be framed in this tortuous and comparative manner. Discrimination should be based on negative treatment suffered by the worker due to a protected characteristic. The worker should just have to show the unfavourable treatment and the ET should then require an explanation from the employer.

231. Whether or not the comparator is sufficiently similar will be a question of fact and degree for the ET; **Hewage v Grampian Heath Board** [2012] IRLR 870.

232. The problems created by the comparative approach have been exacerbated by the fact that the Courts have held that an employer who treats

all staff badly cannot be said to have discriminated against the Claimant; because all staff are treated equally badly and hence, logically, there is no different treatment; **Laing v Manchester City Council** [2006] IRLR 748. This is sometimes called the “bad employer” defence. Fortunately this defence requires the employer to give evidence of how badly it treats its staff and almost all employers refuse to do that in practice because of the commercial damage such an admission may do to their business/organisation.

233. There are two other situations in which comparison evidence is not required. The first is where the detriment constitutes racial segregation. If the worker is segregated from other workers based on race, s/he does not need to show different treatment; section 13(5) EA 2010. Thankfully, racial segregation is a very rare occurrence these days. Segregation based on other protected characteristics still needs to be proven with comparison evidence.

234. Of much more practical help is the fact that where the detriment itself involves reference to a protected characteristic, no evidence of different treatment is required. For example, if a BAME worker is racially abused at work as a “black bastard”, the detriment is specific to her/his race and so no comparison is required.

235. Due to the difficulty of proving different treatment in most direct discrimination claims, which do not involve detriment which references the protected characteristic, it is better to argue victimisation (where there has been a prior protected act) and/or harassment, which are easier to prove in that they do not require comparative evidence.

236. The less favourable treatment must constitute a “detriment” to the worker and must not be trivial.

237. Assuming that you can show detrimental, less favourable treatment, you must then prove that this treatment was because of a protected characteristic. It is a two part test and the second part of establishing causation is very difficult to prove. There is seldom any overt evidence of direct discrimination. Employers always deny that they are discriminators or always state that they had any intention to discriminate. They are often indignant at the mere suggestion of such prejudice existing (which is one reason why victimisation claims are easier to prove).

238. In proving the reason why the less favourable treatment occurred, it is not necessary to prove personal prejudice by the employer or wrong-doing worker. For example, you do not have to prove that they are a “racist”. You simply have to prove that the treatment is because of a/the protected characteristic, rather than the employer/employee intended the harm that they did.

239. Moreover, if the reason why the detriment occurred is because of a protected characteristic, it means that the case is proven, the employer’s motive or intention is irrelevant. Hence, the employer will be liable even if it acted in that manner without realising it (unconsciously) or for a benign motive, or good motive, such as to prevent discrimination. For example, if you moved a BAME worker to a different part of a factory and into a different role, to protect that worker from racist workers, where the unilateral move is to the BAME worker’s detriment (ie: the role is not what he was employed or qualified to do and he objects) s/he can successfully claim direct discrimination. The employer’s correct response would be to tackle the racist workers and not to protect and thereby disadvantage the BAME worker.

240. The employer can also be proven to have acted because of a protected characteristic when it relies on discriminatory stereotypical assumptions to reach its detrimental decision.

241. Helpfully, the protected characteristic need not be the sole cause for the detrimental treatment. It can be the principal cause or “effective and predominant cause… or the real and efficient cause” of several causes; **O'Neill v Governors of St Thomas More Roman Catholic Voluntary Aided Upper School and anor** [1996] IRLR 372 (EAT). The EHRC Code goes further and states that it need not be the “main cause”; EHRC at para 3.12. It is unclear how important the protected characteristic needs to be in terms of the reason why (or causation) before an ET will accept it was a sufficient reason. On the old law test, before the EA 2010, it was sufficient if the protected characteristic was an “important factor” (**Owen & Briggs v James** [1982] IRLR 502 (CA)) or “had a significant influence on the outcome” (**Nagarajan v London Regional Transport** [1999] IRLR 572 (HL)). This long-standing test can be relied upon because the EHRC Code states that the new

EA 2010 test of “because of” the protected characteristic is the same as the old test of “on the grounds of” the protected characteristic; at para 3.11.

242. The EAT summarised the case law immediately prior to the EA 2010 and stated in this regard, “It need not be the only or even the main reason. It is sufficient that it is significant in the sense of being more than trivial”; **London Borough of Islington v Ladele** [2009] IRLR 154 (EAT).

243. The other helpful feature, which exists thanks to EU law, is that the worker only has to prove a “prima facie” case of discrimination (that is facts from which the ET *could conclude* there was discrimination) before the burden of proof is reversed and the employer then has to prove that the detrimental less favourable treatment was in no sense whatsoever because of a protected characteristic.

244. However, to reverse the burden of proof you have to show that it likely that (1) the worker was treated less favourably than her/his comparator; (2) the less favourable treatment amounted to a detriment; and (3) there is something more (additional evidence) from which the ET *could conclude* that the treatment (if unexplained by the employer) was because of a protected characteristic.

245. The Court of Appeal has stated that is not sufficient just to show less favourable treatment and detriment. It stated that the worker would have to prove “something more”; **Madarassy v Nomura International plc** [2007] IRLR 246. This additional element is un-defined and a judicial construct which is sometimes referred to as the “magic ingredient”, probably because it is quite elusive. In practice, it leaves the ET with a broad discretion to draw an inference from any or all of the evidence heard and label the particular evidence as being the “something more” or something else.

246. Factors which help the ET to draw the inference range from previous (successful) complaints of discrimination by other staff, detrimental treatment after the ET claim has been issued (which could also be victimisation), false and contradictory evidence by the employer concerning the less favourable treatment (or generally) (**Solicitors Regulation Authority v Mitchell** 0497/12 (EAT)), an inability of the employer to otherwise explain unreasonable treatment (**Bahl v Law Society** [2004]IRLR 799 cf: an unreasonable explanation may not be sufficient for an inference – **London Borough of**

Islington v Ladele [2009] IRLR 154 (an indirect discrimination case)), and a failure to follow the equal opportunities procedure or the EHRC Code. The failure of the employer to follow its own equal opportunities policy is useful evidence but the EAT stated that it cannot of itself lead to an inference of discrimination; **Qureshi v Newham LBC** [1991] IRLR 264 (EAT). That said, in another appeal case, that failure, together with a failure to take up references on candidates for a job, was identified as important in relation to drawing an inference; **Anya v University of Oxford** [2001] IRLR 377 (CA).

247. In determining the reason for less favourable treatment, the allegations made should be looked at as a whole and not on the basis of 'fragmented approach'; **Qureshi v London Borough of Newham** [1991] IRLR 264 (EAT). There is very helpful guidance in this respect in **Anya v University of Oxford** [2001] IRLR 377 (CA), which speaks of the ET taking a “holistic” approach to the evidence.

248. Putting aside the difficulties of proving the direct discrimination claim, the scope of section 13 is broad. Although the vast majority of direct discrimination claims involve workers suing for less favourably treatment related to their own protected characteristic, the EA 2010 is much broader than that. Direct discrimination claims not restricted to your own protected characteristic and indeed you can have protection even if you have no protected characteristic. You simply need to show that the less favourable, detrimental treatment occurs because of a protected characteristic, rather than your own. For this reason, male workers can sue when they take offence at sexist jokes about female workers. White workers can sue when they take offence at racist jokes about BAME workers.

249. It is also important to note that the wrong-doer and the victim can share the same protected characteristic. For example, some people still believe that BAME people cannot discriminate on the ground of race against someone of the same nationality, race or colour. That is not true. Similarly, the EA 2010 allows, for example, a female worker to sue a female worker of sex discrimination.

250. Moreover, direct discrimination under the EA 2010 also includes discrimination by association. Hence, if you are targeted for less favourable treatment because of your perceived association with someone else’s

protected characteristic, such as your partner, child, relative or friend. For example, you have a disabled child and you are subjected to less favourable treatment because of your child's protected characteristic even though you are not yourself disabled.

251. It also includes discrimination by perception. This occurs when the wrong-doing employee wrongly believes or pretends that you have a particular protected characteristic. The classic examples are Asian workers targeted for being Muslim (whereas in fact they are not) and male workers accused or taunted for being gay (whereas in fact they are not).

252. Strangely, and unhelpfully, discrimination by association and perception does not apply to every protected characteristic. For example, it does not apply to pregnancy claims. However, where it does not apply the claim can normally be advanced under (in that example), pregnancy discrimination or more generally as direct discrimination.

253. As with victimisation and harassment claims, you can also sue your employer for direct discrimination when you are still in employment (although that obviously creates a workplace tension) or after your employment has ended or even in respect of a future job to which you have failed to be appointed.

254. One disappointing aspect of the EA 2010 is that the Government has not implemented the "multiple discrimination" provisions. It would be much easier for say, a black woman, to win a multiple discrimination case rather than to have to prove less favourable treatment based on sex discrimination (comparing herself to a black male worker) and, separately, based on race discrimination (comparing herself to white female worker). The comparisons obviously work against each other. It is also artificial to separate the different protected characteristics when the true motive of the employer is not admitted or overt. Assuming the need for a comparison is not abolished, she should be able to compare herself once to say a white male worker and if she proves less favourable treatment and then argue that the reason for that treatment is her protected characteristics. However, the tide of employment law is definitely moving in the opposite direction.

255. There is no justification or other general defence to direct discrimination, except (quite disgracefully) for age discrimination. There are a

few minor and rare exceptions in which direct discrimination is permitted; where there is an occupational requirement that the post-holder have a specific protected characteristic.

Positive discrimination

256. Positive discrimination regrettably remains illegal in the UK. For that reason, we are unlikely to see any major improvement in equality at work. Positive discrimination would allow the employer to employer a candidate for a job due to their protected characteristic (provided they meet the job description).

257. It was however applied successfully in Northern Ireland under the Patten reforms between 2001 and 2011. The aim was to increase Catholic officers in the police force. The 10 year positive discrimination raised Catholic representation by 22%; from 8-30%. Northern Ireland negotiated a derogation from EU Law to achieve that.

258. There are however two caveats to positive discrimination being unlawful. The first is that you can recruit (or reject) staff with a protected characteristic where that characteristic is an occupational requirement for the job and certain other requirements are met.

259. The second is that if the EA 2010 does not apply to the work concerned, it is neither illegal to discriminate against that worker or to discriminate in favour of that worker. Hence, for example, if an actor can be refused work due to “artistic licence” (ie: because he is BAME, and the producer insists that James Bond has to be white), s/he can also be given the role for the same reason. As a result, the next James Bond could be lawfully restricted to auditions from BAME actors because of their race.

260. Positive action is lawful, helpful but largely ineffective. Positive action is where you actively seek candidates from particular disadvantaged groups by, for example, advertising the role in specialist media as well as mainstream media. Having applied for the vacancy they can then be appointed but only if they are the best candidate.

Tactics, Settlement and Remedy

261. As stated above, a good settlement on a termination agreement (unless the claimant is long-term ill or has lost the benefit of a final salary pension scheme and/or is unable to work in that regulated vocation due to the discrimination) is one year's salary. The first £30,000 of any termination of employment settlement may be paid tax free.

262. Notice monies and injury to feelings are taxable.

263. Given that the average award of a pre-dismissal detriment claim is about £13,000 most of these cases are not cost-effective to run (unless the claimant has suffered significant loss of earnings or a significant personal injury). They are therefore run for three main reasons: (1) to stop or challenge the hostile working environment, as a last resort measure; (2) to leverage a settlement; (3) to win the claim and achieve (1) and/or (2) and (hopefully) justice.

264. There are several situations in which a pre-dismissal detriment claim may be of a higher value because it will include a loss of earnings and/or some other financial benefit, as well as injury to feelings: (1) where the claimant has become long-term injured/ill/disabled due to the discrimination and (a) may not work again as a result or (b) may not return to work for a long period and/or (c) has lost, or will lose, significant earnings while on sick pay; (2) where the claimant has failed to achieve promotion due to the discrimination (and hence, has lost those potential earnings); and/or (3) where the claimant has failed to achieve a significant pay-rise and/or bonus due to the discrimination.

265. Normally, however, the pre-dismissal claim is a leveraging device to obtain a good termination settlement.

266. Some of the largest settlement packages utilise the medical retirement and/or early retirement options, and may include a tax free annual injury award as well as tax free lump sums.

267. A settlement may occur at any stage of the ET litigation. It may also occur at the ET final hearing or after the decision is issued.

268. A settlement of an ET claim can be achieved by (1) a settlement agreement (in which the claimant has been advised on that by a qualified

lawyer); (2) an ACAS settlement agreement ("COT3"); or (3) further to a Judicial Mediation and/or (4) by an ET Decision.

269. In a termination settlement you should try to obtain a good agreed reference.

270. Almost all settlements are confidential and contain gagging clauses.

271. At the ET the awards are relatively low and the first £30,000 tax free concession is not available. The employer is also exposed to the public hearing and any attendant negative media. Both parties can incur significant costs if the trial goes ahead. It is for these reasons that settlement before trial occurs in 36% of discrimination cases on average but in our cases it is nearer 75%.

272. However, in the public sector, commercial settlements are often harder to achieve than they are in the private sector.

Remedy

273. The ET has the power to (1) make non-financial recommendations (2) make a declaration; and (3) make an order for compensation.

274. The ET may recommend that the employer carries out an action that obviates or reduces the adverse impact on the claimant of any matter about which he has successfully claimed; s124(3) EA 2010. If, without reasonable excuse, the employer fails to comply with the ordered recommendation, the claimant is entitled to additional compensation of up to 6 months' monies; s124(7) EA 2010.

275. Recommendations made include that the employer (1) sends a written apology to the claimant; (2) provides the claimant with an agreed reference; (3) arranges diversity or equality training for (certain) staff; (4) to review and implement certain internal policies such as the disciplinary policy; (5) to expunge the claimant's disciplinary record or to remove certain inaccurate documents from their personnel file (eg: a written warning); (6) to expunge any sickness record form the personnel record or disapply such absences when considering future absences under an attendance or sick pay policy, where the absence is connected to the discriminatory treatment; (7) to interview staff about the ET decision.

276. The ET can recommend steps by way of positive action but not positive discrimination.

277. The declaration is simply the Decision (judgment) that the claimant has won all or part of their claim.

278. The award of compensation in discrimination claims is technically unlimited but it cannot reward the claimant (it is purely compensatory). It should equate to all of the net loss caused by the discriminatory conduct; s124(6) and s119(4) EA 2010.

279. The tax treatment of an award by the ET is very complicated.

280. At present, it is believed that injury to feelings awards are not taxable, but the Tax Tribunal appears to believe that it is.

281. The compensatory award will include any loss of earnings and can include injury to feelings, injury to health, aggravated damages and exemplary (punitive) damages.

282. It would appear that the **Polkey** principle will apply to discrimination (loss of earnings) awards, depending on the facts; see **Abbey National plc v Chaggar** [2010] IRLR 47 (CA).

283. The current Vento No 2 bands are as follows (from April 2018): Lower band: £800 to £8,400; Middle band: £8,400 to £25,200; and Upper band: £25,200 to £42,000.

284. If an Employment Tribunal ("ET") awards more than that the employer is likely to be able to successfully appear that award at the Employment Appeal Tribunal ("EAT").

285. That said, on the facts, a one off act could lead to a higher band award; **Hackney LBC v Sivanandan and others** EAT/0075/10

286. Where discrimination involves a dismissal or deliberate and intended discrimination it is normally considered to be more serious.

287. Injury to health awards are complicated and require expert evidence. For psychiatric injury (eg: clinical depression) there is also a banding for awards from severe (c£40,000 to £85,000); moderately severe (c£14,000-£40,000); moderate (c£4,000-£14,000); and less severe/mild (up to £4,000).

288. It is very important to note that if you sue for an injury to health award in your discrimination claim you cannot then bring a separate claim for personal injury in the court arising out of the same set of facts; **Sheriff v**

Klyne Tugs (Lowestoft) Ltd [1999] EWCA 1663. You have to choose whether or sue for discrimination or negligence; you cannot do both.

289. Aggravated damages may be awarded where the employer's conduct in carrying out the discriminatory acts was high-handed, insulting, oppressive or malicious; see **Howard Shaw v MPS**

290. Punitive damages are possible further to the decision of **Rookes v Barnard** [1964] AC 1129 (HL). They may be made when there is "oppressive, arbitrary or unconstitutional" action by Government or a public sector employer. It may be available as a remedy against a private sector employer where the conduct has been calculated to make a profit.

291. However, such awards are very rare, and the first time the EAT considered such an award was in **MOD v Fletcher** in 2010 (EAT/0044/09). In that case, they decided that the £50,000 award for punitive damages was not appropriate and if any award had been justified (it was not) it should have been £7,500.

292. The ET should add interest (at 8%) to the compensatory award.

293. The ET may also increase (or reduce) an award by up to 25% for non-compliance by the employer (or the employee) with the ACAS Code. The code does not apply to worker who are not employees, such as police officers.

294. Finally, it should be noted the ET has no power to reinstate the worker, unless the worker wins an unfair dismissal claim (NB: even in an unfair dismissal case the employer may refuse to reinstate the worker and pay additional compensation instead).