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Multiple Discrimination

A guide to law and evidence
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Multiple Discrimination: A Guide to Law and Evidence

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Availability of the Guide

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Disclaimer

While every attempt has been made to state the law accurately in this Guide, the Equality Act 2010 is new and untested and issues arising from multiple discrimination are particularly unexplored. No responsibility can be taken for advice given on the basis of the contents of the Guide.

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Introduction

‘Multiple discrimination’ in this Guide is used to refer to cases where the worker complains of discrimination involving more than one ‘protected characteristic’.

The concept of ‘multiple discrimination’ has gained much attention with the passing of the Equality Act 2010, but it is not a new issue. Right back in the 1970s, when the early legislation against race and sex discrimination was passed, there was potential for workers to bring cases regarding more than one protected characteristic. As other characteristics gradually came to be added to anti-discrimination law – disability, then religion, sexual orientation and finally age - scope for multiple discrimination cases gradually increased.

The overwhelming majority of cases still concern only one protected characteristic. But there is a substantial and increasing minority which relate to more than one characteristic. Certain issues are frequently found together, for example race and religious discrimination. But unfortunately, other combinations can also occur.

As explained in the Guide, ‘multiple discrimination’ can occur in different ways. It can refer to a situation where a worker is discriminated against because of different protected characteristics on different occasions or at the same time. Most complex is the concept of ‘intersectional’ or ‘combined’ discrimination, where a worker is discriminated against because s/he has a combination of characteristics.

It is necessary to distinguish the different types of multiple discrimination, because different legal and evidential problems arise. The greatest difficulties occur in connection with cases of intersectional discrimination. The best way around this Guide is to start by reading ‘Multiple discrimination: overview’ on p7. This will familiarise you with the categories and terminology used in the Guide. Even if you think you have identified whether your case concerns ordinary multiple discrimination, additive discrimination or intersectional discrimination, it is useful to read all these sections before making a final decision.

The aim of this Guide is to introduce the different forms of multiple discrimination and help workers and advisers decide how best to express their case. This involves legal, evidential and tactical considerations. In order to understand why multiple discrimination claims can be brought in certain ways, it has been necessary to explain some underlying legal concepts, in particular:

- how the burden of proof operates
- the need for comparators whose circumstances are not materially different from those of the claimant
- that to prove discrimination because of a single protected characteristic, that characteristic need not be the exclusive cause of the discrimination, but need only be an important factor.

If this background information feels overwhelming and unnecessary, it is recommended that readers focus on the summary checklist on p11.



This Guide discusses potential problems but cannot give clearcut simple answers. This is partly because of the paucity of case law exploring such issues and partly because of the general complexity of discrimination law into which multiple cases need to fit. Inevitably, much of the Guide simply offers a personal opinion as to how the law will be applied in this area.

At the time of writing (November 2010), the new Coalition Government has not decided whether and when to implement section 14, which makes ‘dual discrimination: combined characteristics’ a specific offence. This is where there is direct discrimination of the intersectional/combined form because of two protected characteristics. Unless and until this section is brought into force, the Guide’s general content regarding ‘Intersectional discrimination: direct discrimination’ will apply.

Overview of discrimination law



The legislation

The Equality Act 2010 replaces the seven previous statutes and sets of regulations which have gradually been enacted to prohibit discrimination: the Equal Pay Act 1970, Sex Discrimination Act 1975, Race Relations Act 1976, Disability Discrimination Act 1995, Employment Equality (Sexual Orientation) Regulations 2003, Employment Equality (Religion and Belief) Regulations 2003, Employment Equality (Age) Regulations 2006.

This guide is only concerned with discrimination law in the employment field although the legislation covers other areas.

The Equality Act largely repeats the previous legislation, ironing out differences which have developed over time between the law regarding different protected characteristics. In a few areas, it changes or improves the law.

The Equality Act is gradually being phased in, with the main provisions effective from October 2010. The previous Employment Codes under the different Acts are replaced by a single Employment Code and an Equal Pay Code. The Codes are not legally enforceable in themselves, but a tribunal can draw an adverse inference against employers who fail to follow relevant parts of the Codes.

There are several European Directives covering discrimination law. National law is supposed to implement the Directives fully. Problems arise in a few areas where national legislation appears inconsistent with the Directives or European case law.

Who can claim discrimination in employment?

To claim unfair dismissal, it is necessary to be an employee, ie someone who works under a contract of employment. It is not always clear whether people are ‘employees’, because the tax position is not conclusive and a number of other factors need to be considered.

To claim discrimination, it is not necessary to be an employee. People can also make a claim if they work on ‘a contract personally to do work’. This covers far more people. Most importantly, there probably does not need to be any legal obligation on the employer to offer work or on the worker to accept work if offered.

‘Contract workers’ are also covered by discrimination law. This means a person who is supplied by his/her employer (defined in the sense meant by discrimination law) to work for someone else (‘the principal’) under a contract between the principal and the employer. If the principal discriminates against the worker, s/he can sue the principal. For example, a cleaner employed by a private company works for a local authority under a contract between the local authority and the private company. If a member of local authority staff discriminates against the cleaner, s/he can make a claim against the local authority.

There is no minimum length of service requirement to claim discrimination.

Protected characteristics

The Equality Act prohibits discrimination based on certain ‘protected characteristics’, ie

- age
- disability
- gender reassignment
- being married or in a civil partnership
- race (colour, nationality, national origins or ethnic origins)
- religion or philosophical belief or lack of religion or belief
- sex (male or female)
- sexual orientation
- pregnancy or maternity

These are defined in sections 4 – 12 of the Act.

Every person possesses a range of protected characteristics, eg

- a young French Muslim woman of Senegalese ethnic origin possesses these protected characteristics: age (young); religion (Muslim); sex (female); nationality (French); national or ethnic origin (Senegalese).
- a middle-aged white English man of Christian religion possesses these protected characteristics: age (middle-aged, say 40 - 50); religion (Christian); sex (male); nationality (English).

The law offers protection when an employer chooses to discriminate on the basis of one or more of these protected characteristics.

In this guide, the term ‘multiple discrimination’ is used in its widest sense, ie to mean any case where an employer discriminates against a worker for a reason related to more than one protected characteristic, whether at the same time or on different occasions. The different types of multiple discrimination are set out on pages 7 – 10.

Note that the scope of this guide is wider than the specific concept of ‘combined discrimination: dual characteristics’ introduced by section 14 of the Equality Act (see p23). It covers all the forms of multiple discrimination which were already covered under the legislation.



Acts of discrimination

The Equality Act 2010 says it is unlawful for an employer to discriminate against a worker in a whole range of employment situations, eg

- in the recruitment arrangements
- by refusing to offer a job
- in the terms of a job offer
- in a worker's terms and conditions
- in making promotion decisions
- in access to facilities and benefits, such as transfer, training, overtime
- in disciplinary action
- in redundancy or other dismissal
- in post-employment references

Types of discrimination: definitions

There are four main types of discrimination:

- s13: direct discrimination
- s19: indirect discrimination
- s27: victimisation
- s26: harassment

There are two types of discrimination relevant only to disability:

- s15: discrimination arising from disability
- s21: failure to make reasonable adjustments

direct discrimination is where the employer treats a worker less favourably because of a protected characteristic

eg Angie, a black woman, is disciplined for making too many personal telephone calls at work. Alice, a white woman, who makes just as many personal calls, is not disciplined. The reason Angie is treated more harshly is because she is black.

The reason why the employer treats the worker less favourably need not be solely because of the protected characteristic, but the protected characteristic must have had a significant influence on the outcome. (See 'Direct discrimination because of more than one reason' at p9.)

There is no justification defence available to employers in direct discrimination cases except in respect of direct age discrimination (although there are specific 'occupational requirement' exceptions).

indirect discrimination applies to all the protected characteristics except pregnancy and maternity. It occurs where

- an employer applies a provision, criterion or practice to a worker
- which puts or would put that worker at a disadvantage and
- which puts or would put others sharing the relevant characteristic at a particular disadvantage

eg an employer insists on all its employees working full-time. Isabel can't work full-time because of childcare obligations. More women than men would find it a disadvantage to be required to work full-time.

Employers can defend indirect discrimination cases if they can prove the provision, criterion or practice was a proportionate means of achieving a legitimate aim.

victimisation is where the employer subjects a worker to a detriment because the worker has done a protected act or the employer believes the worker has done or may do a protected act, ie brought a discrimination case, given evidence in a discrimination case or alleged discrimination.

eg Geraldine takes out a grievance complaining that she did not get promoted because of her age. As a result, her employer finds a pretext to make her redundant.

There is no protection against victimisation if the worker made a false allegation in bad faith.

harassment is unwanted conduct related to a relevant protected characteristic which has the purpose or effect of violating a worker's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the worker.

This definition does not apply to the protected characteristics of pregnancy, maternity or marital or civil partnership status.

There are some additional definitions of sexual harassment.

discrimination arising from disability occurs where an employer treats a disabled worker unfavourably because of something arising in consequence of that worker's disability

eg an employer refuses to recruit Diana as a secretary because she cannot type fast enough. The reason Diana cannot type fast is because of her arthritis.

Employers can defend the claim if they can prove their treatment was a proportionate means of achieving a legitimate aim.

the duty to make reasonable adjustments arises where a provision, criterion or practice or physical feature or lack of an auxiliary aid puts a disabled worker at a substantial disadvantage compared with others; the employer must then take reasonable steps to avoid that disadvantage

eg a partially-sighted worker is put at a disadvantage when trying to read a computer screen; the employer should obtain the necessary adapted software.

Occupational requirement exceptions

In very limited circumstances, it is not unlawful for an employer when recruiting, deciding who to promote, transfer or train, when offering any benefit, facility or service, or when dismissing, to require a worker to have a particular protected characteristic. This only applies where having the relevant protected characteristic is an 'occupational requirement' and the application of the requirement is a 'proportionate means of achieving a legitimate aim'.



A structured approach

When analysing any worker's complaint, the best starting point is usually to itemise the acts of discrimination about which s/he is complaining. Then consider in relation to each act:

- the date it happened (this helps you precisely identify the action and also remember time-limits)
- who carried out the discrimination
- which protected characteristic has been discriminated against
- the type of discrimination (eg direct discrimination or indirect discrimination).

For example:

Facts: Ajmal works for a large retail store. He tried for promotion in March 2010. On 15th March, his manager (Ms Franks) who made the decision told him he was a little too young for such a senior role. On 23 May 2010, when Ajmal is praying in a quiet area in the stock room, his new supervisor (James) makes disparaging remarks about Muslims and tells him to get back to work.

Analysis:

Act	Date	Who	Characteristic	Type
Refused promotion	15.3.10	Ms Franks	Age/young	Direct
Remarks	23.5.10	James	Religion/Muslim	Harassment

Multiple discrimination: overview



'The nature of discrimination is such that it cannot always be sensibly compartmentalised into discrete categories. Whilst some complainants will raise issues relating only to one or other of the prohibited grounds, attempts to view others as raising only one form of discrimination for consideration will result in an inadequate understanding and assessment of the complainant's true disadvantage. Discrimination is often a multi-faceted experience.'

Mrs Justice Cox in *Ministry of Defence v DeBique* (see p31)

Categories of multiple discrimination

In this guide, 'multiple discrimination' is used to refer to any scenario where the employer discriminates against the worker in relation to more than one protected characteristic, whether at the same time or on different occasions. Set out below are examples of the different ways that multiple discrimination can arise.

1. ordinary multiple: different characteristics, different occasions

This is where the employer only discriminates on the basis of one protected characteristic at a time. But on different occasions, the employer discriminates on the basis of the different characteristics of the worker.

For example, Mari – a black woman – is rejected in her promotion attempt in April 2010. This is because her employer does not want to promote black workers. A white woman is promoted instead. A month later, Mari applies to be transferred to a different department. Her request is refused because work in that department is considered to be best done by male workers. Black and white men are employed there. The refused promotion is direct race discrimination and the refused transfer is direct sex discrimination.

For more on this type of multiple discrimination, see p12.

2. additive discrimination: different characteristics, same occasion

This is where the employer discriminates separately on the basis of different characteristics, but at the same time.

For example, the reason Mari was rejected on her promotion application was because her employer does not want to promote black workers or women. A white man is appointed instead. The refused promotion is separately both direct race discrimination and direct sex discrimination.

For more on additive discrimination, see p15.

3. intersectional discrimination – different characteristics in combination

This is where the employer does not discriminate on the basis of any single characteristic on its own. The employer discriminates because of the combination or ‘intersection’ of characteristics.

For example, Mari is not promoted because the employer does not want to promote black women. The employer is quite happy to promote black men (so it is not race discrimination alone) or white women (so it is not sex discrimination alone), but has certain stereotyped views about black women.

Another example of intersectional discrimination would be if older female television presenters were dismissed when younger presenters and older male presenters were not. In 2007, a huge public controversy developed over whether the BBC’s removal of news presenter Moira Stewart (then aged 55) from ‘Sunday AM’ was because she was a middle-aged woman, and whether others such as Kate Adie and Anna Ford had similarly been discarded in a way in which older male presenters were not. It may or may not be true that the BBC discriminated against older women, but it illustrates the concept of intersectional discrimination.

The only type of intersectional discrimination explicitly prohibited by the Equality Act is direct discrimination where two characteristics are involved. This is called ‘combined discrimination: dual characteristics’ and is contained in section 14. At the time of writing, section 14 has not yet been brought into force.

As time goes on, it is likely that practitioners will start referring to this kind of intersectional discrimination as ‘combined discrimination’ or as ‘dual discrimination’.

For more on intersectional discrimination, see p18 and on ‘combined discrimination: dual characteristics’, see p23.

Direct discrimination because of more than one reason

Decisions made for more than one reason:

1 protected characteristic + 1 other factor not related to a protected characteristic

Employers may make their decision not to recruit or promote a worker or to discipline or dismiss him/her for more than one reason. One reason may be because of a protected characteristic, eg age; the other reason may be nothing to do with any protected characteristic. It will be unlawful discrimination because of the protected characteristic provided that characteristic was an important factor causing the employer’s behaviour and had a significant influence on the outcome.

For example:

- A woman is rejected from her application to be a shorthand typist, partly because she is black and partly because she has been unemployed for 3 years. (*Owen & Briggs v James* [1982] IRLR 502, CA)
- A council employee is rejected on her application to a new senior solicitor post, partly because she is apparently not an easy person to work with and not good with staff, and partly because of the strong feminist views she has expressed over a number of years. (*O’Donoghue v Redcar & Cleveland Borough Council* [2001] IRLR 615, CA)

These are examples where one reason for the employer’s decision is clearly because of a protected characteristic or protected allegation of discrimination, but the other reason is not.

Decisions made for more than one reason:

1 protected characteristic + 1 other protected characteristic

In other situations, the employer’s decision may be because of two protected characteristics at the same time, eg a black woman is not promoted because she is black and also because she is a woman. The evidence may show that both race and sex are important factors in the decision. If so, the woman can claim race discrimination alone or sex discrimination alone or both (additive discrimination – see p15).

This leads to an important legal question - can the black woman claim the discrimination was due to each characteristic on its own, if the other characteristic also influenced the employer? The answer should be yes – provided the characteristic relied on is an important factor. To claim race discrimination plus sex discrimination independently, each would need to be an important factor.

How much of an influence must the protected characteristic be?

If the protected characteristic is only a minor influence on the decision, it will not be enough. It is necessary to show it was an important factor or that it had a significant influence on the outcome. The key cases on this point have said this:

In *Owen & Briggs*, the Court of Appeal said that it was sufficient that the protected characteristic (race) ‘was an important factor’.

In *O’Donoghue*, the Court of Appeal said: ‘it was a mixture of two reasons and the unlawful reason was of sufficient weight to be treated as a cause of Mr Cookson being preferred to Ms O’Donoghue.’

In *Nagarajan v London Regional Transport* [1999] IRLR 572, the then House of Lords said this:

‘Decisions are frequently reached for more than one reason. Discrimination may be on racial grounds even though it is not the sole ground for the decision. A variety of phrases, with different shades of meaning, have been used to explain how the legislation applies in such cases: discrimination requires that racial grounds were a cause, the activating cause, a substantial and effective cause, a substantial reason, an important factor. No one phrase is obviously preferable to all others, although in the application of this legislation legalistic phrases, as well as subtle distinctions, are better avoided so far as possible. If racial grounds or protected acts had a significant influence on the outcome, discrimination is made out.’

The Court of Appeal in *Bahl v The Law Society and others* [2004] IRLR 799 repeated the *Nagarajan* test in the context of a case where a woman had claimed the discrimination against her was due to both race and sex.

Terminology

Note that there is much inconsistency in the use of terminology in this area. Although this guide uses the terms ‘multiple’, ‘additive’, ‘intersectional’ and ‘dual/combined’ as set out above, there is no consensus. Words like ‘compound’ and ‘combined’ can also be misleading. Terminology used in academic literature is sometimes inconsistent and in turn, is likely to differ from wording in case law.

When running a tribunal case, the only specific terminology likely to be used is ‘dual discrimination’ or ‘combined discrimination’ by reference to the definition in section 14. In other cases, it is probably best not to *use* any of the terminology in this guide. However, it is still important for an adviser to *think* clearly about the basis of the discrimination against the worker, as that is relevant to the nature of the evidence needed to prove the case. The labels used in this guide are simply used as a clear way to differentiate the different situations discussed.

Examples in this Guide

This guide attempts to represent the full range of protected characteristics in the examples given. However, there are a larger number of examples of discrimination against black women, than other combinations. This is partly because the combination of race and sex discrimination against a single individual is very common in practice. But it is also because it is a simple example to use as a basis for illustrating the different types of multiple discrimination and evidential problems which arise. It is certainly not suggested that discrimination against black women is any more or less serious than discrimination on grounds of any of the protected characteristics, whether singly or in combination.

ADVISERS' CHECKLIST

- Familiarise yourself with the different types of multiple discrimination – ordinary multiple, additive, intersectional and dual combined (see p7).
- Identify the employer's discriminatory actions. Then decide on the type of discrimination for each action, eg direct, indirect, victimisation or harassment.
- In each case, decide whether the action is – as a matter of evidence – based on a single protected characteristic or more than one.
- If based on more than one protected characteristic, is each characteristic an entirely separate factor influencing the employer (additive discrimination) or is the employer influenced by the combination (intersectional or dual combined)?
- Where more than one protected characteristic is involved overall, decide on tactically the best way to express the claim (See pages 12-38.) Consider
 - Does it weaken or strengthen the case overall to mention more than one protected characteristic?
 - Does the evidence needed to prove discrimination because of one protected characteristic contradict the evidence needed to prove discrimination because of the other protected characteristic(s)?
 - Is there clear evidence suggesting each protected characteristic was a factor or is there no indication at all why the employer acted that way?
 - Will the worker lose credibility in the tribunal by listing too many protected characteristics?
 - Will the claim become unfocussed and lose sight of the strongest points by listing too many protected characteristics?
 - How would the burden of proof operate? (See p42.)
 - Who would be the relevant comparators (actual or hypothetical)? (See p39.)
 - Are there time-limit problems, which will be harder to deal with if there are several protected characteristics involved? (See p55.)
- When writing the tribunal claim, make it clear in your description of the facts whether you are talking about discrimination because of several protected characteristics operating independently or in combination. At the end, set out the legal claims. For more on drafting the tribunal claim, see p45.
- If the evidence indicates additive discrimination, it is usually advisable to claim 'in the alternative', eg 'The claimant was not promoted because of her age and/or because she is a woman'.
- If the evidence indicates intersectional discrimination, the legal claim is made for discrimination in respect of each protected characteristic separately - just as in an additive claim. This is because each protected characteristic was an important factor causing the discrimination. Strictly speaking, the claim should be expressed as 'The claimant was discriminated because of (protected characteristic 1) and because of (protected characteristic 2). Expressing the claim 'in the alternative', as with an additive discrimination claim, keeps options open if the evidence fails to prove both protected characteristics were involved.

- If the intersectional discrimination consists of direct discrimination based on two combined characteristics only, the claim can also be made under section 14 of the Equality Act (if and when it comes into force). For example, if the evidence shows the claimant was dismissed because he is a black man, the claim would probably be 'The claimant was dismissed because of his race and/or because of his sex and/or because of the combined characteristics of race and sex'.
- When drafting a questionnaire, it is important to phrase questions in a way which enables you to identify from the questionnaire reply the influence of individual protected characteristics and protected characteristics in combination (see p49).

Ordinary multiple discrimination: direct discrimination



Different characteristics, different occasions

In this guide, 'ordinary multiple discrimination' refers to the situation where an employer has discriminated against a worker on more than one occasion, but not always on the basis of the same protected characteristic.

A good example is Mr Al Jumard's case, set out in the 'Compensation' section (p57). Mr Al Jumard was a disabled worker of Iraqi national origin. He was given a final written warning with no expiry date on grounds of alleged aggression and taping a conversation with a manager. The tribunal said this was direct race discrimination. On a completely different occasion, he was transferred to a location where he had to stand up all the time which aggravated his disability. The tribunal said this was failure to make reasonable adjustments.

(There was another incident where he was disciplined for an alleged security lapse. The tribunal said the disciplinary action was both direct race discrimination and direct disability discrimination at the same time. This would be an example of 'additive' discrimination – see p15.)

As with any case involving more than one act of discrimination, even where these are based on a single protected characteristic, it is important to:

- clearly identify the acts of discrimination by the employer
- consider time-limits
- consider evidence and tactics



Identify the acts of discrimination

Unlike unfair dismissal cases, where the claim is purely about dismissal, discrimination claims can cover mistreatment at any stage in an employment relationship. The first step is therefore to identify the key actions of the employer which the worker wants to complain about, eg disciplinary action, enforced transfer, refused promotion, dismissal.

Because of time-limit considerations (see p55), the main focus is on actions in the previous three months.

Then decide in relation to each action, which protected characteristic caused the treatment. For example, the worker was given a warning because she is black and was later dismissed because of her age.

In deciding which is the relevant protected characteristic, consider the evidence (see below).

It is useful to follow the structured approach set out on p7.

Evidence and tactics

Subject to any time-limit problems, the worker also needs to decide whether it is tactically a good idea to complain about too many acts of discrimination or to suggest that different protected characteristics are involved.

Workers tend to think it strengthens their case to put in every possible argument and allege every possible ground for the discrimination. Often the opposite is true.

Even with single protected characteristic discrimination, the danger of complaining about too many incidents is that the worker's best points can get drowned by the weak points. Cases can get unnecessarily prolonged and tribunals may lose confidence that there is a sensible argument. If workers make weak points, they can get easily discredited by the employer's representative, and this can reduce their credibility when it comes to their good points.

The problem is worse in multiple discrimination cases. A tribunal may find it hard to believe that a worker would have been discriminated against on the basis of a whole range of different protected characteristics without convincing evidence.

There is also a risk of contradictory claims. For example, the best evidence of direct discrimination is usually that the employer has treated another worker without the relevant protected characteristic more favourably in comparable circumstances. Suppose a black female worker argues that in one promotion attempt, she was discriminated against because she is black (the successful candidate being a white woman) and in another promotion attempt, she was discriminated against because she is a woman (the successful candidate being a white man). If the same decision-makers are involved, it seems unlikely that they would favour a woman on one occasion but discriminate against a woman on another occasion. It may have been better just to stick with a race discrimination claim – on both occasions, a white candidate was preferred. If a black man was the successful candidate on the second occasion, then maybe the explanation is that the employer discriminated that time because the worker was a woman or maybe the employer discriminated against the worker both times because she was a 'black woman' (see 'Intersectional discrimination', p18).

On the other hand, there are some cases where a number of serious incidents have occurred and there is good evidence that different protected characteristics influenced the employer on different occasions. It may be important to refer to each of them, not only because they are strong evidentially in themselves, but because the overall pattern makes them even stronger.

It is a matter of judgment. When deciding how many incidents and which protected characteristics to refer to, consider

- what is the strength of evidence on each incident?
- does the evidence add up to a consistent and believable pattern of human behaviour?
- is the evidence indicating the basis for some incidents contradictory?
- does the overall story make sense when you look at the time-scales?
- which claims are in time?

Once a worker has decided to limit and focus his/her claim, s/he should stick to that. S/he may lose credibility if s/he adds incidents and allegations during the course of the tribunal hearing.

ORDINARY MULTIPLE DISCRIMINATION: KEY POINTS

- In this guide, 'ordinary multiple discrimination' is used where an employer has discriminated against a worker more than once, but because of different protected characteristics on each occasion.
- On each occasion, the worker must prove s/he has been discriminated against because of the particular protected characteristic in the usual way.
- Be careful that the evidence adds up to a credible story overall – eg, will a tribunal believe that the worker has been discriminated against because of her sex on one occasion, because of her race on another occasion and because of her sexual orientation on a third occasion?
- Count time-limits from each incident.
- See p36 where an employer discriminates against a worker because of one protected characteristic and then discriminates against him/her again when s/he gets depressed as a result.
- See sections on indirect discrimination, victimisation and harassment, for ordinary multiple discrimination in those contexts.
- See p45 for 'Writing the tribunal claim'.

Additive discrimination: direct discrimination



Different characteristics, same occasion

In this guide, ‘additive discrimination’ refers to the situation where an employer discriminates against a worker on the basis of two or more protected characteristics independently, but in respect of the same incident.

For example, an employer decides not to promote a worker because it considers the worker is too young. The employer generally thinks that workers should not be promoted until they are at least 30. The employer also does not promote the worker because she is black. In the workplace, it is only white staff who get promoted. This is an example of discrimination independently based on the protected characteristic of age (direct age discrimination) and colour (direct race discrimination).

In theory it is possible for more than two protected characteristics to be involved. For example, maybe the worker in the above illustration is a woman and the employer does not like to promote women either.

Evidence and tactics

Where an employer may have discriminated against a worker because of more than one protected characteristic at the same time, the worker has a difficult decision. Is it better not to confuse the issue by bringing in more than one protected characteristic? Or is sticking to one protected characteristic putting all your eggs in one basket and risking that the employer can disprove discrimination was based on that characteristic?

A worker may feel strongly on an emotional basis that s/he has been discriminated against because of more than one protected characteristic. But emotions do not prove cases.

Assessing the evidence

As always, it depends on the evidence. In a direct discrimination case, the best evidence is usually an actual comparator, ie someone without the relevant protected characteristic who has been treated better than the worker in similar circumstances (see p39). But what if the comparator is different from the worker in respect of more than one protected characteristic? Which protected characteristic has influenced the employer?

Sometimes there is no indication at all as to which of the characteristics has caused the discrimination. For example, a young, openly gay, worker fails to gain promotion. The successful candidate is much older and is not gay. The successful candidate is far less qualified and has less relevant experience for the promoted post. No one else applied. There is no other evidence at all

of age or sexual orientation discrimination. The worker claims age and/or sexual orientation discrimination. On the facts, it may be possible for a tribunal to find both age and sexual orientation discrimination if the employer is unable to give a credible neutral explanation for why the successful candidate was preferred. It depends whether a tribunal considers such evidence as exists enough to have shifted the burden of proof. See p42 for how the burden of proof works in this kind of situation.

In another type of situation, the evidence may positively indicate that both characteristics were a factor or that one was more of a factor than another. For example, a black male worker is given a final written warning for coming into work late. A white female colleague also comes in late, but is only given a verbal warning. The worker may be uncertain whether the reason for his less favourable treatment is his race or sex. But other evidence may help him decide. For example, if there are other incidents with other comparators. Or if overall statistics show that black workers tend to get disciplined more than white workers in that workplace, but there is no noticeable difference in disciplinary rates of male and female workers. Or it may be that discriminatory or stereotyped remarks were made by the employer based on either race or sex.

The danger of claiming additive discrimination is that the evidence can be contradictory and the evidence needed for one claim can destroy the evidence needed for the other. The same problem can exist if the discrimination is suggested to be 'either' on the basis of one protected characteristic 'or' on the basis of a different one.

For example, a black worker is dismissed very suddenly for poor performance, days after she tells her employer that she is pregnant. She believes she was dismissed because of her pregnancy. But she also believes her manager is racist. A key piece of evidence which helps her to prove the reason for her dismissal is her pregnancy is that she had no prior warnings or criticisms of her work before she announced her pregnancy. But if her manager wanted to dismiss her because she is black, why would her manager have treated her acceptably up to the point of her pregnancy? If the worker argues that she was discriminated against because of both protected characteristics or either of them, she could end up losing both cases. She could weaken the pregnancy discrimination case by producing evidence to show her manager has never liked her. But she could be left with not enough evidence to prove that that dislike was based on her colour. On balance, she may be better off sticking to the stronger of the two claims, ie on these facts, the pregnancy dismissal.

More than two protected characteristics

Except if the evidence is very strong, these are reasons not to suggest that three or more protected characteristics were involved:

- The evidence is even more at risk of being contradictory and undermining the worker's own case.
- So much time and evidence is likely to be taken up with the employer disproving each protected characteristic, that the best evidence could get lost in the detail.
- It could give the tribunal the impression that the worker was not sure him/herself which was the reason for the discrimination against him/her, so the evidence cannot be very persuasive in any direction.

Burden of proof

The burden of proof is set out on p42. The operation of the burden of proof in multiple discrimination cases can become complicated. This may be another reason to be cautious about adding extra protected characteristics to a claim.

The legal claim

Legally there is no reason why claims cannot be made as 'either one characteristic or the other or both'. As long as the evidence is equally strong in respect of each protected characteristic and is not contradictory, a worker can make a claim 'in the alternative'. For example, a worker can claim she was dismissed because she was pregnant or because she is black and/or for both reasons.

Once a decision has been made to base a claim on additive discrimination, it would usually be sensible to cover every possibility by making the claim 'in the alternative' in this way, ie that the discrimination was based on both protected characteristics and/or either of the single characteristics alone.

Several incidents

As in all discrimination cases, there may be several acts of discrimination within the time-limit. There is no rule that these must all be shaped in the same way. So one incident could be an example of single characteristic discrimination; another incident could be an example of additive discrimination; and a further incident could be an example of intersectional or combined dual discrimination. But as in all cases, the evidence needs to support this and make sense.

ADDITIVE DISCRIMINATION: KEY POINTS

- **This is where an employer discriminates against a worker on the basis of two or more protected characteristics independently, but in respect of the same incident.**
- **The worker needs to prove s/he has been discriminated against because of each characteristic independently in the usual way.**
- **Consider the evidence. Tactically it may be better to stick to the strongest claim rather than make too many allegations which can't be proved.**
- **Be careful not to claim additive discrimination if the evidence that discrimination occurred because of one characteristic seems to contradict any suggestion that it occurred because of the other characteristic.**
- **Where the employer has more favourably treated a comparator who is different in respect of two protected characteristics, this may be enough to shift the burden of proof in respect of both characteristics so that discrimination is proved on the basis of each characteristic if the employer cannot provide a neutral credible explanation.**
- **See sections on indirect discrimination, victimisation and harassment, for additive discrimination in those contexts.**
- **See p45 for 'Writing the tribunal claim'.**

Intersectional discrimination: direct discrimination

Different characteristics in combination

This is where the employer does not discriminate on the basis of any single characteristic on its own, but because of the combination or ‘intersection’ of characteristics.

For example, a young woman is harassed by her supervisor at work. She is not harassed purely because she is a young person (the young men are left alone). Nor is she harassed purely because she is a woman (older women are also left alone). She is harassed because of the combination of age and sex – she is a ‘young woman’.

Terminology

The term ‘intersectional discrimination’ is frequently used by academics but rarely by practising lawyers or the courts. It is useful to have a term which describes a particular type of multiple discrimination that works quite differently from other simpler types of multiple discrimination. But you need to be aware that not everyone will know what you mean by this term and many people will use the phrase ‘multiple discrimination’ to cover all forms of multiple discrimination including intersectional. It is possible that the term ‘combined discrimination’ will come to be used for this type of discrimination in the future.

Background

Intersectional discrimination may be based on two or more protected characteristics. As with all forms of single and multiple discrimination, it covers direct discrimination, indirect discrimination, victimisation and harassment.

Only one type of intersectional discrimination is explicitly covered by the Equality Act, ie direct discrimination because of two characteristics. This is referred to in section 14 as ‘combined discrimination: dual circumstances’ – often called ‘dual combined discrimination’ for short.

Despite strenuous representations by the Discrimination Law Association and others, the Equality Act does not extend this explicit protection to more than two characteristics or beyond direct discrimination. This leaves open the question whether the long-standing definitions of single characteristic discrimination can be interpreted to cover a legal finding of intersectional discrimination.

Generally it is thought not, as a result of two cases under the Race Relations Act 1976 and Sex Discrimination Act 1975: *Bahl v The Law Society* [2004] IRLR 799, CA and *Network Rail Infrastructure Ltd v Griffiths-Henry* [2006] IRLR 865, EAT. These cases concerned direct discrimination claims involving two protected characteristics, race and sex. Ms Bahl, a black Asian woman, complained

of disciplinary action taken against her by the Law Society on grounds of her race and/or sex. Ms Griffiths-Henry, a black woman, claimed race and sex discrimination when she was made redundant on a reorganisation, and the five retained employees were all white men.

It is not completely clear from the case reports whether the claimants were claiming intersectional discrimination, ie that they were discriminated against as 'black women' or additive discrimination, ie because they were women and also because they were black. Initially, Ms Bahl won part of her case in the employment tribunal. The tribunal found certain actions were race and sex discrimination and said this:

'We do not distinguish between the race or sex of the applicant in reaching this conclusion. Our reason for that is simple. The claim was advanced on the basis that Kamlesh Bahl was treated in the way she was because she is a black woman. Kamlesh Bahl was the first office holder that the Law Society had ever had who was not both white and male.'

The Court of Appeal overturned the decision. This was because there was no evidence showing race or sex discrimination at all. As an additional point, the CA said the tribunal was legally wrong in failing to distinguish between the elements of race and sex discrimination. The tribunal should have found the primary facts in respect of each characteristic.

Ms Griffiths-Henry also had a successful finding of race and sex discrimination overturned on appeal, though her case was sent back to the employment tribunal to apply the law correctly. The problem in Ms Griffiths-Henry's case was that the tribunal had inferred discrimination simply because the employer had behaved unfairly. The EAT commented that *Bahl* was correct in suggesting that the tribunal must consider each characteristic separately, but that was not what the tribunal got wrong in Ms Griffiths-Henry's case.

Although the reasoning in both cases does suggest that a tribunal cannot make a finding of intersectional discrimination as such, neither case deals with the issue head on. In neither case was there convincing evidence that discrimination had occurred because of the intersection of race and sex. Arguably an evidence-based finding that discrimination was against a 'black woman' as such would entail the evidential consideration of each characteristic separately as part of that combination, and would not be inconsistent with *Bahl*.

Of course, under section 14 of the Equality Act, the claimants in those cases could claim dual combined discrimination if they so wished. But the legal issues are still important for any worker wanting to claim direct discrimination based on the intersection of three or more characteristics. They are also important for cases before section 14 comes into force and if it is not implemented at all.

Note also that the cases only deal with direct discrimination, not with the differently worded definitions of harassment or indirect discrimination.

There is also the interesting question whether the European Court of Justice would consider that the European Directives require protection beyond dual combined discrimination. The wording of the Directives, as with the wording of the Equality Act, seems only to cover discrimination based on a single characteristic, though interestingly, paragraph (14) of the preamble of the Race Discrimination Directive (2000/43/EC) states that 'In implementing the principle of equal treatment irrespective of racial or ethnic origin, the Community should ... aim to eliminate

inequalities, and to promote equality between men and women, especially since women are often the victims of multiple discrimination.’

The interpretation of discrimination legislation has been stretched in the past in order to secure an equality objective and this could be an area where test cases are taken.

Direct intersectional discrimination

What is it?

Direct discrimination is defined under section 13(1) of the Equality Act as follows:

‘A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.’

Direct intersectional discrimination based on two protected characteristics is covered by section 14 of the Equality Act (once implemented) as ‘combined discrimination: dual circumstances’. It is defined as less favourable treatment ‘because of a combination of two relevant protected characteristics.’ This is discussed in detail at p23.

The following is an example of direct intersectional discrimination based on three protected characteristics:

A company refuses to employ a young Muslim man because it is afraid its staff may think he is a terrorist. The same stereotyped assumption would not be made if the worker was a woman or older or not Muslim. It is the combination or ‘intersection’ of the three characteristics of age, religion and sex which cause the discrimination.

Tactics, evidence and legal difficulties

As explained above, the cases of *Bahl* and *Network Rail* suggest that a tribunal cannot make a finding of ‘intersectional discrimination’ because the standard definition of direct discrimination in section 13 relates only to one protected characteristic. So unless workers want to take a test case, what should they do if the evidence is only consistent with discrimination on the combined grounds?

The answer is to express the claim as based on each protected characteristic separately.

For example, a worker who has evidence that she has been refused promotion because she is an older woman can claim that this legally amounts to (i) age discrimination and/or (ii) sex discrimination. Her comparator for the age discrimination claim is a younger worker whose circumstances (skills, experience *and gender*) are not materially different. She only needs to prove that age had a significant influence on the promotion decision (see p9). Her comparator for the sex discrimination claim would be a man whose circumstances (skills, experience *and age*) are not materially different. She only needs to prove that gender had a significant influence on the promotion decision. See p39 for more on comparators. If and when section 14 is implemented, the worker can also claim, alternatively, that there was combined dual discrimination against her as an older woman.

The same principle applies if the discrimination is based on three or more protected characteristics, eg if the evidence suggests the worker was not promoted specifically because she is an older disabled woman. Legally, the worker could claim direct discrimination because of (i) age and/or (ii) sex

and/or (iii) disability. Once section 14 is implemented, she could even add that she was discriminated against alternatively (iv) as an older woman and/or (v) as a disabled woman and/or (vi) as an older disabled worker. Whether it is a good idea tactically to complicate the case in this way is another matter. Another option is to reduce the claim to two – or even one - of the protected characteristics, but this depends entirely on the evidence.

In practice, there will rarely be evidence suggesting that an employer has discriminated against a worker because of the combination of more than two characteristics. If workers allege they have been discriminated against because of too many different characteristics, they could weaken their case by making a suggestion which seems unlikely.

Incidentally - a point to remember if age is one of the protected characteristics is that direct age discrimination is potentially justifiable by the employer whereas direct discrimination because of the other protected characteristics is not.

An example of three protected characteristic discrimination

Where intersectional discrimination is based on three or more characteristics, it is most likely to be because an employer is applying stereotypes. The example given above of a young Muslim man or maybe a young Asian man is unfortunately one of the most likely combinations to be discriminated against.

In this example, the worker could simply claim he was discriminated against because he was a Muslim. The company might try to defend the claim by showing that it recruited other Muslims (who just happened to be female). The worker's comparator would be a non-Muslim whose circumstances were not materially different, ie a non-Muslim man with similar suitability for the job. As long as the worker could show that the fact that he was a Muslim was an important factor, he would prove direct religious discrimination.

The worker could make similar separate claims of (i) age discrimination and (ii) sex discrimination.

Once section 14 is implemented, he could alternatively claim he was discriminated against because he was a Muslim man. The company might try to defend the claim by showing that it recruited other Muslim men (who just happened to be older). As long as the worker could show that the fact that he was a Muslim man was an important factor, he would prove dual combined discrimination based on religion and sex.

Most likely, he would cover all these claims, stating he was discriminated against because of his religion and/or his sex and/or his age and/or because of the combination of religion and sex.

This is all rather laborious and wordy and it is important when writing the claim to be very clear in the factual statement about what is the alleged discrimination. For example,

'The claimant is a Muslim man aged 25. He applied for a job as call-centre adviser with the respondent company. Despite his lengthy previous relevant experience and good record, he was refused the job. During the interview, the interviewer said there was a lot of banter at work and asked the claimant whether he could take a joke about terrorism. The claimant believes he was refused the job because he was perceived as a potential terrorist and that this perception was because he is a young Muslim man. The claimant claims direct discrimination contrary to section 13 of the Equality Act 2010 because of his religion and/or his sex and/or his age.

Alternatively, he claims combined dual discrimination contrary to section 14 because of a combination of his religion and sex.’

Race discrimination

The concept of intersectional discrimination is not as new as it seems. It has always been part of race discrimination law and no one has any difficulty understanding what it means in that context. Under the Race Relations Act and now under s9(4) of the Equality Act, a person’s ‘racial group’ can comprise more than one ‘racial group’. So a person could be, for example, black British or an East African Asian. As another example, an employer could discriminate against a worker because s/he is black British of African origin as opposed to black British of Caribbean origin or white British of African national origin.

There is no difficulty in making a claim based on a combined racial group, whether it is direct discrimination, indirect discrimination, victimisation or harassment. This is because of the way ‘racial group’ is defined, so that discrimination related to more than one racial group is legally regarded as single characteristic discrimination.

INTERSECTIONAL DISCRIMINATION: KEY POINTS

- Intersectional discrimination is where a worker is discriminated against because s/he has a combination of protected characteristics, eg a black woman is discriminated against as such, even though white women and black men are not discriminated against.
- The Equality Act prohibits direct discrimination based on the combination of two characteristics in section 14 (‘dual combined discrimination’), but does not explicitly cover other forms of intersectional discrimination, ie intersectional harassment, indirect discrimination or victimisation, or direct discrimination based on three or more characteristics. Section 14 has not been implemented at the time of writing.
- Harassment related to two combined characteristics is the most likely form of intersectional discrimination, other than dual combined discrimination, to arise in practice.
- The wording of the legislation and the cases of *Bahl* and *Network Rail*, although not exactly on the point, tend to suggest that tribunals will be unable to find non-section 14 types of intersectional discrimination unlawful as such.
- Where the evidence shows the worker was discriminated against because of the intersection of two or more characteristics, legally this can be expressed as discrimination because of each of the characteristics separately and – once s14 is implemented – alternatively because of the intersection of two characteristics.
- There is a risk of over-complicating cases in terms of evidence. Covering every theoretical option is not always a good idea. Where the evidence is particularly strong on one of the protected characteristics, it is often best to stick to that.
- Evidence and tactics need to be considered very carefully on a case by case basis, bearing in mind that the issue of intersectional discrimination has scarcely been tested by the tribunals.
- See sections on indirect discrimination, victimisation and harassment, for intersectional discrimination in those contexts.
- Race discrimination based on more than one racial group is still single characteristic discrimination.
- See p45 for ‘Writing the tribunal claim’.

Dual combined discrimination

Two different characteristics in combination

Dual combined discrimination is a form of intersectional discrimination. It is the only form of intersectional discrimination which is explicitly covered by section 14 of the Equality Act. For the position on other forms of ‘intersectional discrimination’, see p18.

Dual combined discrimination was not made unlawful when the first parts of the Equality Act came into force in October 2010. At the time of writing, it is ‘under consideration’ by the government, but it is hoped it will be brought in during 2011. Unless and until it is implemented, the law is as for other types of intersectional discrimination.

Dual combined discrimination occurs where the employer does not discriminate on the basis of any single characteristic on its own. The employer discriminates because of the combination or ‘intersection’ of two different characteristics. Only direct discrimination of this kind is explicitly covered by the Equality Act.

For example, a black woman works for a large company. She is unsuccessful in her application for promotion to a management position. She believes this is because she is a black woman. Although the employer has promoted black men and white women in the past, the employer never promotes black women.

We will use this example when discussing evidence and tactics below.

Dual combined discrimination in section 14 does not cover a situation where one of the characteristics is pregnancy. The wording of the key part of section 14 is as follows:

14 Combined discrimination: dual characteristics

(1) A person (A) discriminates against another (B) if, because of a combination of two relevant protected characteristics, A treats B less favourably than A treats or would treat a person who does not share either of those characteristics.

(2) The relevant protected characteristics are—

- (a) age;**
- (b) disability;**
- (c) gender reassignment;**
- (d) race**
- (e) religion or belief;**
- (f) sex;**
- (g) sexual orientation.**

(3) For the purposes of establishing a contravention of this Act by virtue of subsection (1), B need not show that A’s treatment of B is direct discrimination because of each of the characteristics in the combination (taken separately).

(4) But B cannot establish a contravention of this Act by virtue of subsection (1) if, in reliance on another provision of this Act or any other enactment, A shows that A’s treatment of B is not direct discrimination because of either or both of the characteristics in the combination.

Evidence and tactics

Workers who feel they have been discriminated against because of a combination of characteristics may choose to bring a case for combined dual discrimination as a matter of principle, ie they feel their dual identity should be recognised and it should be acknowledged that they have been discriminated against specifically because they are, for example, a black woman.

Or they may choose to bring such a case because evidentially it is difficult to prove they were discriminated against because of either characteristic standing alone. In the example above, a black woman employed in a large company believes she has not been promoted precisely because she is a black woman. There may be evidence that the employer has promoted black men and that the employer has promoted white women. However, the employer may never have promoted a black woman. There may also be other evidence suggesting the employer discriminates against black women – eg a director was heard to make a remark about black women being unsuited to higher management positions.

On the other hand, there is a risk in claiming dual discrimination if there is evidence to defeat the suggestion that the worker has been discriminated against because of one of the two protected characteristics. For example, a man aged 50 believes he was selected for redundancy because the employer does not believe older men are good for its image. However, the manager who made the redundancy decision recently recruited a female employee aged over 50. In this case, the worker may be better off claiming sex discrimination alone or, if still unsure where the evidence is strongest, claiming in the alternative, ie dual discrimination because of the combined characteristics of age and sex under section 14 and/or sex discrimination under section 13.

Comparators

The best kind of evidence for proving discrimination is to show that the employer has treated a worker less favourably than it has treated a comparator in similar circumstances. For general comments on the importance of comparators in discrimination cases, see p39.

In a single characteristic case, the comparator is simply someone who does not share the relevant protected characteristic. For example, if a woman claims she has been discriminated against because she is a woman, her comparator is a man who has been treated better in similar circumstances.

The appropriate comparator is not at all obvious in a case of dual combined discrimination. Logically, the appropriate comparator is someone who does not share the same combination of characteristics. For example, the comparator for a black woman would be a black man or a white woman or a white man.

The more favourable treatment of any of these by the employer in comparable circumstances would be consistent with discrimination against the worker because she is the combination of black plus female, ie a black woman.

But it would be equally consistent with the discrimination being based on single characteristics, ie

- black man comparator – could suggest sex discrimination
- white woman comparator – could suggest race discrimination
- white man comparator – could suggest sex discrimination or race discrimination or combined discrimination.

This makes it likely that a tribunal would require more than one comparator or some other evidence to persuade it to infer that discrimination was because of a particular characteristic or combination of characteristics. This has implications for the operation of the burden of proof (see below).

Section 14(1) of the Equality Act – set out above – is badly worded. It could be read to mean that the appropriate comparator is someone who has neither of the worker's characteristics - in our example, a white man. If so, this is an illogical and unnecessary limitation.

Pending any esoteric arguments in the higher courts, the best thing to do practically speaking is to

- remember you do not need to find an actual comparator. A hypothetical comparison will do, but other evidence will then be necessary.
- ideally do find an actual comparator, especially one without either of the shared characteristics.
- preferably find more than one comparator.
- as well as looking for comparators (those without the shared characteristics who have been treated more favourably), draw attention to negative treatment of others who share both the worker's characteristics.
- look for other evidence which may suggest discrimination is based on a combination of characteristics, eg statistics, remarks or evidence of stereotyping.

Burden of proof

The burden of proof is set out on p42. In a case of dual combined discrimination, the question arises as to what evidence would be necessary to satisfy stage 1, so that the burden shifted to the employer. Would it be sufficient to prove that the employer had treated a single comparator without both the worker's characteristics more favourably? This seems unlikely, given that the more favourable treatment of the comparator could be equally consistent with single characteristic discrimination (see analysis above). Would the burden of proof shift more readily if the comparator had neither of the worker's characteristics as opposed to just one of them, given the wording of section 14? Case law will doubtless develop to answer these uncertainties.

Claiming in the alternative

Even if evidence suggests dual combined discrimination, a worker may still choose to bring a single characteristic discrimination case based on one of the two characteristics involved. In our example (p23), the black woman could bring a single characteristic case of direct race discrimination or direct sex discrimination. This is because discrimination based on the relevant protected characteristic need only be a significant influence on the outcome, it need not be the sole cause (see p9). The woman's race and her sex might each have been important factors in causing the employer not to promote her. But in such a case, a worker may want to cover all her options by claiming direct race discrimination and/or direct sex discrimination and/or dual combined discrimination.

This would be particularly important if the evidence is not entirely clear as to whether single characteristic or dual combined discrimination is involved. For example, the person promoted (the comparator) is a white man with less experience, knowledge and qualifications than the worker. This would be consistent with direct discrimination because of race alone, sex alone or the combination.

The analysis of statistics may also lead to uncertain conclusions. For example, perhaps a questionnaire reply reveals that the higher positions in the company are overwhelmingly held by white men and women, although three lower-ranked managers are black male and one is black female. This may suggest:

- **single characteristic race discrimination:** it seems that there is no direct sex discrimination because sex is not an important factor, but there may be direct race discrimination, because four black managers is a tiny proportion of the total, especially as they are also lower ranked. It may also seem that there is no dual combined discrimination against black women because one of four black managers is a woman, which is not such a small proportion of the whole that it indicates black women are being targeted specifically; or
- **no discrimination at all:** it may seem that there is no direct race discrimination because there are as many as four black managers and no sex discrimination because women hold many of the management positions; or
- **dual combined discrimination:** on either analysis, as only one of the managers is black female, there may be a pattern of dual combined discrimination against black women.

It is unclear how the shifting burden of proof would work in a case where the worker has made alternative claims. For example, if the worker claims she has not been promoted because she is a woman and/or because she is black and/or because she is a black woman, what happens if the person who was promoted is a white man who is less qualified and experienced than her? If she has no other evidence of discrimination, is this fact alone enough to shift the burden of proof on all three of her claims – or on any of them separately? Or would further evidence specifically pointing to the basis of the discrimination be necessary? Could a tribunal make a finding on an either/or basis? Or could it find that all three claims are proved? Ultimately this will be for the tribunals and higher courts to decide. Meanwhile there is only the sketchy guidance from the *Bahl* case (see p18).

Several incidents

As in all discrimination cases, there may be several acts of discrimination within the time-limit. There is no rule that these must all be shaped in the same way. So one incident could be an example of single characteristic discrimination; another incident could be an example of additive discrimination; and a further incident could be an example of intersectional or combined dual discrimination. But as in all cases, the evidence needs to support this and make sense.

The occupational requirement exception

The occupational requirement exception applicable to all protected characteristics is set out on p6. Under EA s14(4), where the exception applies to one of the two combined characteristics, dual combined discrimination will not apply.

DUAL COMBINED DISCRIMINATION: KEY POINTS

- This is the only form of intersectional discrimination covered by the Equality Act (section 14) but, at the time of writing, it has not been brought into force. You need to check the latest position.
- It is where the employer directly discriminates against the worker because of a combination of two protected characteristics, eg because she is a black woman.
- The comparator (whether actual or hypothetical) is someone who the employer treats more favourably and who does not share both the characteristics.
- Section 14 suggests the comparator must not share either characteristic.
- No single comparator would conclusively prove that the discrimination was based on the two combined characteristics because it would be equally possible that discrimination was based on one of the characteristics.
- Additional comparators or other evidence, eg remarks or statistics, would be necessary to prove dual combined discrimination.
- Claims can be made in the alternative, eg race discrimination and/or sex discrimination and/or dual combined discrimination based on race and sex. This is particularly important where the evidence may collapse in respect of one of the combined characteristics.
- It is unclear how easily the burden of proof will shift in dual combined discrimination cases.
- There cannot be dual combined discrimination where the occupational requirement exception applies to one of the characteristics.
- Until section 14 comes into force, dual combined discrimination should be treated as a form of intersectional discrimination (see p18) and the claim made for direct discrimination because of each protected characteristic separately.
- See sections on indirect discrimination, victimisation and harassment, for combined / intersectional discrimination in those contexts.
- See p45 for 'Writing the tribunal claim'.

Indirect discrimination

What is indirect discrimination?

Indirect discrimination is defined under section 19 of the Equality Act as follows:

- ‘(1) A person (A) discriminates against another (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of B’s.
- (2) For the purposes of subsection (1), a provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of B’s if—
- (a) A applies, or would apply, it to persons with whom B does not share the characteristic,
 - (b) it puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it,
 - (c) it puts, or would put, B at that disadvantage, and
 - (d) A cannot show it to be a proportionate means of achieving a legitimate aim.’

There are many provisions, criteria or practices (‘PCPs’) which disadvantage people with certain protected characteristics. If unjustified, they could be indirect discrimination. For example,

- a PCP that job applicants must speak fluent English would disadvantage those born in non-English-speaking countries
- a PCP that employees must work full-time would disadvantage many women because of childcare obligations
- a PCP that kitchen workers are clean-shaven would disadvantage Sikhs who wish to follow their religious precepts.

Ordinary multiple indirect discrimination

This is where a PCP, which disadvantages a worker because of one protected characteristic, is applied on one occasion, and a different PCP which disadvantages a worker because of a different protected characteristic, is applied on a different occasion.

For example, an employer will not allow a Jewish woman to leave early on Fridays, even though she is willing to start early. The employer says all staff must work till 6 pm on Fridays. This rule disadvantages some Jewish employees because they believe Jewish people should not be working once the Sabbath comes in. This could be indirect religious discrimination. Some time later, the employer refuses the Jewish woman’s request to change to part-time working to look after her young child. This could be indirect sex discrimination on a different occasion.

See section on ‘Ordinary multiple discrimination: direct discrimination’ (p12) for general comments on taking cases of ordinary multiple discrimination.



Additive indirect discrimination

This is where the employer applies two different PCPs to a worker at the same time, each disadvantaging the worker because of a different protected characteristic, and each of them independently indirectly discriminate against the worker.

For example, an employer selects a young woman for redundancy because she is unable to travel away on business due to childcare. The employer wants to retain the most 'flexible' employees. This is potentially indirect sex discrimination. The employer also decides to make the woman redundant for another reason. This is because she has less service than other employees. This is potentially indirect age discrimination.

See section on 'Additive discrimination: direct discrimination' (p15) for general comments on taking cases of additive discrimination.

Indirect intersectional discrimination

What is it?

This is where the employer applies a single PCP to a worker, which disadvantages the worker because s/he has combined protected characteristics. For example,

- The employer requires all workers to go bare-headed. This disadvantages Sikh men (race + sex or religion + sex) as well as Muslim women (religion + sex).
- Requirements for certain job qualifications or experience may disadvantage certain groups, eg black men or young women.
- A recruitment requirement that candidates have not been unemployed for long periods may disadvantage certain groups, eg older disabled people or black men or South Asian women.

It may also be that the combination of two different PCPs being applied at the same time disadvantages a worker because of his/her combination of characteristics. An example of this is the *DeBique* case reported below.

Tactics, evidence and legal difficulties

The definition of indirect discrimination refers to a provision, criterion or practice putting those with 'a relevant protected characteristic' at a particular disadvantage. It is hard to read this in the plural, ie as covering those who are put at a disadvantage because of a combination of characteristics. Therefore if a provision, criterion or practice disadvantages workers because of a combination of characteristics which they have, a claim should be brought on the basis that the combined effect leads to indirect discrimination based on each characteristic separately (eg see *DeBique* in box below). There are two ways of arguing that this does not matter legally:

1. Not everyone with the relevant protected characteristic needs to be at a disadvantage:

The definition of indirect discrimination in the Equality Act, which was gradually introduced in the previous legislation, is much wider than the original and early definitions. All that is necessary under the current definition is to show that 'persons with whom B shares the characteristic' would be put at a disadvantage 'when compared with persons with whom B does not share it'. It need not be everybody who shares the relevant characteristic who is put at a disadvantage, though it needs to be more than one or two people. So if a reasonable number of black men are

disadvantaged, they should represent a sufficient number of black *people* who are disadvantaged. Indirect race discrimination could then be claimed.

Dress requirements tend to disadvantage certain groups because of a combination of their religion or race and their sex. In the past, claims have been brought on the basis of religion or race alone and this does not appear to have caused problems. It is only now that there is starting to be an awareness of the concept of intersectional discrimination that issues may start to arise. Nevertheless, it should be possible to formulate such claims as based on a single characteristic.

For example, a Muslim woman may complain that a requirement that no workers wear head coverings puts herself and other Muslim women at a disadvantage because of their religious belief that they should cover their head. The woman can claim indirect discrimination based on a single characteristic, ie indirect religious discrimination. She should be able to show that at least some Muslims would be at a disadvantage ‘compared with others’, ie non Muslims.

2. Defining the pool: The appropriate pool depends on which section of the workplace or public is likely to be affected by the provision, criterion or practice (*London Underground Ltd v Edwards* [1998] IRLR 364, CA). A pool must ‘realistically and effectively test the particular allegation’ (*DeBique*, opposite). There would seem to be no reason why the pool for comparison cannot be defined by the other characteristic, eg if only women would potentially be disadvantaged by a dress requirement, the comparison should be the disadvantage felt by, say, Muslim women compared with non-Muslim women.

Evidence

In all indirect discrimination cases, evidence needs to be gathered to show a provision, criterion or practice disadvantages those with certain protected characteristics. This may take the form of expert evidence, internal statistics of the employing organisation or general public statistics. Where it is those sharing two or more characteristics who are disadvantaged, the research must be tailored accordingly. Information about the impact of a provision, criterion or practice on existing employees defined by characteristics or combined characteristics can be obtained by a questionnaire (see p49 for sample questions). Sources such as the census may not have all the combinations you want, but often break down categories such as age and religion by reference to sex.

MINISTRY OF DEFENCE V DEBIQUE

UKEAT/0048-0049/09; [2010] IRLR 471.

This case provides an important example where indirect discrimination was found separately in regard to two different protected characteristics, where the intersection of those characteristics caused the particular disadvantage.

Ms DeBique was a female soldier in the British Army of St Vincent national origin. She was a single parent of a young daughter. She claimed indirect sex discrimination because the army required that, as a soldier, she be available on a 24 hour basis ('the 24/7 PCP'). This was not compatible with her childcare obligations. She also claimed indirect race discrimination because she could not have a member of her extended family (a half-sister) to stay with her in the Service Families Accommodation in order to help her with childcare because her sister was a foreign national only entitled to stay in the UK for a short period ('the immigration PCP'). She believed that as a Crown employer, the army was in a position to relax the immigration rules in her case (as it had done in other cases before).

The employment tribunal upheld Ms DeBique's claims, finding both indirect race discrimination and indirect sex discrimination. It said the 24/7 PCP disadvantaged Ms DeBique and other female soldiers. Nevertheless, it was justifiable when viewed in isolation, because the Army needed to be in a constant state of readiness. However, taken together with the immigration PCP, it particularly disadvantaged women in the British Army whose potential childcarers were foreign nationals and it was not justifiable. Similarly, the immigration PCP was unjustifiable indirect race discrimination when taken together with the 24/7 PCP. In both cases, a relaxation of either PCP would have avoided the disadvantage.

The MOD appealed, arguing that the tribunal was wrong to consider the combined effect of the two PCPs on the separate grounds of indirect race discrimination and indirect sex discrimination. The EAT rejected the appeal. It said looking at the matters entirely separately would have failed to recognise the cause of the particular disadvantage to Ms DeBique and others in her position. The EAT said:

'The nature of discrimination is such that it cannot always be sensibly compartmentalised into discrete categories. Whilst some complainants will raise issues relating only to one or other of the prohibited grounds, attempts to view others as raising only one form of discrimination for consideration will result in an inadequate understanding and assessment of the complainant's true disadvantage. Discrimination is often a multi-faceted experience.'

Harassment

Ordinary multiple harassment

See section on ‘Ordinary multiple discrimination: direct discrimination’ (p12) for general comments on taking cases of ordinary multiple discrimination.

Additive harassment

See section on ‘Additive discrimination: direct discrimination’ (p15) for general comments on taking cases of additive discrimination.

Intersectional harassment

What is it?

Harassment is defined under section 26(1) of the Equality Act as follows:

‘A person (A) harasses another (B) if—

- (a) A engages in unwanted conduct related to a relevant protected characteristic, and
- (b) the conduct has the purpose or effect of—
 - (i) violating B’s dignity, or
 - (ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.’

The following are examples taken from real cases of intersectional harassment related to two protected characteristics:

A gay man works in a bar. His supervisor keeps making remarks such as ‘All gay men should be put on an island so they don’t spread AIDS’. These remarks are made specifically because the worker is gay and a man, ie because of the combination of the protected characteristics of sexual orientation and sex. The remarks would not have been made to a straight man or lesbian.

While Caryl, a black woman, is on her holiday in Spain, her work colleague circulates an e-mail image of a black woman in a bikini with a gorilla’s head stuck on top. He has written the words, ‘Is this Caryl on holiday?’ The postcard is clearly harassment of Caryl as a black woman, ie because of the combination of the protected characteristics of race and sex.

A young female sales person was harassed in her job by a middle-aged female supervisor, who kept accusing her of flirting and even called her a ‘floozy’ on one occasion. The young woman said she does not flirt. The supervisor did not harass other (older) female staff, nor did she harass young (male) staff. Clearly, the harassment related to the fact that the worker was a ‘young woman’ and it took the form of remarks which were unlikely to have been made to a young man or older woman.



Tactics, evidence and legal difficulties

The definition of harassment in the Equality Act refers to unwanted conduct ‘related to a relevant protected characteristic’. It does not explicitly cover unwanted conduct related to a combination of characteristics.

So in a situation of intersectional harassment, a worker should express his/her harassment claim as based on just one of the protected characteristics or, in the alternative, based on each of the protected characteristics standing alone. For example, the gay man can say the supervisor engaged in unwanted conduct related to his sexual orientation and/or to his sex.

In direct discrimination cases, where an employer’s treatment of the worker is based on more than one reason, it is sufficient if the protected characteristic is an important factor in the outcome or a significant influence (see p9). However, the definition of harassment is different from that of direct discrimination. It talks about conduct ‘related to’ a relevant protected characteristic as opposed to treatment ‘because of’ the characteristic as required for direct discrimination. It may be that ‘related to’ means that the protected characteristic does not need to be such a significant or important factor, and need only be loosely related or a small influence on the harassment. This remains to be tested by the case law.

Another possibility where harassment is based on two intersecting characteristics is to consider whether the claim can be made alternatively as direct discrimination. This would enable it to fall under section 14, dual combined discrimination (once section 14 is implemented). The harassment and direct discrimination definitions in the Equality Act are mutually exclusive, but the borderline between the two is untested.

Taking one of the examples above, if a supervisor repeatedly accuses a young female employee of flirting, it can fall within the definition of harassment – unwanted treatment related to sex which violates the worker’s dignity. But why could it not alternatively fall within the definition of direct sex discrimination, ie the supervisor would not have made such remarks to a male employee or dual combined discrimination, ie the supervisor would not have made such remarks to someone who was not a young woman.

Although this boundary has not been tested, it may be possible to claim direct discrimination in situations more commonly falling under the ‘harassment’ classification. After all, many acts of direct discrimination could be said to violate dignity or create a hostile environment, eg discriminatory disciplinary action.

On the other hand, in scenarios conventionally regarded as harassment, the definition of ‘harassment’ is often preferable to that of direct discrimination, because direct discrimination cases require a comparison, ie the worker must show that someone without the relevant protected characteristic would have been better treated in similar circumstances. A comparator is not necessary for harassment claims.

This can make harassment easier to prove than direct discrimination. In our example, it may be that the supervisor in question made equally unpleasant remarks to older women or men. It may then not amount to less favourable treatment because of age and/or sex, but it may nevertheless be unwanted conduct related to age and/or sex.

However, it is only in a limited number of cases that the need to make a comparison causes a problem. If the supervisor only directs nasty comments to young women, there is no difficulty with proving the comparison.

Victimisation



Ordinary multiple victimisation

See section on ‘Ordinary multiple discrimination: direct discrimination’ (p12) for general comments on taking cases of ordinary multiple discrimination.

Additive victimisation

See section on ‘Additive discrimination: direct discrimination’ (p15) for general comments on taking cases of additive discrimination.

Intersectional victimisation

What is it?

Victimisation is defined under section 27 of the Equality Act as follows:

- (1) A person (A) victimises another person (B) if A subjects B to a detriment because—
 - (a) B does a protected act, or
 - (b) A believes that B has done, or may do, a protected act.
- (2) Each of the following is a protected act—
 - (a) bringing proceedings under this Act;
 - (b) giving evidence or information in connection with proceedings under this Act;
 - (c) doing any other thing for the purposes of or in connection with this Act;
 - (d) making an allegation (whether or not express) that A or another person has contravened this Act.
- (3) Giving false evidence or information, or making a false allegation, is not a protected act if the evidence or information is given, or the allegation is made, in bad faith.

The following is an example of victimisation based on a complaint of intersectional discrimination:

The worker complains to her manager that, as an older disabled woman, she has been marginalised in her job. This annoys her manager and, when the next round of redundancies occurs, the worker is selected for redundancy.



Tactics, evidence and legal difficulties

The definition of victimisation in the Equality Act protects workers who have made a complaint of discrimination ‘under this Act’. If a worker is victimised for complaining of ordinary single characteristic discrimination or dual combined discrimination (once s14 is in force), s/he is therefore covered. But what happens if a worker complains of a form of intersectional discrimination which is not explicitly protected by the Equality Act?

In the rest of this guide, we explain that where evidence indicates discrimination was based on an intersection of characteristics, tribunals should still be able to find that this amounted to discrimination based on each of the characteristics separately. Therefore a complaint of intersectional discrimination should also be protected as it encompasses a complaint of unlawful discrimination under the Act.

For example, a worker takes out a grievance complaining he has been denied client-facing work because he is a young Muslim man. As a result, his employer finds an excuse to dismiss him. The worker’s complaint of intersectional direct discrimination related to three protected characteristics (age / religion / sex) incorporates a complaint about discrimination related to each of those characteristics singly. The latter is a complaint about discrimination ‘under the Act’.

It should not matter that the employer has victimised the worker precisely because the complaint is about intersectional discrimination and would not have victimised the worker had the complaint been about discrimination because of any of the characteristics singly. One could imagine an employer might be particularly sensitive about a complaint of discrimination against young Muslim men, but would not have reacted so badly to a suggestion purely of discrimination against young workers. This should not make any difference. Looking purely at the wording of section 27:

- the worker has done a ‘protected act’ ie made an allegation that his employer has contravened the Equality Act. (The allegation of intersectional direct discrimination based on 3 characteristics encompasses an allegation of direct discrimination based on each characteristic singly, if each individual characteristic had a significant influence on the discrimination originally complained of – see p9 above.)
- the employer has subjected the worker to a detriment because he has done that protected act.

The way to write such a claim might therefore be:

‘I started work as an accountant with the respondent firm on 8 January. On 3 June, I complained to my manager that I was never taken to client meetings. I said I believed this was because I am a young Muslim man and the firm was worried about what its clients would think. My manager laughed it off but seemed annoyed. On 10 August, I was called to a disciplinary and dismissed for alleged poor work. None of the criticisms had been made before. I believe I was victimised contrary to section 27(2)(d) of the Equality Act 2010 because of my complaint of discrimination on 3 June.’

Of course workers are rarely so specific about their complaints. A worker complaining that she didn’t get promotion because she is a black woman will probably be unclear as to whether she is talking about additive discrimination or intersectional/dual combined discrimination. If the employer victimises her because it (wrongly) believes her to be referring to additive discrimination, this would be unlawful without any difficulties, as additive discrimination is definitely covered by the Act.

Discrimination and depression

How is depression covered by the Equality Act?

Workers with depression may or may not be considered disabled under the Equality Act, depending on the severity and length of its effects. The definition of ‘disability’ is set out in section 6 and schedule 1. The worker needs to prove that:

- his/her depression has a substantial adverse effect on his/her ability to carry out day-to-day activities, eg s/he cannot follow a simple recipe; s/he cannot find the energy to go out or phone friends; s/he can't sleep. Simply having a ‘low mood’ will not be enough.
- this effect is long-term, ie has lasted or is likely to last 12 months or is likely to recur.

A worker whose depression is covered by the Act must not be discriminated against in these ways:

- direct discrimination: an employer decides not to recruit a worker when s/he mentions at interview that s/he has suffered from depression in the past.
- discrimination arising from disability: an employer unjustifiably dismisses a worker for taking too many days off. The reason the worker took days off was because s/he was suffering from depression.
- harassment: the worker is subjected to unwanted treatment related to disability which has the purpose or effect of violating his/her dignity or creating an intimidating, hostile, degrading or offensive environment for the worker. For example, a depressed worker's colleagues start ostracising her and making unpleasant remarks because of her depression.
- failure to make reasonable adjustments: an employer refuses to allow a depressed worker to return to work on a phased basis.

For more detail on proving that someone with disability is covered by the Act and the type of reasonable adjustments which may be appropriate, see *Proving disability and reasonable adjustments: a worker's guide to evidence under the DDA* by Tamara Lewis. See p61 for availability.

How does depression fit into multiple discrimination scenarios?

Many workers who have been discriminated against at work suffer injury to feelings and injury to health, which unfortunately can consist of an injury to their mental health such as severe depression.

In such cases, part of their compensation for the original discrimination will comprise compensation for injury to health (often known as personal injury). Medical evidence is almost always necessary to prove the injury.

This applies regardless of which protected characteristic the discrimination causing the depression was related to.



For example, a worker is subjected to racial harassment. As a consequence, he develops depression. The worker’s claim is for racial harassment and his compensation will usually include a sum for any injury to his health.

This straightforward situation does not involve multiple discrimination.

However, where the worker is still in employment, there can be a second stage. Whereas the original mistreatment may have been due purely to, say, race discrimination, the employer may carry out further acts of discrimination which relate to the worker’s depression. Or the employer may fail to make any reasonable adjustments necessitated by the worker’s depression.

For example, a worker subjected to racial harassment develops depression and needs time off to go to counselling prescribed by his doctor. The employer refuses to allow the time off and says he must go after work. This could be a failure to make reasonable adjustments.

Subject to time-limit issues (see p55), the worker would have several claims, ie

- (1) for the original racial harassment
- (2) for the subsequent disability discrimination or failure to make reasonable adjustments. For this, the worker would need to prove that his depression falls within the definition of ‘disability’.

Remember that to add stage 2, it is not enough that the worker has developed depression as a result of the original discrimination and has remained in employment. The employer must then have done something else which discriminates against the worker because of his/her depression or must have failed to make reasonable adjustments.

Workers may have a long factually-complicated story. To unravel it, it is useful to go through the analytic stages set out on p7. Here are some typical examples.

Example:

Sol, a young solicitor, is constantly deprived of opportunities to meet business clients because his manager is worried that the clients will find out he is gay. This has gone on since Sol started work on 12 February 2008. As a result of this discrimination, Sol becomes depressed and moody at work. When redundancies need to be made, Sol is selected on 5 April 2010. Sol believes his manager made him redundant because he is gay and also, as a separate matter, because his manager has become irritated about his depression.

Employer’s act/date	Protected characteristic	Type of discrimination
Excluded from client meetings (12 February 2008 onwards)	Sexual orientation	Direct
Redundancy dismissal (5 April 2010)	Sexual orientation and/or disability	Direct

Example:

Mitchell, a construction worker, is racially abused by his supervisor on 5 May 2010. When he complains about it to the depot manager, he is suspended the next day pending an investigatory meeting on grounds that he may have fabricated the allegation. Soon after, he goes off sick with depression, becoming progressively more ill. On 20 May, his employer refuses his request to postpone the investigatory meeting. The meeting goes ahead on 25 May in Mitchell’s absence and the charge is dropped on grounds that the evidence is inconclusive. Mitchell remains off sick. On 18 July, Mitchell is dismissed for his ongoing sickness absence.

Employer’s act/date	Protected characteristic	Type of discrimination
Racial abuse (5 May 2010) (5 May 2010)	Race	Harassment
Suspension (6 May 2010)	Race	Victimisation
Refusal to postpone investigatory (20 May 2010)	Disability	Failure to make reasonable adjustment
Dismissal (18 July 2010) disability (dismissal); failure	Disability	Discrimination arising from disability (dismissal); failure to make reasonable adjustments

The analysis may be even more complicated, because it is possible that the refusal to postpone the disciplinary and the dismissal were also victimisation because of Mitchell’s allegation of racial harassment.

Note that to keep all these claims in time, 3 months should be counted from the earliest incident, ie from 5 May 2010 (unless, exceptionally, there is evidence of a continuing discriminatory state of affairs). See p55 for time-limits.

Evidence to prove direct discrimination

Comparators

Actual comparators

Direct discrimination occurs where, because of a protected characteristic, an employer or agency treats a worker less favourably than it treats or would treat others.

The best evidence is where the worker can prove that the employer has treated a real comparator more favourably in similar circumstances. A comparator is a person in the same position as the worker in all relevant respects, but who does not have the same protected characteristic. Section 23 of the Equality Act says that on a comparison of cases, there must be no ‘material difference between the circumstances relating to each case’.

For example:

- A woman is unsuccessful when she applies for a job. If the successful candidate is a man with similar or less qualifications and experience, he would be the comparator.
- A black worker is given a final written warning for coming in late to work. The comparator is a white worker who also came in late to work, but who only received a verbal reprimand.

Employers usually try to argue that it is not a valid comparison and the reason they have treated the comparator differently is because the circumstances were quite different. In the above example, they may say that the white worker had a better previous disciplinary record or the black worker had been late before or had a less good reason for being late or was more late. The tribunal will have to decide whether it believes these distinctions explained the differential treatment rather than the fact that one worker was black and one was white. Therefore, the more similar the behaviour and circumstances of the comparator, the easier it is to prove direct discrimination.

Evidential comparators

It is not always easy to find an exact comparator. If not, it can still be useful to make less precise comparisons, ie to find people without the relevant protected characteristic who have been treated better in equivalent or similar circumstances. These were called ‘evidential comparators’ by the *House of Lords in Shamoon v Chief Constable of the RUC* [2003] IRLR 285, although that phrase is not widely used by tribunals and practitioners.

These are not the same as actual comparators, but they are ‘building blocks’ which help a tribunal decide how a hypothetical identical comparator would have been treated.

For example, a Muslim worker is dismissed for sleeping on duty. No other workers have ever been found sleeping on duty, so an exact comparison cannot be made. However, a non-Muslim worker was found guilty of unauthorised absence from work and was only given a written warning. This is an equally serious offence, which one would normally expect to be met with the same sanction.

It may therefore be evidence suggesting that the dismissal of the Muslim worker was on religious grounds.

Evidential comparators are not as good as real comparators because it is much easier for employers to give an innocent non-discriminatory explanation as to why they may have treated different circumstances differently. It is therefore sometimes necessary to have more than one evidential comparator, to show a pattern.

The circumstances of evidential comparators should not be too far removed from the claimant's circumstances. Otherwise tribunals may feel they are hearing irrelevant evidence.

Comparators in intersectional discrimination cases

As explained on p20, where evidence shows intersectional discrimination, legally the worker must base the claim on each of the characteristics separately. For each separate claim, there must be no 'material differences' between the 'circumstances' of the worker and his/her comparator. But in intersectional discrimination cases, those circumstances will need to include the other protected characteristic(s) involved. Otherwise the claim will not succeed evidentially.

For example, a worker may claim she was made redundant because she was an older (over 50) woman. The evidence shows men over 50 and younger workers generally were not made redundant. Her comparators would be:

1. For her age discrimination claim, female workers under 50 who were not made redundant and who had similar scores on the redundancy selection criteria. Being female must be a relevant 'circumstance' for the comparator. Otherwise the employer can point to (male) workers over 50 who were not made redundant and say there was no age discrimination.
2. For her sex discrimination claim, male workers over 50 who were not made redundant and who had similar scores on the redundancy selection criteria. Being over 50 must be a relevant 'circumstance' for the comparator. Otherwise the employer can point to women (under 50) who were not made redundant and say there was no sex discrimination.

Comparators in intersectional discrimination cases

In cases of dual combined discrimination, the position is particularly difficult. No single comparator can reveal the true basis of the discrimination. In theory, a comparator would be a person who does not share all the relevant characteristics of the claimant. For example, if the claimant believes she has been discriminated against because she is a black woman, her comparator would be a black man or a white woman or a white man. In fact, none of these conclusively shows the discrimination is because the claimant is the combination of 'black woman'. They are all equally consistent with single characteristic discrimination. This is discussed further in the sections on 'Intersectional discrimination', 'Dual combined discrimination' and 'Burden of Proof'.



Other evidence

Sometimes there are no comparators. It is not necessary to prove discrimination that there are any comparators. Other evidence may be enough.

Where there are no actual comparators, tribunals like to construct a 'hypothetical comparator', this is a fictional person who is the same as the claimant in all respects except that s/he does not have the relevant protected characteristic. The question then becomes whether the employer would have treated such a hypothetical comparator more favourably. That of course begs the question.

Other evidence indicating discrimination could be:

- Statistics showing less favourable treatment generally of others with the claimant's protected characteristics (or combined characteristics).
- Offensive remarks or stereotyping.
- Extremely unfair and inconsistent treatment of the claimant by the employer, which the employer cannot credibly explain. An explanation which is credible but unfair will not prove discrimination.
- The way previous complaints of discrimination have been handled.
- Failure to follow a clear recommendation in the EHRC Code of Practice.
- Failure to answer a questionnaire properly.

These factors are of varying importance and more than one will probably be needed.

Because of the difficulty in finding a single conclusive comparator in intersectional or dual combined discrimination cases, other evidence pointing to discrimination will be particularly important, especially discriminatory comments or evidence of stereotyped attitudes towards people with the combined characteristics, eg evidence of stereotyped fears that young Asian or Muslim men are terrorists.

Employers' treatment of other workers sharing the claimant's characteristics

Employers often use a reverse process to disprove discrimination, ie they show that they have treated other workers with the claimant's characteristic as well as they have treated those without the relevant characteristic.

For example, if a blind worker claims she has not been promoted because she is blind, the employer may point out another blind worker who has in fact been promoted. This suggests the reason for the claimant's non-promotion is nothing to do with her disability.

The claimant needs to show that this is not a significant piece of evidence. For example, maybe the other blind person was promoted by a different manager or to a lower ranked position or there was no other applicant on that occasion.

In intersectional or dual combined discrimination cases, employers would have to point out good treatment of anyone who shared *all* the relevant protected characteristics of the claimant. For example, if the claimant says she was excluded from business meetings because she was a young

woman, the employer must show that other young women were taken to business meetings. It would not answer the case simply to show that young men or older women were invited to the meetings (although that may defeat separate but additive claims of age and sex discrimination).

Questionnaires

Questionnaires often elicit information which reveals comparators who have been treated more favourably. Questionnaires may also reveal other workers sharing the claimant's characteristics who have been treated well. This alerts the claimant to potential evidential problems. Questionnaires are an opportunity to explore whether these other people are truly comparable. For more detail, see the 'Questionnaire' section at p49.

The burden of proof

Section 136 of the Equality Act sets out the burden of proof as follows:

- (1) This section applies to any proceedings relating to a contravention of this Act.
- (2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.
- (3) But subsection (2) does not apply if A shows that A did not contravene the provision.

Strangely, this section does not state that it is the worker bringing a claim who must prove the initial facts. But this is probably the case, since that is required by the European Directives and was stated explicitly in the previous legislation and case law.

There are therefore two stages (though the evidence in a tribunal will cover all the issues at the same time):

- stage 1: The facts, if unexplained, suggest unlawful discrimination has occurred. This is sometimes referred to as a 'prima facie' case.
- stage 2: The burden of proof is reversed and the employer must provide an innocent explanation. Otherwise the tribunal must find there was unlawful discrimination.

Full guidelines (though on the wording in the Sex Discrimination Act 1975) were set out by the Court of Appeal in the case of *Igen Ltd and others v Wong; Chamberlin Solicitors and another v Emokpae; Brunel University v Webster* [2005] IRLR 258.



Section 136 applies to all types of discrimination. The question is what facts are sufficient to prove a case in the absence of an adequate explanation from the employer (stage 1)? Even in single protected characteristic cases, there is no clear answer. In multiple discrimination cases, it is likely to be even more uncertain.

Although the concept of the shifting burden of proof applies to all forms of discrimination, the examples below are in the context of direct discrimination.

single protected characteristic cases

In single protected characteristic cases, it may be enough to identify a comparator without the worker's protected characteristic who has been treated differently or better in comparable circumstances. But it may be necessary to have some extra evidence of discrimination beyond a mere difference of treatment and difference of protected characteristic.

For example, it may not be enough to shift the burden of proof for a black worker simply to show a white comparator was promoted to a post for which s/he had applied. S/he may also have to show that s/he met the stated requirements of the post and was at least as well qualified as the white comparator. (See *Dresdner Kleinwort Wasserstein Ltd v Adebayo* [2005] IRLR 514, EAT.)

In another case, it was enough that a black woman was not selected for one of five posts following a reorganisation in circumstances where all the successful candidates were white men with whom she was equally qualified. It may not have been enough if a number of equally qualified white candidates had also been rejected. (*Network Rail Infrastructure Ltd v Griffiths-Henry* [2006] IRLR 865, EAT).

Of the two cases, *Dresdner Kleinwort Wasserstein Ltd* is more helpful because it suggests the burden of proof might shift in a selection cases with only one white comparator.

ordinary multiple discrimination

This is the type of discrimination where an employer discriminates on the basis of one protected characteristic in one incident and on the basis of a different protected characteristic in a different incident. See p12.

In theory, the burden of proof should operate independently for each incident, just as it does for single characteristic discrimination. But it is possible that the suggestion that different protected characteristics are the reason for discrimination on different occasions makes it harder to shift the burden of proof in respect of each incident.

For example, if a black woman fails to get promoted on two occasions and believes it is because she is black, it may be enough to shift the burden of proof that on each occasion a white worker was promoted who was no more qualified for the job. On the other hand, if the woman believed she was not promoted on one occasion because she is black and on the second occasion because she is a woman, it may require a little more evidence in respect of each failed promotion to shift the burden of proof in the first instance for race discrimination and the second instance for sex discrimination.

additive cases

This is the type of discrimination where the employer discriminates in one incident on the basis of two protected characteristics separately. For example, an employer fails to promote an older disabled worker because s/he is disabled and also, as a separate matter, because of his/her age.

There needs to be independent evidence to establish a prima facie case (stage 1) in respect of each of the relevant characteristics. Often the more favourable treatment of a comparator with different protected characteristics can be enough even if there is no other evidence explicitly suggesting that age, disability etc is a factor.

In additive cases, the better treatment of a single comparator who does not have any of the relevant protected characteristics can sometimes be enough on its own to establish a prima facie case in respect of each of those characteristics separately. In the above example, the employer may have promoted a younger candidate who was not disabled, but who was far less suitable for the post. Even if there is no other evidence of age or disability discrimination, this would probably be enough to shift the burden of proof (stage 1) for both age and disability discrimination. Then if the employer cannot provide a neutral credible explanation, the tribunal would have to find age and disability discrimination.

A very useful case on this is *Network Rail Infrastructure Ltd v Griffiths-Henry* [2006] IRLR 865, EAT (see p18 for more detail). In this case, Ms Griffiths-Henry was a black woman. She was one of nine colleagues applying for five posts after a reorganisation. Ms Griffiths-Henry was unsuccessful. This was sufficient to shift the burden of proof. The reason was that she was at least as well qualified as the five white men who were successful. This meant that if the employer could not provide a credible neutral explanation for not appointing her, she would win her claims for race and sex discrimination.

The EAT said that in theory, the burden of proof could shift on more than two protected characteristics. For example, Ms Griffiths-Henry may also have been Anglican or gay and the successful candidates may not have been. The EAT said that logically a tribunal would be able to find stage 1 was satisfied in respect of all these characteristics. However, the more characteristics that were involved, the easier it would be for an employer to provide evidence which prevented a prima facie case being established, eg by proving that it was unaware of its employees' sexual orientation or religious affiliation, or – in respect of the sex discrimination allegation – that it had frequently promoted women in the past.

Although the *Network Rail* case is very helpful, it is advisable for workers to apply common sense and confine the claim to the most likely characteristics which affected the employer's decision.

Also bear in mind that the level of evidence necessary to establish a prima facie case (stage 1) where selection is involved (whether redundancy, recruitment or promotion) may be more straight-forward than in disciplinary and capability cases where comparators – if any – are less precise. In the latter type of case, it is probable that the higher number of protected characteristics which are involved, the harder it will be to satisfy a tribunal that stage 1 has been established.



dual combined or intersectional discrimination cases

In single characteristic or additive cases, the less favourable treatment of the worker compared with a sole comparator without that characteristic can be enough to establish stage 1 and shift the burden of proof even if there is no other evidence that discrimination is due to the particular characteristic.

In ‘dual combined’ discrimination cases under section 14 of the Equality Act, it is less clearcut. The less favourable treatment of the worker compared with a sole comparator who has only one or neither of the worker’s relevant characteristics is equally consistent with discrimination being on the basis of a single characteristic. Perhaps tribunals will resolve this by finding stage 1 has been satisfied in respect of the combined characteristics as well as each characteristic individually (if the claim was made on all those grounds). It will then depend on whether there is any other evidence to narrow things down.

Writing the tribunal claim



Deciding what claims to make

As discussed throughout this guide, consider the strength of the evidence when deciding whether to claim additive or intersectional discrimination and how many protected characteristics to mention. It is important to make the right decision at the outset. It is difficult to get the tribunal’s permission to amend a tribunal claim at a later stage to add a new cause of action such as a new protected characteristic or alleged act of discrimination.

On the other hand, it is not a good idea to apply a ‘scatter gun’ approach by putting in numerous allegations and protected characteristics, with a view to narrowing down the claim later. This can be used to discredit the worker and show s/he is inconsistent and contradictory. In extreme cases, it could waste a lot of time and money and even risk costs.

However, where the evidence genuinely and credibly suggests that, say, either of two protected characteristics may be the reason for the less favourable treatment, it would usually be sensible to include both as a possibility in the claim. Sometimes part of the claim may be withdrawn once the reply to the questionnaire is received, but it is preferable to send a questionnaire early enough to get a reply before the tribunal deadline.

ANALYSING THE CLAIM

The first thing to do is to analyse the proposed claim by listing the acts of discrimination and the type of discrimination involved on each occasion, eg as suggested on p7. Once this is done, the facts can be written in a relevant and logical way and the legal claims itemised at the end.

An interesting example of how to analyse a claim of intersectional discrimination where section 14 of the Equality Act does not yet apply is Ms O'Reilly's claim against the BBC. Her claim was that the evidence showed discrimination based on the intersection of two characteristics (age and sex), which legally amounted to single characteristic discrimination on each characteristic. At the time of writing, the tribunal outcome is awaited.

In November 2010, Miriam O'Reilly's multiple discrimination case against the BBC started in the employment tribunal. Ms O'Reilly claimed age and sex discrimination. At the age of 51, she was moved from her position as presenter on Countryfile, which she had held for 7 years. Three other female presenters (all over 40) were also removed when Countryfile moved to a primetime slot. The three male presenters aged over 40 were retained. Two new female presenters aged under 40 were appointed.

Ms O'Reilly claimed she was removed from the programme because she was an older woman. As s14 of the Equality Act was not yet in force, her claim was broken down into these categories:

1. Direct age discrimination. A younger (under 40) female presenter with Ms O'Reilly's skills and experience would have been retained.
2. Direct sex discrimination. A male presenter of Ms O'Reilly's age, skills and experience would have been retained.
3. (Only if the direct discrimination claims failed), indirect age discrimination. The BBC unjustifiably applied a PCP that TV presenters in prime-time slots have prime-time audience appeal. Ms O'Reilly was disadvantaged by this PCP because it led to her removal from the programme. The PCP would disadvantage female presenters over 40 compared with female presenters under 40.
4. Indirect sex discrimination – the PCP would disadvantage female presenters over 40 compared with male presenters over 40.

Comment: Because of the legal complexity, it is probably worth spelling out the comparators in a case such as this in the tribunal claim form. It does not matter if the comparison is based on real people or hypothetical.

Thanks to Camilla Palmer, partner at Leigh Day & Co, and Ms O'Reilly's solicitor, for information regarding how this claim was argued.

Drafting the claim

This guide does not attempt to give full guidance on how to write a tribunal discrimination claim. The examples set out below are simply illustrations of how such claims may be written.

The steps are:

- Decide what kind of discrimination is involved: single protected characteristic, ordinary multiple, additive, dual combined or other intersectional.
- Set out the key facts.

- When describing the facts, make it clear whether you are saying the discrimination was (as a matter of evidence) because of one protected characteristic alone or because of more than one protected characteristic at the same time or because of the combination of more than one protected characteristic.
- If you feel confident, set out the legal basis for the claim (see Table below).

TABLE: SETTING OUT BOTH THE EVIDENTIAL BASIS AND THE LEGAL BASIS FOR DIRECT DISCRIMINATION CLAIMS

SECTION NUMBERS

Section 13 is direct discrimination because of a single protected characteristic; s14 is dual combined discrimination; sections 5 – 12 list the different protected characteristics.

ORDINARY MULTIPLE DISCRIMINATION

Evidential basis	1. Facts 2. I believe I was not promoted because I am black. 3. I believe I was dismissed because I am nearly 65.
Legal basis	4. The failure to promote me was direct discrimination because of my race contrary to s13 and s9 of the Equality Act 2010. 5. My dismissal was direct discrimination because of my age contrary to s13 and s5 of the Equality Act 2010.

ADDITIVE DISCRIMINATION

Evidential basis	1. Facts 2. I believe I was not promoted because I am black and also because I am a woman.
Legal basis	3. The failure to promote me was direct discrimination because of my race contrary to s13 and s9 EA 2010 and direct discrimination because of my sex contrary to s13 and s11 EA 2010.

DUAL COMBINED DISCRIMINATION (ONCE IN FORCE)

Evidential basis	1. Facts 2. I believe I was not promoted because I am a black woman.
Legal basis	3. The failure to promote me was direct discrimination contrary to s14 EA 2010 because of the combined characteristics of race and sex and/or direct discrimination because of my race contrary to s13 <i>and/or direct discrimination because of my sex contrary to s13 EA 2010.</i>

INTERSECTIONAL DISCRIMINATION

Evidential basis	1. Facts 2. I believe I was not promoted because I am an older black woman.
Legal basis	3. The failure to promote me was direct discrimination contrary to s13 and s5 EA 2010 because of my age and/or direct discrimination contrary to s13 and s9 because of my race and/or direct discrimination contrary to s13 and s11 because of my sex.

NOTE Adding the text in italics enables the worker to fall back on a claim that only one protected characteristic was involved if the evidence fails to show more than one caused the discrimination.

Sample claim: ordinary multiple discrimination (sex, disability – depression)

1. The claimant worked as a barperson for the respondents. The head chef subjected her to unwanted sexual comments and inappropriate touching on the following occasions: (*set out dates and details*).
2. On (*date*), the claimant complained to her manager, but he failed to investigate and told her to ‘stop whinging’. The claimant became upset and angry. She swore at her manager and left work early. On (*date*), she was given a final written warning for this.
3. The respondents’ behaviour had caused the claimant to develop severe depression and panic attacks. The claimant’s request that her mother accompany her to the disciplinary hearing to provide support was refused on grounds that family members are never allowed to come to disciplinarys
4. The claimant claims:
 - (a) sexual harassment by the chef contrary to s26(2) of the Equality Act 2010 in the matters set out at para 1 above.
 - (b) direct discrimination because of her sex contrary to s13 EA 2010 in that her manager (i) failed to investigate her complaint, (ii) told her to ‘stop whinging’, (iii) gave her a final written warning.
 - (c) victimisation contrary to s27 EA 2010 in that, because she had complained of sexual harassment, her manager (i) failed to investigate her complaint, (ii) told her to ‘stop whinging’, (iii) gave her a final written warning.
 - (d) failure to make reasonable adjustments contrary to s20 EA 2010. Due to her disability, attending a disciplinary hearing put the claimant at a substantial disadvantage. A reasonable adjustment would have been allowing her mother to attend with her.

Note that these facts are very similar to a real case where the claimant’s claims were all upheld by an employment tribunal.

Sample claim: additive discrimination (sex, race)

1. I started with the respondent advertising agency as an advertising executive on 4th January 2005. Throughout my employment I received no warnings and no complaint about the standard of my work. I am a Black British female worker.
2. I applied for a vacancy as account manager on 10th August 2010 and I was interviewed on 2nd September 2010. I felt the interview went well. However, a few days later, I was informed I was unsuccessful.
3. The successful member of staff, Rob Milton (who is white), was considerably less qualified and less experienced than myself.
4. I believe I was not promoted because I am a woman and/or because I am black. This was direct discrimination under s13 Equality Act 2010 because of sex and/or because of race.

Sample wording: additive or intersectional/dual combined discrimination

4. I believe I was not promoted because I am a woman and/or because I am black and/or because I am a black woman. This was direct discrimination under s13 Equality Act 2010

because of sex and/or because of race [and/or dual combined discrimination under s14 Equality Act 2010 because of the combined characteristics of race and sex].

Note: wording in square brackets can be added only once s14 comes into force.

For a further example of a claim raising possible intersectional discrimination which is phrased as single characteristic and/or additive and/or dual combined discrimination, see p21 (religion, sex, age).

Questionnaires



The questionnaire procedure

The questionnaire procedure is unique to discrimination claims. Before starting a tribunal case, or within 28 days afterwards, the claimant can send the employer a set of questions, usually written on a standard questionnaire form.

There are two standard forms, one for equal pay cases and the other for all other types of discrimination and protected characteristic. The content is set out in the Equality Act 2010 (Obtaining Information) Order 2010 (SI No.2194). These are now available on the Government Equality Office ('GEO') website (see 'Resources').

Employers cannot be ordered to answer the questions but they usually do so, provided they are sufficiently chased up. This is because, under EA s138(4), a tribunal at the final hearing can draw an adverse conclusion from employers' failure to answer within 8 weeks of receiving the questionnaire or from an evasive answer.

The questionnaire form is sent direct to the employer, who should send the reply back to the claimant. This process does not start a tribunal claim, which can only be done by presenting the tribunal claim form to the appropriate tribunal office.

There are detailed rules about how a questionnaire is 'served' and when it is deemed 'served', which are new. For these, see SI No.2194.

It is strongly advised that claimants send questionnaires because it is a way of getting crucial evidence which probably cannot be obtained by any other process. Although claimants sometimes ask for documents, a better use of the process is to ask precise and detailed questions. The questions are generally to:

- find out information of which the claimant is unaware
- confirm information which the claimant believes is true but is uncertain or cannot prove
- pin down employers on their explanation for why they have taken certain actions

- find out the employers' defence to the claim
- obtain statistics regarding the general treatment of people with certain protected characteristics in the workplace
- find out employers' policies on relevant matters
- obtain information about any comparators of which the claimant is aware
- find out about the treatment of other employees to see whether any of them would be good comparators.

The last two points listed are by far the most important. For example:

- if the claimant feels she was not short-listed for a job because she is a woman, the questionnaire can ask about the gender, qualifications, and experience of all candidates and which ones were short-listed
- if the claimant was dismissed for poor attendance and believes that was because she is black, the questionnaire can ask about the attendance records of everyone in the relevant department by reference to their race and any disciplinary action taken.

For more guidance on the procedure, together with advice, tactics and precedents, see the set of Central London Law Centre Guides to writing questionnaires in relation to each of the protected characteristics (see 'Resources', p61). Although these Guides were written in relation to the separate legislation prior to the Equality Act 2010, the principles regarding questionnaires are exactly the same. There are just some minor differences in the precise wording of the law, the availability of the forms, the particular rules about service and the time-limits.

Asking for information by reference to the protected characteristic

In single protected characteristic cases

In single characteristic discrimination cases, it is necessary to ask whether or not any identified comparators, or others in the workplace generally, have the relevant protected characteristic. For example, where the worker feels she was not short-listed because she is a woman, the question about the short-listing process may be:

'Please state all applicants for the job by reference to (i) their qualifications (ii) their experience (iii) whether short-listed (iv) whether offered the job (v) whether male or female.'

Then when asking statistical questions about the workplace, one question may be:

'Please state all staff employed by the company as at (date of short-listing) by reference to (i) job title (ii) department (iii) start date (iv) whether male or female.'

Other variables relevant in sex discrimination cases involving pregnancy, maternity or childcare, may be whether married or unmarried; whether or not a single parent; whether has children under 5; whether pregnant; whether on maternity leave.

In race discrimination cases, it is too vague to ask for information by reference to 'race'. It is usually best to itemise the categories in the Equality Act. For example, where a black man failed in his promotion attempt after interview and believes this was direct race discrimination, he may ask:

‘Please state all candidates for promotion who were interviewed by reference to (i) their qualifications (ii) their experience (iii) whether offered the job (iv) their race *’ and at the foot of the questionnaire, note:

* race – please state by reference to (a) colour (b) nationality (c) national origins (d) ethnic origins’

In certain cases, it may be sensible to add one more category. For example, if a Chinese man was bringing the claim, he could note:

* race – please state by reference to (a) colour (b) nationality (c) national origins (d) ethnic origins (e) whether or not Chinese.’

In age discrimination cases, it is usually more accurate to ask for ‘date of birth’ rather than ‘age’, so that age can be worked out at any relevant point in time.

In multiple discrimination cases

In multiple discrimination cases, it is necessary to ask about each of the relevant characteristics separately. For example, if an older woman feels she was not promoted to be a manager both because of her age and independently because she is a woman, a question may be:

‘Please state all candidates for promotion to manager who were interviewed by reference to (i) their qualifications (ii) their experience (iii) whether offered the job (iv) their date of birth (v) whether male or female.’

A statistical workplace question may then be:

‘Please state all managers employed by the company as at (date of promotion interview) by reference to (i) job title (ii) department (iii) start date (iv) date of birth (v) whether male or female.’

In intersectional/dual combined discrimination cases, it is also necessary to ask the information in combination. There are two ways of doing this.

Method 1: The best way is usually to ask that each person referred to is identified by a letter. In this case, you will be able to work out the combinations yourself. So you would rephrase the above examples as follows:

‘Please identify each candidate for promotion by a letter and in each case, state (i) their qualifications (ii) their experience (iii) whether offered the job (iv) their date of birth (v) whether male or female’

and

‘Please identify by letter each manager employed by the company as at (date of promotion interview) and state their (i) job title (ii) department (iii) start date (iv) date of birth (v) whether male or female.’

Method 2: Another way of doing it is to ask the employer to supply the combined information. For example, where the worker believes she has been made redundant because she is a black woman, the questionnaire could ask:

‘Please list all employees in the redundancy selection pool by reference to (i) job title (ii) start date (iii) whether made redundant (iv) whether black female (v) whether white female (vi) whether black male (vii) whether white male.’

A statistical workplace question may then be:

‘Please list all staff employed by the company as at (date of first notification of possible redundancies) by reference to (i) job title (ii) department (iii) start date (iv) termination date (if applicable) (v) whether black female (vi) whether white female (vii) whether black male (viii) whether white male. Their names may be replaced by letters.’

On balance, the first method is preferred, because it is not easy to express combinations this way if more than two characteristics are involved or, for example, if one of the characteristics is age.

Method 3: What is certainly *not* recommended is questions structured like this:

‘Please state (i) how many black women people were in the selection pool (ii) how many white men were in the selection pool (iii) how many black women were made redundant (iv) how many white men were made redundant.’

This will not reveal information with nearly enough precision. It invites the answer ‘(i) 6 (ii) 12 (iii) 4 (iv) 5’. This shows that black women have been disproportionately selected compared with white men. It does not show whether the problem is race or sex or the intersection/dual combination. To get that information too, the question would need to be expanded to add:

‘(v) how many women were made redundant (vi) how many men were made redundant (vii) how many black people were made redundant (viii) how many white people were made redundant.’

This starts to get clumsy. It also does not give you other information, such as the job titles of people concerned, so you are unable, for example, to compare the relative treatment of black managers, white managers, black female managers, white female managers, black male managers, white male managers, black assistant managers, white assistant managers and so on.

Rather than ask for global numbers under different categories, the best technique is as in method 1, ie to ask employees to be listed (anonymously if necessary) with all the variables. Employers usually provide schedules by way of reply. Then, when analysing the information provided, workers can put together all the different combinations, to see what the evidence suggests.

Of course, when asking for large-scale statistics, you may be limited by the way the employer has monitored and collected information. If the employer comes back and says that it is unable to provide information in the way you request because it monitors in a different way, you may need to adjust your request. Find out how the employer does monitor and what is on computer. But don’t be put off asking. It is surprising how often employers do indeed produce large-scale statistics in answer to questions asked in the ‘method 1’ format.

Too many characteristics: Do not be tempted to ask about too many different protected characteristics on a speculative basis. It could be very onerous to expect an employer to gather and provide information on all the different characteristics and this can give the employer an excuse not to provide the information which you really do need.

Another risk is that the employer does provide information on all the variables and it confuses any clear patterns as to what the discrimination is founded upon.



Analysing the questionnaire reply

When considering individual comparators as well as general statistical patterns, see what the information reveals both in terms of single characteristic patterns and also in terms of multiple patterns. Watch out for:

- comparators who do not share the same protected characteristic or combination of characteristics who have been treated better by the employer in comparable circumstances.
- workers who share the worker's protected characteristic or combination of characteristics and who have been treated well by the employer in comparable circumstances.
- whether the evidence suggests single characteristic discrimination; additive discrimination; or intersectional/dual combined discrimination.
- contradictory evidence, suggesting the employer has discriminated against people with a particular protected characteristic on one occasion, but favoured them on another.

Sample questionnaire

The facts for this sample questionnaire are on p48 (sample claim: additive discrimination (sex, race)).

questions

1. In relation to the vacancy for account manager in August 2010, please state
 - (a) when, how and where the position was advertised
 - (b) every criterion required for the job, stating whether mandatory or preferable
 - (c) when each criterion was decided upon and by whom
 - (d) whether the criteria were in writing. If so, please supply copies.
 - (e) whether there was a job description or person specification. If so, please provide copies.
2. Please state every applicant for the vacancy (identifying which one was Rob Milton), stating in each case
 - (a) their job title at the time of their application
 - (b) their start date with the company
 - (c) whether male or female
 - (d) their race*
 - (e) whether they were interviewed and if so, the date and who interviewed them
 - (f) whether they were appointed or rejected and why
 - (g) who made the decision at (e) and (f)
 - (h) who else was consulted in respect of each decision and when.
3. With regard to the decision not to promote me and to promote Rob Milton instead, please state
 - (a) who made the decision, when and what were their reasons
 - (b) who was consulted, when and what were their views.
4. Please state all employees employed by the company at any stage between 1 August 2007 – date, by reference to (a) job title (b) start date (c) if applicable, termination date (d) whether male or female (e) their race*.

5. Please state all employees promoted within the company over the 3 years prior to the date of this questionnaire, giving in each case :
- (a) their prior job title
 - (b) the job title to which they were promoted
 - (c) the date of promotion
 - (d) whether male or female
 - (e) their race*.

* “race” – please state by reference to (i) black / white (ie colour) (ii) nationality (iii) national origin (iv) ethnic origin.

comments on questions

Note that this is a basic sample questionnaire, designed mainly to consider how questionnaires might differ in multiple discrimination cases. For detailed advice and full-length questionnaires precedents, including in promotion situations, see the series of questionnaire Guides on the EHRC website (see ‘Resources’, p61).

The claimant here believes she has been discriminated against either because she is a woman or because she is black or because she is a black woman. See p48 for a sample tribunal claim on these facts. If the claimant instead thought she was discriminated against because she was a young woman, replace ‘race*’ every time it appears in the precedent with ‘date of birth’.

Question 2: From the answer to this question, it will be possible not only to establish the race or sex of each candidate, but also their combined characteristics, eg whether they were a black woman or not.

Questions 4 and 5: From the answer to these questions, it will be possible to identify the status of employees and pattern of promotions by reference to gender alone or race alone or combined characteristics. It should therefore reveal whether there is a pattern of not promoting or taking on women or black employees or black women into higher positions.

Question 4 is written in a concise way and the answer can be analysed to show patterns of staff in employment at the date of the promotion exercise, plus staff leaving or taken on in the previous 3 years. If information cannot be given in the form asked in question 4, it could be reformulated as follows, but this would be much clumsier and potentially less revealing:

- 4.1 Please state the number of female advertising executives employed by the company as at 10 August 2010 by reference to race*
- 4.2 Please state the number of male advertising executives employed by the company as at 10 August 2010 by reference to race*
- 4.3 Please state the number of female account managers employed by the company as at 10 August 2010 by reference to race*
- 4.4 Please state the number of male account managers employed by the company as at 10 August 2010 by reference to race*

- 4.5 Please state all female advertising executives recruited into the company since 1 August 2007 by reference to race* (then the same question regarding male advertising executives, female account managers, male account managers).
- 4.6 Please state all female advertising executives dismissed or leaving the company (stating which) since 1 August 2007 by reference to race* (then the same question regarding male advertising executives, female account managers, male account managers).

Time-limits



The claim form must arrive at the tribunal no later than 3 calendar months less one day from the act of discrimination. For example, if the act of discrimination took place on 5 January, the last day for presenting the tribunal claim is 4 April of the same year.

The date an act of discrimination takes place can be hard to identify. For a disciplinary warning, it is the date the warning was given. For a failed promotion, the date is when the decision was taken not to promote the worker.

Grievances and appeals

The time-limit is not extended while the worker appeals or takes out a grievance regarding a discriminatory action. For example, a worker is given a final written warning on 10 June; she sends in an appeal letter and her appeal is rejected on 25 July. The time-limit for complaining about the final written warning is 9 September.

Sometimes the grievance or appeal has not been decided by the tribunal time-limit. If so, the worker will have to put in his/her tribunal claim while the grievance / appeal is still outstanding.

Several acts of discrimination

Where there are several acts of discrimination, the 3 months is counted from each act which the worker wants to complain about. For example, a worker is given a bad appraisal on 20 September. On 10 November, he is issued with a warning under the capability procedure. He believes both actions are discriminatory. The time-limit is 19 December if he wishes to ensure both actions are in time.

Conduct extending over a period

In some situations, discriminatory action takes place over a period of time. If so, the time-limit is counted from the end of that period, not the beginning. Section 123(3)(a) of the Equality Act states that 'conduct extending over a period is to be treated as done at the end of the period'.

This is often colloquially known as 'continuing discrimination'. The actual test is whether there is a 'continuing discriminatory state of affairs'. This can be hard to prove where there are several separate incidents, as it is necessary to prove some sort of link between the different acts.

The following examples could amount to continuing discrimination provided a tribunal did not consider that they consisted of independent self-contained incidents:

- an employer decides that the post of departmental manager must be full-time and maintains its refusal to allow a woman to work part-time.
- an employer continually fails to give a black worker acting-up opportunities when vacancies arise. This is part of an ongoing unwritten practice that acting-up opportunities are given to white staff.
- a woman is subjected to numerous acts of sexual harassment over a long period of time.

Continuing discrimination is a useful concept when a worker has already missed time-limits for earlier discriminatory incidents. But it can be hard to prove that incidents are linked, especially if they are carried out by different perpetrators or occurred at lengthy intervals or concern quite different types of incident. It is far safer to count the 3 months from each independent act of discrimination, even where there are several.

In the context of multiple discrimination, workers need to be extremely careful where some discriminatory actions are because of one protected characteristic and others are because of another protected characteristic. It is hard to see how the concept of continuing discrimination could be used to link incidents based on different protected characteristics.

For example, the worker complains of the following discriminatory actions:

1. Disciplinary warning because of her religion on 3 January.
2. Further disciplinary action because of her religion on 10 March.
3. Dismissal because of her religion on 9 November.

Ideally, she would have lodged her claim regarding the initial warning by 2 April and regarding the further disciplinary action by 9 June. But she missed these dates. As long as she puts in her claim by 8 February the following year, she can try to argue that all three actions were part of discriminatory conduct over a period of time because of her religion. But, if she thought the dismissal was because of her sex and not because of her religion, and if there has been no indication of any religious discrimination following 10 March, then the 3 January and 10 March claims will be out of time.

Failure to make reasonable adjustments

The concept of continuing discrimination does not apply to failure to take action for discriminatory reasons. The time-limit for failure to make reasonable adjustments is counted from when the employer refuses to make the adjustment or, if the employer does not explicitly refuse, from when



the employer does anything inconsistent with making an adjustment or otherwise, from when a non-discriminatory employer would have made the adjustment.

Late claims

A tribunal can allow in a late claim if it believes it is just and equitable to do so. The tribunal will balance several factors including the reason for the lateness of the claim; the degree of lateness; the prejudice (harm) to the worker of being deprived of the claim; and the prejudice to the employer of having to face a claim at a later date than otherwise, eg because witnesses have forgotten the facts or left the country or documents have been shredded.

Where several claims are in time, tribunals have often been willing to allow in earlier out-of-time claims, since they will be referred to as supporting evidence in any event. This argument may not be so appealing to a tribunal where the in-time claims are based on one protected characteristic and the out-of-time incidents are based on a different protected characteristic and so would not be relevant supporting evidence of the in-time claim.

Compensation



Overview

There is no upper limit on the amount of discrimination compensation which can be awarded. Compensation for discrimination can consist of:

- financial loss
- injury to feelings
- aggravated damages
- injury to health (personal injury)
- exemplary damages (in very rare cases)
- interest

The concepts of injury to feelings, aggravated damages and injury to health are connected and tribunals are expected to ensure awards don't overlap.

The award for injury to feelings is to reflect the hurt caused to the claimant by the discriminatory actions. Extra compensation can be awarded for aggravated damages where the claimant's hurt feelings are increased by the way the employer behaved. Awards can also be made for injury to health where, for example, the discrimination causes clinical depression, a nervous breakdown or post-traumatic stress disorder. The line between injury to feelings and injury to health is not always

clear, but the key point is that the overall award fairly reflects the injury and there is no duplication, ie no award under different headings for the same hurt.

The Court of Appeal in *Chief Constable of West Yorkshire Police v Vento* (No.2) [2003] IRLR 102 set out three broad categories of awards for injury to feelings. The pay bands have been updated to take account of inflation by *Da'Bell v National Society for Prevention of Cruelty to Children* UKEAT/0227/09; [2010] IRLR 19 so that they now are:

- a top band normally between £18,000 and £30,000 for the most serious cases, eg a lengthy campaign of harassment
- a middle band between £6000 and £18,000 for serious cases which do not warrant the top band
- a lower band of £500 - £6000 for less serious cases.

It is important to remember that these bands are only for injury to feelings. They do not encompass aggravated damages or injury to health.

Awards for injury to health can get rather technical and follow the Judicial Studies Board guidelines for personal injury cases. These guidelines put awards into four categories of severity. Medical evidence is usually essential where large claims are made for injury to health.

Multiple discrimination

In cases where there are several discriminatory actions and these are due to more than one protected characteristic, it is not enough for a tribunal to lump everything together and consider how hurt the claimant's feelings are overall. This could lead to an inadequate award.

There is no rule that the claimant's feelings about every single discriminatory incident need to be separately assessed, but there should be some level of differentiation. Having looked at matters separately, a tribunal does need to make sure that the overall award is not disproportionate and that it does not double-count.

These points were made by the EAT in *Al Jumard v Clynw Leisure Ltd* (see box below). *Al Jumard* is interesting because it shows different types of multiple discrimination:

- ordinary multiple discrimination, ie some incidents due to race discrimination and some separate incidents entailing disability discrimination
- an example of additive discrimination, ie a single incident caused by both race and disability discrimination.

What if some discrimination is proved and other discrimination is not?

A worker may believe s/he has been discriminated because of several protected characteristics, and all of this has led to the injury to his/her feelings. What happens if the tribunal finds that only one of those protected characteristics was the cause of her treatment – and therefore her hurt feelings? For example, if the worker becomes very depressed because she fails to gain a promotion and she believes this was both because of her age and her sex, what happens if the tribunal says it was only because of her age? Will she get compensation for the whole of her hurt feelings?

A worker can gain compensation for injury to feelings, even if s/he did not realise the employer's discriminatory actions were because of a protected characteristic. The worker may simply be hurt

because of mistreatment by the employer, eg disciplinary action or a poor appraisal, but if that mistreatment was in fact because of a protected characteristic, the worker can get compensation for resulting injury to feelings. Obviously if the worker does realise s/he has been discriminated against because of a protected characteristic, s/he is likely to have a higher level of hurt. (See *Taylor v XLN Telecom Ltd* and others UKEAT/0385/09.)

But what if the worker correctly believed the mistreatment was because of one protected characteristic and incorrectly thought it was also because of another protected characteristic? Does this mean the worker can only be compensated for part of his/her hurt feelings? After *Taylor*, the answer may be that if the hurt feelings were primarily caused by the lack of promotion etc and not by any suspicion that it was because of age or sex (for example), then the full award for injury to feelings should be made. But if the hurt feelings were, very specifically, partly because of the belief that it was age discrimination, and partly because of the belief that it was sex discrimination, then only the injury to feelings attributable to the suspicion of age discrimination would be awarded.

In *Thaine v London School of Economics* UKEAT/0144/10, a tribunal decided that the worker's psychiatric injury (injury to health) was caused partly by the unlawful sexual harassment, partly by other incidents of perceived sex discrimination which the tribunal had not upheld, and partly by domestic circumstances. It therefore assessed the extent to which the unlawful discrimination had contributed to her ill-health as 40% and reduced the compensation it would otherwise have awarded for the unlawful discrimination by 60%.

The lessons from these cases are

- the worker needs very specific evidence tying his/her injury to feelings or injury to health to the unlawful discrimination
- adding in extra claims for discrimination or extra protected characteristics as a basis for discrimination, if not upheld, could lead to a reduction in any award for injury to feelings or health if the worker's injury was also in response to the unproved matters.

AL JUMARD V CLYWD LEISURE LTD [2008] IRLR 345

Mr Al Jumard, a British national of Iraqi birth, worked as duty manager at a leisure centre operated by Clywd Leisure Ltd. He had a hip problem for most of his working life and was disabled.

An employment tribunal found that Mr Al Jumard had been unfairly dismissed and subjected to various acts of discrimination. In May 2002 he was given a written warning for setting off the alarm at the leisure centre because he did not leave quickly enough after setting it. This was as a result of his disability. Others were not disciplined for similar security lapses. The tribunal said the warning was direct race and direct disability discrimination. In addition, Clywd had failed to make reasonable adjustments in respect of Mr Al Jumard's disability because nothing had been done to extend the period between setting the alarm and getting off the premises.

In early 2004, Mr Al Jumard raised a grievance that his manager had treated him less favourably than white colleagues in a number of incidents. His grievance was not upheld, but as a result, the chief executive gave him a severe dressing down and told Mr Al Jumard that his own conduct would be monitored. Later in 2004, Mr Al Jumard was given a final written warning with no expiry date for an incident where he taped a conversation with another member of management and was allegedly aggressive. The tribunal found these incidents were further acts of race discrimination.

Mr Al Jumard was then transferred to another centre where some of the work involved standing all the time and his disability became worse. The tribunal found Clywd had failed to make reasonable adjustments when moving him to the different centre.

After he lodged tribunal claims for race and disability discrimination in 2005, Mr Al Jumard was put under surveillance. A tribunal found this was victimisation.

In regard to injury to feelings, the tribunal found that Mr Al Jumard was distressed, frightened and under threat from December 2003 until his dismissal in November 2005. The injury to feelings and stress had escalated as the situation developed through a series of incidents. He was on anti-depressants for 18 months, but was now recovered. The tribunal concluded that 'for the injury to feelings and stress suffered for the racial and disability discrimination, which occurred over a period of some 20 months, we award £13,000'. The tribunal also awarded £5000 for personal injury and £1500 for aggravated damages, as well as substantial awards for loss of earnings and pension loss.

Mr Al Jumard appealed the way his compensation was calculated. The EAT agreed. It said that although no scientific calculation of injury to feelings arising from each incident is possible, the tribunal was a little too broad brush, and a more nuanced approach was necessary. The losses flowing from race and disability discrimination should have been separately considered, at least where they did not arise from the same facts. For example, the offence, humiliation or upset resulting from a deliberate act of race discrimination may quite understandably cause greater injury to feelings than a thoughtless failure to make reasonable adjustments for disability. The tribunal should have also considered whether any separate loss could be identified in respect of the victimisation. Having considered these elements separately, an ET must still stand back and look at the global figure, ensuring there is no double counting and that the overall award is not disproportionate.

Resources



Discrimination books and guides

Employment Law: An Adviser's Handbook. By Tamara Lewis.

Published Legal Action Group. Tel: 020 7833 2931. Edition 8 (2009). Updated every two years. Guide to law, evidence, tactics and tribunal procedure, with comprehensive check-lists and precedents. Covers all key areas of employment law with large discrimination section.

The following guides by Tamara Lewis are available free on the Equality and Human Rights Commission website, www.equalityhumanrights.com. It is easiest to find them by searching "Tamara Lewis" and working down the list. Some guides may not yet have been updated to take account of the Equality Act, but if you are aware of its small legal differences, the practical guidance should still be valid.

RRA Questionnaires: How to Use the Questionnaire Procedure in Cases of Race Discrimination in Employment. Guide to procedure and sample Questionnaires for many race discrimination situations. There are parallel guides for sex, disability, age and general discrimination.

Proving disability and reasonable adjustments: a worker's guide to evidence under the DDA. With special focus on 26 different impairments.

An employer's guide to reasonable adjustments under the DDA.

Redundancy Discrimination: Law and evidence for tribunal cases

Using the Data Protection Act and Freedom of Information Act in Employment Discrimination cases

A discrimination claimant's companion: a client's guide to discrimination cases in employment tribunals. Guide for advisers to hand out to their clients in discrimination cases to answer common queries and uncertainties. This is not a guide for clients to run cases themselves. Adapted from the generic **Claimant's Companion** available at www.londonlawcentre.org.uk

Research on multiple discrimination

Tackling Multiple Discrimination: Practices, policies and laws (2007)

Hanne Bielefeldt, Danish Institute for Human Rights. Research report funded by the European Commission.

There are a number of studies that focus on particular areas of intersectional/multiple discrimination (the following summary originally by Gay Moon):

Fairness and Freedom: The Final Report of the Equalities Review (February 2007) notes that multiple markers of disadvantages can drastically reduce the probability of being employed. The employment penalties suffered by Pakistani and Bangladeshi women are greater than those of women as group or Pakistani or Bangladeshi men.

Evidence of the disadvantage that comes from the combination of ethnicity and gender is also highlighted in a report by the former Equal Opportunities Commission, *Moving on up: The way forward* (March 2007), and the Fawcett Society *Black Minority Ethnic Women in the UK* (February 2005). The latter concludes, 'In some areas, sexism and racism combine to create an intensity of discrimination that far exceeds the impact of a single strand'.

Outsider Status: Stigma and discrimination experienced by Gay men and African people with HIV by C Dodds, P Keogh, O Chime, T Haruperi, B Nabulya, W Sersuma & P Weatherburn, Sigma Research and NAT, 2004, p 25, para 2.4.

This report by the National AIDS Trust notes that when discrimination against people living with HIV becomes combined with another ground for discrimination, the disadvantage experienced often becomes more acute. It found that 'all African people with HIV suffer racism and xenophobia in a heightened form'.

The report **Re-thinking Identity: the Challenge of Diversity** (ed Katherine Zappone, commissioned by the Joint Equality and Human Rights Forum, June 2003) considers the impact of intersectional discrimination in a series of different areas: disabled minority ethnic people, Black and minority ethnic women, disabled lesbian and gay people, disabled women, young lesbian, gay and bisexual people and young minority ethnic men.

Websites

Equality and Human Rights Commission www.equalityhumanrights.com

Government Equalities Office www.equalities.gov.uk

