

## What is meant by racial group and racial grounds?

It is unlawful to discriminate against a person if on the *grounds* of their *race* they are treated less favourably than other persons would be treated.

Under Section 3 (1) of the Race Relations Act 1976 ("the 1976 Act") a *racial group* is a group of persons defined by reference to their colour, race, nationality or ethnic or national origins. *Racial grounds* are also defined by reference to the same criteria.

In *Mandla v Dowell Lee* (1983) the House of Lords found that Sikhs constituted a racial group when a Sikh boy was refused a place at a school because he wore a turban. In reaching their decision the following characteristics were taken into consideration and these have been applied in determining other ethnic groups:

- A long shared history, of which the group is conscious as distinguishing it from other groups, and the memory of which keeps it alive.
- A cultural tradition of its own, including family and social customs and manners, often but not necessarily associated with religious observance.
- Either a common geographical origin or descent from a small number of common ancestors.
- A common language, not necessarily peculiar to the group.
- A common literature peculiar to the group.
- A common religion different from that of neighbouring groups or from the general community surrounding it.
- Being a minority or being an oppressed or a dominant group within a larger community

Gypsies and Jewish people have also been regarded as ethnic groups. However, in *Crown Suppliers (Property Services Agency) v Dawkins* (1993) the Court of Appeal established that Rastafarians do not constitute a racial group for the purposes of the 1976 Act. Therefore, a Rastafarian who was refused a job because he insisted on wearing his hair in dreadlocks as part of his religious beliefs as a Rastafarian had no remedy under the 1976 Act. The Court went on to add that when compared with the rest of the Afro Caribbean community in England, there was nothing to set Rastafarians apart as a separate ethnic group

## What is Direct Discrimination?

**Section 1 of the 1976 Act defines direct discrimination as being where a person, on the grounds of race, treats a person less favourably than he treats or would treat another person.**

A clear example of direct discrimination is illustrated in *Owen & Briggs v James* (1982) where J - a black applicant - was unsuccessful when she applied for a typist position despite being more qualified than the white candidate who was offered the position. J brought a claim for discrimination when she was informed that the interviewer had told the white candidate "I cannot understand why any English employer would want to take on a coloured girl when English girls are available." The Tribunal found in J's favour on the basis that racial grounds were an important factor in not employing her.

In contrast, in *Simon v Brimham Associates* (1987) the tribunal established that an employer cannot be liable for racial discrimination if he had no knowledge of the ethnic, racial or national origin of the person allegedly suffering discrimination. Therefore, a Jewish job applicant who was informed by the interviewer that Arab employers might not select him if he were Jewish was unsuccessful in his claim for racial discrimination because the prospective employer had no knowledge of his racial origin.

Race discrimination tends to be less overt these days. Nevertheless, it is still direct discrimination where the unfavourable treatment was caused by racial considerations, e.g. an employee resigned rather than comply with an instruction to not hire vehicles to members of ethnic minorities: *Weathersfield Ltd v Sargent* 1999.

### **What is Indirect Discrimination?**

The definition of indirect discrimination is more complicated than that of direct discrimination. This part of the definition, set out in section 1, applies generally to the circumstances to which the 1976 Act applies, including employment matters.

***If a person applies to another person a requirement or condition which he applies or would apply equally to persons not of the same racial group as that other but – Which is such that the proportion of persons of the same racial group as that other who can comply with it is considerably smaller than the proportion of persons not of that racial group who can comply with it, and which he cannot show to be justifiable irrespective of the racial group which the person to whom it is applied belongs, and the application of the requirement or condition is to the detriment of that other because he cannot comply with it.***

As stated, the above definition also applies to employment matters, but the definition has been expanded by section 1A in the way that it applies to various other areas, again including employment, so that it will be indirect discrimination where:

***A person applies to another a provision, criterion or practice which he applies or would apply equally to persons not of the same race or ethnic or national origins as that other but –***

***Which puts or would put persons of the same race or ethnic or national origins as that other at a particular disadvantage when compared with other persons, and which puts that person at that disadvantage, and which he cannot show to be a proportionate means of achieving a legitimate aim.***

For example, it would almost certainly be unlawful indirect discrimination to register a job specifying that a filing clerk must speak English without an accent, when such a requirement is not needed to perform the job properly.

Again, if the employer has imposed a “provision, criterion or practice”, for example, in respect of clothing or appearance – where a penalty is imposed for non-compliance, this may amount to indirect discrimination and it would be necessary to consider whether the employee can comply with the provision, criterion or practice.

Other examples of indirect discrimination are the exclusive use of “word of mouth” recruitment in organisations whose work force is mainly, or exclusively, of one racial group, or the imposition of unnecessary dress requirements which cannot be justified, i.e. prohibiting traffic wardens from wearing turbans.

This was illustrated in the case of *Malik v Bertram Personnel Group Limited* 1990 where a Tribunal held that it was not justified that the company image required all female shop assistants to wear a uniform of an overall over a skirt. They held that the severe detriment to Muslims far outweighed any commercial necessity. In contrast, in *Kingston and Richmond Health Authority v Kaur* 1981, the health authority withdrew an offer of a place on a nurses training scheme when a female Sikh said that she would have to wear trousers with her uniform. The Employment Appeal Tribunal (EAT) held that it was desirable for nurses to have a uniform because it boosted morale, reassured patients and guarded against intruders. Statutory Regulations laid down by the General Nursing Council did not permit trousers as part of the uniform for female nurses, and the EAT concluded that the employers were justified in abiding by those rules. It is not clear to what extent if any this remains good law. The defence of justification, since 19 July 2003 relies on the respondent being able to demonstrate that the relevant “provision, criterion or practice” is “objectively justified by a legitimate aim and the means of achieving that aim is appropriate and necessary”. This is similar to the approach currently used by the courts; see below, but for the new additional requirement that the relevant provision must be necessary.

### **Can indirect discrimination ever be justified?**

The employer has a defence to an indirect discrimination claim if he can show that the “provision, criterion or practice” is justifiable on non-racial grounds. There must be an objective balance

between the discriminatory effect of the condition and reasonable need of the party who applies the condition. One must distinguish between rules that are necessary and those which are merely convenient, as well as considering whether the same objective could have been achieved in a non-discriminatory way. In cases where the alleged discrimination is due to the application of a provision, criterion or practice, the employer would have to show that such an application was a proportionate means of achieving a legitimate aim.

Examples of potentially justifiable requirements include wearing a uniform or hairnet for reasons of hygiene, holding a professional qualification, or requiring an adequate command of a language. Thus in *Panesar v Nestle Co Limited* (1980) a Sikh was refused a job because he refused to shave his beard. The Tribunal held that the employer's rule was justifiable on non-racial grounds for hygiene reasons. Employers should nonetheless be willing to show flexibility where this is feasible. This is illustrated in *J H Walker v Hussain* 1996 where the employer was not justified in insisting that employees work during the Muslim festival of Eid, given that they were willing to work overtime on other days to make up for taking the day off.

### **What is Victimisation?**

Victimisation is unlawful and occurs where a person is treated less favourably by another ("the discriminator") by reason that the discriminator knows or suspects he has/will bring proceedings under the 1976 Act or has/will assist(ed) another person to bring proceedings, etc.

### **What is Harassment?**

Harassment is unlawful and occurs where, on the grounds of race, or ethnic or national origins a person engages in unwanted conduct towards another, which has the purpose or effect of (a) violating that other person's dignity or (b) creating an intimidating, hostile, degrading, humiliating or offensive environment for that other.

### **What amounts to unlawful discrimination by an employer?**

An employer would be unlawfully discriminating against applicants and employees in the following circumstances. Agencies should bear in mind that it would be unlawful for them to act on such a discriminatory instruction.

#### **i) Applicants**

It is unlawful for a person, in relation to employment by him at an establishment in Great Britain, to discriminate against another (a) in the arrangements he makes for the purpose of determining who should be offered that employment; or (b) in the terms on which he offers him that employment; or (c) by refusing or deliberately omitting to offer him that employment.

## **ii) Employees**

It is unlawful for a person, in the case of a person employed by him at an establishment in Great Britain, to discriminate against that employee (a) in the terms of employment which he affords him; or (b) in the way he affords him access to opportunities for promotion, transfer or training, or to any other benefits, facilities or services, or by refusing or deliberate omitting to afford him access to them; or (c) by dismissing him, or subjecting him to any other detriment.

### **Can Employers be Liable for Discrimination by Third Parties?**

Employers may also be liable for acts of discrimination by third parties (i.e. persons who are not their employees) although the circumstances where liability will be imputed are more limited. The House of Lords in its 2003 decision in the cases of *MacDonald v Advocate General for Scotland* and *Pearce v Mayfield School* also stated that *Burton v De Vere Hotels* (the 'Bernard Manning' case) was wrongly decided. The House of Lords stated that whilst an employer's failure to prevent third parties committing acts of sexual/racial harassment might amount to discrimination by the employer, it will only do so if the employer failed to take such steps because of the employee's sex/race. This has significant ramifications for discrimination claims generally.

### **Which party bears the burden of proof?**

Like the other areas in discrimination laws, the burden of proof is reversed if the complainant can make out a basic case to the tribunal, after which it is effectively then for the accused to prove he did not discriminate.

More precisely, where, at the hearing, the complaint proves facts from which the tribunal could conclude, in the absence of an adequate explanation, that the accused (which could be an employer, agency or employment business) has committed an act of discrimination, the tribunal shall uphold the complaint, unless the employer, etc, proves he did not commit the act.

### **What are the Consequences of a Discrimination Claim succeeding against an Employer?**

If an employer is found guilty of racial discrimination before an Employment Tribunal, the Tribunal can make a declaration that the individual has been discriminated against, and make a recommendation that steps are taken by the employer to remedy the situation and assist the person making the complaint. There is no limit on the amount of compensation payable. The employer could be ordered to pay compensation (and interest at the Tribunal's discretion) for loss suffered and injury to feelings.

## Exceptions –are there any situations to which the 1976 Act does not apply?

The provisions of the 1976 Act do not apply in the situations mentioned below. In practice, there are likely to be very few instances where an employer can legitimately discriminate on ground of race. If an employer claims that a particular vacancy falls within one of the exceptions set out below, members should ideally obtain a written statement setting out why the vacancy is not subject to the race discrimination legislation, to protect them from a subsequent allegation of unlawful racial discrimination: -

### **i) Where persons are employed in a private household?**

Whether or not employment is for the purposes of a private household would be a question for an Employment Tribunal to decide. Employment in a business run from a person's home will not constitute employment for the purposes of a private household. Prior to 19 July 2003, persons employed in a private household were exempt from the 1976 Act, except in relation to victimisation, which was not permitted and specifically covered. Since 19 July 2003, the scope of the 1976 Act has been extended. In the context of private households only discrimination on grounds of race or ethnic or national origins is unlawful, victimisation remains unlawful, but discrimination on grounds of colour or nationality is not covered. Therefore such discrimination, in the context of a private household may be lawful provided it is not otherwise unlawful.

### **ii) Where persons not ordinarily resident in Great Britain are employed to provide them with training in skills to be exercised outside Great Britain .**

However, this exception does not apply to discrimination on the grounds of race or ethnic or national origins, but does apply to selection on the basis of nationality.

### **iii) Where people are employed wholly or mainly outside Great Britain**

Great Britain does not include Northern Ireland, the Channel Islands and the Isle of Man, but may include designated off - shore areas. However, these exclusions do not apply where the employment is in another EU member state ( *Bossa v Nordstress Limited* (1998)). Since 19 July 2003, even where a person wholly does his work outside Great Britain, it is unlawful to discriminate on grounds of race or ethnic or national origins, or harassment where (a) the employer has a place of business at an establishment in Great Britain; (b) the work is for the purposes of the business carried out at that establishment; and (c) the employee is ordinarily resident in Great Britain (i) at the time when he applies for or is offered the employment, or (ii) at any time during the course of the employment. This will extend the scope to some but not all workers working abroad.

*NB It is worth noting that in both b) and c) it remains unlawful to stipulate a person's colour, race or ethnic or national origin. In advertisements for work or training overseas, only nationality may be stipulated*

**[iv] Where acts are done under statutory authority,**

**[v] Where there are rules restricting employment in the services of the Crown** or prescribed public body to persons of particular birth, nationality, descent or residence i.e. the Civil Service nationality rules (section 75).

**[vi] Where employment is restricted to safeguard national security,** it may be necessary for an employer to impose restrictions relating to nationality or place of birth.

**[vii] Where being part of a particular racial group is a Genuine Occupational Requirement (GOR) for a job.**

Once somebody has been offered a particular job, a Genuine Occupational Qualification ("GOQ") defence cannot be invoked to justify discriminatory terms of employment, or discrimination in affording access to other benefits or discriminatory dismissal.

There are only four grounds on which it may be argued that race is a GOQ for a job (these may apply to part of a job or to the whole job):

***Dramatic performances*** - if a job involves participation in a dramatic performance or other entertainment, and a person of a particular racial group is required for reasons of authenticity.

***Models*** - if a job involves being an artist's or photographic model in the production of a work of art, visual image or sequence of visual images, and a person of a particular racial group is required for reasons of authenticity.

***Public restaurants etc.*** - if a job involves working in a place where food or drink is provided to and consumed by members of the public, or a section of the public in a particular setting, and a person of a particular racial group is required for reasons of authenticity. Consequently, a Chinese restaurateur can insist on Chinese waiters. However, the GOQ is limited to places where food and drink are provided to the public, whether or not they pay for them. It would not apply, for example, to a private club or a works canteen.

***Personal welfare services*** - if a job involves providing personal services to members of a particular racial group to promote their welfare, and those services can most effectively be provided by a person of that racial group. For example, it may be more effective to employ a Bengali social worker to administer to a specifically Bengali immigrant community. 'Personal services' in this context has been defined by the Court of Appeal as meaning face-to-face contact between the giver and the recipient. In considering whether such services "can most effectively be provided" by a person of that racial group, the real test is whether or not the personal services would be less effective, if provided by others.

Being a member of a particular racial group is only a GOQ in the limited circumstances described above. Even in those circumstances the availability of the defence may be lost if an employer already has sufficient employees of the relevant racial group to perform those duties for which membership of the racial group is a GOQ. If an employer who is filling a vacancy already has employees of the racial group in question (i) who are capable of carrying out the duties to which a

GOQ applies, and (ii) could reasonably be allocated to those duties, and whose numbers are sufficient to meet the client's likely requirements without undue inconvenience then the employer cannot rely on a GOQ to justify discrimination.

### **Recruiting personnel and the right to work in the UK**

It is of the utmost importance that those dealing with matters at the sharp end of recruitment, i.e. those who are likely to be registering temporary workers, and placing permanent staff, understand the inter-action between the provisions of Section 8 of the Asylum and Immigration Act 1996, together with a basic understanding of immigration law and the obligations under the race discrimination legislation. It should be remembered that in December 2003, race discrimination legislation was extended to make unlawful discrimination on grounds of religion or belief. Enquiries should only be made in respect of an applicant's right to work in the UK and not their immigration status as it could constitute unlawful racial discrimination.

To ensure that there is no discrimination when registering applicants, it will be necessary to check the different types of permission that may be granted to applicants for employment and also current guidelines issued by the Home Office. It may not be sufficient to simply rely on national insurance numbers if this means that an agency is not registering someone who has a passport stamp showing that they are entitled to work in the UK but does not have national insurance number.

Where an agency just asks for national insurance numbers, it may be found guilty of less favourable treatment on racial grounds and, therefore, agencies should avoid the temptation to act in this way.