

Equal Respect

The rights of officers to equal treatment and respect regardless of their race

The Definition of Race

The Equality Act 2010 ("the Act") provides protection against discrimination on the basis of race. Race includes colour, nationality, and ethnic or national origins. Colour means any colour, including white, black or brown. For the purposes of the Act, an ethnic group must have a long shared history and its own cultural tradition. There may also be other relevant characteristics that assist in establishing an ethnic group, such as shared language, geographical descent or religion. Sikhs and Jews have established that they are an ethnic group, whereas Rastafarians and Muslims have not. Rastafarians and Muslims would however be protected by the provisions on religious discrimination.

At present, "caste" does not come under the notion of race although there is provision under the Act to allow caste to be added. Arguably, caste should be read into the Act by virtue of European law.



Discrimination, victimisation & harassment

There are four ways race discrimination may arise.

1. Direct discrimination

It is unlawful to treat a person less favourably because of race. In order to succeed in a claim of direct discrimination, you must show:

- That you have been less favourably treated than a person not of that race has or would be treated, and
- That this treatment was because of race, and
- That you were subject to disadvantage or detriment as a result of that treatment.

The Act requires that 'like must be compared with like', so the less favourable treatment must be compared with that of someone of a different race, known as a comparator. Your comparator must be a person who in all other respects is in a similar or 'not materially different' position to you. The comparator can be a real person or hypothetical.

There is no need to show motive or intention behind the discriminatory treatment as it is accepted that discriminatory treatment can be unconscious. Further, it does not matter if the discriminator shares the race of the individual being discriminated against.

The less favourable treatment does not necessarily have to be because of your race. For example, someone who is treated less favourably because of his wife's or parents' race would be protected. The Act also protects those who are treated less favourably because of their perceived race. One example of this is where someone who is non-white is treated less favourably because he is perceived not to be British.

The protection provided by The Act

Who is protected?

In the police sphere, the Act applies to recruitment, service and vocational training. It is unlawful to discriminate against someone because of race, from the initial job application process through to termination of service. The Act extends the definition of "employment" to cover the police. To establish unlawful race discrimination at work, the officer must be able to prove that they were denied opportunities (for example, opportunities for promotion, transfer, training or other benefits), or that they have been subjected to any other detriment. "Detriment" means being put at a disadvantage.

What is prohibited?

The Act outlaws direct and indirect discrimination, victimisation and harassment. The Act also extends in limited circumstances to discrimination after the working relationship has ended. For instance, if a force provides a discriminatory reference, or refuses to provide a reference at all, because of a person's race, this could amount to unlawful discrimination.

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2. Indirect discrimination

The Act provides that a person also discriminates if an arrangement or feature relating to the service (technically known as a provision, criterion or practice (PCP)) is applied or would be applied equally to all officers, but:

- Puts people of a particular race at a particular disadvantage when compared with people of another race
- Puts the complainant at that disadvantage; and is not a proportionate means of reaching a legitimate aim (in other words the PCP is not objectively justified).

The PCP must have been applied universally to all. For example, a requirement that all motorcycle patrol officers must wear motorcycle helmets could disadvantage Sikh officers wearing turbans who may be unable to wear helmets. This requirement would be unlawful, unless it could be justified by the force.

3. Victimisation

The law protects people who seek to enforce their rights under the Act. It is unlawful to treat a person unfavourably because they have been involved in a complaint of discrimination under the Act. Discrimination by way of victimisation occurs when you are treated unfavourably because you have done, you are about to do, or you are suspected of doing a 'protected act'. A protected act includes:

- Bringing proceedings against the discriminator or any other person under the Act or the RRA; or
- Giving evidence or information in connection with proceedings against the discriminator or any other person under the Act or the RRA; or
- Doing anything in relation to the discriminator or any other person under or by reference to the Act or the RRA; or
- Making allegations that the discriminator or any other person has committed an act which contravenes the Act or the RRA.

So for example, if you have made a complaint about race discrimination and are later treated unfavourably for doing so you should be covered by the Act. Victimisation following termination of employment is also unlawful. A protected act must be done in good faith.



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4. Harassment

Harassment related to race is a form of discrimination. It is defined as being : “unwanted conduct related to race that has the purpose or effect of violating a person’s dignity or of creating an intimidating, hostile, degrading, humiliating or offensive environment”.

An essential characteristic of the behaviour is that it is unwanted. In considering the effect of the conduct, the Tribunal will consider the individual’s own subjective experience together with whether it was reasonable for the conduct to have had that particular effect.

A claim can also be brought if harassment occurs because of an association with someone of a particular race, or if someone is perceived to be of a particular race.

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Exceptions

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The general occupational requirement exception

This is available where, having regard to the nature or context of the work, being of a particular race is an occupational requirement. The defence will only succeed if the application of the requirement is a proportionate means of achieving a legitimate aim.

Positive action provisions

There are two positive action provisions

1. The general positive action rule can apply where the Force reasonably thinks that persons with a particular protected characteristic are disadvantaged, have different needs or are disproportionately under-represented. In those circumstances, the Force can take proportionate measures to enable or encourage persons with the relevant characteristic to overcome that disadvantage, to meet their needs, or to enable or encourage their increased participation
2. The provision concerning positive action in recruitment and promotion. This applies where a Force reasonably thinks that persons with a particular protected characteristic are disadvantaged or disproportionately under-represented. In those circumstances, the Force can treat a person with the relevant characteristic more favourably than others in recruitment or promotion, as long as the person with the relevant characteristic is "as qualified as" those others.

Otherwise positive action is generally outlawed.



Burden of proof

It has long been recognised as difficult for those bringing discrimination claims to find evidence to support their case. To combat this, the Act provides that if the claimant can establish clear facts which could enable the tribunal to conclude that discrimination has occurred, it is then for the force to provide evidence for the reason why the claimant was treated in that way. In the absence of an adequate non-race based explanation from the force, the tribunal must draw an inference of discrimination. Where a force has failed to comply with relevant statutory Codes of Practice, the Tribunal may also draw inferences from this failure.

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Time limits

Most claims will need to be brought in the employment tribunal within 3 months less one day of the treatment you are complaining about. Where that treatment amounts to a continuing course of conduct by the force, the claim may be brought within three months less one day from the end of the conduct. This time limit applies even if you are going through the force's internal grievance procedure.

An act of discrimination which extends over a period of time is treated as having been 'done' at the end of that period. An act may extend over a period of time if it takes the form of some policy, rule or practice. It can sometimes be possible to argue that a continuing campaign of harassment, or a continuing regime of discriminatory conduct, amounts to one act extending over a period of time. However these are complex arguments and it is wise to err on the side of caution in calculating the time limit. A tribunal does have the power to consider a claim that is brought out of time, if in all the circumstances of the case it considers it is just and equitable to do so. However you should not rely on this.

Questionnaire

You can serve a questionnaire on the force to obtain useful information relating to your complaint. ACAS have prepared guidance on 'asking and responding to questions of discrimination in the workplace' which is available on their website at www.acas.org.uk.

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Remedies

If a complainant is successful in their complaint of unlawful discrimination, the tribunal may grant whichever of the following remedies it considers 'just and equitable':

- A declaration on the rights of the parties
- A recommendation that the Respondent takes a particular course of action
- Compensation (plus interest).

Compensation may include awards for injury to feelings, aggravated damages, loss of congenial work, and any actual and/or future financial loss, for example loss of earnings and pension losses. There is no limit on the amount of compensation that can be awarded in respect of financial losses, but a complainant will only be compensated for the losses which they can show were directly caused by the unlawful discrimination as found by the tribunal.

Employment Tribunal Procedure

Mandatory Acas Early Conciliation

If you are thinking about making an employment tribunal claim, you will first need to notify details of your claim to Acas, who will then offer early conciliation to try to resolve the dispute. The conciliation period can be up to one month. If the claim does not settle, Acas will issue a certificate confirming that the mandatory conciliation process has concluded.

There are changes to time periods within which to lodge claims to allow for the period during which a claim is with Acas. The period within which a claim is with Acas will not count for calculation of time limits; and if the time limit would usually expire during that period, or within the month after the certificate is issued, then you will have up to one month following receipt of the conciliation certificate in which to lodge a claim.

The process makes the calculation of time limits in employment tribunal cases more complicated. Claimants are advised to be aware of limitation issues and seek legal advice promptly. For further information on the Acas early conciliation process visit: www.acas.org.uk

Employment Tribunal Fees

You have to pay a fee when you file your claim in the employment tribunal. Fees are payable when you issue your claim and prior to a final hearing. A fee remission scheme is in place- see the employment tribunal website at www.employmenttribunals.service.gov.uk for further details. The booklet on the website "EX160A Court and Tribunal fees – do I have to pay them?" Provides details for claiming a remission of fees.

If you need further assistance, in the first instance please contact your local Joint Branch Board.

W: www.slatergordon.co.uk/policelaw

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