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Non-discrimination

United Kingdom

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Country report

Non-discrimination

United Kingdom

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Based on the 2015 report written by Aileen McColgan

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EXECUTIVE SUMMARY

1. Introduction

The United Kingdom (UK) comprises England, Wales, Scotland and Northern Ireland (NI), with the term Great Britain (GB) used to refer to England, Wales and Scotland. The UK is a parliamentary democracy, based around the core principle of parliamentary sovereignty. It has neither a written constitution nor an entrenched constitutional bill of rights but an extensive set of constitutional conventions establish what has been described as an unwritten constitution. The English, Welsh, Scots and Irish have historically been regarded as the four major ethnic groups in the UK but the UK has always been a country of migration, and the increase in the size and variety of different ethnic groups since the late 1940s, added to the constant influx of migrant labour from EU and non-EU states, has made the UK a multicultural state.

Certain ethnic minorities, including the native Traveller communities, continue to suffer from high rates of unemployment, social exclusion and poverty. Media campaigns against asylum-seekers and Travellers/Gypsies, including Roma, have contributed to greater hostility towards these particular groups. The events of 11 September 2001 and the London suicide bombings in July 2005 had a similar impact upon British Muslim community.

Some prejudice also exists against disabled persons and gay/ lesbian/ bi-sexual/ transgendered people and age discrimination is not unknown. In recent years, however, there has been much wider social acceptance of the rights of gay men and women to full equality across the political and media spectrum. In 2004 UK introduced comprehensive civil partnership legislation permitting same-sex couples to register their partnership and obtain equivalent legal rights as those available to opposite-sex married couples. The Marriage (Same Sex Couples) Act 2013 placed same-sex couples on an equal footing with heterosexual couples as regards civil marriage from March 2014 in England and Wales. Similar legislation was passed in Scotland in February 2014 but the NI Executive has not introduced, and does not intend to introduce, such legislation.

In Northern Ireland the ongoing tensions between the Unionist/Protestant majority and Nationalist/Catholic minority continue to generate sectarian division, though much less so than during the period of "the troubles". Sectarian divisions also feature in parts of Scotland.

The UK traditionally permitted very limited scope in law for preferential treatment for disadvantaged groups, but since 2000 a series of positive duties have been imposed upon public authorities to promote equality of opportunity on the grounds of race/ethnicity, disability and gender, while a similar duty in Northern Ireland extends across all of the six equality grounds (sex, race, disability, sexual orientation, religion/belief and age). Positive action strategies have been adopted at national, regional and local level across the various equality grounds and private employers are also subject to monitoring requirements and obligations to take action to remedy under- representation of either of the two main communities (Catholic and Protestant) in Northern Ireland.

The Equality Act 2010 significantly extended the ability of employers and others to adopt positive action measures to promote equality, and imposed a single cross-ground general equality duty on all GB public authorities. Changes to the availability of public funding and proposed changes to rules concerning standing in judicial review claims call into question the continued utility of the Public Sector Equality Duty (PSED).

2. Main legislation

As the UK has no written constitution, legislation is the primary tool for establishing anti-discrimination law in the UK. The UK has ratified all the major international human rights treaties and the main Council of Europe human rights instruments, including the ECHR, the Charter on Minority Languages and the Convention on Minority Rights. International treaties are not directly applicable in UK law unless incorporated by an Act of Parliament, although they can be used to interpret legislation in certain circumstances. The Human Rights Act 1998, which gives effect to the ECHR in UK law, can provide valuable protection in some contexts against discrimination. The devolution settlements under which power is devolved to Scotland, Northern Ireland and Wales also include additional safeguards particularly as regards the protection of human rights.

Anti-discrimination legislation in the UK was first introduced in the field of race/ethnicity in the 1960s. It mainly consists of civil law provisions but there are in addition some criminal offences such as incitement to racial and religious hatred. In Northern Ireland, a separate legislative framework has been introduced for political and constitutional reasons.

The Equality Act 2010 now prohibits direct and indirect discrimination, harassment, victimisation and instructions to discriminate because of race (defined as ethnicity, colour, national origin or nationality), sex (including married or civilly partnered status, pregnancy and gender reassignment), disability, sexual orientation, religion or belief and age in employment and occupation and (other than in the case of married or civilly partnered status or, in the case of housing, age) access to goods and services, education, housing and the performance of public functions. (There are a significant number of exceptions to the prohibition on age discrimination which does not, further, protect under 18 year olds other than in the context of employment broadly defined.) Duties of reasonable accommodation are imposed in relation to disability. The provisions of the Equality Act 2010 are at least broadly in conformity with the requirements of the 2000 directives, though its material scope is considerably broader. Northern Ireland's legislation adopts broadly similar definitions of discrimination though there is no single equality provision and age discrimination is regulated only across the material scope of Directive 2000/78.

3. Main principles and definitions

There is no definition in statute or case law of "race" or "racial origin": the legislation prohibits discrimination on "racial grounds", which are defined as to include colour, nationality (including citizenship), and ethnic and national origins (s.9 Equality Act 2010). The meaning of "ethnic origins" and "ethnic group" has been clarified by the UK courts through precedent. In 2015, an Employment Tribunal accepted that 'caste' could fall within the definition of ethnic origins as defined in the Equality Act 2010.¹ The EAT did not rule that caste was a form of race for the purposes of the Equality Act 2010, rather that aspects of caste overlapped with aspects of race and so the facts of a particular caste-related case may be caught within the Act.

"Religion", "belief", "age" or "sexual orientation" are not defined in detail in the Equality Act 2010 or the equivalent provisions of NI law. Section 10 of the Equality Act 2010 provides that "Religion means any religion and a reference to religion includes a reference to a lack of religion" and that "Belief means any religious or philosophical belief and a reference to belief includes a reference to a lack of belief." "Sexual orientation" is defined by s.12 as "a person's sexual orientation towards— (a) persons of the same sex, (b) persons of the opposite sex, or (c) persons of either sex".

A person is regarded as disabled for the purposes of the Equality Act 2010 (the Act protecting only those with disabilities against disability-related discrimination) if s/he "has

¹ Chandhok v Turkey, Employment Appeal Tribunal, UKEAT/0190/14/KN/ 19 December 2014; Employment Tribunal Case number 3400174/2013 July 2015.

a physical or mental impairment ... [which] has a substantial and long-term adverse effect on [his or her] ability to carry out normal day-to-day activities." A disability will only be considered to have "substantial and long-term adverse effect" if it impacts substantially upon how the person performs day-to-day activities, and has lasted for at least 12 months, or the period for which it is likely to last is at least 12 months, or for the rest of the person's life. In 2015 in *Bickerstaff v Butcher*² the Tribunal referred to the decision of the CJEU in the *Kaltoft*³ case and ruled that an obese claimant was disabled, rejecting the argument put for Mr Butcher that the condition was self-inflicted.

There is a consistent definition of direct discrimination across all GB legislation (s.13 Equality Act 2010): "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." s.13(2) goes on to provide that "If the protected characteristic is age, A does not discriminate against B if A can show A's treatment of B to be a proportionate means of achieving a legitimate aim", s.13(3) that "If the protected characteristic is disability, and B is not a disabled person, A does not discriminate against B only because A treats or would treat disabled persons more favourably than A treats B". Only in relation to age can direct discrimination be justified. S.23 of the Equality Act 2010 provides that "On a comparison of cases for the purposes [of establishing discrimination] there must be no material difference between the circumstances relating to each case". In particular, where disability discrimination is at issue: "[t]he circumstances relating to a case include a person's abilities". The Equality Act 2010 also makes segregation on racial grounds a form of direct discrimination (s.13(5)). The position in NI is broadly similar though the definition of direct discrimination refers to less favourable treatment "on grounds of" rather than "because of" the protected characteristic.

The Equality Act 2010 provides (s.19) that "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", s.19(2) further providing that "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". The prohibition against indirect discrimination applies in GB to all the protected grounds whereas, in NI, there is not as yet any prohibition on indirect discrimination related to disability. The definition of indirect discrimination in NI is materially similar to that in the Equality Act 2010 except that, where the discrimination at issue falls outside the scope of the 2000 directives, the original definition of indirect discrimination that was used in the UK race and gender discrimination legislation continues to apply.

In *Home Office (UK Border Agency) v Essop and others*⁴ the Court of Appeal ruled that it was insufficient for claimants to show a statistical disparity in the application of a provision, criterion or practice (PCP) to establish indirect discrimination. Rather, the applicants would have to point to the reason why the PCP had disadvantaged them. As a result, claiming indirect discrimination will be more difficult, because in addition to showing that disadvantage was caused to a group by a PCP, claimants will also have to find an explanation for that disadvantage.

Insofar as it applies to disability, the Equality Act prohibits direct and indirect discrimination and also prohibits unjustified discrimination "arising from disability" (s.15), and failures to make reasonable adjustments (ss.20, 21). In 2015 in *Griffiths v Secretary of State for*

² Northern Ireland's Fair Employment Tribunal [2015] 92/14 FET 9 December 2014.

³ (C-354/13).

⁴ Court of Appeal [2015] EWCA Civ 609 22 June 2015.

*Work and Pensions*⁵ the Court of Appeal confirmed that the duty of reasonable adjustment arises once there is evidence that the arrangements placed the disabled person at a substantial disadvantage because of her disability.

S.15 defines discrimination arising from disability as occurring where “A treats B unfavourably because of something arising in consequence of B's disability, and ... A cannot show that the treatment is a proportionate means of achieving a legitimate aim”, unless “A shows that A did not know, and could not reasonably have been expected to know, that B had the disability”. In NI, the DDA does not prohibit indirect discrimination but does (s. 3A) prohibit three different concepts of discrimination:

- a) Discrimination for a reason relating to a disabled person's disability, which can be objectively justified;
- b) Direct discrimination on the grounds of a person's disability in employment and occupation, i.e. where a person is treated differently because of the fact he or she is disabled and not for a related reason, which cannot be justified in law; and
- c) Discrimination by virtue of a failure to comply with the duty to make reasonable adjustments, which cannot be justified in the employment and occupation context but can in the context of goods and services.

The Equality Act 2010 is thought, because of prohibition of less favourable treatment “because of” any protected ground, to regulate all discrimination based on assumed or perceived characteristics. In NI, judicial interpretation is required to achieve this in relation to age and disability as the relevant legislation refers in each case to discrimination on the grounds of the age or disability of the person discriminated against.

The Equality Act 2010 defines harassment as occurring (s.26(1)) where “(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”. Section 26(2) further provides that “A also harasses B if—(a) A engages in unwanted conduct of a sexual nature, and (b) the treatment has the purpose or effect referred to in subsection (1)(b)” and s.26(3) explicitly defines and prohibits less favourable conduct arising from submission to or rejection of unwanted conduct of a sexual nature or that is related to gender reassignment or sex. The Equality Act imposes a partly objective test to the question whether conduct which is not intended to violate dignity etc. can nevertheless be regarded as having the effect of so doing. In NI a common definition of harassment has been incorporated into the legislation that covers the scope of the 2000 Directives across all the equality grounds, which is broadly similar to that in the Equality Act 2010.

Victimisation is prohibited across all the equality grounds in GB and NI but the definition of victimisation is different in the legislation that applies to GB to that which applies to NI. In GB the Equality Act 2010 provides (s.27(1)) that “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”, s.27(2) defining as 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”. The approach in NI is similar save that the person alleging victimisation has to establish *less favourable* treatment on the ground of his or her having performed the protected act, a formulation which has given rise to significant difficulty at times. In both GB and in NI the protection from victimisation does not apply if the allegation made by the victim was *both* untrue *and* made in bad faith.

⁵ Court of Appeal [2015] EWCA Civ 1265 10 December 2015.

Section 111 Equality Act 2010 provides in its first paragraph that: "... A person (A) must not" instruct or cause or induce another person "(B) to do in relation to a third person (C)" anything which breaches the Act. In NI, instructions to discriminate and pressure or inducement to discriminate are explicitly prohibited on all the protected grounds except sexual orientation, but only in the case of religion/ political belief and age can an individual bring enforcement action. In other cases the Equality Commission alone can act. Having said this, there is authority that a person who is instructed to discriminate against another can bring enforcement proceedings against the instructor where (as in *Weathersfield Ltd. v Sargent*, where the instruction was issued by an employer)⁶ the instruction amounts to the imposition of a detriment on the person to whom it is issued.

Discriminatory advertisements are currently only explicitly prohibited in Northern Ireland, and then only when they relate to the race, religion/ belief or disability. Only the ECNI has the power to bring enforcement action in respect of such advertisements. Individuals across the UK may only bring legal claims in respect of discriminatory advertisements if they are actually subject to less favourable treatment on a prohibited ground, (as, for example, where they apply for the posts in question and are rejected on the relevant ground). Perhaps on this basis, the UK government has indicated that it considers that UK law is in conformity with the *Feryn* decision and it did not take the opportunity provided by the Equality Act to extend legislation in this area, instead removing such prohibitions (enforceable by the EHRC) as had previously applied.

The Equality Act provides an exception for occupational requirements⁷ together with broader exceptions applicable to religious organisations. In NI, the DDA does not provide an exception for genuine and determining occupational requirements, GORs or specific exceptions being provided in relation to other protected characteristics. The Equality Act and NI Age Regulations make provision for age differences in minimum wage schemes and seniority-linked pay differentials but the state "default retirement age" of 65 was abolished in April 2011. Different exceptions exist for national security and public order across the various legislative instruments. The Armed Forces are largely exempt. Outside the scope of the 2000 Directives, exceptions exist for actions authorised by other statutes.

4. Material scope

The UK anti-discrimination legislation applies to all sectors of employment, both public and private. The 2011 decision of the Supreme Court in *Jivraj v Hashwani* [2011] UKSC 40 has cast significant doubt on the extent to which the Equality Act covers access to self-employment, as a result of which domestic legislation may well fail to comply with the directives.

In *EAD Solicitors LLP and ors v Abrams*⁸ the Employment Appeal Tribunal confirmed that the word "person" in the Equality Act should be interpreted to include legal persons. It confirmed that nothing in the Equality Act prevents a company from bringing such a claim.

Discrimination in the provision of goods and services, housing, education, social protection including social security and health care, social advantages and the performance of public functions is also now prohibited across all the equality grounds except age in both GB and Northern Ireland. Having said this, UK law does not contain any clear definition of social advantage, and whether the existing legislation is adequate to implement EU law will not be known until a body of case law has been developed, both within the UK and in the European Court of Justice. The Equality Act 2010 contains provisions providing protection against age discrimination for GB in relation to the provision of goods and services, health

⁶ [1999] IRLR 94.

⁷ The words 'genuine and determining', which are used in Article 4(1) Directive 2000/78, were removed in the Equality Act 2010 on the basis that the words are superfluous. The assumption is that a requirement will not be proportionate if it is not genuine or determining.

⁸ UKEAT/0054/15/DM Employment Appeal Tribunal 5 June 2015.

care, social advantages and the performance of public functions. These do not apply to children under the age of 18.

5. Enforcing the law

Individuals who consider they have been discriminated against can bring legal proceedings, with cases involving allegations of employment-related discrimination (public sector and private sector) going to the employment tribunals (industrial tribunal or Fair Employment Tribunal in NI), and complaints concerning any other unlawful discrimination (by public sector or private sector bodies) going to the civil courts. Tribunal fees of up to £1 100 were introduced in July 2013 resulting in a reduction of around 70-80% in Tribunal cases (although no change in the success rate of cases). All legal attempts to challenge the introduction of these fees, including on grounds that they are incompatible with the EU principle of effective remedy, have thus far failed.

The main remedy available is damages, which are calculated as in civil proceedings for tort ("delict" in Scotland). Injunctive relief can also be obtained. Compensation awards vary across the grounds, and from context to context. Median and maximum awards made by employment tribunals varied in 2014-15 (the latest available figures) between EUR 7459 (£6 000) and EUR 100 422 (£80 783) in sexual orientation cases; through EUR 1 343 (£1 080) and EUR 1 343 (£1 080) in religion/ belief cases (previous years have been higher, e.g. EUR 4 430 (£3 191) and EUR 38 400 (£27 659) for 2013-14); to EUR 9 323 (£7 500) and EUR 35 339 (£28 428) in age cases; EUR 9976 (£8 025) and EUR 260 045 (£209 188) in race cases; EUR 15 539 (£12 500) and EUR 692 465 (£557 039) in sex discrimination cases; and EUR 10 748 (£8 646) and EUR 298 240 (£239 913) in disability cases. No figures are available from county (or, in Scotland, Sheriff) courts which enforce the non-employment related provisions of the legislation. Various conciliation or arbitration procedures are also available. Since the introduction of significant fees in July 2013 as a condition of Tribunal access (£1100 in the case of discrimination cases) the number of Tribunal claims (across all complaints) has fallen dramatically; latest figures (June 2015) suggest a 67% decrease in single cases, and 69% decrease in multiple cases.

There are no restrictions under the normal rules of civil procedure under the different sets of rules of civil procedure that apply in the three jurisdictions in the UK on any organisation offering support to complainants in discrimination cases. Some trade unions, the equality commissions and some specialised NGOs employ qualified lawyers and therefore can and do offer full support to complainants. But such organisations cannot usually initiate a complaint, except that the equality commissions can bring a case where instructions to discriminate or unlawful advertising is concerned. Anti-discrimination cases are quite common, and attract considerable publicity. However, complainants can suffer from a lack of available skilled advice, assistance and representation in discrimination cases and significant tribunal fees apply in discrimination and other employment cases (in excess of EUR 1 300).

Remedies are in general reasonably dissuasive, although the inability of courts and tribunals to order wider remedial measures to be adopted by discriminating organisations is a real problem.

All of the relevant UK legislation makes provision for shift of the burden of proof in relation to each of the grounds of discrimination and to all of the activities considered to be within the scope of the directives.

6. Equality bodies

There is a single Equality and Human Rights Commission (EHRC) in GB which can support complainants in legal proceedings, has enforcement powers of its own, and also has powers to promote and encourage respect for equality of opportunity through research, public

comments and other methods. There is a separate Equality Commission for Northern Ireland, which has similar functions (and in places, greater powers relating to positive action) to those of the EHRC while in Scotland there is also a Scottish Human Rights Commission with which the EHRC shares its human rights remit.

7. Key issues

The most pressing difficulty concerns the high levels of fees payable in employment tribunals and the impact of this on access to justice. Also of concern is the wide scope for schools to discriminate against teachers on grounds of religion. Finally there is some concern over whether UK law adequately protects self-employed workers.

As to best practice, the positive duties imposed on public authorities by the Public Sector Equality Duty (s149 Equality Act 2010) in GB and s75 Northern Ireland Act 1998 (in NI) are perhaps the most interesting feature of UK discrimination law.

RÉSUMÉ

1. Introduction

Le Royaume-Uni (R-U) comprend la Grande-Bretagne – elle-même composée de l'Angleterre, du Pays de Galles et de l'Écosse – et l'Irlande du Nord. Il s'agit d'une démocratie parlementaire fondée sur le principe fondamental de la souveraineté parlementaire. Le Royaume-Uni ne possède ni Constitution écrite ni Déclaration constitutionnelle des droits, mais il s'est doté d'une vaste série de conventions constitutionnelles établissant ce qui a été décrit comme une constitution non écrite. Les Anglais, les Gallois, les Écossais et les Irlandais ont été traditionnellement considérés comme les quatre principaux groupes ethniques du Royaume-Uni; celui-ci a toujours été un pays de migration, et la taille et la diversité croissantes de ses groupes ethniques depuis la fin des années quarante, conjuguées à l'afflux constant de main-d'œuvre immigrée venant à la fois d'États membres de l'UE et de pays tiers, font du Royaume-Uni un État multiculturel.

Certaines minorités ethniques, parmi lesquelles les communautés autochtones des gens du voyage, continuent de connaître un taux élevé de chômage, d'exclusion sociale et de pauvreté. Les campagnes médiatiques menées contre les demandeurs d'asile et les gens du voyage/tsiganes, y compris les Roms, ont exacerbé l'hostilité grandissante à l'égard de ces groupes en particulier. Les événements du 11 septembre 2001 et les attentats suicides de Londres en juillet 2005 ont eu un impact similaire vis-à-vis de la communauté musulmane britannique.

On observe également certains préjugés à l'égard des personnes handicapées et des homosexuels, bisexuels ou transsexuels (GLBT), de même qu'une certaine discrimination fondée sur l'âge. Depuis quelques années toutefois, l'acceptation sociale des droits des gays et des lesbiennes s'est largement imposée avec une égalité complète dans le paysage politique et médiatique. Le Royaume-Uni a introduit en 2004 une législation exhaustive en matière de partenariat civil autorisant les couples de même sexe à enregistrer leur partenariat et à obtenir des droits équivalant à ceux que la loi confère aux couples mariés de sexes opposés. La loi de 2013 sur le mariage (couples de même sexe) instaure à partir de mars 2014, en Angleterre et au Pays de Galles, l'égalité de traitement entre les couples de même sexe et les couples hétérosexuels pour ce qui concerne le mariage civil. Une législation analogue a été votée en Écosse en février 2014 mais l'exécutif d'Irlande du Nord n'a pas introduit – et n'a pas l'intention d'introduire – de législation dans ce sens.

En Irlande du Nord, la persistance de tensions entre la majorité unioniste/protestante et la minorité nationaliste/catholique maintient une division sectaire, laquelle est cependant beaucoup moins marquée qu'à l'époque des «troubles». Ce type de division sectaire se manifeste également dans certaines parties de l'Écosse.

Le Royaume-Uni n'a traditionnellement réservé dans sa législation qu'une place très limitée au traitement préférentiel en faveur de groupes défavorisés. Depuis 2000 toutefois, une série d'obligations positives ont été imposées aux pouvoirs publics afin de promouvoir l'égalité des chances indépendamment de l'origine ethnique/raciale, du handicap et du genre; une obligation similaire s'étend aux six motifs d'égalité (sexe, race, handicap, orientation sexuelle, religion/convictions et âge) en Irlande du Nord. Des mesures d'action positive fondées sur les divers critères d'égalité ont également été adoptées aux niveaux national, régional et local. Les employeurs privés sont soumis à des exigences de surveillance et à l'obligation de prendre des mesures en vue de pallier la sous-représentation de l'une ou l'autre des deux communautés principales (catholique et protestante) en Irlande du Nord.

La loi de 2010 sur l'égalité (*Equality Act 2010*) a considérablement élargi la capacité des employeurs et d'autres d'adopter des mesures positives visant à promouvoir l'égalité, et

elle impose à l'ensemble des autorités publiques britanniques une obligation générale d'égalité couvrant tous les motifs. Les modifications apportées à la mise à disposition de financements publics et les changements proposés concernant les règles d'habilitation dans le cadre de demandes de contrôle juridictionnel mettent en question la persistance de l'utilité de ce devoir d'égalité incombant au secteur public (*Public Sector Equality Duty* ou PSED).

2. Législation principale

En l'absence de constitution écrite, la législation est le moyen principal d'instaurer le droit antidiscrimination au Royaume-Uni. Ce dernier a ratifié l'ensemble des grands traités internationaux relatifs aux droits de l'homme, de même que les principaux instruments du Conseil de l'Europe en la matière, dont la CEDH, la Charte européenne des langues régionales ou minoritaires et la Convention-cadre du Conseil de l'Europe pour la protection des minorités nationales. Les traités internationaux ne sont pas directement applicables en droit britannique à moins d'y avoir été incorporés par une loi du Parlement; ils peuvent néanmoins servir à l'interprétation de la législation dans certaines circonstances. La loi de 1998 sur les droits de l'homme, qui transpose la CEDH en droit interne, peut offrir dans certaines situations une précieuse protection contre la discrimination. Les accords de décentralisation en vertu desquels des compétences sont transférées à l'Écosse, à l'Irlande du Nord et au Pays de Galles comportent également des mesures supplémentaires de protection, en matière de droits de l'homme notamment.

La première législation antidiscrimination a été introduite au Royaume-Uni dans les années soixante et concernait la race/l'origine ethnique. Elle comprend essentiellement des dispositions relevant du droit civil, mais elle vise aussi certains délits pénaux tels que l'incitation à la haine raciale et religieuse. Un cadre législatif distinct a été introduit en Irlande du Nord pour des raisons politiques et constitutionnelles.

La loi de 2010 sur l'égalité interdit désormais la discrimination directe et indirecte, le harcèlement, les rétorsions et l'injonction de pratiquer une discrimination se fondant sur la race (définie comme l'origine ethnique, la couleur de peau, l'origine nationale ou la nationalité), le sexe (y compris au titre du mariage ou partenariat civil, d'une grossesse ou d'un changement de sexe), le handicap, l'orientation sexuelle, la religion, les convictions et l'âge dans le domaine de l'emploi et du travail, et (à l'exception des cas de discrimination fondée sur le statut de personne mariée ou de partenaire civil ou, pour ce qui concerne le logement, sur l'âge) dans les domaines de l'accès aux biens et aux services, de l'enseignement, du logement et de l'exercice de fonctions publiques. (L'interdiction de discrimination fondée sur l'âge est assortie d'un nombre important d'exceptions et elle ne protège pas, en outre, les moins de 18 ans en dehors du domaine de l'emploi largement défini). Des obligations d'aménagement raisonnable sont imposées en faveur des personnes handicapées. Les dispositions de la loi de 2010 sur l'égalité sont globalement conformes aux exigences des directives de 2000, bien que son champ d'application soit sensiblement plus étendu. La législation de l'Irlande du Nord contient des définitions très similaires, mais ne comporte pas de disposition unique en matière d'égalité; la discrimination fondée sur l'âge y est seulement réglementée en ce qui concerne le champ d'application matériel de la directive 2000/78.

3. Principes généraux et définitions

Il n'existe aucune définition légale ni jurisprudentielle des notions de «race» ou d'«origine raciale»: la législation interdit toute discrimination fondée sur des «motifs raciaux», lesquels sont définis comme «la couleur de peau, la nationalité (y compris la citoyenneté), ainsi que l'origine ethnique et l'origine nationale» (article 9 de la loi de 2010 sur l'égalité). La signification des termes «origine ethnique» et «groupe ethnique» a été clarifiée par les juridictions britanniques au moyen de précédents. En 2015, un tribunal du travail a admis que le terme «caste» pouvait relever de la définition des origines ethniques telles que

définies dans la loi sur l'égalité de 2010.⁹ La cour d'appel du travail n'a pas estimé que la caste constitue une forme de race aux fins de la loi de 2010, mais que certains aspects de la caste recoupent des aspects de la race de sorte que les faits d'une affaire particulière en rapport avec la caste peuvent être visés par ladite loi.

Ni la loi de 2010 sur l'égalité ni les dispositions analogues du droit nord-irlandais ne définissent précisément les concepts de «religion», «convictions», «âge» ou «orientation sexuelle». Selon l'article 10 de la loi de 2010 sur l'égalité, le terme «religion» couvre n'importe quelle religion et la référence à la religion couvre également l'absence de religion. Toujours selon cet article, le terme «convictions» vise toute conviction religieuse ou philosophique et toute référence aux convictions couvre également le fait de ne pas avoir de conviction. L'article 12 définit l'«orientation sexuelle» comme «un attrait sexuel pour: a) des personnes du même sexe, b) des personnes du sexe opposé ou c) des personnes du même sexe et du sexe opposé».

Aux fins de la loi de 2010 sur l'égalité (qui protège les personnes handicapées contre la discrimination liée au handicap), une personne est réputée handicapée lorsqu'elle présente une altération physique ou mentale affectant de manière substantielle et durable son aptitude à exécuter les activités courantes de la vie quotidienne. Pour «affecter de manière substantielle et durable», le handicap doit avoir une incidence substantielle sur la façon dont la personne accomplit ses activités quotidiennes et durer au moins 12 mois, ou pendant une période allant probablement durer 12 mois au moins, voire pendant la vie entière de la personne concernée. En 2015, dans l'affaire *Bickerstaff c. Butcher*,¹⁰ le tribunal s'est référé à l'arrêt de la CJUE dans l'affaire *Kaltoft*¹¹ en déclarant qu'une partie requérante obèse était handicapée, rejetant l'argument avancé pour M. Butcher, à savoir que l'état d'obésité était auto-infligé.

Il existe une définition cohérente de la discrimination directe qui s'applique à l'ensemble de la législation britannique (article 13 de la loi de 2010 sur l'égalité): «une personne (A) exerce une discrimination contre une autre personne (B) lorsque, en raison d'une caractéristique protégée, A traite B de manière moins favorable que A ne traite ou ne traiterait d'autres personnes». L'article 13, paragraphe 2, dispose en outre que si le motif de protection est l'âge, A n'exerce pas de discrimination envers B si elle peut prouver que la manière dont elle traite B est un moyen proportionné d'atteindre un but légitime, tandis que l'article 13, paragraphe 3, prévoit que si le motif de protection est le handicap et que B n'est pas une personne handicapée, A n'exerce pas de discrimination envers B pour le simple motif que A traite ou traiterait des personnes handicapées plus favorablement que A ne traite B. L'âge est le seul motif susceptible de justifier une discrimination directe. L'article 23 de la loi de 2010 sur l'égalité prévoit que lorsque des cas sont comparés aux fins d'établir l'existence d'une discrimination, il ne peut y avoir aucune différence matérielle entre les circonstances afférentes à chacun des cas. De manière plus spécifique, lorsqu'un handicap est en cause, la loi précise que les circonstances afférentes à un cas incluent les aptitudes de la personne. La loi de 2010 sur l'égalité considère aussi la ségrégation fondée sur la race comme une forme de discrimination directe (article 13, paragraphe 5). La situation en Irlande du Nord est globalement analogue, si ce n'est que la définition de la discrimination directe fait référence à tout traitement moins favorable «fondé sur» la caractéristique protégée, plutôt que «en raison de» la caractéristique protégée.

La loi de 2010 sur l'égalité (article 19) prévoit qu'une personne (A) exerce une discrimination envers une autre personne (B) lorsqu'elle applique à B une disposition, un critère ou une pratique discriminatoire au regard de la caractéristique protégée de B, l'article 19, paragraphe 2, ajoutant qu'une disposition, un critère ou une pratique est

⁹ *Chandhok c. Tirkey*, cour d'appel du travail, UKEAT/0190/14/KN/, 19 décembre 2014; tribunal du travail, affaire n° 3400174/2013, juillet 2015.

¹⁰ Irlande du Nord, *Fair Employment Tribunal* (tribunal de l'emploi équitable), [2015] 92/14 FET du 9 décembre 2014.

¹¹ C-354/13.

discriminatoire au regard d'une caractéristique protégée de B si (a) A l'applique ou l'appliquerait également à des personnes ne présentant pas la même caractéristique que B, (b) cela soumet ou soumettrait les personnes présentant la même caractéristique que B à un désavantage particulier par rapport à d'autres personnes ne présentant pas la même caractéristique que B, (c) cela soumet ou soumettrait B à ce désavantage, et (d) A ne peut prouver qu'il s'agit d'un moyen proportionné de réaliser un objectif légitime. En Grande-Bretagne, l'interdiction visant toute discrimination indirecte s'applique à l'ensemble des motifs de protection, tandis que l'Irlande du Nord ne connaît pas encore d'interdiction de discrimination indirecte en rapport avec le handicap. La définition de la discrimination indirecte en Irlande du Nord est matériellement identique à celle figurant dans la loi de 2010 sur l'égalité, si ce n'est que la définition initialement utilisée dans la législation du Royaume-Uni relative à la discrimination fondée sur la race et le sexe continue de s'appliquer lorsque la discrimination en cause ne relève pas du champ d'application des directives de 2000.

Dans l'affaire *Home Office (UK Border Agency) c. Essop and others*,¹² la cour d'appel a déclaré qu'il ne suffisait pas pour établir l'existence d'une discrimination indirecte que les requérants fassent état d'une disparité statistique dans l'application d'une disposition, d'un critère ou d'une pratique: il faut qu'ils mettent en évidence la raison pour laquelle la disposition, le critère ou la pratique en question les défavorise. Il en résulte que la discrimination indirecte va s'avérer plus difficile à faire valoir, étant donné que les requérants doivent désormais non seulement démontrer qu'un groupe a été défavorisé par une disposition, un critère ou une pratique, mais également trouver une explication à ce désavantage.

S'agissant du handicap, la loi de 2010 sur l'égalité interdit toute discrimination directe ou indirecte ainsi que toute discrimination injustifiée «découlant du handicap» (article 15) et du fait de n'avoir pas procédé aux ajustements nécessaires (articles 20 et 21). En 2015, dans l'affaire *Griffiths c. Secretary of State for Work and Pensions*,¹³ la cour d'appel a confirmé que l'obligation d'aménagement raisonnable naît lorsque des éléments attestent que les modalités en place défavorisent de façon substantielle la personne handicapée en raison de son invalidité.

Selon l'article 15, une discrimination fondée sur le handicap se produit lorsqu'une personne A traite moins favorablement une personne B pour une raison découlant du handicap de B, et que A ne peut prouver que le traitement en question constitue un moyen proportionné d'atteindre un but légitime, sauf si A prouve qu'il/elle ne savait pas et n'aurait raisonnablement pas pu savoir que B souffrait du handicap en question. En Irlande du Nord, la loi relative à la discrimination fondée sur le handicap (*Disability Discrimination Act* - DDA) n'interdit pas la discrimination indirecte, mais elle interdit (article 3A) trois concepts de discrimination différents, à savoir:

- d) la discrimination fondée sur un motif lié au handicap d'une personne handicapée, qui peut faire l'objet d'une justification objective;
- e) la discrimination directe fondée sur le handicap dans le domaine de l'emploi et du travail, à savoir lorsqu'une personne est traitée différemment parce qu'elle est handicapée et non pour une raison connexe, qui ne peut faire l'objet d'une justification en droit; et
- f) la discrimination découlant d'un non-respect de l'obligation de procéder à des adaptations raisonnables, qui ne peut trouver de justification dans le domaine de l'emploi et du travail, mais qui peut être justifiée dans le domaine des biens et des services.

Parce qu'elle interdit tout traitement moins favorable «en raison de» l'un des motifs protégés, la loi de 2010 sur l'égalité est considérée comme visant toutes les discriminations

¹² Cour d'appel, [2015] EWCA Civ 609, 22 juin 2015.

¹³ Cour d'appel, [2015] EWCA Civ 1265, 10 décembre 2015.

fondées sur des caractéristiques présumées ou perçues. En Irlande du Nord, une interprétation judiciaire s'impose pour obtenir le même résultat par rapport à l'âge et au handicap, dès lors que la législation pertinente fait référence dans chaque cas à une discrimination fondée sur l'âge ou le handicap de la personne discriminée.

Selon la loi de 2010 sur l'égalité, un harcèlement se produit (article 26, paragraphe 1) (a) lorsque la personne A se livre à un comportement non désiré lié à une caractéristique pertinente protégée et (b) que ce comportement a pour objet ou pour effet: i) de porter atteinte à la dignité de B, ou ii) de créer un environnement intimidant, hostile, dégradant, humiliant ou offensant pour B. L'article 26 prévoit en outre en son paragraphe 2 que A harcèle également B: a) lorsque A se livre à un comportement non désiré à caractère sexuel et b) que ce comportement a le même objet ou effet que ceux visés au paragraphe 1 b). Le paragraphe 3 du même article définit explicitement et interdit un traitement moins favorable par suite de la soumission ou du rejet du comportement non désiré à caractère sexuel ou lié à un changement de sexe. La loi relative à l'égalité impose un test partiellement objectif quant à la question de savoir si un comportement n'ayant pas pour dessein de porter atteinte à la dignité d'autrui peut néanmoins être considéré comme ayant cet effet. En Irlande du Nord, une définition commune du harcèlement – globalement similaire à celle figurant dans la loi de 2010 sur l'égalité – a été incorporée dans la législation qui couvre le champ d'application des directives de 2000 pour tous les motifs d'égalité.

Les rétorsions sont interdites pour tous les motifs d'égalité en Grande-Bretagne et en Irlande du Nord, mais leur définition diffère entre la législation s'appliquant au Royaume-Uni et celle qui s'applique en Irlande du Nord. Dans le premier cas, la loi de 2010 sur l'égalité prévoit en son article 27, paragraphe 1, qu'une personne (A) exerce des rétorsions envers une autre personne (B) si A préjudicie B parce que – (a) B a effectué un acte bénéficiant d'une protection, ou (b) A croit que B a effectué, ou pourrait effectuer, un acte bénéficiant d'une protection. Selon l'article 27, paragraphe 2, il convient d'entendre par «acte bénéficiant d'une protection» (a) le fait d'engager une procédure au titre de la dite loi; (b) le fait de fournir des preuves ou des informations dans le cadre d'une procédure engagée au titre de la dite loi; (c) le fait de poser tout autre acte aux fins de la dite loi ou en rapport avec elle; (d) le fait d'alléguer (expressément ou non) que A ou une autre personne a enfreint la dite loi. L'approche adoptée en Irlande du Nord est similaire, si ce n'est que la personne alléguant des rétorsions doit prouver l'existence d'un traitement *moins favorable* découlant de l'accomplissement d'un acte bénéficiant d'une protection – une formulation qui n'a pas manqué de poser parfois de vives difficultés. En Grande-Bretagne comme en Irlande du Nord, la protection contre les rétorsions n'est pas d'application si l'allégation de la victime s'avère à *la fois* non conforme à la vérité et faite de mauvaise foi.

L'article 111 de la loi de 2010 sur l'égalité dispose en son premier paragraphe qu'une personne (A) ne peut pas ordonner, amener ou inciter une autre personne (B) à agir à l'encontre d'une tierce personne (C) d'une quelconque manière contrevenant à la dite loi. En Irlande du Nord, les injonctions de discriminer ainsi que les pressions ou incitations à discriminer sont explicitement interdites pour tous les motifs de protection, hormis l'orientation sexuelle, mais seule la victime d'une discrimination fondée sur les convictions religieuses/politiques ou sur l'âge peut réclamer des mesures de répression. Dans les autres cas, l'*Equality Commission* est la seule instance habilitée à agir. Ceci étant dit, il est notoire qu'une personne ayant reçu pour instruction de pratiquer une discrimination envers une autre personne peut demander des mesures répressives à l'encontre de la personne dont émanent les instructions lorsque (comme dans l'affaire *Weathersfield Ltd. c. Sargent*, où ces instructions émanaient d'un employeur)¹⁴ l'instruction reçue revient à imposer un préjudice à la personne à laquelle elle s'adresse.

¹⁴ [1999] IRLR 94.

À l'heure actuelle, les annonces discriminatoires ne sont explicitement interdites qu'en Irlande du Nord et à la seule condition qu'elles concernent la race, la religion/les convictions ou le handicap. Seule la Commission pour l'égalité pour l'Irlande du Nord (*Equality Commission for Northern Ireland* ou ECNI) est habilitée à engager une procédure en vue de demander l'application de mesures répressives à l'encontre de ce type d'annonces. Les particuliers ne peuvent, où que ce soit au Royaume-Uni, intenter d'action en justice contre des annonces discriminatoires qu'à condition d'avoir effectivement fait l'objet d'un traitement moins favorable fondé sur un motif prohibé (par exemple lorsque ces personnes sont candidates à un poste et que leur candidature est rejetée pour le motif en question). C'est sans doute sur cette base que le gouvernement britannique a indiqué qu'il considère que le droit du Royaume-Uni est conforme à l'arrêt *Feryn* et qu'il n'a pas saisi l'occasion de la loi sur l'égalité pour étendre la législation dans ce domaine, préférant supprimer les interdictions (dont le non-respect est sanctionné par l'*Equality and Human Rights Commission* ou EHRC) telles qu'elle étaient précédemment appliquées.

La loi sur l'égalité prévoit une exception pour exigences professionnelles¹⁵ ainsi que des exceptions plus larges applicables aux organisations religieuses. En Irlande du Nord, la loi relative à la discrimination fondée sur le handicap ne prévoit pas d'exception pour exigences professionnelles essentielles et déterminantes – des exigences professionnelles essentielles ou des exceptions spécifiques étant prévues en rapport avec d'autres caractéristiques protégées. La loi sur l'égalité (Grande-Bretagne) et la réglementation en matière d'âge (Irlande du Nord) maintiennent des différences d'âge en ce qui concerne les systèmes de salaire minimum ainsi que des écarts de rémunération liés à l'ancienneté, mais «l'âge légal de la retraite par défaut», fixé à 65 ans, a été supprimé en avril 2011. Les divers instruments législatifs contiennent plusieurs exceptions à des fins de sécurité nationale et d'ordre public. Ainsi les forces armées sont-elles largement exemptées. Il existe des exceptions pour les actions autorisées par d'autres lois en dehors du champ d'application des directives 2000.

4. Champ d'application matériel

La législation antidiscrimination du Royaume-Uni s'applique à tous les secteurs de l'emploi, qu'ils soient publics ou privés. L'arrêt prononcé en 2011 par la Cour suprême dans l'affaire *Jivraj c. Hashwani* [2011] UKSC 40, a jeté un sérieux doute quant à la mesure dans laquelle la loi sur l'égalité couvre l'accès à l'emploi indépendant – ce qui pourrait bien signifier que la législation nationale ne respecte pas les directives à cet égard.

Dans l'affaire *EAD Solicitors LLP and others c. Abrams*,¹⁶ la cour d'appel du travail a confirmé que, dans la loi sur l'égalité, le terme «personne» doit être interprété comme incluant les personnes morales. Elle a confirmé que rien dans la loi sur l'égalité n'empêche une entreprise d'introduire ce type de recours.

La discrimination en matière de fourniture de biens et de services, de logement, d'éducation, de protection sociale, y compris la sécurité sociale et les soins de santé, d'avantages sociaux et d'exercice de fonctions publiques est également interdite désormais en Grande-Bretagne comme en Irlande du Nord pour l'ensemble des motifs d'égalité hormis l'âge. Ceci étant dit, la loi britannique ne contient pas de définition précise de l'avantage social et on ne saura si la législation existante transpose correctement le droit de l'UE que lorsqu'une jurisprudence se sera développée tant au Royaume-Uni qu'au niveau de la Cour de justice de l'UE. La loi de 2010 sur l'égalité prévoit des dispositions qui étendent, en Grande-Bretagne, la protection contre la discrimination fondée sur l'âge à la fourniture de biens et de services, à la santé, aux avantages sociaux et à l'exercice de fonctions publiques. Elles ne s'appliquent cependant pas aux jeunes de moins de 18 ans.

¹⁵ Les qualificatifs «essentielle et déterminante» utilisés à l'article 4, paragraphe 1, de la directive 2000/78 ont été supprimés dans la loi de 2010 sur l'égalité car jugés superflus – l'hypothèse étant qu'une exigence ne peut être proportionnée si elle n'est pas essentielle ou déterminante.

¹⁶ UKEAT/0054/15/DM, cour d'appel du travail, 5 juin 2015.

5. Mise en application de la loi

Les personnes estimant avoir été victimes de discrimination peuvent engager une action en justice, les affaires impliquant des allégations de discrimination liée à l'emploi (secteur public et secteur privé) étant portées devant les juridictions du travail (tribunal du travail ou tribunal de l'emploi équitable en Irlande du Nord) et les plaintes relatives à toute autre discrimination illégale (de la part d'organes du secteur public et du secteur privé) étant portées devant les juridictions civiles. Des frais de justice pouvant atteindre 1 100 £ ont été instaurés en juillet 2013 – ce qui entraîné une diminution de 70 à 80 % environ du nombre d'affaires dont le tribunal a été saisi (mais n'a nullement modifié le taux de réussite des recours). Toutes les tentatives menées à ce jour sur le plan juridique pour contester l'introduction de ces frais, invoquant notamment leur incompatibilité avec le principe de l'UE en matière de sanction efficace, ont échoué.

La principale voie de recours offerte est celle des dommages et intérêts, lesquels sont calculés de la même manière que lors de poursuites civiles pour acte délictueux. Des recours en injonction sont également possibles. Les indemnisations allouées varient selon les motifs et le contexte. En 2014-2015 (derniers chiffres disponibles), les montants moyens et maxima attribués par les juridictions du travail ont varié de 7 459 € (6 000 £) à 100 422 € (80 783 £) dans des affaires liées à l'orientation sexuelle; 1 343 € (1 080 £) pour le montant moyen et le montant maximum dans des affaires liées à la religion/aux convictions (les chiffres étaient plus élevés les années précédentes: 4 430 € (3 191 £) et 38 400 € (27 659 £) en 2013-2014, par exemple); de 9 323 € (7 500 £) à 35 339 € (28 428 £) dans des affaires liées à l'âge; de 9 976 € (8 025 £) à 260 045 € (209 188 £) dans des affaires liées à la race; de 15 539 € (12 500 £) à 692 465 € (557 039 £) dans des affaires liées à une discrimination fondée sur le sexe; et de 10 748 € (8 646 £) à 298 240 € (239 913 £) dans des affaires liées au handicap. On ne dispose d'aucun chiffre en ce qui concerne les tribunaux de comté (cours du shérif en Écosse) qui appliquent les dispositions légales autres que celles liées à l'emploi. Il existe également diverses procédures de conciliation et d'arbitrage. Depuis l'instauration en juillet 2013 de frais importants pour introduire une affaire en justice (1 100 £ s'il s'agit d'une affaire de discrimination), le nombre de recours dont les tribunaux ont été saisis (toutes plaintes confondues) a chuté: les derniers chiffres disponibles (juin 2015) suggèrent une baisse de 67 % dans les cas uniques, et de 69 % dans les cas multiples.

Les règles habituelles de procédure civile respectivement appliquées dans les trois juridictions du Royaume-Uni ne prévoient aucune restriction à l'égard d'une organisation quelconque apportant son appui à des plaignants dans le cadre d'affaires de discrimination. Certains syndicats, les commissions pour l'égalité et certaines ONG spécialisées emploient des juristes qualifiés et peuvent donc offrir – et offrent – un soutien total aux parties plaignantes. Ces organisations ne sont cependant pas habilitées, de manière générale, à introduire une plainte, si ce n'est que les commissions pour l'égalité peuvent tenter une action lorsqu'il s'agit d'injonctions de discriminer ou d'annonces entachées d'illégalité. Si les affaires de discrimination sont assez courantes et font l'objet d'une large publicité, il arrive néanmoins que les plaignants manquent d'une assistance, d'une représentation et de conseils spécialisés en la matière, sans compter que des frais de justice importants sont réclamés dans les affaires de discrimination ou autres affaires relatives à des questions d'emploi (plus de 1 300 €).

Les sanctions sont, de façon générale, raisonnablement dissuasives, même si l'incapacité des juridictions à ordonner l'adoption par les organisations coupables de discrimination de mesures correctives plus larges pose un réel problème.

Toute la législation pertinente du Royaume-Uni prévoit le renversement de la charge de la preuve pour chacun des motifs de discrimination et l'ensemble des activités considérées comme relevant du champ d'application des directives.

6. Organisme de promotion de l'égalité de traitement

Une Commission unique pour l'égalité et les droits de l'homme (*Equality and Human Rights Commission* ou EHRC) a été instituée en Grande-Bretagne: elle vient en aide aux plaignants dans le cadre d'actions en justice; elle dispose de pouvoirs d'application propres; et elle est habilitée à promouvoir et encourager le respect de l'égalité des chances au moyen d'études, de commentaires publics et d'autres méthodes. Une Commission pour l'égalité distincte est en place en Irlande du Nord: ses fonctions sont similaires à celles de l'EHRC (et ses compétences parfois plus larges en matière d'action positive). Une Commission pour les droits de l'homme existe également en Écosse, avec laquelle l'EHRC partage son mandat.

7. Points essentiels

Le problème le plus urgent concerne le niveau élevé des frais appliqués par les juridictions du travail et leur incidence sur l'accès à la justice. La large marge laissée aux établissements scolaires en termes de discrimination fondée sur la religion à l'égard des enseignants est une autre source de préoccupation. Enfin, une certaine inquiétude persiste sur le point de savoir si la législation du Royaume-Uni assure une protection adéquate aux travailleurs indépendants.

En ce qui concerne les bonnes pratiques, les obligations positives imposées aux autorités publiques en vertu du devoir d'égalité incombant au secteur public (*Public Sector Equality Duty* ou PSED) visé à l'article 149 de la loi de 2010 sur l'égalité pour ce qui concerne la Grande-Bretagne et à l'article 75 de la loi de 1998 sur l'Irlande du Nord pour ce qui concerne celle-ci, sont sans doute l'aspect le plus intéressant du droit antidiscrimination en vigueur au Royaume-Uni.

ZUSAMMENFASSUNG

1. Einleitung

Das Vereinigte Königreich besteht aus England, Wales, Schottland und Nordirland, wobei zur gemeinsamen Benennung von England, Wales, Schottland auch der Begriff Großbritannien verwendet wird. Das Vereinigte Königreich ist eine parlamentarische Demokratie, sein Kerngrundsatz ist die Souveränität des Parlaments. Es hat weder eine geschriebene Verfassung noch eine Grundrechtecharta mit Verfassungsrang, jedoch eine lange Reihe verfassungsgebender Traditionen, die als ungeschriebene Verfassung bezeichnet werden. Historisch waren die vier wichtigsten ethnischen Gruppen die Engländer, Waliser, Schotten und Iren. Das Vereinigte Königreich ist jedoch von jeher ein Einwanderungsland und hat sich durch den umfassenden und vielfältigen Zuzug ethnischer Gruppen seit den späten 1940er Jahren und dann durch den ständigen Zustrom von Arbeitskräften aus EU- und Nicht-EU-Staaten in ein multikulturelles Land verwandelt.

Einzelne ethnische Minderheiten, darunter die einheimische Gemeinschaft der Travellers, sind weiterhin überproportional häufig von Arbeitslosigkeit, sozialer Ausgrenzung und Armut betroffen. Medienkampagnen gegen Asylsuchende und Fahrende bzw. Zigeuner, einschließlich Roma, haben die Ablehnung dieser beiden Gruppen weiter verstärkt. Die Ereignisse vom 11. September 2001 und die Selbstmordanschläge in London vom Juli 2005 hatten ähnliche Folgen für die britischen Muslime.

Es gibt Vorurteile gegen behinderte Menschen und LGBT-Personen und auch Altersdiskriminierung ist nicht unbekannt. In letzter Zeit hat die gesellschaftliche Akzeptanz jedoch zugenommen und in Politik und Medien ist das Recht von Schwulen und Lesben auf völlige Gleichbehandlung unumstritten. 2004 wurden im Vereinigten Königreich umfassende Rechtsvorschriften über Lebenspartnerschaften eingeführt, die es gleichgeschlechtlichen Paaren erlauben, ihre Partnerschaft einzutragen, und diesen Partnerschaften dieselben Rechte gewähren wie verschiedengeschlechtlichen verheirateten Paaren. Das Eheschließungsgesetz (Gleichgeschlechtliche Paare) von 2013 stellte gleichgeschlechtliche Paaren ab März 2014 in England und Wales in Bezug auf die bürgerliche Ehe verschiedengeschlechtlichen Paaren gleich. Ein ähnliches Gesetz wurde im Februar 2014 in Schottland eingeführt, die Regierung Nordirlands hat jedoch bisher derartige Rechtsvorschriften nicht eingeführt und hat dies auch nicht vor.

In Nordirland verursachen die Spannungen zwischen Unionisten, d. h. der protestantischen Mehrheit, und Nationalisten, d. h. der katholischen Minderheit, weiterhin eine politische Spaltung, wenn diese heute auch weniger ausgeprägt ist als während der „Unruhen“. Eine starke Polarisierung gibt es auch in Teilen von Schottland.

Das Recht des Vereinigten Königreichs bietet traditionell wenig Spielraum für die Vorzugsbehandlung benachteiligter Gruppen. Seit 2000 haben öffentliche Stellen jedoch eine Reihe positiver Verpflichtungen zur Förderung der Chancengleichheit ungeachtet von Rasse oder ethnischer Zugehörigkeit, Behinderung und Geschlecht. Ähnliche Verpflichtungen in Nordirland betreffen alle sechs Diskriminierungsgründe (Geschlecht, Rasse, Behinderung, sexuelle Ausrichtung, Religion oder Weltanschauung und Alter). In Nordirland wurden für die einzelnen Diskriminierungsgründe auf nationaler, regionaler und kommunaler Ebene positive Förderstrategien entwickelt und private Arbeitgeber sind verpflichtet, die Chancengleichheit zu überwachen und gegebenenfalls die Unterrepräsentation einer der beiden Hauptgruppen (Katholiken und Protestanten) auszugleichen.

Das Gleichstellungsgesetz 2010 verbesserte die Möglichkeiten von Arbeitgebern und anderen Akteuren, die Gleichstellung mit positiven Maßnahmen zu fördern und enthält für alle öffentlichen Stellen in Großbritannien ein einheitliches, bereichsübergreifendes Gleichbehandlungsgebot. Die Kürzung der staatlichen Finanzierung und die geplante

Änderung der Regeln zur richterlichen Kontrolle werfen jedoch die Frage auf, ob das Gleichbehandlungsgebot für die öffentliche Hand weiterhin ihre Funktion erfüllt.

2. Wichtigste Gesetze

Da das Vereinigte Königreich keine schriftliche Verfassung hat, wird das Antidiskriminierungsrecht vorwiegend gesetzgeberisch geregelt. Das Königreich hat alle wichtigen internationalen Menschenrechtsabkommen und die Menschenrechtsinstrumente des Europarats ratifiziert, einschließlich der EMRK, der Charta der Regional- oder Minderheitensprachen und das Rahmenübereinkommen zum Schutz nationaler Minderheiten. Internationale Übereinkommen sind im Recht des Vereinigten Königreichs nicht direkt anwendbar, sondern müssen durch ein Gesetz in nationales Recht aufgenommen werden. Allerdings werden sie unter bestimmten Umständen bei der Auslegung von Rechtsvorschriften herangezogen. Das Menschenrechtsgesetz 1998, mit dem die EMRK in nationales Recht umgesetzt wurde, bietet in bestimmten Fällen wertvollen Schutz vor Diskriminierung. Die Abkommen, mit denen Befugnisse an Schottland, Nordirland und Wales übertragen wurden, enthalten ebenfalls besondere Sicherheitsmechanismen, insbesondere zum Schutz der Menschenrechte.

Rechtsvorschriften gegen Diskriminierung wurden im Vereinigten Königreich erstmals in den 1960ern für den Diskriminierungsgrund Rasse bzw. ethnische Zugehörigkeit eingeführt. Sie bestanden vorwiegend aus zivilrechtlichen Bestimmungen, es gibt jedoch auch Straftatbestände, wie die Anstiftung zu rassistischem und religiösem Hass. Aus politischen und verfassungsrechtlichen Gründen wurde in Nordirland ein eigener Rechtsrahmen eingeführt.

Das Gleichstellungsgesetz 2010 verbietet unmittelbare und mittelbare Diskriminierung, Belästigung, Viktimisierung und Anweisung zur Diskriminierung aufgrund von Rasse (definiert als ethnische Zugehörigkeit, Hautfarbe, nationale Herkunft oder Nationalität), Geschlecht (einschließlich des Personenstands bzw. Bestehen einer eingetragenen Partnerschaft, Schwangerschaft und Geschlechtsumwandlung), Behinderung, sexuelle Ausrichtung, Religion oder Weltanschauung und Alter in den Bereichen Beschäftigung und (mit Ausnahme von Ehestand oder eingetragener Partnerschaft oder im Fall von Wohnraum, Alter) Zugang zu Gütern und Dienstleistungen, Bildung, Wohnraum und der Ausübung öffentlicher Ämter. (Vom Verbot der Altersdiskriminierung gibt es zahlreiche Ausnahmen, außerdem schützt es Personen unter 18 Jahren nur im allgemein definierten Bereich Beschäftigung). Es gibt Verpflichtungen zu angemessenen Vorkehrungen für Menschen mit Behinderungen. Das Gleichstellungsgesetz 2010 erfüllt zumindest in groben Zügen die Vorgaben der Richtlinien aus dem Jahr 2000, sein sachlicher Anwendungsbereich ist jedoch wesentlich weiter. Die Gesetze in Nordirland nutzen eine im Wesentlichen ähnliche Definition von Diskriminierung, es gibt jedoch kein einheitliches Gleichbehandlungsgebot und Altersdiskriminierung ist nur im sachlichen Anwendungsbereich der Richtlinie 2000/78 verboten.

3. Wichtigste Grundsätze und Begriffe

Weder in einem Gesetz noch in der Rechtsprechung gibt es eine Definition von „Rasse“ oder „rassischer Herkunft“: Das Gesetz verbietet Diskriminierung aus „rassischen Gründen“, zu denen Hautfarbe, Nationalität (einschließlich Staatsangehörigkeit) und ethnische und nationale Herkunft gezählt wird (§ 9 Gleichstellungsgesetz 2010). Die Bedeutung von „ethnischer Herkunft“ und „ethnischer Gruppe“ wurde durch die britischen Gerichte präjudiziert. 2015 akzeptierte ein Employment Appeal Tribunal, dass „Kaste“ unter den Begriff der „ethnischen Herkunft“ im Sinne des Gleichstellungsgesetzes 2010 fallen könne.¹⁷ Das Gericht entschied nicht, dass Kaste eine Form von Rasse im Sinne des Gleichstellungsgesetzes 2010 sei, sondern dass gewisse Aspekte von Kaste sich mit

¹⁷ *Chandhok v Turkey*, Employment Appeal Tribunal, UKEAT/0190/14/KN/, 19. Dezember 2014; Employment Tribunal, Rechtssache 3400174/2013, Juli 2015.

gewissen Aspekten von Rasse überschneiden und der Sachverhalt eines konkreten, kastenbezogenen Falls somit unter das Gesetz fallen könne.

„Religion“, „Weltanschauung“, „Alter“ oder „sexuelle Ausrichtung“ sind weder im Gleichstellungsgesetz von 2010 noch in den entsprechenden Bestimmungen in Nordirland ausführlich definiert. Paragraph 10 des Gleichstellungsgesetzes 2010 definiert: „Religion meint jede Religion und ein Verweis auf Religion schließt einen Verweis auf das Fehlen von Religion ein“ und „Weltanschauung meint jede religiöse oder philosophische Weltanschauung und ein Verweis auf Weltanschauung schließt einen Verweis auf das Fehlen von Weltanschauung ein“. „Sexuelle Ausrichtung“ wird in § 12 definiert als „sexuelle Ausrichtung einer Person hin zu – (a) Personen desselben Geschlechts, (b) Personen des anderen Geschlechts oder (c) Personen beiderlei Geschlechts“.

Eine Person gilt als behindert im Sinne des Gleichstellungsgesetzes 2010 (das Gesetz schützt nur Menschen mit Behinderungen vor Behindertendiskriminierung), wenn er/sie „eine körperliche oder geistige Behinderung hat ... [die] seine oder ihre Fähigkeit zur Bewältigung des Alltags wesentlich und langfristig beeinträchtigt.“ Eine Behinderung gilt nur als „wesentliche und langfristige Beeinträchtigung“, wenn sie den Alltag der Person wesentlich prägt und mindestens seit 12 Monaten besteht oder vermutlich für 12 Monate oder für den Rest des Lebens bestehen wird. In *Bickerstaff v Butcher*¹⁸ bezog sich das nordirische Fair Employment Tribunal 2015 auf das Urteil des EuGH in der Rechtssache *Kaltoft*¹⁹ und entschied, dass ein adipöser Kläger behindert sei; das von Herrn Butcher vorgebrachte Argument, die Situation sei selbstverschuldet, wurde zurückgewiesen.

Unmittelbare Diskriminierung wird in allen britischen Gesetze einheitlich definiert (§ 13 Gleichstellungsgesetz 2010): „Eine Person (A) diskriminiert eine andere (B), wenn sie A wegen einer geschützten Eigenschaft weniger günstig behandelt als A andere behandelt oder behandeln würde“. In § 13(2) wird weiter ausgeführt: „Wenn die geschützte Eigenschaft das Alter ist, diskriminiert A B nicht, wenn A zeigen kann, dass die Ungleichbehandlung von B ein angemessenes Mittel zur Erreichung eines rechtmäßigen Zwecks darstellt“, und in § 13(3): „Wenn die geschützte Eigenschaft eine Behinderung ist, und B keine Behinderung hat, diskriminiert A B nicht, nur weil A eine behinderte Person günstiger behandelt oder behandeln würde als B.“ Nur in Bezug auf Alter kann unmittelbare Diskriminierung rechtmäßig sein. Nach § 23 des Gleichstellungsgesetzes 2010 gilt: „Bei einem Vergleich von Fällen zu diesen Zwecken [Nachweis von Diskriminierung] müssen die Umstände der jeweiligen Fälle im Wesentlichen gleich sein.“ Insbesondere, wenn es um Behindertendiskriminierung geht: „Zu den Umständen eines Falls gehören auch die persönlichen Fähigkeiten.“ Nach dem Gleichstellungsgesetz 2010 ist auch Segregation aufgrund der Rasse eine Form von unmittelbarer Diskriminierung (§ 13(5)). Die Rechtslage in Nordirland ist im Wesentlichen gleich, obwohl die Definition von unmittelbarer Diskriminierung eine weniger günstige Behandlung „aufgrund von“ anstelle von „wegen“ einer geschützten Eigenschaft verbietet.

Das Gleichstellungsgesetz 2010 besagt (§ 19): „Eine Person (A) diskriminiert eine andere (B), wenn A auf B Vorschriften, Kriterien oder Verfahren anwendet, die in Bezug auf eine relevante geschützte Eigenschaft von B diskriminierend sind“, und § 19 Absatz 2 fährt fort: „Vorschriften, Kriterien oder Verfahren sind in Bezug auf eine relevante geschützte Eigenschaft von B diskriminierend, wenn (a) A sie auf Personen ohne die Eigenschaft von B anwenden würde, (b) sie Personen mit derselben Eigenschaft wie B gegenüber Personen ohne die Eigenschaft von B benachteiligt oder benachteiligen würden, (c) B benachteiligt oder benachteiligen würden und (d) A nicht nachweisen kann, dass sie ein angemessenes Mittel zum Erreichen eines rechtmäßigen Zwecks darstellen. Das Verbot der mittelbaren Diskriminierung gilt in Großbritannien für alle geschützten Gründe, in Nordirland ist mittelbare Diskriminierung in Bezug auf Diskriminierung dagegen noch nicht verboten. Die Definition von mittelbarer Diskriminierung in Nordirland entspricht inhaltlich der des

¹⁸ Fair Employment Tribunal [2015] 92/14 FET, 9. Dezember 2014.

¹⁹ C-354/13.

Gleichstellungsgesetzes 2010, mit Ausnahme der sachlichen Anwendungsbereiche, die nicht unter die Richtlinien von 2000 fallen. In diesen Bereichen gilt weiterhin die Definition von mittelbarer Diskriminierung gemäß den Rechtsvorschriften des Vereinigten Königreichs gegen Diskriminierung aufgrund von Rasse und Geschlecht.

In *Home Office (UK Border Agency) v Essop and others*²⁰ entschied der Court of Appeal, dass es nicht ausreicht, seitens der beschwerdeführenden Partei statistische Unterschiede in der Anwendung einer Vorschrift, eines Kriteriums oder eines Verfahrens darzulegen, um eine mittelbare Diskriminierung zu belegen. Die beschwerdeführende Partei müsse vielmehr darlegen, aus welchem Grund sie durch die Vorschrift, das Kriterium oder das Verfahren benachteiligt wurde. Klagen wegen mittelbarer Diskriminierung werden dadurch erschwert, da die beschwerdeführende Partei nicht nur darlegen muss, dass eine Gruppe durch eine Vorschrift, ein Kriterium oder ein Verfahren benachteiligt wird, sondern auch eine Erklärung für diese Benachteiligung liefern muss.

In Bezug auf Behinderung verbietet das Gleichstellungsgesetz unmittelbare und mittelbare Diskriminierung sowie unrechtmäßige Diskriminierung „die sich durch Behinderung ergibt“ (§ 15) und verpflichtet zu angemessenen Vorkehrungen (§§ 20 und 21). 2015 bestätigte der Court of Appeal in *Griffiths v Secretary of State for Work and Pensions*,²¹ dass die Pflicht zum Treffen angemessener Vorkehrungen entsteht, sobald Anzeichen dafür vorliegen, dass die bestehenden Vorkehrungen die behinderte Person aufgrund ihrer Behinderung in erheblichem Maße benachteiligen.

§ 15 definiert Diskriminierung aufgrund von Behinderung als eine Situation, in der „B durch A wegen einer Sache, die sich infolge der Behinderung von B ergibt, eine weniger günstige Behandlung erfährt und A (...) nicht nachweisen kann, dass die Behandlung ein verhältnismäßige Mittel zur Erreichung eines rechtmäßigen Zwecks ist“, es sei denn „A weist nach, dass A nicht wusste oder wissen konnte, dass B die Behinderung hat.“ In Nordirland verbietet das BDG nicht mittelbare Diskriminierung, sondern (§ 3A) drei unterschiedliche Begriffe von Diskriminierung:

- g) Diskriminierung aus einem Grund, der sich auf die Behinderung der behinderten Person bezieht und sachlich gerechtfertigt ist,
- h) Unmittelbare Diskriminierung aufgrund einer Behinderung im Arbeitsleben, d. h. wenn eine Person aufgrund der Tatsache, dass sie behindert ist und nicht aufgrund eines darauf bezogenen Grundes, der gesetzlich gerechtfertigt ist, ungleich behandelt wird und
- i) Diskriminierung durch Verletzung der Pflicht zu angemessenen Vorkehrungen, die im Arbeitsleben nicht gerechtfertigt ist, jedoch gegebenenfalls bei der Bereitstellung von Gütern und Dienstleistungen.

Da das Gleichstellungsgesetz 2010 eine weniger günstige Behandlung „wegen“ eines geschützten Grundes verbietet, geht man davon aus, dass sie auch Diskriminierung aufgrund von mutmaßlichen oder wahrgenommenen Eigenschaften verbietet. Ob dies in Nordirland auch in Bezug auf Alter und Behinderung der Fall ist, muss durch die juristische Auslegung geklärt werden, weil die einschlägigen Rechtsvorschriften sich in jedem Fall von Diskriminierung aufgrund von Alter oder Behinderung auf die Person beziehen, die diskriminiert wird.

Das Gleichstellungsgesetz 2010 definiert Belästigung (§ 26(1)), wenn „A unerwünschte Verhaltensweisen in Bezug auf eine relevante geschützte Eigenschaft zeigt und (b) die Verhaltensweisen bezwecken oder bewirken, dass (i) die Würde von B verletzt, oder (ii) für B ein von Einschüchterungen, Anfeindungen, Erniedrigungen, Entwürdigungen oder Beleidigungen gekennzeichnetes Umfeld geschaffen wird.“ Paragraph 26(2) legt außerdem fest, dass „A B auch belästigt, wenn – (a) A unerwünschte Verhaltensweisen sexueller Art

²⁰ Court of Appeal [2015] EWCA Civ 609, 22. Juni 2015.

²¹ Court of Appeal [2015] EWCA Civ 1265, 10. Dezember 2015.

zeigt und (b) das Verhalten die in Absatz 1 (b) genannten Folgen bezweckt oder bewirkt“ und § 26 (3) definiert und verbietet ausdrücklich eine weniger günstige Behandlung infolge einer Duldung oder Zurückweisung unerwünschter Verhaltensweisen sexueller Art oder aufgrund einer Geschlechtsumwandlung oder des Geschlechts. Das Gleichstellungsgesetz enthält einen teilweise objektiven Test, mit dem überprüft werden kann, ob eine Verhaltensweise, die nicht bezweckt, die Würde zu verletzen usw., dennoch genau dies bewirkt. In Nordirland wurde für den Anwendungsbereich der Richtlinien aus dem Jahr 2000 eine einheitliche Definition von Belästigung eingeführt, die derjenigen des Gleichstellungsgesetzes 2010 im Wesentlichen entspricht und alle Diskriminierungsgründe abdeckt.

Viktimisierung ist für alle Diskriminierungsgründe in Großbritannien und Nordirland verboten, jedoch unterscheidet sich die jeweilige Definition von Viktimisierung. In Großbritannien gilt nach dem Gleichstellungsgesetz (§ 27 (1)), dass „eine Person (a) eine andere Person (B) viktimisiert, wenn A B benachteiligt, weil (a) B eine geschützte Handlung ausführt, oder (b) A glaubt, dass B eine geschützte Handlung ausgeführt hat oder ausführen wird.“ § 27(2) definiert eine „geschützte Handlung“ wie folgt: „(a) Klage nach diesem Gesetz einreichen, (b) als Zeuge oder Gutachter in einem Verfahren nach diesem Gesetz teilnehmen, (c) sonstige Handlungen im Sinne oder im Zusammenhang mit diesem Gesetz, (d) Beschuldigungen (ausdrücklich oder nicht), dass A oder eine dritte Person gegen dieses Gesetz verstoßen hat.“ Der Ansatz in Nordirland ist ähnlich, nur muss die Person, die Viktimisierung geltend macht, beweisen, dass sie aufgrund einer geschützten Handlung eine *weniger günstige* Behandlung erfahren hat, was sich in manchen Fällen als schwierig erweist. Sowohl in Großbritannien als auch in Nordirland gilt der Schutz vor Viktimisierung nicht, wenn die Beschuldigung des Opfers *sowohl falsch, als auch* in böser Absicht war.

Paragraph 111 des Gleichstellungsgesetzes besagt: „... Eine Person (A) darf eine andere Person (B) nicht anweisen oder veranlassen oder verleiten, in Bezug auf eine dritte Person (C) gegen dieses Gesetz zu verstoßen.“ In Nordirland sind Anweisung, Druck oder Beeinflussung zur Diskriminierung ausdrücklich für alle geschützten Gründe, mit Ausnahme der sexuellen Ausrichtung, verboten. Allerdings können Einzelpersonen nur im Fall von Religion, politischer Überzeugung und Alter ihre Rechte durch eine Klage durchsetzen. In anderen Fällen kann nur die Gleichstellungskommission eingreifen. Dessen ungeachtet kann eine Person, die angewiesen wurde, eine andere Person zu diskriminieren, gegen die anweisende Person klagen, wenn (wie im Fall *Weathersfield Ltd. v Sargent*, wo ein Arbeitgeber die Anweisung erteilt hat)²² die Anweisung selbst eine Benachteiligung der angewiesenen Person darstellt.

Diskriminierende Werbung ist derzeit nur in Nordirland ausdrücklich verboten und dort auch nur in Bezug auf Rasse, Religion bzw. Weltanschauung und Behinderung. Nur die ECNI ist befugt, gegen derartige Werbung zu klagen. Einzelpersonen dürfen im Vereinigten Königreich nur dann gegen diskriminierende Werbung klagen, wenn sie tatsächlich aufgrund verbotener Diskriminierungsgründe weniger günstig behandelt werden (z. B. wenn sie sich auf eine Stelle bewerben und aufgrund eines relevanten Diskriminierungsgrundes abgelehnt werden). Vielleicht aus diesem Grund hat die Regierung des Vereinigten Königreichs zu erkennen gegeben, dass sie das britische Recht in Übereinstimmung mit dem Urteil im Fall *Feryn* sieht und hat die Verabschiedung des Gleichstellungsgesetzes nicht zur Ausweitung der Rechtsprechung in diesem Bereich genutzt, sondern die bisher geltenden Verbote (die von der Kommission für Gleichstellung und Menschenrechte (EHRC) durchgesetzt werden konnten) aufgehoben.

Das Gleichstellungsgesetz sieht Ausnahmen für berufliche Voraussetzungen²³ sowie weiter

²² [1999] IRLR 94.

²³ Die Worte „wesentliche und entscheidende“, die in Artikel 4 Abs. 1 der Richtlinie 2000/78 verwendet werden, wurden im Gleichstellungsgesetz 2010 weggelassen, da sie entbehrlich sind. Es wird grundsätzlich davon ausgegangen, dass eine Anforderung nicht angemessen ist, wenn sie nicht wesentlich oder entscheidend ist.

gefasste Ausnahmen für religiöse Organisationen vor. In Nordirland erlaubt das BDG Ausnahmen für wesentliche und entscheidende berufliche Voraussetzungen, wobei die wesentlichen beruflichen Voraussetzungen oder speziellen Ausnahmeregelungen in Bezug auf weitere geschützte Diskriminierungsgründe gelten. Das Gleichstellungsgesetz und die in Nordirland geltende Altersregelung erlauben eine Altersdifferenzierung beim Mindestlohn und eine nach Alter gestaffelte Entlohnung, allerdings wurde das „gesetzliche Rentenalter“ von 65 Jahren im April 2011 aufgehoben. In den jeweiligen Rechtsinstrumenten gibt es mehrere Ausnahmen in Bezug auf nationale Sicherheit und öffentliche Ordnung. Die Streifkräfte sind im Wesentlichen ausgenommen. Außerhalb der Anwendungsbereiche der Richtlinien von 2000 gibt es Aufnahmen für Handlungen, die durch andere Rechtsinstrumente erlaubt sind.

4. Sachlicher Anwendungsbereich

Das Antidiskriminierungsrecht des Vereinigten Königreichs gilt für Beschäftigung im privaten und im öffentlichen Sektor. Das Urteil des Obersten Gerichtshofs in der Rechtssache *Jivraj v Hashwani* [2011] UKSC 40 lässt stark bezweifeln, dass das Gleichstellungsgesetz auch den Zugang zu selbständiger Beschäftigung abdeckt und deutet darauf hin, dass das nationale Recht hier die Vorgabe der Richtlinien nicht erfüllt.

In *EAD Solicitors LLP and ors v Abrams*²⁴ bekräftigte das Employment Appeal Tribunal, dass der Begriff „Person“ im Gleichstellungsgesetz dahingehend auszulegen sei, dass er auch juristische Personen erfasse. Nichts im Gleichstellungsgesetz, so das Employment Appeal Tribunal, hindere ein Unternehmen daran, entsprechende Ansprüche geltend zu machen.

Diskriminierung bei der Bereitstellung von Gütern und Dienstleistungen, Wohnraum, Bildung, Sozialschutz einschließlich der Sozialversicherung und der medizinischen Versorgung, sozialen Vergünstigungen und der Ausübung öffentlicher Funktionen ist sowohl in Großbritannien als auch in Nordirland inzwischen für alle Diskriminierungsgründe, mit Ausnahme des Alters, verboten. Allerdings enthält das Recht des Vereinigten Königreichs keine klare Definition von sozialen Vergünstigungen. Daher muss die künftige Rechtsprechung im Königreich und durch den Europäischen Gerichtshof zeigen, ob die bestehenden Rechtsvorschriften das EU-Recht angemessen umsetzen. Das Gleichstellungsgesetz 2010 enthält Bestimmungen, die in Großbritannien beim Zugang zu Gütern und Dienstleistungen, im Gesundheitswesen, bei sozialen Vergünstigungen und bei der Ausübung öffentlicher Funktionen Schutz vor Altersdiskriminierung bieten. Diese gelten jedoch nicht für Kinder unter 18 Jahren.

5. Rechtsdurchsetzung

Einzelpersonen, die sich diskriminiert fühlen, können Klage einreichen, wobei Fälle, die Diskriminierung im Arbeitsleben betreffen (öffentlicher und privater Sektor), vor Arbeitsgerichten verhandelt werden (in Nordirland vor dem Arbeitsgericht oder Arbeitsschiedsgericht) und Klage gegen sonstige rechtswidrige Diskriminierung (durch die öffentliche Hand oder Privatpersonen) vor den Zivilgerichten. Im Juli 2013 wurde für Arbeitsgerichte eine Bearbeitungsgebühr in Höhe von £ 1100 eingeführt, wodurch die Fälle vor dem Schiedsgericht um 70-80 % zurückgegangen sind (die Erfolgsquote der Klagen blieb jedoch gleich). Alle juristischen Versuche, die Einführung dieser Gebühren zu verhindern, insbesondere weil sie gegen den Grundsatz der EU der wirksamen Rechtsmittel verstoßen, sind bisher gescheitert.

Das wichtigste Rechtsmittel ist die Klage auf Schadenersatz, die wie in Zivilverfahren für Vergehen („Delikte“ in Schottland) berechnet werden. Es kann aber auch auf Unterlassung geklagt werden. Die Höhe des Schadensersatzes ist je nach Diskriminierungsgrund und

²⁴ UKEAT/0054/15/DM, Employment Appeal Tribunal, 5. Juni 2015.

Kontext stark unterschiedlich. Die von den Arbeitsgerichten zugesprochenen durchschnittlichen bzw. maximalen Beträge lagen im Zeitraum 2014-15 (letzte verfügbare Zahlen) zwischen EUR 7459 (£ 6000) und EUR 100 422 (£ 80 783) bei Diskriminierungen aufgrund der sexuellen Ausrichtung, EUR 1343 (£ 1080) und EUR 1343 (£ 1080) bei Diskriminierungen aufgrund von Religion bzw. Weltanschauung (in den Vorjahren waren diese Beträge höher: z. B. EUR 4430 (£ 3191) bzw. EUR 38 400 (£ 27 659) für 2013-14), EUR 9323 (£ 7500) und EUR 35 339 (£ 28 428) bei Altersdiskriminierung, EUR 9976 (£ 8025) und EUR 260 045 (£ 209 188) bei Diskriminierungen aufgrund der rassistischen Zugehörigkeit, EUR 15 539 (£ 12 500) und EUR 692 465 (£ 557 039) bei geschlechtsbezogener Diskriminierung bzw. EUR 10 748 (£ 8646) und EUR 298 240 (£ 239 913) bei Diskriminierungen aufgrund von Behinderung. Für die Bezirksgerichte (bzw. in Schottland Amtsgerichte), vor denen das Diskriminierungsverbot außerhalb des Bereichs Beschäftigung verhandelt wird, liegen keine Zahlen vor. Außerdem stehen mehrere Schlichtungs- oder Schiedsverfahren zur Verfügung. Seit der Einführung einer nicht unwesentlichen Gebühr im Juli 2013 für Klagen vor einem Arbeitsgericht (für Diskriminierungsfälle beträgt die Gebühr £ 1100) ist die Fallzahl der Arbeitsgerichte (bei allen Klagen) drastisch gesunken, jüngsten Zahlen zufolge (Juni 2015) um 67 % bei einzelnen Diskriminierungen und um 69 % bei Mehrfachdiskriminierungen.

Die üblichen Regeln der Zivilprozessordnung, die in den drei Rechtssystemen des Vereinigten Königreichs gelten, enthalten keine Bestimmung, die Organisationen daran hindern, Kläger in Diskriminierungsfällen zu unterstützen. Einige Gewerkschaften, Gleichstellungskommissionen und spezialisierte NRO beschäftigen qualifizierte Juristen und können den Kläger somit einen vollständigen Rechtsbeistand bieten. Diese Organisationen können in der Regel jedoch nicht selbst klagen, mit Ausnahme der Gleichstellungskommissionen, die bei einer Anweisung zur Diskriminierung oder gesetzwidriger Werbung Klagen einreichen können. Antidiskriminierungsklagen sind relativ häufig und werden von der Öffentlichkeit aufmerksam beobachtet. Allerdings werden die Opfer in Diskriminierungsfällen häufig durch das Fehlen einer angemessenen Beratung, Unterstützung und Vertretung und die hohen Bearbeitungsgebühren für Diskriminierungs- und sonstige Arbeitsrechtsfälle behindert (die EUR 1300 übersteigen).

Die Rechtsmittel sind in der Regel angemessen abschreckend, allerdings ist es problematisch, dass die Gerichte und Arbeitsgerichte Organisationen, die wegen einer Diskriminierung verurteilt werden, nicht zu umfassenden Abhilfemaßnahmen verurteilen können.

Alle einschlägigen Gesetze im Vereinigten Königreich sehen bei allen Diskriminierungsgründen und in allen sachlichen Anwendungsbereichen der Richtlinien eine Umkehrung der Beweislast vor.

6. Gleichbehandlungsstellen

In Großbritannien ist eine einzige Kommission für Gleichstellung und Menschenrechte (EHRC) dafür zuständig, Kläger in Gerichtsverfahren zu unterstützen, das Recht auf eigene Initiative durchzusetzen und den Respekt für die Chancengleichheit durch Forschung, öffentliche Stellungnahmen und andere Mittel zu fördern und zu stärken. In Nordirland gibt es eine gesonderte Gleichstellungskommission mit ähnlichen Funktionen (und zum Teil weiteren Befugnissen zu positiven Maßnahmen) wie die EHRC, in Schottland gibt es zusätzlich die Schottische Menschenrechtskommission, die gemeinsam mit der EHRC für den Schutz der Menschenrechte zuständig ist.

7. Wichtige Punkte

Das dringendste Problem sind die hohen Gebühren, die von den Arbeitsgerichten gefordert werden, und deren Auswirkungen auf den Zugang zum Rechtssystem. Ebenfalls problematisch sind die großen Spielräume, die Schulen bei der Diskriminierung von Lehrern

aufgrund der Religion eingeräumt werden. Schließlich ist nicht sicher, ob das Recht des Vereinigten Königreichs selbständig Beschäftigte angemessen schützt.

Im Hinblick auf die besten Verfahren sind die positiven Verpflichtungen für öffentliche Stellen im Rahmen des Gleichbehandlungsgebot für die öffentliche Hand (§ 149 Gleichstellungsgesetz von 2010) in Großbritannien und § 75 Nordirlandgesetz 1998 (in Nordirland) als besonders interessante Merkmale des Antidiskriminierungsrechts im Vereinten Königreich zu nennen.

INTRODUCTION

The national legal system

The United Kingdom (UK) comprises England, Wales, Scotland and Northern Ireland (NI). Great Britain (GB) includes England, Wales and Scotland.²⁵ The UK, which has three legal systems (England and Wales, Scotland and Northern Ireland), is a parliamentary democracy with neither a written constitution prescribing separation of legislative, executive and judicial powers, nor an entrenched constitutional bill of rights.

All UK-wide law-making powers are vested in the Westminster Parliament, which legislates through both primary legislation (Acts of Parliament) and secondary laws (Statutory Instruments). These laws are subsequently "interpreted" by the courts to create a body of case-law which is based on the binding rules of legal precedent. The Westminster Parliament can only legislate in the areas which have not devolved to the Scottish Parliament, the Welsh Assembly or the Northern Ireland Assembly. However it can legislate in those areas where one of those legislatures consents to legislation being passed on its behalf. Of importance in this context is that equalities legislation in Scotland and Wales is reserved to the Westminster Parliament - in other words it is only Westminster that can legislate in the area of equalities for England, Wales and Scotland.

The Northern Ireland Assembly has competence to legislate in the area of equalities

Section 2(2) of the European Communities Act 1972²⁶ permits the transposition of EU legislation into UK legislation by regulations without the need for primary legislation.

Anti-discrimination legislation in the UK is enforced mainly through the civil courts, with the exception of some minor provisions that provide for criminal sanctions. The relevant judicial systems in the three jurisdictions within the UK (England and Wales, Scotland and Northern Ireland) are similar but not identical. In each there are first instance tribunals in which all employment-related cases are heard, and separate civil courts (county courts in NI and England and Wales, sheriff courts in Scotland) for other civil claims. The final civil appeal court for all three jurisdictions is the Supreme Court which came into being in October 2009, replacing the Appellate Committee of the House of Lords (and the Judicial Committee of the Privy Council). Non-employment cases are generally heard in the county courts or (in the case of some public law claims, the Administrative Court) with appeal to the Court of Appeal and Supreme Court.

List of main legislation transposing and implementing the directives

GB

- The Equality Act 2010²⁷ (EqA):
 - o adopted 8 April 2010;
 - o entry into force 1 October 2010;
 - o latest amendments 25 April 2013 (by the Enterprise and Regulatory Reform Act 2013);²⁸
 - o grounds covered: sex (incl. gender reassignment, married/ civilly partnered status/ pregnancy), colour, nationality (including citizenship), ethnic origins, national origins, disability, sexual orientation, religion or belief, age;

²⁵ For purposes of transposition of EU legislation, the UK also has responsibility for Gibraltar. To comply with the Directives 2000/43/EC and 2000/78/EC the Gibraltar legislature enacted the Equal Opportunities Ordinance 2004 (or Act), which came into force on 11 March 2004. This legislation has been replaced by the Equal Opportunities Act 2006. The Gibraltar legislation is not discussed in this report.

²⁶ European Communities Act 1972, 17 October 1972, <http://www.legislation.gov.uk/ukpga/1972/68/contents> accessed 7 June 2016.

²⁷ <http://www.legislation.gov.uk/ukpga/2010/15/contents>, accessed 7 June 2016.

²⁸ <http://www.legislation.gov.uk/ukpga/2013/24/contents/enacted>. Date of adoption: 25th April 2013 accessed 7 June 2016.

- o material scope: employment (broadly defined to include occupation, vocational training etc.); education; housing; provision of goods, facilities and services; membership organisations; functions of public authorities.

NI

- The Disability Discrimination Act 1995²⁹ (DDA):
 - o adopted 8 November 1995;
 - o entry into force – various dates from November 1995;
 - o latest amendments 1 August 2011 (by the Autism Act (NI) 2011);³⁰
 - o grounds covered: disability;
 - o material scope: employment (broadly defined to include occupation, vocational training etc.); education; housing; provision of goods, facilities and services; membership organisations; functions of public authorities.
- The Race Relations (NI) Order 1997³¹ (RRO):
 - o adopted 19 March 1997;
 - o entry into force – various dates from March 1997;
 - o latest amendments 9 July 2012 (by the Race Relations Order 1997 (Amendment) Order (Northern Ireland) 2012/263);
 - o grounds covered: race, colour, nationality (including citizenship), ethnic origins, national origins and belonging to Irish Traveller community;
 - o material scope: employment (broadly defined to include occupation, vocational training etc.); education; housing; provision of goods, facilities and services; membership organisations; functions of public authorities.
- The Fair Employment and Treatment Order 1998³² (FETO):
 - o adopted 16 December 1998;
 - o entry into force 1 March 1999;
 - o latest amendments 10 December 2003 (by the Fair Employment and Treatment Order (Amendment) Regulations (Northern Ireland) 2003/520);
 - o grounds covered: religion/ belief/ political belief;
 - o material scope: employment (broadly defined to include occupation, vocational training etc.); education; housing; provision of goods, facilities and services; functions of public authorities.
- The Employment Equality (Sexual Orientation) Regulations (NI) 2003 (SOR 2003):
 - o adopted 1 December 2003;
 - o entry into force 2 December 2003;
 - o latest amendments;
 - o 5 December 2005 (by the Civil Partnership Act 2004 (Amendments to Subordinate Legislation) Order (Northern Ireland) 2005/520);
 - o grounds covered: sexual orientation;
 - o material scope: employment (broadly defined to include occupation, vocational training etc.).
- The Employment Equality (Age) Regulations (NI) 2006 (Age Regs):
 - o adopted 14 June 2006;
 - o entry into force 1 October 2006;
 - o latest amendments 6 April 2011 (by the Employment Equality (Repeal of Retirement Age Provisions) Regulations (Northern Ireland) 2011/168);
 - o grounds covered: age;
 - o material scope: employment (broadly defined to include occupation, vocational training etc.).

²⁹ <http://www.legislation.gov.uk/ukpga/1995/50/contents> Date of adoption: 8th November 1995 accessed 7 June 2016.

³⁰ <http://www.legislation.gov.uk/nia/2011/27/introduction> Date of adoption: 9th May 2011 accessed 7 June 2016.

³¹ <http://www.legislation.gov.uk/nisi/1997/869/contents> accessed 7 June 2016.

³² <http://www.legislation.gov.uk/nisi/1998/3162/contents> accessed 7 June 2016.

1 GENERAL LEGAL FRAMEWORK

Constitutional provisions on protection against discrimination and the promotion of equality

The UK constitution is unwritten and so by definition contains no articles dealing with non-discrimination. The Human Rights Act 1998,³³ however, partially incorporates the European Convention on Human Rights (ECHR) into domestic law, and by so doing gives Article 14 ECHR *quasi*-constitutional force. (Public authorities can only act contrary to that provision if required by primary law so to do, with a very strong interpretive obligation applying to the courts in their interpretation of such legislation, while the devolved Parliaments in Scotland, Wales and Northern Ireland may not pass legislation incompatible with the Convention nor may their governments act incompatibly with Convention rights).

³³ <http://www.legislation.gov.uk/ukpga/1998/42/contents> Date of adoption: 9th November 1998, accessed 7 June 2016.

2 THE DEFINITION OF DISCRIMINATION

2.1 Grounds of unlawful discrimination explicitly covered

The following grounds of discrimination are explicitly prohibited in national law:

UK

- sex (incl. gender reassignment, married/ civilly partnered status/ pregnancy)
- colour
- nationality (including citizenship)
- ethnic origins
- national origins
- disability
- sexual orientation
- religion or belief
- age
- material scope: employment (broadly defined to include occupation, vocational training etc.); education; housing; provision of goods, facilities and services; membership organisations; functions of public authorities

NI (in addition to the grounds above)

- race
- belonging to the Irish Traveller community
- political belief

2.1.1 Definition of the grounds of unlawful discrimination within the directives

Race

The term “racial origin” is not used in UK legislation. The RRO (art. 5(1)) (NI) provides that “‘racial grounds’ means any of the following grounds, namely colour, race, nationality (including citizenship), ethnic and national origins”.

The EqA provides (s9) that “race” includes colour, nationality and ethnic or national origin (see below) and that “A racial group is a group of persons defined by reference to race; and a reference to a person’s racial group is a reference to a racial group into which the person falls”. There is no definition in statute or case law of “racial origin”; since the first Race Relations Act³⁴ in 1965 it has been clear that, as in Recital (6) of the Race Directive, the term has never been used to imply an acceptance of any theories regarding separate human races.

Section 9 EqA, as amended, requires the government to introduce secondary legislation to make caste an aspect of race, thus making caste discrimination a form of race discrimination. This was initially intended to be introduced in summer 2015, however, the position is being reviewed following the Employment Appeal Tribunal case in which it was accepted that, on the facts of a particular case, discrimination on the basis of caste could fall within discrimination on the basis of ethnic origin: *Chandhok v Tirkey*.³⁵

Ethnic origin

The Equality Act 2010 includes “ethnic or national origins” as part of its definition of race under s9. The RRO (art. 5(1)) (NI) also includes the concept of ethnic or national origins as part of its definition of race. The definition of ethnic origins was discussed in *Mandla and*

³⁴ <http://www.legislation.gov.uk/ukpga/1965/73/contents/enacted> Date of adoption: 8 November 1965 accessed 7 June 2016.

³⁵ Employment Appeal Tribunal *Chandhok v Tirkey* [2015] IRLR 195 19 December 2014. http://www.bailii.org/uk/cases/UKCAT/2014/0190_14_1912.html. accessed 8 April 2016.

another v Dowell Lee,³⁶ and summarised thus: "For a group to constitute an ethnic group in the sense of the 1976 Act [precursor to the Equality Act 2010], it must...regard itself, and be regarded by others, as a distinct community by virtue of certain characteristics. Some of these characteristics are essential; others are not essential but one or more of them will commonly be found and will help to distinguish the group from the surrounding community. The conditions which appear to me to be essential are these: (1) a long shared history, of which the group is conscious as distinguishing it from other groups, and the memory of which it keeps alive; (2) a cultural tradition of its own, including family and social customs and manners, often but not necessarily associated with religious observance. In addition to those two essential characteristics the following characteristics are, in my opinion, relevant; (3) either a common geographical origin, or descent from a small number of common ancestors; (4) a common language, not necessarily peculiar to the group; (5) a common literature peculiar to the group; (6) a common religion, different from that of neighbouring groups or from the general community surrounding it; (7) being a minority or being an oppressed or a dominant group within a larger community....".³⁷

In *Chandhok v Tirkey*³⁸ the Employment Appeal Tribunal accepted that discrimination on the basis of caste could fall within discrimination on the basis of ethnic origin.

Religion/ belief

In NI FETO provides (Article 2) that "religious belief' in relation to discrimination or harassment ... includes any religion or similar philosophical belief", further that "references to a person's religious belief or political opinion include references to

- (1) His supposed religious belief or political opinion; and
- (2) The absence or supposed absence of any, or any particular, religious belief or political opinion."

In GB the EqA provides (s10) that:

- (1) Religion means any religion and a reference to religion includes a reference to a lack of religion.
- (2) Belief means any religious or philosophical belief and a reference to belief includes a reference to a lack of belief.

"Religion" itself is not defined. The Government made clear in Parliament, in introducing the Employment Equality (Religion or Belief) Regulations 2003 (by which religious discrimination was first regulated), that it expected religion or belief to be defined in accordance with case law developed under Article 9 ECHR. Courts and tribunals have adopted a very broad approach to what can constitute a "belief": see for example *Grainger v Nicholson* in which the Employment Appeal Tribunal (EAT)³⁹ accepted that the predecessor to the EqA protected any belief which was (1) genuinely held; (2) a belief and not an opinion or viewpoint based on the present state of information available; (3) concerned a weighty and substantial aspect of human life and behaviour; (4) attain a certain level of cogency, seriousness, cohesion and importance; and (5) was worthy of respect in a democratic society, not incompatible with human dignity and not in conflict with the fundamental rights of others.⁴⁰ There the EAT accepted that the claimant's belief in man-made climate change and the environment was capable of falling within the concept of "belief" notwithstanding the fact that the belief was free-standing, rather than being

³⁶ House of Lords *Mandla v Dowell Lee* [1983] 2 AC 548 24 March 1982
<http://www.bailii.org/uk/cases/UKHL/1982/7.html> accessed 8 April 2016.

³⁷ Per Lord Fraser in *Mandla v Dowell Lee*.

³⁸ *Chandhok v Tirkey*, [2015] IRLR 195 http://www.bailii.org/uk/cases/UKLAT/2014/0190_14_1912.html, accessed 8 April 2016.

³⁹ To which cases go on appeal from employment tribunals in Great Britain.

⁴⁰ Employment Appeal Tribunal [2010] IRLR 4, [2010] ICR 360 3 November 2009
http://www.bailii.org/uk/cases/UKLAT/2009/0219_09_0311.html, accessed 8 April 2016.

part of a philosophy of life. The EAT did not accept that support for a political party would be protected by the Regulations, some limitation being required on the concept of “philosophical belief” to which the Regulations restricted protected beliefs and suggested that racist or other beliefs would be unprotected.⁴¹ Subsequently, tribunals have accepted as “philosophical beliefs” a strongly held belief in the sanctity of life, including opposition to fox hunting and hare-coursing;⁴² a belief that “public service broadcasting has the higher purpose of promoting cultural interchange and social cohesion”;⁴³ strong belief in “democratic socialism” and in “left wing democratic socialism”;⁴⁴ beliefs about the relationship between human beings and animals, which included a commitment to vegetarianism and sympathy for Buddhism;⁴⁵ and a very strong belief in personal freedom and privacy, respect for personal property, freedom from authoritarianism and respect for human rights.⁴⁶ Another tribunal ruled, however, that a belief that it was necessary to show respect to those who gave their lives by wearing a poppy was not a philosophical belief, this because it lacked the “cogency, cohesion and importance” required by *Grainger*, and could not “be fairly described as being a belief as to a weighty and substantial aspect of human life and behaviour”.⁴⁷ And in *Arya v London Borough of Waltham Forest* a tribunal rejected a claim for protection of anti-Semitic views on the basis that, although genuinely held, “profound and affect[ing the claimant’s] way of life and his view of the world” and reaching a “certain level of cogency, seriousness, cohesion and importance” anti-Semitic (and racist) views were “not worthy of respect in a democratic society” and were “incompatible with human dignity”. They were, accordingly, not protected by the EqA.⁴⁸

Disability

The status protected by the EqA and, in NI, the DDA is that of being “a disabled person”, that is, “a person who has a physical or mental impairment which has a substantial and long-term adverse effect on ability to carry out normal day-to-day activities”.⁴⁹ “Long-term” means lasting or likely to last at least 12 months, or for the rest of the person’s life.⁵⁰ This definition covers physical, psychosocial and intellectual disabilities. Under DDA (for NI) an impairment is only taken to affect a person’s ability to carry out normal day-to-day activities if it affects their mobility, manual dexterity, physical co-ordination, continence, ability to lift, carry or otherwise move everyday objects, speech, hearing or eyesight, memory or ability to concentrate, learn or understand, or their perception of the risk of physical danger.⁵¹ This list of capabilities has been removed in GB by the EqA, though the requirement for long term substantial impairment of the ability to carry out normal day to day activities remains.⁵²

⁴¹ See also Employment Tribunal *Kelly and others v Unison*, 28 January 2011, Case No. ET/2203854/08, available at <http://employment.practicallaw.com/6-505-3354>, accessed 8 April 2016.

⁴² Employment Tribunal *Hashman v Milton Park (Dorset) Limited t/a Orchard Park*, 31 January 2011, Case No. ET/31055552009, available at http://www.bindmans.com/documents/Hashman_judgment.pdf, accessed 8 April 2016.

⁴³ Employment Tribunal *Maistry v BBC*, 29 March 2011, Case No. ET/1313142/2010 [2011] EqLR 549, available at <http://employment.practicallaw.com/6-505-6183>, accessed 8 April 2016.

⁴⁴ Employment Tribunal *Olivier v Department of Work and Pensions*, 18 November 2013, Case No. ET/1701407/2013 unreported; Employment Tribunal *Henderson v General Municipal and Boilermakers Union*, 30 September 2013 [2013], Case Nos 3301690/2012, 3301172/2013 & 3301828/2013, EqLR 1137.

⁴⁵ Employment Tribunal *Alexander v Farmtastic Valley Ltd and others*, 13 October 2011, Case No. ET/2513832/10, unreported.

⁴⁶ Employment Tribunal *Nikiel-Wolski v Burton’s Foods Ltd*, 18 July 2012, Case No 2411204/11 [2013] EqLR 192.

⁴⁷ Employment Tribunal *Lisk v Shield Guardian Co and others*, 27 September 2011, Case No.3300873/11 [2011] EqLR 1290, available at <http://employment.practicallaw.com/4-511-0992>, accessed 8 April 2016.

⁴⁸ Employment Tribunal 24 August 2013, Case No 3200396/2011, [2013] EqLR 858.

⁴⁹ EqA s6, DDA s1(1). Note, however, the decision in Employment Appeal Tribunal *Attridge Law v Coleman* (No.2), [2010] IRLR 10 30 October 2009 http://www.bailii.org/uk/cases/UKCAT/2009/0071_09_3010.html. (accessed 8 April 2016), in which the EAT followed the decision of the CJEU in *Coleman v Attridge Law* Case C-303/06 and interpreted the DDA (now EqA) to apply to discrimination by association.

⁵⁰ DDA Sch 1, para 2.

⁵¹ DDA Sch 1, para 4(1).

⁵² Equality Act 2010 Schedule 1

In addition to the above situations the EqA and DDA cover a number of special conditions, including progressive or asymptomatic conditions, controlled or corrected conditions, and severe disfigurement. A person who has cancer, HIV infection or multiple sclerosis is deemed to meet the definition of disability, effectively from the point of diagnosis.

The UK definitions differ from that adopted by the CJEU in Joined Cases C-335/11 and C-337/11 *Skouboe Werge and Ring* in that they refer to hindrance in “day to day activities” as distinct from “professional activities” and do not make specific reference to the “interaction with various barriers”. The UK approach, accordingly, appears less consistent with the social model of disability than is that of the CJEU. However, there are signs of some change in interpretation to align with the CJEU approach. In *Paterson v Commissioner of Police for the Metropolis*,⁵³ the EAT interpreted the definition of disability in line with the approach adopted by the CJEU in the *Chacón Navas* case to rule that the concept of “day-to-day activities” must be given a meaning “which encompasses the activities which are relevant to participation in professional life”. This meant that, if the effect of a disability would adversely affect promotion prospects, it could be said to affect day to day activities, as it would hinder participation in the claimant’s professional life. On this basis, the EAT held that the complainant’s dyslexia was sufficient to constitute a disability which sufficiently interfered with his job as a police officer to qualify as a disability under the DDA, in that it hindered his chances of promotion. A similar approach was adopted more recently in *Sobhi v Commissioner of Police of the Metropolis*.⁵⁴ There remains some conflicting case law on the approach to be taken. In *Chief Constable of Lothian and Borders Police v Cumming* the EAT ruled that visual impairment which did not require correction by glasses or contact lenses, but which excluded the claimant from employment as a police officer, did not amount to a disability for the purposes of the DDA.⁵⁵ According to the Court: “the status of disability ... cannot be dependent on the decision of the employer as to how to react to the employee’s impairment”. However, in *Banaszczyk v Booker*⁵⁶ the EAT ruled that warehouse work including manually lifting and moving items of up to 25 kg is a “normal day-to-day activity” for the purposes of disability discrimination. The original tribunal had held that because the need to carry such a weight was only needed at work, it was not a “day-to-day activity”. This was overturned by the EAT, which interpreted day-to-day activity to include day-to-day activities of professional life, in accordance with the approach in *Ring*.⁵⁷

Age

Neither the EqA nor the NI Age Regs define the term “age”, leaving it open to the courts and tribunals to define if necessary. Both provisions do define the term “age group” as a “group of persons defined by reference to age, whether by reference to a particular age or a range of ages”: this may be important in indirect age discrimination claims.

Sexual orientation

The EqA defines “sexual orientation” as “a sexual orientation towards - (a) persons of the same sex, (b) persons of the opposite sex, or (c) persons of either sex”. The SORs 2003 define “sexual orientation” as “a sexual orientation towards - (a) persons of the same sex, (b) persons of the opposite sex, or (c) persons of the same sex and of the opposite sex”.⁵⁸

⁵³ Employment Appeal Tribunal [2007] ICR 1522, [2007] IRLR 763 23 July 2007, http://www.bailii.org/uk/cases/UKCAT/2007/0635_06_2307.html accessed 8 April 2016.

⁵⁴ Employment Appeal Tribunal (2013) UKEAT/0518/12, [2013] EqLR 78502 May 2013, http://www.bailii.org/uk/cases/UKCAT/2013/0518_12_0205.html accessed 8 April 2016.

⁵⁵ Employment Appeal Tribunal [2010] IRLR 109 29 July 2009, http://www.bailii.org/uk/cases/UKCAT/2009/0077_08_2907.html accessed 8 April 2016.

⁵⁶ Employment Appeal Tribunal [2016] UKEAT/0132/15/RN 01 February 2016 http://www.bailii.org/uk/cases/UKCAT/2016/0132_15_0102.html accessed 8 April 2016.

⁵⁷ Court of Justice of the EU Joined Cases C-335/11 and C-337/11 *Skouboe Werge and Ring* 11 April 2013.

⁵⁸ s.12(1) and Reg 2(2) respectively.

2.1.2 Multiple discrimination

In the UK prohibition of multiple discrimination is included in the law, though judicial interpretation is required. Express provision is made only in the EqA which provides (s.14) for the recognition of "dual discrimination" in cases (involving direct discrimination alone) where "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". However, this provision has not come into force.

There is, however, some recognition of multiple discrimination in the case law. In *Ministry of Defence v DeBique* the EAT upheld a tribunal decision that the claimant, a single mother who had originally been recruited to the British Army from St Vincent and the Grenadines, had been subject to indirect discrimination on grounds of her combined sex and race (which meant that she was particularly disadvantaged by a requirement to be available for work 24 hours a day 7 days a week).⁵⁹ The EAT ruled that "the nature of discrimination is such that it cannot always be sensibly compartmentalised into discrete categories. Whilst some complainants will raise issues relating to only 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." In *Hewage v Grampian Health Board* the Supreme Court accepted that a tribunal had been entitled to find that the claimant had been discriminated against on grounds of sex and race. The Supreme Court did not take issue with the fact that the claimant argued both race and sex discrimination, and that the tribunal did not identify separate facts to support findings of race discrimination and sex discrimination.⁶⁰

There is no record of the combined nature of the discrimination having any impact on the level of the EUR 18 333 (£15 000) damages awarded to the claimant in *Ministry of Defence v DeBique* in respect of injury to her feelings.⁶¹

2.1.3 Assumed and associated discrimination

a) Discrimination by assumption

In GB the following national law (including case law) prohibits discrimination based on perception or assumption of what a person is:

- S13 EqA, which defines direct discrimination, refers to discrimination "because of" a protected characteristic which is accepted as being sufficiently wide to encompass discrimination based on perceived or assumed characteristics. The Explanatory Notes to the EqA state (para 59) that the use of the term "because of" "is broad enough to cover cases where the less favourable treatment is because of the victim's association with someone who has that characteristic (for example, is disabled), or because the victim is wrongly thought to have it (for example, a particular religious belief)" and that the change in wording "does not change the legal meaning of the definition, but rather is designed to make it more accessible to the ordinary user of the Act".
- In *English v Thomas Sanderson Blinds Ltd* the Court of Appeal accepted that harassment would occur "on the grounds of" the relevant protected characteristic (there sexual orientation) as long as it based upon or linked to the claimant's real or imagined sexual orientation.⁶²

⁵⁹ Employment Appeal Tribunal [2010] IRLR 471 12 October 2009 available at http://www.bailii.org/uk/cases/UKCAT/2009/0048_09_1210.html accessed 1 June 2016.

⁶⁰ Supreme Court [2012] UKSC 37, [2012] IRLR 870, [2012] EqLR 884 25 July 2012 https://www.supremecourt.uk/decided-cases/docs/UKSC_2011_0050_Judgment.pdf, accessed 19 March 2015.

⁶¹ Employment Appeal Tribunal *DeBique v Ministry of Defence (No.2)* 15 September 2011, UKEAT/0075/11/SM http://www.bailii.org/uk/cases/UKCAT/2011/0075_11_1509.html, accessed 8 April 2016.

⁶² Court of Appeal [2008] EWCA Civ 1421 [2009] IRLR 206 19 December 2008. See also Employment Tribunal *Austin v Samuel Grant (North East) Ltd* Case no 25039956/11 [2012] EqLR 617 29 March 2012.

- In relation to disability, however, it has been suggested that the EqA may not prohibit assumed discrimination (this because such might have the effect of imposing liability on an employer for discriminating against a claimant on the basis of a condition which does not meet the statutory threshold for disability: *J v DLA Piper plc.*).⁶³
- In *Hainsworth v Ministry of Defence* (see 12.2 below) the Court of Appeal rejected a claim that the employer had discriminated against the claimant by refusing to make reasonable adjustments to meet the disability-related needs of her daughter.

In NI the following national law (including case law) prohibits discrimination based on perception or assumption of what a person is:

- The definition of direct discrimination in the RRO (Art 3), FETO (Art 3) and the SOR 2003 (reg 3), of less favourable treatment on the relevant grounds, is understood to extend to discrimination on the basis of assumed characteristics;
- The Age Regs expressly provide (reg 3) that the prohibition on less favourable treatment on grounds of the claimant's age (this being the definition of direct discrimination adopted by the Regs) "includes [the claimant]'s apparent age".

In NI the following national law (including case law) does not appear to prohibit discrimination based on perception or assumption of what a person is:

- The definition of direct discrimination in the DDA (s3A: less favourable treatment on grounds of the claimant's disability) is not generally understood to extend to discrimination on the basis of assumed characteristics.

b) Discrimination by association

In GB the following national law (including case law) prohibits discrimination based on association with persons with particular characteristics: s13 EqA, which defines direct discrimination, refers to discrimination "because of" a protected characteristic which is accepted as being sufficiently wide to encompass discrimination based on association with persons with particular characteristics. In *Saini v All Saints Haque Centre* the EAT accepted that harassment "on grounds of religion or belief" extended to cover harassment of the claimant because of the religion or belief of his colleague.⁶⁴

In NI the following national law (including case law) prohibits discrimination by association:

- The definition of direct discrimination in the RRO (Art 3), FETO (Art 3) and the SOR 2003 (reg 3), of less favourable treatment on the relevant grounds, is understood to extend to discrimination based on association with persons with particular characteristics;
- The definition of direct discrimination in the DDA and the Age Regs (s3A and reg 3 respectively: less favourable treatment on grounds of the claimant's disability or age) does not on its face appear to extend to discrimination based on association with persons with particular characteristics but the Northern Irish courts are virtually certain to follow the approach of the EAT in *EBR Attridge Law LLP & Anor v Coleman (No.2)*⁶⁵ and interpret the relevant provisions of the DDA and NI Age Regs to cover discrimination by association

⁶³ Employment Appeal Tribunal [2010] ICR 1052 15 June 2010, http://www.bailii.org/uk/cases/UKCAT/2010/0263_09_1506.html, accessed 8 April 2016

⁶⁴ Employment Appeal Tribunal [2009] IRLR 74 24 October 2008, http://www.bailii.org/uk/cases/UKCAT/2008/0227_08_2410.html, accessed 8 April 2016. Support for the argument that associated discrimination is caught by the statutory regime is also provided by the decision of the House of Lords in *House of Lords Ahsan v Watt*, [2007] UKHL 51, [2008] 1 AC 696 21 November 2007 <http://www.bailii.org/uk/cases/UKHL/2007/51.html>, accessed 8 April 2016.

⁶⁵ Employment Appeal Tribunal [2010] IRLR 10 30 October 2009, http://www.bailii.org/uk/cases/UKCAT/2009/0071_09_3010.html accessed 8 April 2016.

2.2 Direct discrimination (Article 2(2)(a))

a) Prohibition and definition of direct discrimination

In the UK direct discrimination is prohibited in national law. It is defined as follows:

GB

- Less favourable treatment “because of a protected characteristic”: s13 EqA:
 - o S23 EqA imposes an explicitly comparative approach except in the case of pregnancy (where the requirement is for unfavourable rather than less favourable treatment);⁶⁶
 - o In the case of age it is capable of justification;
 - o In the case of disability it protects only those with disabilities (or who associate with people with disabilities);⁶⁷
 - o In the case of race it explicitly applies to segregation;
 - o In the case of disability the comparison is between the disabled person and a real or hypothetical comparator with “the same abilities”.

NI

- The RRO, FETO and SOR (Art 3, Art 3 and reg 3) define direct discrimination as less favourable treatment “on [the relevant] grounds”. The legal provisions are materially identical to the EqA (above);⁶⁸
- The Age Regs and the DDA (reg 3 and s3A) define direct discrimination as less favourable treatment on grounds of the claimant’s age or disability.

b) Justification of direct discrimination

The only form of direct discrimination which can be justified in the UK is age discrimination.

2.2.1 Situation testing

a) Legal framework

In the UK situation testing is permitted in national law in the sense that there is no prohibition on it, and there is no legal bar to the evidence generated by it being used as evidence across all the equality grounds to establish that direct discrimination is occurring. There is no legal definition of this term, nor are there any particular procedural conditions for its admissibility, or barriers to its use once its relevance has been established. One possible difficulty which might arise in Northern Ireland concerns whether the recruitment of (say) a man and a woman, or an Asian and a White person, for the purposes of carrying out situational testing would be lawful (this would not be a problem in Great Britain because the approach to genuine occupational requirements (GORs) is broader, as discussed below). The question has not given rise to any reported case law other than *R (European Roma Rights Centre) v Chief Immigration Officer, Prague Airport* in which (in a case concerning practices of UK immigration officials at Prague airport) the House of Lords was willing to accept evidence obtained through situational testing, together with other forms of evidence, as relevant and admissible testimony.⁶⁹

b) Practice

⁶⁶ A hypothetical comparator is acceptable.

⁶⁷ And possibly, in GB, those assumed to be disabled – this would require judicial interpretation based on the requirements of EU law.

⁶⁸ The equivalents of s23 EqA are RRO 3(1c); FETO art. 3(3); and reg.3(2) SOR.

⁶⁹ House of Lords [2004] UKHL 55, [2005] 2 AC 1 9 December 2004.

In the UK situation testing is not used in practice other than on an ad hoc and/or occasional basis although some disability rights groups use situational testing to assess compliance with the DDA/ EqA.

2.3 Indirect discrimination (Article 2(2)(b))

a) Prohibition and definition of indirect discrimination

In the UK indirect discrimination is prohibited in national law. It is defined as:

GB

- (s19 EqA) the application to the claimant of a provision, criterion or practice which is also applied to others but which places the claimant, and places or would place others with whom s/he shares a protected characteristic, at a particular disadvantage by comparison with those who do not share the characteristic, and which cannot be shown to be a proportionate means of achieving a legitimate aim.

NI

- Materially identical definitions apply in Northern Ireland to age and sexual orientation and, insofar as it overlaps with EU law, race and religion/ belief discrimination (respectively reg 3 each of the NI Age and SO Regs 2003, Art 3 each of RRO and FETO);
- Indirect disability discrimination is not regulated in NI (although duties of reasonable adjustment apply);
- Discrimination other than that falling within EU law (nationality or colour-related discrimination, for example, or race discrimination in the coercive function of the state, or religion/ belief discrimination other than in the context of employment/ occupation) falls to be considered according to an older definition which (RRO, art.3(1)(b)) defines indirect discrimination as the application to the claimant of a requirement or condition which is also applied to others, but with which a considerably smaller proportion of the claimant's racial or religious group than of others can comply, with which the claimant cannot comply, to his or her detriment, and which cannot be shown to be justifiable irrespective of the race/ religion or belief of the claimant.

b) Justification test for indirect discrimination

The test for indirect discrimination falling within EU law is whether the application of the provision, criterion or practice is shown (by the person(s) applying it) to be a proportionate means of achieving a legitimate aim (s19 RRA, reg 3 each of the NI Age and SO Regs 2003 and Art 3 each of RRO and FETO). This is the same approach as is taken in EU law. In *Mba v Mayor & Burgess of the London Borough of Merton* the Court of Appeal ruled that the employer did not discriminate by requiring an employee to work her contracted hours on a Sunday despite her claim that this prevented her from complying with the requirement, as a Christian, to observe Sunday as a day of rest. The claimant worked in a children's home which operated a rota system. The employer had accommodated her insistence on Sundays off for two years but came to the view that this was unsustainable. The Court ruled that "it is not necessary to establish that all or most Christians, or all or most non-conformist Christians, are or would be put at a particular disadvantage" for the justification requirement to apply but that the change to the rota was in accordance with the claimant's contract and so the requirement was necessarily proportionate.⁷⁰

In *Home Office (UK Border Agency) v Essop and others*⁷¹ the Court of Appeal imposed an additional requirement when bring a claim for indirect discrimination, by showing the

⁷⁰ Court of Appeal [2013] EWCA Civ 1562 05 December 2013, <http://www.bailii.org/ew/cases/EWCA/Civ/2013/1562.html>, accessed 8 April 2016.

⁷¹ Court of Appeal [2015] EWCA Civ 609 22nd June 2015

reason why a provision, criterion or practice put a group at a particular disadvantage. The case was brought by civil servants who had failed a generic "Core Skills Assessment" ("CSA") test which all civil servants were required to pass in order to become eligible for promotion. The CSA bore no correlation to the post for which a candidate intended to apply (and in respect of which a candidate who had passed the CSA would have to pass a second, job-specific test). The evidence was that the success rate of Black and Minority Ethnic (BME) candidates was 40.3% that of white candidates and that of candidates aged 35 or over 37.4% that of younger candidates.

The Court of Appeal ruled that it was insufficient for the claimants to establish a statistical disparity in success rates in the CSA in order to bring a *prima facie* claim of age and race discrimination. Rather, they would have to point to the reason why the CSA had disadvantaged them as BME and older candidates. The Court reached this conclusion because, it said, it was impossible to prove that a provision, criterion or practice (PCP) put a group at a particular disadvantage, and also put a claimant at that disadvantage (this being the language of s19 Equality Act 2010) without establishing the reason why the PCP was said to put the group (and the individual) at the disadvantage. This is likely to impose significant hurdles for indirect discrimination claimants, as it requires claimants to show not just that the PCP causes disadvantage, but also the reason for this.

c) Comparison in relation to age discrimination

GB

Section 19 EqA simply refers to age as one of the protected characteristics in respect of which the prohibition on age discrimination applies. S5 provides that "(1) In relation to the protected characteristic of age (a) a reference to a person who has a particular protected characteristic is a reference to a person of a particular age group; (b) a reference to persons who share a protected characteristic is a reference to persons of the same age group. (2) A reference to an age group is a reference to a group of persons defined by reference to age, whether by reference to a particular age or to a range of ages." It follows that a complaint can be made of a provision criterion or practice which disadvantages (or would disadvantage) the "over 60s", "those aged between 50 and 65" or the "under 25s". The Age Regs similarly (reg 3) define "age group" as a "group of persons defined by reference to age, whether by reference to a particular age or a range of ages". Aside from this, the Regulations do not specify how a comparison is to be made.

2.3.1 Statistical evidence

a) Legal framework

In the UK there are no national rules permitting data collection but such data collection is permitted (subject to any restrictions imposed by the data protection legislation and human rights considerations), in line with the normal principle that that which is not prohibited by law is permitted. (The Data Protection Act 1998⁷² regulates the processing of "personal data" and "sensitive personal data" (the latter including data related to a person's racial or ethnic origin, political opinions, religious or similar beliefs and sexual life). It does, however, allow the collection and processing of sensitive data for employment monitoring purposes).

The collection and publication of statistics by public authorities is sometimes required by law. In Northern Ireland FETO imposes a positive duty on employers with a workforce of ten employees or more to take measures to ensure a fair proportion of Catholics and Protestants in their workforce. Such employers must monitor the "community composition" of their workforce annually, and review their recruitment, promotion and training practices every three years. In GB there is a general statutory duty upon public authorities to

<http://www.bailii.org/ew/cases/EWCA/Civ/2015/609.html> accessed 1 June 2016.

⁷² <http://www.legislation.gov.uk/ukpga/1998/29/contents> 16th July 1998, accessed 7 June 2016.

eliminate unlawful discrimination related to sex, gender reassignment, pregnancy and maternity, race, disability, age, religion or belief and sexual orientation and to promote equality of opportunity related to each of these “protected characteristics” (s149 EqA). As part of giving effect to this duty, public authorities are often required to monitor the composition of their workforce and the relevant pools of service users. How authorities collect statistics and data may vary from ground to ground, however.

In NI, s75 of the Northern Ireland Act 1998 imposes a duty on specified public authorities to have “due regard to the need to promote equality of opportunity” across all the equality grounds. This can require the collection of data, including data on religious belief, age, disability and the other equality grounds. The Equality Commission for Northern Ireland (ECNI) has issued guidance on monitoring and may enforce compliance with this duty.

Statistics are regularly used in both the public and private sectors to design positive action schemes (within the limits of the law applying in the UK). The positive duties outlined above require the collection of data and its use to formulate positive action planning. Private bodies also are increasingly using data to develop positive action on a voluntary basis.

The data collected is taken from equal opportunities monitoring, which is commonplace now in the UK: this involves the use of voluntary monitoring mechanisms, whereby job applicants and individuals applying for promotion, service users and others provide anonymous data on their ethnic background, gender, disabled status, age and other indicators. This information is scrutinised and conclusions drawn about where, when and how positive action needs to be taken.

Both the Equality and Human Rights Commission (EHRC) and ECNI use statistical evidence in their research, promotional and enforcement activity, in particular evidence obtained from public sector bodies under the positive equality duties (and from private sector bodies under the NI FETO duty).

In the UK statistical evidence is permitted by national law in order to establish indirect discrimination. In *West Midlands Passenger Transport Executive v Singh* the Court of Appeal laid down extensive guidance as to the use of statistics in race discrimination cases.⁷³ Statistical evidence is not conclusive and definite proof by itself but, in the absence of a satisfactory explanation of clear-cut statistical disadvantage, an inference of discrimination can be established depending upon the circumstances. In the sex discrimination case of *London Underground v Edwards (No 2)*, the Court of Appeal ruled that the tribunal was entitled to take into account national statistical patterns that indicated that women had greater primary care responsibility for children than men in general, and that such account could be taken of relevant statistics across all the grounds covered by the directives.⁷⁴

b) Practice

In the UK statistical evidence in order to establish indirect discrimination is used in practice. The use of statistical evidence is common, especially in race and gender cases where its utility may be greatest. There are no real obstacles to the use of statistical evidence in the courts, if the evidence is probative and relevant: the influence of European sex discrimination law is strong here, as is experience from the USA and Commonwealth countries. However, of course, there may be circumstances where lawyers or applicants face difficulty in finding relevant statistical evidence.

⁷³ Court of Appeal [1988] ICR 614 18 March 1988.

⁷⁴ Court of Appeal [1999] ICR 494, [1998] IRLR 364 21 May 1998.
<http://www.bailii.org/ew/cases/EWCA/Civ/1998/876.html> accessed 7 June 2016.

2.4 Harassment (Article 2(3))

a) Prohibition and definition of harassment

In the UK, harassment is prohibited in national law. It is defined (so far as relevant) as unwanted conduct related to a relevant protected characteristic the purpose or effect of which is to violate the claimant's dignity, or create an intimidating, hostile, degrading, humiliating or offensive environment for him or her.⁷⁵ S26 EqA, which applies in GB, further provides that, in deciding whether conduct has the effect of creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant, account must be taken of:

- the perception of the claimant;
- the other circumstances of the case;
- whether it is reasonable for the conduct to have that effect.

A similar definition of harassment applies in Northern Ireland under the RRO, DDA, FETO, SOR and Age Regs,⁷⁶ insofar as the conduct falls within the scope of EU law. NI legislation uses the term "on grounds of" rather than "related to" but in *English v Thomas Sanderson Blinds Ltd* the Court of Appeal accepted that the subjection of a man who was not gay, and who was known by his harassers not to be gay, to homophobic abuse, amounted to harassment "on the grounds of" the applicant's sexual orientation.⁷⁷ When that case returned to the EAT after a finding of facts by an employment tribunal, however, that court ruled that the claimant had not been subject to harassment because his willing participation in the office banter of which he subsequently complained indicated that the conduct was not such as to violate the claimant's dignity or create an intimidating, hostile, degrading, humiliating or offensive environment for him. Although the comments directed at the claimant included "distasteful, demeaning and degrading" descriptions of him as a "faggot" and was constant, he had himself written articles for the employer's internal magazines which were "riddled with sexist and ageist innuendo" and had had to apologise to a woman for an offensive remark about her breasts.⁷⁸

In *Grant v H M Land Registry* the Court of Appeal ruled, in a case in which the claimant complained of harassment after a manager disclosed his (the claimant's) sexual orientation to fellow employees that by putting [his sexual orientation] into the public domain the claimant had taken the risk of becoming the focus of conversation and gossip and that to describe the publication of that sexual orientation by his manager as creating for the claimant a humiliating environment "is a distortion of language which brings discrimination law into disrepute".⁷⁹ This is not to say, however, that sexual orientation harassment claims are closed to those who are "out"; in *Smith v Ideal Shopping Direct Ltd* the EAT allowed an appeal by a gay man against the dismissal by a tribunal of his complaint of sexual orientation harassment. He had complained of having been referred to by colleagues as "Val's bitch" (Val being his line manager) and as "Big Gay Wayne". The tribunal had ruled that, although these words could have a homophobic connotation, they were not homophobic in the instant case in which the claimant "brought his sexuality to the attention of his colleagues and would emphasise it." The EAT ruled, however, that the tribunal had erred in law in regarding the abusive language used by his colleagues as acceptable because the claimant had "parade[d]" his sexual orientation.⁸⁰

⁷⁵ S26 EqA, Art 3, s3B, Art 3A, reg 6 and reg 5 of the RRO, DDA, FETO, SOR and Age Regs respectively.

⁷⁶ Art 3, s3B, Art 3A, reg 6 and reg 5 respectively.

⁷⁷ Court of Appeal [2008] EWCA Civ 1421 [2009] IRLR 206 19 December 2008. See also Employment Appeal *Austin v Samuel Grant (North East) Ltd*, [2012], Case no 25039956/11, EqLR 617 29 March 2012.

⁷⁸ Employment Appeal Tribunal *English v Thomas Sanderson Blinds Ltd (No.2)*, [2011], UKEAT 0316_10_2102 21 February 2011, http://www.bailii.org/uk/cases/UKEAT/2011/0316_10_2102.html, accessed 8 April 2016.

⁷⁹ Court of Appeal [2011] EWCA Civ 769, [2011] ICR 1390 01 July 2011, <http://www.bailii.org/ew/cases/EWCA/Civ/2011/769.html>, accessed 8 April 2016.

⁸⁰ Employment Appeal Tribunal UKEAT/0590/12, [2013] EqLR 943 16 May 2013 http://www.bailii.org/uk/cases/UKEAT/2013/0590_12_1605.html, accessed 8 April 2016.

In the UK harassment does not explicitly constitute a form of discrimination but it is regulated as a separate form of wrong in respect of which the same rules concerning burden of proof apply and the same remedies are available.⁸¹

b) Scope of liability for harassment

Where harassment is perpetrated by an employee, in the UK both the employer and the employee will usually be liable, vicarious liability being established under all domestic provisions subject to an “all reasonable steps” defence available to the employer. Domestic legislation also renders offending employees liable for having assisted their employer.⁸² In *Jones v Tower Boot* [1997] IRLR 168⁸³ the Court of Appeal ruled that the statutory test for vicarious liability should be given a purposive interpretation, extending such liability for discrimination beyond the-then scope of employers’ common law liability in tort.

Until its amendment in 2013 the EqA provided (s40(2) & (3)) that employers are liable for harassment by third parties where they “know[] that [the worker] has been harassed in the course of [his or her] employment on at least two other occasions by a third party ... whether the third party is the same or a different person on each occasion”, and “failed to take such steps as would have been reasonably practicable to prevent the third party from doing so”. This provision was repealed in 2013 as the Coalition Government regarded it as an unnecessary “burden on business”. In *Sheffield City Council v Norouzi*, however, the EAT ruled that the claimant could rely on the Race Directive to hold his employer liable for harassment by a third party where the employer had failed to take adequate steps to protect an Iranian social worker from the abusive conduct of a child in care.⁸⁴

2.5 Instructions to discriminate (Article 2(4))

a) Prohibition of instructions to discriminate

In the UK instructions to discriminate are prohibited in national law. Instructions are not defined. S.111 EqA, which applies in GB, prohibits the causing or inducement of discrimination as well as the issue of instructions to discriminate. The position in NI is more complex. Instructions to discriminate and pressure or inducement to discriminate are explicitly prohibited in NI in the case of all the protected grounds except sexual orientation.⁸⁵

In the UK instructions do not explicitly constitute a form of discrimination, though issuing instructions to A to discriminate against B may amount to direct discrimination against A (the courts having recognised that such an instruction may involve a detriment to A and that the detriment is “on grounds of” or “because of” the relevant characteristic (*Weathersfield Ltd v Sargent*)).⁸⁶

b) Scope of liability for instructions to discriminate

⁸¹ S26 EqA, Arts 32 & 33 RRO, ss57&58 DDA, Arts 35 & 36 FETO, regs 26 & 27 Age Regs and reg 5 SOR. It is the author’s view that, for this reason, no question of (non)compatibility with the directives arises.

⁸² Ss109 & 110 EqA, Art 3 RRO, s3B DDA, Art 3A FETO, reg 6 Age Regs and regs 25 & 25 SOR.

⁸³ Court of Appeal [1997] IRLR 168 11 December 1996
<http://www.bailii.org/ew/cases/EWCA/Civ/1996/1185.html> accessed 7 June 2016.

⁸⁴ Employment Appeal Tribunal [2011] EqLR 1039, [2011] IRLR 897 14 June 2011.
http://www.bailii.org/uk/cases/UKCAT/2011/0497_10_1406.html accessed 7 June 2016.

⁸⁵ DDA ss16C, 28UB; RRO Art 30; FETO Art 35; NI Age Regs reg 5. In NI, where instructions to discriminate on grounds of sexual orientation take place in the context of goods and services, housing etc, (outside the scope of EU law) they are explicitly regulated by the Equality Act 2006 (Sexual Orientation) Regs 2006, reg 21.

⁸⁶ Court of Appeal [1999] ICR 425, [1999] IRLR 94 10 December 1998 available at
<http://www.bailii.org/ew/cases/EWCA/Civ/1998/1938.html> (accessed 1 June 2016).

In the UK the instructor is liable for issuing the instruction to discriminate and the discriminator is liable if s/he acts on the instruction.⁸⁷

2.6 Reasonable accommodation duties (Article 2(2)(b)(ii) and Article 5 Directive 2000/78)

- a) Implementation of the duty to provide reasonable accommodation for people with disabilities in the area of employment

In the UK the duty to provide reasonable accommodation is included in the law. It is defined in GB by s20 EqA and in NI by s4A DDA. The duty applies in UK (in the context of employment/occupation) where “a provision, criterion or practice” or “a physical feature” or the lack of an “auxiliary aid” “puts a disabled person at a substantial disadvantage ... in comparison with persons who are not disabled”. The duty is a duty “to take such steps as it is reasonable to have to take” to avoid the disadvantage or to provide the auxiliary aid.”⁸⁸

- b) Practice

The DDA, which was the predecessor to the EqA and which still applies in NI, includes at s18B(2) some examples of steps an employer may need to take in order to comply with a duty to make reasonable adjustments; these include making physical adjustments to premises; allocating some duties to another employee; transferring the person to fill an existing vacancy, being flexible with regard to working hours or place of work; allowing absence from work for rehabilitation, treatment and assessment; giving or arranging special training; acquiring or modifying equipment; modifying instructions or reference manuals; modifying procedures for testing or assessment; providing a reader or interpreter; and providing supervision or other support. The EqA contains no such list. In *Archibald v Fife CC*⁸⁹ the House of Lords decided that the obligation to make reasonable accommodation could require employers not to apply the standard procedures for selecting individuals to fill posts in order to accommodate a disabled person.

The EqA does not use or define the concept of “disproportionate burden” but the question whether any particular adjustment is “reasonable” involves, in essence, the determination of this question. In *Morse v Wiltshire CC*⁹⁰ the EAT held that a tribunal must apply an objective test in deciding whether a particular accommodation was “reasonable” in the circumstances. Deciding what is reasonable is a task for the tribunal, which should pay considerable attention to what factors the employer has considered or failed to consider, scrutinise any explanation for not accommodating the disabled person in question, and reach its own decision on what, if any, steps were reasonable.

The DDA sets out a list of factors which should be considered in determining whether in the particular circumstances it is reasonable for the employer to have to make a particular adjustment. The factors s18B(1) DDA lists can be summarised in general as follows:

- Effectiveness in preventing the particular disadvantage;
- Practicability;
- Financial and other costs which would be incurred and extent of any disruption caused;
- The employer’s financial or other resources;
- The availability to the employer of financial or other assistance;
- Increased risk to the health and safety of any person;

⁸⁷ Ss109 & 110 EqA, Art 3 RRO, s3B DDA, Art 3A FETO, reg 6 Age Regs and regs 25 & 25 SOR.

⁸⁸ S20 EqA, s4A DDA.

⁸⁹ House of Lords [2004] UKHL 32, [2004] ICR 954; [2004] IRLR 651 1 July 2004 available at <http://www.bailii.org/uk/cases/UKHL/2004/32.html>, accessed 1 June 2016.

⁹⁰ Employment Appeal Tribunal [1998] ICR 1023, [1998] IRLR 352, 1 May 1998 http://www.bailii.org/uk/cases/UKCAT/1998/1279_97_0105.html, accessed 7 June 2016.

- The nature of the employer's activities and size of its undertaking.

The EqA contains no such list. *Cordell v Foreign and Commonwealth Office*⁹¹ is a fairly unusual example of a case in which the costs of an adjustment were accepted as contributing to its unreasonableness. The claimant was a diplomat whose offer of a posting to Kazakhstan was withdrawn when it was discovered that it would cost over £1 million over the three year posting to provide her with the necessary lip speakers to accommodate the fact that she was profoundly deaf. Nor was it clear that such lip speakers could in fact be found were the posting made. The respondent had previously posted the claimant to Warsaw at an annual cost of £146,000 and would provide up to £25,000 per child per year to fund residential schooling in the UK for children whose parents were posted abroad. EAT accepted, however, that the adjustments which the claimant sought could not be regarded as reasonable in view, among other things, of the uncertainty as to whether lip speakers would be willing to be posted in Kazakhstan and the fact that the cost involved was some 500% of the claimant's salary.

c) Definition of disability and non-discrimination protection

The definition of disability for the purposes of claiming a reasonable accommodation does not differ from the definition for claiming protection from discrimination in general (EqA s6, DDA s1(1), see section 2.1.1 above).

d) Duties to provide reasonable accommodation in areas other than employment for people with disabilities

In the UK there is a duty to provide reasonable accommodation for people with disabilities outside the employment field. The duties of reasonable adjustment found in s20 EqA and (in NI) s4A DDA apply not only to employment but also to education, housing, membership organisations, the provision of goods, facilities and services and the functions of public authorities. As the duty is owed to disabled persons generally, it is an anticipatory duty.⁹² As above, there is no definition of "disproportionate burden" in the EqA or the DDA but the question whether an adjustment is "reasonable" requires an objective analysis by the court/ tribunal. What is a reasonable adjustment in any particular case is a fact sensitive question but what is reasonable in the case of an existing employee is likely to be different from what is reasonable in relation (for example) to a casual shopper.

e) Failure to meet the duty of reasonable accommodation for people with disabilities

In the UK failure to meet the duty of reasonable accommodation counts as discrimination (s 21 EqA and s3A (2) DDA). The legislation defines this as a free-standing form of discrimination rather than an example of direct or indirect discrimination. There is no justification for a failure to make reasonable adjustment in GB or, in the context of employment/ occupation, in NI. In NI a failure to make reasonable accommodation may be justified in relation to a matter falling outside the scope of Directive 2000/78.⁹³ The sanction for this form of discrimination is the same as that for the other forms of discrimination prohibited by the EqA and the DDA: compensation and/or a recommendation that the employer takes particular steps to obviate the impact of the discrimination on the individual. The burden of proof shifts in relation to this form of discrimination as in relation to all other forms of discrimination.⁹⁴

⁹¹ *Cordell v Foreign and Commonwealth Office* Employment Appeal Tribunal UKEAT/0016/11/SM [2012] ICR 280 5 October 2011 http://www.bailii.org/uk/cases/UKEAT/2011/0016_11_0510.html, accessed 8 April 2016.

⁹² Schedule 2 EqA.

⁹³ DDA ss20, 28B, 28S. The types of interest that may justify a failure to adjust are likely to be the same as those which would make an adjustment unreasonable.

⁹⁴ Though in NI only in relation to discrimination in the context of employment/ occupation – s136 EqA, s17(1C) DDA.

f) Duties to provide reasonable accommodation in respect of other grounds

In the UK there is no express duty imposed by law to provide reasonable accommodation in respect of other grounds in the public and/or the private sector. In some cases, however, a failure to make reasonable accommodation of the needs of minority groups (Gypsies/travellers, for example, or religious minorities) may amount to a breach of Article 14 ECHR read with Art 8 or 9⁹⁵ in which case the courts may be obliged to interpret the relevant legal provisions to require such accommodation to be made.⁹⁶ It is possible that the same might apply where a failure to make reasonable accommodation for age or sexual orientation amounted to a breach of an ECHR provision.

g) Accessibility of services, buildings and infrastructure

In the UK national law requires services available to the public, buildings and infrastructure to be designed and built in a disability-accessible way.

Buildings regulations (Approved Document M – Access to and Use of Buildings)⁹⁷ provide specifications to which buildings must be designed, built and (where relevant) renovated, which specifications are designed to provide a degree of accessibility to disabled people. These Regulations apply to those building or renovating premises but do not impose on-going obligations to maintain any degree of accessibility to existing buildings. A failure to make reasonable adjustments to premises could, however, found a claim under the reasonable accommodation requirements imposed by the EqA in GB or the DDA in NI. Adjustments could include, for example, provisions of ramps to allow better access. These duties extend beyond the area of occupation/ employment to cover, *inter alia*, education and access to goods, facilities and services. There is no reason why a failure to comply with the Buildings Regulations could not be litigated as a failure to make a reasonable adjustment in a suitable case though the author is not aware of any reported case in which this has been done.

In the UK national law contains a duty to provide accessibility by anticipation for people with disabilities in some areas to which disability discrimination legislation applies.⁹⁸ The EqA imposes anticipatory duties to make reasonable accommodation in connection with access to goods, services and facilities, the functions of public authorities, and access to education. In NI anticipatory duties apply only in relation to access to goods, facilities and services and public functions.⁹⁹ The duties vary somewhat between GB and NI and are enforceable only by an individual disabled person who is placed at a disadvantage by the failure to make the anticipatory adjustments. A failure to make a reasonable adjustment is not capable of justification in GB though in NI a justification defence does apply where the person who would otherwise be subject to the duty reasonably considers that the treatment is necessary in order not to endanger the health or safety of any person, or that the particular disabled person is incapable of entering into an enforceable agreement, or of giving an informed consent, and for that reason the treatment is reasonable in that case (or, in the exercise of a public function, that the treatment, or non-compliance with the duty, is necessary for the protection of the rights and freedoms of other persons).

In GB transport is treated the same as other facilities and services but with many specific exceptions provided by Sch 3, paras 32-34A EqA. In NI the DDA imposes specific

⁹⁵ See for example House of Lords *Kay v Lambeth; Price v Leeds*, [2006] UKHL 10, [2006] 2 AC 465 8 March 2006 <http://www.publications.parliament.uk/pa/ld200506/ldjudgmt/jd060308/leeds-1.htm>, accessed 7 June 2016; European Court of Human Rights *Eweida v United Kingdom*, [2013] ECHR 37, 15 January 2013 <http://www.bailii.org/eu/cases/ECHR/2013/37.html>, accessed 7 June 2016.

⁹⁶ See for example Supreme Court *Bull & Anor v Hall & Anor* [2013] UKSC 73, 27 November 2013. <http://www.bailii.org/uk/cases/UKSC/2013/73.html>, accessed 7 June 2016, at para 47.

⁹⁷ <http://www.planningportal.gov.uk/buildingregulations/approveddocuments/partm/approved>, accessed 8 April 2016.

⁹⁸ S20 EqA, read with Sch 2 (services and public functions) and s29.

⁹⁹ DDA ss19, 20, 21D & 21E.

accessibility regulations in respect of taxis, designated transport facilities and public service vehicles, also imposing limited prohibitions on disability discrimination in this context (s21ZA DDA).

In addition, the introduction in GB by the EqA of a prohibition on indirect disability discrimination¹⁰⁰ has the effect that a failure to anticipate may result in an employer or a service provider, public authority, educator etc. being in a position such that its provisions, criteria or practices, method of service or public function delivery, premises, etc. will place disabled people at a disadvantage compared with non-disabled people. If this was foreseeable, it is likely that the employer/ service provider will not be able to justify the indirect discrimination by way of an argument that they cannot change the practice etc. in time to accommodate the needs of the particular disabled person who is complaining of discrimination. In addition, the public sector equality duty requires that public authorities pay due regard to the needs to eliminate discrimination relating to disability and promote equality for disabled people in everything that they do. This may well impose some anticipatory duties on such authorities and on others who perform public functions.

In none of the above cases is accessibility defined as such. Under the EqA a duty to make adjustments is imposed on goods and service providers, public authorities etc. where a provision, criterion or practice, a physical feature or a failure to provide an auxiliary service would put disabled persons generally at a substantial disadvantage by comparison with persons who are not disabled.¹⁰¹ The formula adopted in NI under the DDA refers to policies, practices or procedures, physical features or failures to provide an auxiliary aid which make it "impossible or unreasonably difficult for disabled persons to make use of" services etc.

h) Accessibility of public documents

In the UK a failure to provide material in a way which is accessible to people who are visually impaired may breach the anticipatory duties to make reasonable adjustments (see paragraph (g) immediately above), and may also amount (in GB) to indirect discrimination on grounds of disability. Failure to consider the accessibility of material to people who are visually impaired would also breach the public sector equality duty in both GB and NI. Neither the EqA nor (in NI) the DDA operates by imposing obligations as such to produce materials in braille, as distinct from making them reasonably accessible to users who are visually impaired. There are a number of different ways to facilitate such accessibility, among them the use of email etc. It is common practice for public services to provide information in ways which are accessible to service users. The duty to make adjustments also applies to people with other disabilities, and so a failure to provide material in a way that is accessible to people with learning disabilities (e.g. easy to read texts) could also amount to a failure to make a reasonable adjustment or to indirect discrimination.

¹⁰⁰ S19 EqA.

¹⁰¹ S20 EqA read with s20 (goods, facilities, services and public functions) and Sch 2; ss19, 20 and 21B DDA.

3 PERSONAL AND MATERIAL SCOPE

3.1 Personal scope

3.1.1 EU and non-EU nationals (Recital 13 and Article 3(2) Directive 2000/43 and Recital 12 and Article 3(2) Directive 2000/78)

In the UK there are no residence or citizenship/nationality requirements for protection under the relevant national laws transposing the directives.

3.1.2 Protection against discrimination (Recital 16 Directive 2000/43)

a) Natural and legal persons

In the UK, the personal scope of anti-discrimination law generally has not traditionally covered legal, as distinct from natural, persons for the purpose of protection against discrimination. However, in 2015 in *EAD Solicitors LLP and ors v Abrams*, a case involving age discrimination, the EAT held that a limited company can bring a claim for direct discrimination.¹⁰² The case involved Mr Abrams, previously a partner in the firm EAD Solicitors. Mr Abrams set up and was the sole director of a firm 'Gary Abrams Limited'. The firm was to take his place as a partner in EAD Solicitors, for tax reasons. The limited company then contracted with EAD Solicitors to provide the services of Mr Abrams as a fee earner. The partnership agreement contained a retirement clause, requiring members of the partnership to retire at the age of 62. When Mr Abrams reached the age of 62, he was required to stop work and his company was no longer allowed to be a member of the partnership. It was claimed that this was unlawful direct discrimination against the company, by association, because of Mr Abrams's age. The EAT upheld his claim, on the basis that nothing in the EqA prevents a company from bringing such a claim. The EAT confirmed that the word "person" in the EqA should be interpreted to include legal persons.

In the case of disability discrimination, although there is no express exclusion of legal persons from protection against disability discrimination, protection under the EqA and (in NI) the DDA is provided to "a disabled person", which, on the basis of the statutory definition, will always be a natural person. Protection against discrimination in the field of employment applies only to persons who come within the definitions of employee, partner, officeholder, barrister, member of a trade union or professional association etc., which are limited to natural persons. In principle, there could be discrimination against a legal person in relation to the provision of goods facilities and services, or the exercise of public functions, under s.20 EqA (where, for example, a corporate body was perceived as having, or being associated with, a particular ethnicity, sexual orientation or religion). The same is true in NI but the author is not aware of reported cases where this has occurred.

In the UK the personal scope of anti-discrimination law covers all natural and legal persons for the purpose of liability for discrimination.

There has never been any doubt that the discriminator, as employer, provider of goods and services, provider of education or training, etc. may be a natural or a legal person though it is not spelled out explicitly in the legislation (and would not be expected to be expressly provided).

b) Private and public sector including public bodies

In the UK the personal scope of national law covers private and public sector including public bodies for the purpose of protection against discrimination as there is no relevant legal distinction between the two so the legislation applies to both.

¹⁰² Employment Appeal Tribunal *EAD Solicitors LLP and ors v Abrams* UKEAT/0054/15/DM, 5 June 2015 http://www.bailii.org/uk/cases/UKEAT/2015/0054_15_0506.html accessed 7 June 2016.

In the UK the personal scope of anti-discrimination law covers private and public sector including public bodies for the purpose of liability for discrimination.

3.2 Material scope

3.2.1 Employment, self-employment and occupation

In the UK national legislation applies to all sectors of private and public employment, self-employment and occupation, including contract work, self-employment, military service, holding statutory office, for the five grounds, with the exceptions listed below:

- a) UK anti-discrimination legislation covers some, but not all, forms of self-employment. In *Jivraj v Hashwani* the Supreme Court ruled that arbitrators were not “employed” for the purposes of the anti-discrimination provisions¹⁰³ and, more significantly, that the prohibition of employment “under a contract personally to do work” did not cover independent providers of services who were not in a relationship of subordination with the person who received the services. The extent to which domestic law protects self-employed persons against discrimination is uncertain following *Jivraj* except where (as in the case of contract workers, police officers, partners in firms, barristers and advocates) such persons are expressly covered by the legislation.
- b) Employment includes employment in the armed forces in the UK but (Sch.9, para 4(3) EqA, and equivalent provisions in the DDA and Age Regulations in NI (s64(7) and reg 50(4) respectively) the prohibitions on age and disability discrimination in employment and occupation “do not apply to service in the armed forces.”
- c) Certain other forms of occupation, such as occupation in a voluntary capacity, fall outside the anti-discrimination legislation with the effect that the material scope of UK law may not fully reflect that of the directives in every respect: see *X v Mid-Sussex Citizens Advice Bureau*, in which the Supreme Court ruled that the wide definition of worker protected by UK discrimination law did not include volunteers.¹⁰⁴

3.2.2 Conditions for access to employment, to self-employment or to occupation, including selection criteria, recruitment conditions and promotion, whatever the branch of activity and at all levels of the professional hierarchy (Article 3(1)(a))

In the UK national legislation¹⁰⁵ includes conditions for access to employment, to self-employment or to occupation, including selection criteria, recruitment conditions and promotion, whatever the branch of activity and at all levels of the professional hierarchy for the five grounds in both private and public sectors as described in the directives, with the exceptions listed in 3.2.1 above.

3.2.3 Employment and working conditions, including pay and dismissals (Article 3(1)(c))

In the UK national legislation includes working conditions including pay and dismissals, for all five grounds and for both private and public employment.¹⁰⁶

¹⁰³ Supreme Court [2011] UKSC 40, [2012] 1 All ER 629, [2011] IRLR 827, 27 July 2011

https://www.supremecourt.uk/decided-cases/docs/UKSC_2010_0158_Judgment.pdf, accessed 7 June 2016.

¹⁰⁴ Supreme Court [2013] UKSC 59, [2013] IRLR 146, [2013] ICR 249, 12 December 2012
<http://www.bailii.org/uk/cases/UKSC/2012/59.html> accessed 7 June 2016.

¹⁰⁵ ss39-56, 58-59 EqA; ss4-12, 14A-14D, 15A-15C DDA; Arts 6-7, 9, 11-12, 15-17, 26 RRO; Arts 19-24A, 26, 32 FETO; regs 6-7, 9, 12-16, 20-21 SOR 2003; regs 7-8, 10, 13-18, 22-23 Age Regs.

¹⁰⁶ ss39-52, 61-61 EqA; ss4-12, 15A-15C, 17-18 DDA; Arts 6-7, 9, 11-12, 17, 26 RRO; Arts 19-24A, 25A, 26, 32 FETO; regs 6-7, 9, 11-16SOR 2003; reg 7-8, 10, 13-18 Age Regs.

3.2.3.1 Occupational pensions constituting part of pay

UK anti-discrimination legislation for all the grounds applies to the provision of occupational pensions by employers which, under the influence of the sex discrimination case-law of the CJEU, are now treated, as a result of judicial interpretation, as “benefits” conferred by an employer and therefore come within the various legislative prohibition on the different types of discrimination. The EqA (ss61-63) and, in Northern Ireland, the DDA, FETO and SOR 2003 on discrimination and (in the case of the DDA) requirements for reasonable adjustments apply to occupational pension schemes.¹⁰⁷

3.2.4 Access to all types and to all levels of vocational guidance, vocational training, advanced vocational training and retraining, including practical work experience (Article 3(1)(b))

In the UK national legislation applies to vocational training outside the employment relationship, such as that provided by technical schools or universities, and such as adult lifelong learning courses.¹⁰⁸

3.2.5 Membership of, and involvement in, an organisation of workers or employers, or any organisation whose members carry on a particular profession, including the benefits provided for by such organisations (Article 3(1)(d))

In the UK national legislation includes membership of, and involvement in workers or employers’ organisations as formulated in the directives for all five grounds and for both private and public employment.¹⁰⁹

3.2.6 Social protection, including social security and healthcare (Article 3(1)(e) Directive 2000/43)

In the UK national legislation includes social protection, including social security and healthcare as formulated in the Racial Equality Directive.¹¹⁰

Although “social protection” is not defined in UK law the EqA prohibits discrimination on all the grounds by public or private sector organisations in the provision of goods, facilities and services to the public or a section of the public. It also covers all functions of public authorities, which would include any publicly provided social protection as well as social security and publicly provided healthcare. There are extensive exceptions in the case of the prohibition on age discrimination which does not in this context protect those under 18.¹¹¹

In Northern Ireland the RRO¹¹² prohibits discrimination in the functions of public authorities that consist of the provision of any form of social security, healthcare and any other form of social protection. The DDA prohibits discrimination in access to goods, facilities and services provided to the public or a section of the public, which would be expected to include health care, and prohibits discrimination on the grounds of disability in the exercise of public functions by public authorities, which encompasses the administration of publicly provided forms of social protection, including healthcare, as well as social security.¹¹³ FETO prohibits discrimination on grounds of religious belief or political opinion in provision by public or private sector organisations of goods, facilities and services to the public or a

¹⁰⁷ s17 DDA; Arts 6-7 RRO; Art 25A FETO; reg, 11 SOR 2003; reg 12 Age Regs.

¹⁰⁸ EqA ss53-54, 90-97; DDA ss14A-14D; RRO Arts 14-15, 18; FETO Arts 24-25; SOR 2003 regs 18-22; Age Regs regs 20-24.

¹⁰⁹ EqA s57; DDA ss13-14; RRO Art 13; FETO Art 23; SOR 2003 regs 17; Age Regs reg 19.

¹¹⁰ EqA s29; DDA s29; RRO Arts 20, 20A; FETO Art 28; SOR 2006 regs 5,12.

¹¹¹ S28A EqA.

¹¹² Art 20A RRO.

¹¹³ Ss19, 21B DDA.

section of the public.¹¹⁴ Healthcare would be included, but it is unlikely that all forms of social protection and social security including inequality in levels of state benefits would be wholly within FETO. The Equality Act (Sexual Orientation) Regulations (Northern Ireland) 2006 (SOR 2006) prohibit discrimination on the ground of sexual orientation in the performance of public functions, again including social protection including healthcare and social security.¹¹⁵ Age discrimination is not regulated in NI outside the scope of Directive 2000/78.

In *Secretary of State for Work and Pensions v MM* the Court of Appeal ruled that the Secretary of State had unlawfully discriminated against people with cognitive, mental and intellectual disabilities by limiting the amount of medical evidence taken into account in assessing eligibility for certain benefits.¹¹⁶ The Court found that people with mental health problems might well be disadvantaged by the decision-making process designed to determine whether claimants were fit to work (1) because they suffered a greater risk than others that the decision-maker would not reach the right decision because the information available from the claimant himself or herself would often be insufficient to indicate the true nature and extent of the illness from which they were suffering and (2) the process itself imposed a greater stress and anxiety on this group than others.

The various positive duties imposed upon British and NI public authorities discussed at 2.3.1 above require public bodies to pay due regard to the need to eliminate discrimination and promote equality of opportunity in the performance of public functions, which would presumably include the provision of social protection.

3.2.6.1 Article 3.3 exception (Directive 2000/78)

All discrimination by public authorities in GB is now prohibited on all grounds covered by the Directive as a result of s.29 EqA, but subject to an exception which covers all discrimination authorised by statute where the discrimination is not also prohibited by EU law. Thus, subject to the requirements of the European Convention on Human Rights, discrimination in state social security schemes could be authorised despite the EqA. To the best of the author's knowledge no such statutory authority has been enacted. A similar position prevails in Northern Ireland, except that age discrimination in this context is not there regulated.¹¹⁷

3.2.7 Social advantages (Article 3(1)(f) Directive 2000/43)

In the UK, national legislation includes social advantages as formulated in the Racial Equality Directive though judicial interpretation is required as none of the legislation makes explicit reference to social advantages.¹¹⁸

The EqA, which covers all five grounds in GB, prohibits discrimination in the provision by public or private sector organisations of goods, facilities and services to the public or a section of the public. It also covers all functions of public authorities, which would include much of what might be regarded as "social advantages".

In Northern Ireland the RRO¹¹⁹ prohibits discrimination by public authorities in providing any form of social advantage (art 20A). The DDA prohibits discrimination in access to goods, facilities and services provided to the public or a section of the public, which would be expected to include health care, and prohibits discrimination on the grounds of disability

¹¹⁴ Art 28 FETO.

¹¹⁵ Regs 5, 12 SOR 2006.

¹¹⁶ Court of Appeal [2013] EWCA Civ 1565 [2014] EqLR 34, 4 December 2013
<http://www.bailii.org/ew/cases/EWCA/Civ/2013/1565.html>, accessed 7 June 2016.

¹¹⁷ EqA s29; DDA ss29, 59; RRO Arts 20, 20A & 40; FETO Arts 28, 78; SOR 2006 regs 5,12 & 49.

¹¹⁸ EqA s29; DDA ss19, 21B; RRO 20, 20A; FETO Art 28; SOR 2006 regs 5,12.

¹¹⁹ Article 20A RRO.

in the exercise of public functions by public authorities, would include much of what might be regarded as “social advantages”.

FETO prohibits discrimination on grounds of religious belief or political opinion in provision by public or private sector organisations of goods, facilities and services to the public or a section of the public and the SOR 2006 prohibit discrimination on the ground of sexual orientation in the performance of public functions. Both should catch at least some areas of “social advantages”. Age discrimination is not regulated in NI outside the scope of Directive 2000/78.

The various positive duties imposed upon GB and NI public authorities discussed at 2.3.1 above require public bodies to pay due regard to the need to eliminate discrimination and promote equality of opportunity in the performance of public functions, which would presumably include the provision of social advantages. UK law does not, however, contain any clear definition of social advantage, and whether the existing legislation is adequate to implement EU law will not be known until a body of case law has been developed, both within the UK and in the CJEU.

In the UK the lack of definition of social advantages does not raise problems in view of the broad prohibitions on discrimination that apply in relation to access to services and facilities, and the functions of public authorities.

3.2.8 Education (Article 3(1)(g) Directive 2000/43)

In the UK, national legislation includes education as formulated in the Racial Equality Directive.¹²⁰

Both the EqA and (in NI) the RRO prohibit discrimination and segregation across their scope of application, so segregation in schools between persons of different racial or ethnic groups would be unlawful, including segregation of traveller or Roma children. Despite this, concerns persist as to the concentration of ethnic minority students in particular schools, which reflect wider issues of divided communities and social segregation,¹²¹ and at times a tendency for white families to avoid schools which are seen to contain few white pupils. Further, state funding is provided for schools which select their pupils by religious adherence, which has implications for racial diversity in intake. While various initiatives exist at local level which attempt to deal with this problem, this produces at times a pattern of segregation: however, studies have shown that the national situation is complex and it is difficult to make generalisations in this area (Department of Education: *Ethnicity and Education* (2006), p. 28-9, Runnymede Trust, *School Choice and Ethnic Segregation* (2007)).¹²²

The EqA regulates discrimination on grounds of religion in education in GB but there is no equivalent provision in NI except in relation to further and higher education. The EqA contains an extensive series of exceptions to prohibitions on religious discrimination in education designed to protect the status of public state-funded denominational schools and private schools with a particular religious ethos. None have as yet given rise to legal issues involving segregation. Segregation of Catholic and Protestant pupils in Northern Ireland has been a constant problem there for many decades, with large proportions of the different groups going to faith schools.

¹²⁰ EqA ss84-99; DDA ss28A-31C; RRO Arts 18-20; FETO Art 27; SOR 2009 regs 9-12.

¹²¹ See S. Burgess and D. Wilson (2004), *Ethnic Segregation in England's Schools*, CASE paper 79, Centre for Analysis of Social Exclusion, London School of Economics, available at: <http://sticerd.lse.ac.uk/dps/case/cp/CASEpaper79.pdf>, accessed 8 April 2016.

¹²² <http://www.runnymedetrust.org/uploads/publications/pdfs/School%20ChoiceFINAL.pdf> and see generally <http://www.measuringdiversity.org.uk/>, both accessed 8 April 2016.

The EqA and the SOR 2006 prohibit discrimination in access to and the provision of education on the grounds of sexual orientation in GB and NI respectively, subject to certain narrow exceptions. They do not prohibit harassment related to sexual orientation, though such harassment will amount to direct discrimination where it amounts to *less favourable treatment* because of (or, in Northern Ireland, on grounds of) sexual orientation.

The relevant provisions of the EqA prohibit age discrimination in GB in the provision of goods and services and in the performance of public functions but do not protect those under 18 from age discrimination and the prohibition on age discrimination does not apply to schools in the performance of their education function. Age discrimination in education is not prohibited in NI.

The various positive duties imposed upon public authorities in GB and NI discussed at **2.3.1** above require public bodies to take active steps to eliminate discrimination and promote equality of opportunity in the provision of education.

a) Pupils with disabilities

Disability discrimination in education is regulated both in GB and NI, by the EqA and the DDA respectively.¹²³ Scotland has always had a separate education system to England and Wales, albeit that the EqA applies in Scotland. Duties of reasonable accommodation are imposed in relation to school pupils and a variety of policy initiatives and legislative provisions are intended to encourage integrated education within the educational mainstream for persons with disabilities. There are systems of "statementing" whereby children with more severe special educational needs (SEN) have those needs documented and the educational resources required to meet them stipulated, the child then being entitled as of right to the statemented provision (funded by the state). The system in England and Wales, which has been in place for decades is currently undergoing significant change with "education, health and care plans" gradually replacing "statements of Special Educational Need" and funding to some extent being decoupled from individual children with SEN. The systems of education for children with SEN/ disabilities are fairly developed in the UK but it is often not easy for parents to negotiate the bureaucracy involved.

b) Trends and patterns regarding Roma pupils

In the UK, specific patterns exist in education regarding Roma pupils such as segregation ("Roma" here being used to include from Gypsies/ Travellers/ Irish Travellers as well as Roma from Eastern and Central Europe). A study published in 2010 reported that, even if they made the transition from primary to secondary school aged 11 (which 20% did not), many Gypsy and Traveller children in England (almost 50% of the total) dropped out before reaching statutory school leaving age.¹²⁴ Gypsy, Roma and Traveller pupils are amongst the lowest achieving in the school system in England, are more likely than others to be identified as having SEN, and are four times as likely as pupils from other ethnic groups to be excluded from school by reason of poor behaviour. The 2010 report disclosed that they were disproportionately likely to attend low achieving schools, to be poor and to suffer from disrupted education (including high levels of absenteeism). The report cited strategies adopted by head teachers to encourage attainment by these disadvantaged pupils, including the provision of teaching assistants and curriculum support with monitoring of performance and celebration of Gypsy, Roma and Traveller culture. There is no reason to believe that that position in the rest of the UK is any better.¹²⁵

¹²³ EqA ss84-99, DDA ss28A-31C.

¹²⁴ Department for Education, *Improving the outcomes for Gypsy, Roma and Traveller Pupils* https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/181669/DFE-RR043.pdf, accessed 8 April 2016. See also the reports at http://orca.cf.ac.uk/42241/1/routes_report_030113.pdf and http://ec.europa.eu/justice/discrimination/files/roma_childdiscrimination_en.pdf accessed 8 April 2016.

¹²⁵ See for example *Mapping the Roma Community in Scotland* (2013) <http://www.gov.scot/resource/0043/00434972.pdf>, accessed 8 April 2016, *Gypsies/Travellers in Scotland: Summary of the Evidence Base*, Summer 2013 <http://www.gov.scot/Resource/0043/00430806.pdf>,

3.2.9 Access to and supply of goods and services which are available to the public (Article 3(1)(h) Directive 2000/43)

In the UK, national legislation includes access to and supply of goods and services as formulated in the Racial Equality Directive.

The EqA prohibits discrimination related to race, disability, religion, belief, age (other than in the case of those aged under 18) and sexual orientation, by public or private sector bodies in the provision of goods, facilities or services to the public or a section of the public in GB (s29). In NI the RRO (art. 21), DDA (Part 3), FETO (art 28) and SOR 2006 (reg 5) prohibit discrimination in access to goods, facilities and services provided to the public or a section of the public on grounds of race, disability, religion/ belief and sexual orientation respectively.

3.2.9.1 Distinction between goods and services available publicly or privately

In the UK national law distinguishes between goods and services available to the public (e.g. in shops, restaurants, banks) and those only available privately (e.g. limited to members of a private association).

There are separate provisions prohibiting discrimination by associations with 25 or more members because of race, disability, religion or belief, age (other than in the case of those aged under 18) or sexual orientation against any member or associate in access to any benefits, facilities or services in GB (EqA, Part 7) and, in NI, on grounds of race, sexual orientation and disability (RRO art 25; SOR reg 17, DDA s21F). Insofar as they apply to disability these provisions require the making of reasonable adjustments.

The various positive duties imposed upon GB and NI public authorities discussed at 2.3.1 above require public bodies to take active steps to eliminate discrimination and promote equality of opportunity in the provision of state services.

3.2.10 Housing (Article 3(1)(h) Directive 2000/43)

In the UK, national legislation includes housing as formulated in the Racial Equality Directive.¹²⁶

The EqA and the RRO regulate discrimination in all aspects of housing: sale and letting of privately owned properties, allocation of tenancies in public or private sector, management of rented accommodation in public or private sector, residential care institutions etc. The EqA applies in this context to discrimination because of race, disability, religion or belief and sexual orientation, but not age. FETO and the SOR 2006 also regulate discrimination in NI in housing as does the DDA.

The various positive duties imposed upon British and NI public authorities discussed at 2.3.1 above require public bodies to take active steps to eliminate discrimination and promote equality of opportunity in the provision of housing. These duties may influence how other statutory duties are performed by public authorities, such as their duties to provide housing for local populations.

In previous decades, BME (black and minority ethnic) groups suffered discrimination in housing, both as a result of discrimination by private landlords and segregation and discrimination in the allocation of public housing. Certain towns and cities in the north of England still remain segregated, even if discrimination in the sphere of housing appears to

accessed 8 April 2016.

¹²⁶ EqA ss32-35; RRO Arts 22-24; FETO Arts 29-31; DDA ss22-24M; SOR 2006 regs 6-7.

be less common than was the case in the past, and levels of segregation are decreasing.¹²⁷ Segregation is also a problem in NI, where Catholic and Protestant communities often live in segregated communities as a result of the communal violence of the last forty years.

3.2.10.1 Trends and patterns regarding housing segregation for Roma

In the UK there are patterns of housing segregation and discrimination against the Roma.¹²⁸

As above, 'Roma' here is taken to include Gypsies/ Travellers and Irish and Scottish Travellers who have been resident in significant numbers in the UK for a much longer period than Eastern and Central European Roma. One of the issues which arises in connection with Gypsies/ Travellers and Irish and Scottish Travellers is the preference of many to live in caravans rather than in fixed homes. Caravans need sites, and may not be parked even on land owned by the owners of the caravans without appropriate planning permission. Such planning permission is very difficult to obtain in large areas of the country which are designated "green field" sites. Thus many Gypsies/ Travellers/ Irish Travellers can find themselves unable to park their own caravans on their own land. (The 2011 Dale Farm evictions which followed protracted but ultimately unsuccessful legal action by the residents was an example of exactly this).¹²⁹

Many privately owned caravan sites are reluctant to accommodate Gypsies/ Travellers and Irish and Scottish Travellers and, although direct refusals based on ethnicity would be unlawful, many private sites do not offer long term facilities such as many Gypsies/ Travellers and Irish Travellers require. The position as regards public authorities has varied over time. Prior to 1996 local authorities in England and Wales had a statutory duty to provide caravan sites for Gypsies and Travellers under the Caravan Sites Act 1968¹³⁰. This was removed by the Criminal Justice and Public Order Act 1994¹³¹ which gave local authorities and the police broad powers to evict Gypsies and Travellers from unauthorised sites. Even where Gypsies/ Travellers and Irish and Scottish Travellers can park on local authority sites in England and Wales they do not have security of tenure and can be required to quit on four weeks' notice. In Scotland, the number of Gypsy/ Traveller pitches fell from 478 to 425 between 2009 and 2013/14.¹³²

Circular 1/94 encouraged local authorities in England and Wales to take special action to encourage Travellers to purchase land for halting sites themselves and to apply to legitimise their own sites through the planning system. Such planning permission was and is often very difficult to obtain, however, with other residents resisting the establishment of such sites and also of public authority sites suitable for Gypsies/ Travellers/ Irish Travellers. The Housing Act 2004,¹³³ in conjunction with Circular ODPM 1/06, required local authorities in England and Wales to undertake Gypsy and Traveller Accommodation Assessments (GTTAs) to determine the level of need for traveller accommodation. These assessments formed part of regional strategies concerning the provision of such accommodation. Circular ODPM 1/ also permitted some development of Gypsy/ Traveller/ Irish Traveller/ Scottish Traveller sites on green belt land. This approach was replaced in

¹²⁷ <http://www.ethnicity.ac.uk/medialibrary/briefingsupdated/has-neighbourhood-ethnic-segregation-decreased.pdf> accessed 8 April 2016.

¹²⁸ In Scotland for example see Gypsies/Travellers in Scotland: Summary of the Evidence Base, Summer 2013 <http://www.gov.scot/Resource/0043/00430806.pdf>, accessed 8 April 2016.

¹²⁹ See Court of Appeal Basildon District Council v McCarthy & Ors, [2009] EWCA Civ 13, [2009] LGR 1013, 22 January 2009 <http://www.bailii.org/ew/cases/EWCA/Civ/2009/13.html>, accessed 7 June 2016.

¹³⁰ <http://www.legislation.gov.uk/ukpga/1968/52/contents>. Date of adoption: 26 June 1968 accessed 7 June 2016.

¹³¹ <http://www.legislation.gov.uk/ukpga/1994/33/contents>. Date of adoption: 3rd November 1994 accessed 7 June 2016.

¹³² <http://www.gov.scot/Topics/Built-Environment/Housing/supply-demand/chma/hnda/gypsytravelleranalysis>. Accessed 8 April 2016.

¹³³ <http://www.legislation.gov.uk/ukpga/2004/34/contents>. Date of adoption: 18th November 2004 accessed 7 June 2016.

2011, however (as part of a move towards increased “localism”), by the National Planning Policy Framework which removed the requirement to carry out GTTAs and reinstated the ban on development in green belt land except with local support (such support being unlikely in the case of Gypsy/ Traveller/ Irish Traveller/ Scottish Traveller sites). A report published by the Irish Traveller Movement in Britain in June 2011, predicted that the impact would be to make planning permission even more difficult for this disadvantaged group to obtain.¹³⁴

¹³⁴ Planning for Gypsies and Travellers: the Impact of Localism, <http://www.travellermovement.org.uk/wp-content/uploads/2013/11/ITMB-Planning-for-Gypsies-and-Travellers.pdf>, accessed 8 April 2016.

4 EXCEPTIONS

4.1 Genuine and determining occupational requirements (Article 4)

In the UK national legislation provides an exception in accordance with Article 4 for genuine and determining occupational requirements. The words “genuine and determining”, which are used in Article 4 Directive 2000/78, were removed in the Equality Act 2010 on the basis that the words are superfluous. The assumption is that the objective of such a requirement will not be legitimate or proportionate if it is not genuine or determining.

In GB the EqA applies a general occupational requirement defence across all the protected grounds (Sch 9 para 1). There are, in addition, broader exceptions applicable to religious organisations (Sch 9 paras 2 & 3) which do not, however, permit discrimination on grounds of race, ethnicity, disability or age. (A general justification defence also applies in respect of age discrimination.)

In NI the RRO (art 8(2)) lists four types of jobs where being of a particular colour or nationality may be a genuine occupational qualification.¹³⁵ In the case of race and ethnic and national origins, however, the RRO applies a new generic GOR defence which is the same as that which applies under the SOR 2003 and the Age Regs (i.e., whether having a particular protected characteristic is a genuine and determining occupational requirement which it is proportionate to apply that requirement in the particular case).¹³⁶ The DDA does not provide a GOR but FETO permits discrimination on grounds of religious belief in the recruitment of teachers (Art 71), police (Art 71A) and clergy (Art 70), also (Art 70) “where the essential nature of the job requires it to be done by a person holding or not holding a particular religious belief” (which, under the FETO Regulations, would include any religion or similar philosophical belief).¹³⁷ This exception is considerably wider than Article 4(1) or 4(2) of the Directive; most significantly there is no obligation to justify the requirement on the basis of a legitimate aim or that it is a proportionate means of meeting that aim. Judicial interpretation of the regulations will be required to ensure that direct effect is given to the directive.

4.2 Employers with an ethos based on religion or belief (Article 4(2) Directive 2000/78)

In the UK national law provides an exception for employers with an ethos based on religion or belief.

GB

The EqA provides, in relation to religion or belief, an additional occupational requirement defence where (Sch 9, para 3) an employer has an ethos based on religion or belief and, having regard to that ethos and the nature and context of the job, being of a particular religion or belief is an occupational requirement, “the application of the requirement is a proportionate means of achieving a legitimate aim, and the person to whom ... the requirement [is applied] does not meet it (or [the person applying it] has reasonable grounds for not being satisfied that the person meets it)”.

The EqA does not replicate the wording of Article 4(2) that requires that the religious ethos exception need only be genuine, and not determining, in contrast to the general GOR which

¹³⁵ a) participation in a dramatic performance, b) participation as an artist’s or photographer’s model, c) working where food or drink is provided to the public in a particular setting where a person of a particular racial group is required for reasons of authenticity, and d) providing persons of a particular racial group with personal services promoting their welfare which can most effectively be provided by a person of that racial group. The only case law in this area makes it clear that these provisions are to be narrowly interpreted: in particular, *Lambeth London Borough Council v Commission for Racial Equality* [1990] ICR 768, [1990] IRLR 231.

¹³⁶ RRO Art 7A, SOR reg 8; Age Regs reg 9.

¹³⁷ Art 70.

has to be both genuine and determining. Instead, the EqA says that in assessing the legitimacy and proportionality of the aim of an occupational requirement, regard must be to the ethos and the nature and context of the job. Given that the EqA must be interpreted to accord with Article 4, this difference in wording between the two instruments may not be of significance in practice. However, it is arguable that the removal of these terms, particularly the term 'determining' from the face of the domestic legislation has hidden from view an important distinction between the two levels of occupational requirement.¹³⁸

The EqA's prohibitions on discrimination related to religion or belief are made subject to ss58–60 of the School Standards and Framework Act 1998¹³⁹ (reg. 39), which permit voluntary aided schools (publicly maintained schools with a degree of independent management) with a religious character to discriminate in the recruitment of teachers and their dismissal. Specifically, s60(5) of the School Standards and Framework Act 1998 permits a voluntary aided school with a religious character to have regard "in connection with the termination of the employment of any teacher at the school, to any conduct on his part which is incompatible with the precepts, or with the upholding of the tenets, of the [school's specified] religion or religious denomination". This exception applies only to teachers, according to s. 60(6). A similar provision exists for Scottish Catholic schools in s.21(2A) of the Education Act (Scotland) 1980.¹⁴⁰ In addition, in voluntary controlled schools (also publicly maintained schools with a slightly different management system to voluntary aided schools) religion can be taken into account in appointing the head teacher, and regard may be had to his or her "ability and fitness to preserve and develop the religious character of the school".¹⁴¹ In addition the school can "reserve" up to a fifth of its teaching staff who can be "selected for their fitness and competence" to give religious education in accordance with the tenets of the faith of the school.¹⁴²

These provisions permit wide scope for discrimination in selection and dismissal, as schools are not required to demonstrate that the person's religion or belief constitutes a genuine, legitimate and justified occupational requirement for the job in question (for example teaching mathematics). By taking the School Standards and Framework Act and/or the Education Act (Scotland) Act into account, the EqA may fail to comply with Article 4(2) and judicial interpretation of the Regulations to ensure that direct effect is given to Article 4(2) and may be required. This appears to have been done in *Glasgow City Council v McNab*,¹⁴³ in which the EAT gave a narrow interpretation to the permitted "ethos" exceptions to the prohibition on discrimination based on religion or belief to rule that the rejection of an atheist from a temporary position as acting head of a Catholic state school was unlawful. However, *Glasgow v McNab* did not involve the School Standards and Framework Act 1998, and so the precursor to the EqA applied. There may be little room for judicial interpretation of the School Standards and Framework Act 1998 which is clear in its scope.

NI – Religious belief

FETO provides exceptions for employment as a clergyman or minister of a religious denomination and discrimination "where the essential nature of the job requires it to be done by a person holding or not holding a particular religious belief" (which, under the FETO Regulations, would include any religion or similar philosophical belief).¹⁴⁴ As pointed out above (4.2), this exception is considerably wider than Article 4(1) or 4(2) of the directive and judicial interpretation of the regulations will be required to ensure that direct effect is given to the directive.

¹³⁸ There has not yet been case law on this issue to test whether the EqA will be construed in broader terms than Art. 4(2).

¹³⁹ <http://www.legislation.gov.uk/ukpga/1998/31/contents>. Date of adoption: 24 July 1998 accessed 7 June 2016.

¹⁴⁰ <http://www.legislation.gov.uk/ukpga/1980/44>. Date of adoption: 1 August 1980 accessed 7 June 2016.

¹⁴¹ S 60 SSFA 1998, as amended by s 37 of the Education and Inspections Act 2006.

¹⁴² S 58 SSFA 1998.

¹⁴³ Employment Appeal Tribunal [2007] IRR 476, 17 January 2007

http://www.bailii.org/uk/cases/UKCAT/2007/0037_06_1701.html accessed 7 June 2016.

¹⁴⁴ Art 70.

- Conflicts between rights of organisations with an ethos based on religion or belief and other rights to non-discrimination

In the UK there are specific provisions and case law in this area relating to conflicts between the rights of organised religions and other rights to non-discrimination.

Sch 9, para 2 EqA provides that a person does not contravene any of the Act's prohibitions on discrimination in relation to employment by applying a "requirement related to sexual orientation" (or sex, marriage or civil partnership) if (broadly) the discriminator shows that: (1) the employment is for the purposes of an organised religion; (2) the requirement is applied to comply with the doctrines of the religion or to avoid conflicting with the strongly held religious convictions of a significant number of the religion's followers. The relevant provisions of the SOR (reg 8(2)) are materially similar. They appear to go beyond the exceptions permitted under the Employment Equality Directive in that they do not provide that the "requirement related to sexual orientation" (e.g. not engaging in any sexual activity at all, or not doing so outside of a different-sex marriage, and accepting the religious organisation's doctrines on same-sex sexual activity) must be "proportionate" to any legitimate aim, especially considering the nature of the job to which the requirement is applied (priest vs. cleaner in a convent). Nor do they appear to comply with art. 4(2) (second para.) of the Directive, as they create (as drafted) a blanket exception, without regard to the conduct of the individual employee or prospective employee, for any employment "for the purposes of organised religion". However, judicial interpretation of the Regulations¹⁴⁵ and the EqA suggests that these provisions will be very narrowly interpreted, so as to apply only to clergy or their equivalent. In such cases, it would be likely that occupational requirements to comply with religious doctrine would be proportionate.

The compatibility of the (materially identical) predecessor provisions to Sch 9 para 2 with the Directive and with the ECHR was challenged by a number of trade unions which applied, unsuccessfully, to the High Court in the *Amicus* case to have the regulation annulled.¹⁴⁶ The Court accepted the government's argument that the provision was intended to have a narrow scope and was therefore not outside Art 4(1) of the Directive. The Court was clear that the words "for the purposes of a religion" referred to the appointment of religious leaders and teachers such as priests and imams, and would not apply to jobs with religious organisations such as schools and hospitals run by religious organisations.

There remain arguments that, despite the narrow scope specified in *Amicus*, these exceptions should be repealed but there are not at present any discussions to this end.

It is arguable that the special exception for employment for the purposes of an organised religion is unnecessary, as requirements relating to the sex or sexual orientation of religious personnel would often be covered in any event by the general occupational requirement provisions of Schedule 9 paragraph 1: a requirement relating to sex or sexual orientation which is applied by a religious group in order to comply with religious doctrine¹⁴⁷ would in many cases be judged to be proportionate if the provisions are interpreted to accord with the provisions of the ECHR. ECHR case law is clear that where an employee is playing a key role in the group's manifestation of religion (for example, carrying out religious rites), the autonomy of the religious group should be accorded great weight when set against other interests.¹⁴⁸

¹⁴⁵ High Court *R (Amicus & Ors) v Secretary of State for Trade and Industry*, [2004] EWHC 860 (Admin), [2007] ICR 1176, [2004] IRLR 430, 26 April 2004
<http://www.bailii.org/ew/cases/EWHC/Admin/2004/860.html>, accessed 7 June 2016.

¹⁴⁶ High Court *R (Amicus & Ors) v Secretary of State for Trade and Industry* *ibid*.

¹⁴⁷ Or to avoid conflicting with the strongly held religious convictions of a significant number of the religion's followers.

¹⁴⁸ See, for example, European Court of Human Rights *Hasan v Bulgaria* App No 30985/96, (2002) 34 EHRR 55 26 October 2000 <http://www.bailii.org/eu/cases/ECHR/2000/511.html>, accessed 7 June 2016; European

To date the controversial cases in the UK have arisen where individuals have alleged that they have been subject to religious discrimination when they are required to refrain from wearing particular symbols linked to their religious beliefs (see *Azmi v Kirklees Metropolitan Council*,¹⁴⁹ *Eweida & Chaplin v United Kingdom*)¹⁵⁰ or have been disciplined for refusing to perform functions relating to same-sex partnership and family rights (see *Ladele & McFarlane v United Kingdom*).^{151 152} In *Ladele* the Court of Appeal held that the refusal of a Christian registrar's request to be exempt from carrying out civil partnerships did not amount to indirect religious discrimination as it was justified. The employer was entitled to rely on its policy of requiring all staff to offer services to all service users regardless of sexual orientation.¹⁵³

– Religious institutions affecting employment in state funded entities

In the UK religious institutions are permitted to select people (on the basis of their religion) to hire or to dismiss from a job when that job is in a state entity, or in an entity financed by the State. Sch 9 para 3 (and, NI, FETO Art 70) allows organisations with an ethos based on religion or belief to apply "in relation to work a requirement to be of a particular religion or belief if [the organisation] shows that, having regard to that ethos and to the nature or context of the work- (a) it is an occupational requirement [and] (b) the application of the requirement is a proportionate means of achieving a legitimate aim...". And in NI FETO provides exceptions for employment as a clergyman or minister of a religious denomination and discrimination "where the essential nature of the job requires it to be done by a person holding or not holding a particular religious belief" (which, under the FETO Regulations, would include any religion or similar philosophical belief).¹⁵⁴

4.3 Armed forces and other specific occupations (Article 3(4) and Recital 18 Directive 2000/78)

In the UK national legislation provides for an exception for the armed forces in relation to age and disability discrimination (Article 3(4), Directive 2000/78). The EqA disapplies the prohibition on employment-related age and disability discrimination in relation to service in the armed forces (Sch 9, para 4). In NI, the Age Regs do not extend to the armed forces and the DDA includes an exception in relation to service in the armed forces (reg 50(4), s64(7) respectively).

4.4 Nationality discrimination (Article 3(2))

a) Discrimination on the ground of nationality

In the UK national law includes limited exceptions relating to difference of treatment based on nationality. These exceptions relate for the most part to immigration, Sch 18, para 2 EqA allowing ministers to authorise discrimination on grounds of nationality (and ethnic or

Court of Human Rights, *Serif v Greece* App No 38178/97 (2001) 31 EHRR 20 14 December 1999 <http://www.bailii.org/eu/cases/ECHR/1999/169.html>, accessed 7 June 2016.

¹⁴⁹ Employment Appeal Tribunal [2007] ICR 1154, [2007] ELR 339, [2007] IRLR 484, 30 March 2007 http://www.bailii.org/uk/cases/UKCAT/2007/0009_07_3003.html, accessed 7 June 2016.

¹⁵⁰ European Court of Human Rights *Eweida v United Kingdom*, [2013] ECHR 37, 15 January 2013 <http://www.bailii.org/eu/cases/ECHR/2013/37.html>, accessed 7 June 2016. Also Employment Appeal Tribunal *Begum v Pedagogy Auras UK Ltd t/a Barley Lane Montessori Day Nursery* UK EAT/0309/13/RN 22. May 2015 http://www.bailii.org/uk/cases/UKCAT/2015/0309_13_2205.html, accessed 7 June 2016.

¹⁵¹ Decided with European Court of Human Rights *Eweida v United Kingdom*, [2013] ECHR 37, 15 January 2013 <http://www.bailii.org/eu/cases/ECHR/2013/37.html>, accessed 7 June 2016.

¹⁵² And see High Court *Smith v Trafford Housing Trust*, [2012] EWHC 3221 (Ch), [2013] IRLR 86, 16 November 2012 <http://www.bailii.org/ew/cases/EWHC/Ch/2012/3221.html>, accessed 7 June 2016, for a decision in which the religious employee's freedom of expression was upheld.

¹⁵³ Court of Appeal *Ladele v Islington Borough Council* [2009] EWCA Civ 1357, 15 December 2009 <http://www.bailii.org/ew/cases/EWCA/Civ/2009/1357.html>, accessed 7 June 2016

¹⁵⁴ Art 70.

national origins) in the carrying out of specified immigration control functions. The RRO also permits discrimination on grounds of nationality in the immigration function. Under the Race Relations (Immigration and Asylum) Authorisation 2011 there is a list (not in the public domain) of nationalities, and a person of a nationality on the list seeking to enter the UK can be subjected to more rigorous examination than other persons, detention pending examination, refusal of leave to enter and imposition of conditions on temporary admission and a person of a nationality on the list wishing to travel to the UK can be refused leave to enter or can be required to provide information and documents.

In the UK nationality (as in citizenship) is explicitly mentioned as a protected ground in national anti-discrimination law, and generally receives the same level of protection as ethnicity, national origins and colour (EqA s9, RRO reg 5).

b) Relationship between nationality and 'race or ethnic origin'

Claimants choose how to categorise the discrimination of which they complain and may choose to advance their claim on a single, alternative or multiple grounds. A Zimbabwean African woman might, for example, be treated less favourably because she is Black, or because she is of African origin, or specifically because of her Zimbabwean nationality. Or she may be discriminated against precisely because she is a Black Zimbabwean. Very little attention is paid in domestic case law to the overlaps between these types of categories because, for the most part, the protection afforded then under national law does not differ.¹⁵⁵

4.5 Work-related family benefits (Recital 22 Directive 2000/78)

a) Benefits for married employees

In the UK, it would constitute unlawful discrimination in national law if an employer only provided benefits to those employees who are married, i.e. by drawing a distinction between such employees and those who have entered into (same-sex) civil partnerships. Discrimination *in favour* of those who are married/ civilly partnered (i.e., *against* those who are single) is not prohibited.

Section 23(3) EqA provides that, when carrying out a comparison exercise to determine whether there has been direct or indirect discrimination, if the protected characteristic is sexual orientation, the fact that one person is a civil partner while another is married cannot be a 'material difference'. In NI SOR Reg 3(3) SOR 2003 is in materially identical terms. Employers across the UK must extend any benefits offered to the spouses of employees who are married to partners of employees who are in a civil partnership and pension schemes are now required to provide survivor's pensions for registered civil partners accrued from 1988 as they do for surviving widowers, though the prohibition on discrimination as regards pensions does not apply to benefits accrued or payable in respect of periods of service prior to December 5, 2005.¹⁵⁶ In *Bull v Hall*, a case concerning a refusal to permit a same sex civilly partnered couple to share a guesthouse room, the Supreme Court accepted (by a majority) that the distinction drawn between "married" and "non-married" couples entailed direct discrimination because of sexual orientation.¹⁵⁷ (The dissenters took the view that the discrimination was of the (unjustified) indirect form.)

b) Benefits for employees with opposite-sex partners

¹⁵⁵ For a rare exception see Court of Appeal *R (Mohammed) v Secretary of State for Defence*, [2007] EWCA Civ 1023, [2007] All ER (D) 09 (May), 1 May 2007 <http://www.bailii.org/ew/cases/EWCA/Civ/2007/1023.html>, accessed 7 June 2016.

¹⁵⁶ EqA Sch 9 para 19, SOR 2003 reg 28.

¹⁵⁷ Supreme Court [2013] UKSC 73, [2014] 1 All ER 919, 27 November 2013 <http://www.bailii.org/uk/cases/UKSC/2013/73.html>, accessed 7 June 2016.

In the UK it would constitute unlawful discrimination in national law if an employer only provides benefits to those employees with opposite-sex partners. The EqA and, in NI, SOR 2003 prohibit discrimination because of/ on grounds of sexual orientation in relation to work-related benefits (ss15 and 39 EqA and regs 3 and 6 SOR 2003).

4.6 Health and safety (Article 7(2) Directive 2000/78)

a) Exceptions in relation to disability and health/safety

In NI, but not GB, there are some limited exceptions in relation to disability and health and safety (Article 7(2), Directive 2000/78).

In GB there is no justification defence for direct discrimination, which is narrowly defined, though there is a general justification defence for other forms of disability discrimination (such as where, for example, a disabled person is treated less favourably for reasons which result from his or her disability, rather than because of the disability itself: s15 EqA). In such cases the question will be whether the treatment was "a proportionate means of achieving a legitimate aim".

In NI disability-related discrimination in the provision of goods and services can be justified under the DDA (s.20(4)) on the grounds of health and safety, where the treatment is necessary in order not to endanger the health and safety of any person (including the disabled person).

Other than in relation to pregnant women, the EqA does not contain any exceptions relating to health and safety. NI legislation outlawing discrimination on grounds other than disability does not include specific exceptions relating to health and safety law.

A number of cases alleging indirect discrimination on racial grounds have been brought where employers or educational institutions have imposed dress codes on health and safety grounds that disadvantaged members of particular racial groups who were not able to comply with the dress requirements. Examples of such codes include a "no beards" requirement applicable, for reasons of hygiene, to those involved in food preparation or packaging,¹⁵⁸ a requirement that all railway repair workers wear protective head gear¹⁵⁹ and a prohibition on the wearing of a religious bangle by a Sikh schoolgirl.¹⁶⁰ *Chaplin v Royal Devon and Exeter NHS Foundation Trust*¹⁶¹ involved a challenge to the imposition of a health & safety prohibition by a hospital of the wearing of necklaces (in the claimant's case, a crucifix). The claimant's challenge to the ECtHR failed. The restriction on religious freedom was justified as it served the legitimate aim of protecting health and safety.¹⁶²

The outcome of such cases, in common with any other complaint of indirect discrimination, depends on whether the employer can show that their need for the rule outweighs its discriminatory impact: often such cases have resulted in the employer recognising that there were other, non-discriminatory, ways in which they could have dealt with the health and safety risk.

It should be noted that Sikh men are exempted from otherwise generally applicable statutory requirements to wear motorcycle helmets when riding motorcycles and to wear hard hats when working on construction sites.

¹⁵⁸ Court of Appeal *Panesar v Nestle Co. Ltd.* [1980] IRLR 64 27 November 1979.

¹⁵⁹ Employment Appeal Tribunal *Singh v British Rail Engineering Ltd* [1986] ICR 22, 29 July 1985.

¹⁶⁰ High Court *R (Watkins-Singh) v Governing Body of Aberdare Girls School*, [2008] EWHC 1865 (Admin), [2008] ELR 561, 29 July 2008 <http://www.bailii.org/ew/cases/EWHC/Admin/2008/1865.html>, accessed 7 June 2016.

¹⁶¹ Employment Tribunal *Chaplin v Royal Devon and Exeter NHS Foundation Trust* [2011] EqLR 548 (21 April 2010) [2010] ET 1702886/2009.

¹⁶² European Court of Human Rights *Eweida v United Kingdom*, [2013] ECHR 37, 15 January 2013 <http://www.bailii.org/eu/cases/ECHR/2013/37.html>, accessed 7 June 2016.

4.7 Exceptions related to discrimination on the ground of age (Article 6 Directive 2000/78)

4.7.1 Direct discrimination

In the UK national law does provide exceptions for direct discrimination on grounds of age.

Specific exceptions allow age distinctions in the payment of the national minimum wage in order to encourage employers to employ younger workers (see EqA, Sch 9, paras 11 and 12, Age Regs reg 33). This is controversial, and may be difficult to justify given the CJEU decision in *Mangold*. Para 14 provides less controversial specific exemptions allowing the payment of insurance benefits to older workers: in NI the equivalent exemption covers the payment of life assurance benefits to retired workers (reg 36)) while special and complex exceptions are also made for the use of some age-based criteria in invalidity and occupational pension schemes, as permitted by Article 6(2) of the Directive: see below. Provision is also made for positive action in training and encouraging workers from particular age groups: this is much narrower in NI (reg 31) than in GB following the implementation of the positive action provisions of the EqA. Another specific exemption allows older workers to receive higher levels of redundancy payment (Sch 9, para 13 EqA/ reg 35 SOR 2003): this remains controversial despite the view of the UK government that this exemption is objectively justified under the Directive, given that older workers have less future earning potential than younger workers.

a) Justification of direct discrimination on the ground of age

In the UK it is possible, generally, to justify direct discrimination on the ground of age where the discriminator can show that the discriminatory treatment on the grounds of age is a proportionate means of achieving a legitimate aim.¹⁶³ The test would appear to be consistent with that in Art 6(2); in *Homer v Chief Constable of West Yorkshire Police* the Supreme Court ruled that the aims which could justify direct age discrimination were narrower than the aims which could justify indirect discrimination generally, being limited to the social policy or other objectives derived from Articles 6(1), 4(1) and 2(5) of the Directive.¹⁶⁴

b) Permitted differences of treatment based on age

In the UK national law permits differences of treatment based on age for some activities within the material scope of Directive 2000/78.

In addition to the matters discussed above, benefits that are linked to an employee's length of service with a particular employer are also exempted from the legislation in certain circumstances. The use of length of service by an employer to award or increase benefits to employees during the first five years of their service is deemed by the EqA (Sch 9, para 10: in NI by the Age Regs, reg 34) to be clearly justified, and a complete and automatic exemption will apply: the UK government considers that this is objectively justified as it allows employers to encourage recently recruited employees to remain with their new employers for at least some time.

In contrast, discriminating between employees on the basis of length of service requirements which are longer than five years may still be justified, but will not be automatically so. Reg 34(2) Age Regs provides that "Where B's length of service exceeds 5 years, it must reasonably appear to A that the way in which he uses the criterion of length of service, in relation to the award in respect of which B is put at a disadvantage, fulfils a business need of his undertaking (for example, by encouraging the loyalty or

¹⁶³ S13(2) and Sch EqA, regs 3, 28-31 and 33-36 Age Regs.

¹⁶⁴ Supreme Court [2012] UKSC 15, [2012] IRLR 601, 25 April 2012.
<http://www.bailii.org/uk/cases/UKSC/2012/15.html>, accessed 7 June 2016.

motivation, or rewarding the experience, of some or all of his workers)”. By contrast, Sch 9, para 10(2) EqA provides only that “If B’s period of service exceeds 5 years, A may rely on sub-paragraph (1) [which permits the reward of service] only if A reasonably believes that doing so fulfils a business need.”

- c) Fixing of ages for admission or entitlements to benefits of occupational pension schemes

In the UK national law allows occupational pension schemes to fix ages for admission to the scheme or entitlement to benefits, taking up the possibility provided for by article 6(2).

The EqA (Age Exceptions for Pension Schemes) Order 2010 provides wide exceptions including in relation to the application of length-of-service provisions; minimum and maximum age limits and minimum pay limits on admissions to pension schemes; the use of age criteria in actuarial calculations and contributions; minimum age for age-related benefits; the specification of normal retirement dates and payment of early and late retirement pensions; the payment of ill-health early retirement pensions without reduction and/or with enhancement, etc. Similar exceptions are provided in NI.¹⁶⁵ Some of these exceptions may be potentially wider in scope than the exception set out in Article 6(2) of the Directive, and any exceptions still in the regulations that lie outside the scope of Article 6(2) will have to be shown to be objectively justified under Article 6.1.

4.7.2 Special conditions for young people, older workers and persons with caring responsibilities

In the UK special conditions are set by law for younger workers in order to promote their vocational integration, and for persons with caring responsibilities to ensure their protection.

The national minimum wage (NMW) is paid at three different rates based on the age of the worker: the rates as of October 2015 are – under 18 EUR 4.79 (£3.87) per hour; 18-20 EUR 6.56 (£5.30) per hour and workers 21 and over EUR 8.29 (£6.70) per hour. Apprentices under 19, or 19 and over but in their first year of apprenticeship, are entitled only to EUR 4.09 (£3.30) per hour.

The EqA and NI Age Regulations, as discussed above, contain exemptions allowing for the payment of age-differentiated NMW, but not otherwise permitting different rates according to age. The UK government argues that the exception is objectively justified as necessary to promote the integration of younger workers into the workforce.

In NI the Employment (northern Ireland) Order 2002 enables people with caring responsibilities for children under age 17 (or under 18 if disabled), or for adults to request a change in their terms and conditions of employment regarding hours, time of work or working partly or wholly from home. Similar provisions used to apply in GB but now provide the right to request flexible working to employees more generally, and so do not provide special treatment for carers any more.¹⁶⁶

4.7.3 Minimum and maximum age requirements

In the UK there are exceptions permitting minimum and/or maximum age requirements in relation to access to employment (notably in the public sector) and training.

Leaving aside the possibility of positive action, there are national laws and local by-laws (along with specific NI legislation) regulating the employment of children (up to minimum school leaving age (age 16)) consistent with EC Directive 94/33/EC. Currently, a wide

¹⁶⁵ Age Regs Sch 1.

¹⁶⁶ Employment Rights Act 1996 s80F.

variety of trades and professions set minimum age for entry as trainees: the use of such entry ages will have to be objectively justified under the age regulations. Health and safety considerations may influence minimum age for certain types of jobs. In some cases there are also maximum ages for entry while some jobs, notably judicial office, are subject to maximum age limits (broadly 70 or 75 depending on date of appointment). In fixing age limits which are not prescribed by law employers will have to take care to avoid unjustifiable age discrimination and unlawful discrimination on other grounds. A maximum age for entry to the Civil Service, for example was held to be unlawful indirect discrimination on grounds of sex prior to the implementation of the legislative prohibition of age discrimination as such.¹⁶⁷ Any difference in age limits for men and women would be unlawful sex discrimination.

4.7.4 Retirement

a) State pension age

In the UK there are state pension ages at which individuals must begin to collect their state pensions. State pensions are payable as of 31 December 2014 to women from the age of just under 62.5 and to men at 65, these ages being equalised at 65 by November 2018 (at 66 by October 2020 and at 68 by 2046).

If an individual wishes to work longer, the pension can be deferred. An individual can collect a pension and still work.

b) Occupational pension schemes

In the UK there is no normal age when people can begin to receive payments from occupational pension schemes and other employer-funded pension arrangements.

If an individual wishes to work longer, payments from such occupational pension schemes can usually be deferred.

An individual can usually collect a pension and still work.

c) State imposed mandatory retirement ages

In the UK there is no state-imposed mandatory retirement age, though for certain public sector employment that is regulated by statute there are national laws specifying a retirement age. (Examples include the judiciary, the police and some civil servants.) Mandatory retirement ages have been unenforceable since April 2011 unless justifiable by the employer.

d) Retirement ages imposed by employers

In the UK national law permits employers to set retirement ages (or ages at which the termination of an employment contract is possible) by contract and/or collective bargaining and/or unilaterally, subject to the justifiability of the resulting age discrimination.

In *Seldon v Clarkson Wright & Jakes* the Supreme Court accepted that an employer could in principle impose a mandatory retirement age on a partner in a law firm in the interests of (there) retention ("ensuring that associates are given the opportunity of partnership after a reasonable period as an associate, thereby ensuring that associates do not leave the firm") workforce planning ("facilitating the planning of the partnership and workforce across individual departments by having a realistic long term expectation as to when vacancies will arise") and congeniality ("limiting the need to expel partners by way of

¹⁶⁷ Employment Appeal Tribunal *Price v Civil Service Commission*, [1977] 1 WLR 1417, [1977] IRLR 291, 15 July 1977 http://www.bailii.org/uk/cases/UKCAT/1977/1_77_1507.html, accessed 7 June 2016.

performance management, thus contributing to the congenial and supportive culture in the firm").¹⁶⁸ The Court referred back to the lower courts the question whether the retirement age selected was in fact justifiable. In *Seldon v Clarkson Wright & Jakes (No.2)* the EAT ruled that the enforced retirement at 65 of the equity partner was justified. The EAT did not accept that the employer was under a heavy burden to justify the choice of the particular age (there 65) in circumstances in which the aims pursued required that an age be selected, but there was no strong reason for selecting 65 instead of (say) 66, or 67.¹⁶⁹

e) Employment rights applicable to all workers irrespective of age

Employment rights are applicable to all employees irrespective of age.

f) Compliance of national law with CJEU case law

In UK it seems that national legislation is in line with the CJEU case law on age regarding compulsory retirement. The possible justification of mandatory retirement ages would appear to be in line with EU case law, this being the starting point adopted by the Supreme Court in *Seldon*. The position with regard to length of service (see 4.7.1 above) is less clear. Domestic law in this respect, particularly in the case of the EqA, appears to be easier to satisfy than the full objective justification test and the exceptions may be wider than permitted under the Directive, even though the UK government believes them to be objectively justified. Concern has also been expressed that the five year exemption of any length of service requirement may provide employers with too much leeway: five years is a considerable period of time in the contemporary workplace, and this time limit seems to be potentially disproportionate. It should also be noted that length of service requirements may fall foul of the prohibition on indirect sex and race discrimination in certain circumstances.¹⁷⁰

4.7.5 Redundancy

a) Age and seniority taken into account for redundancy selection

In the UK national law permits age and seniority to be taken into account in selecting workers for redundancy if this is justified. In *Rolls Royce Plc v Unite* the Court of Appeal upheld the decision of the High Court that an employer's use of length of service as part of a scheme used to select employees for redundancy was lawful despite the fact that it favoured older workers. The Court accepted that the discrimination at issue was covered by the exception, discussed at 4.7.1(a) above, which permits employers to award "benefits" to employees based on length of service, but went on to accept that, even had the scheme not fallen within the exception, the indirect age discrimination it entailed would be objectively justified: "viewed objectively, the inclusion of the length of service criterion is a proportionate means of achieving a legitimate aim [of] ... reward[ing] ... loyalty, and the overall desirability of achieving a stable workforce in the context of a fair process of redundancy selection. The proportionate means is ... amply demonstrated by the fact that the length of service criterion is only one of a substantial number of criteria for measuring employees suitability for redundancy, and that it is by no means determinative.

Equally, it is entirely consistent with the overarching concept of fairness".¹⁷¹

¹⁶⁸ Supreme Court [2012] UKSC 16, [2012] IRLR 590 [2012] EqLR 579, 25 April 2012 https://www.supremecourt.uk/decided-cases/docs/UKSC_2010_0201_Judgment.pdf, accessed 7 June 2016.

¹⁶⁹ Employment Appeal Tribunal [2014] IRLR 748, 13 May 2014.

¹⁷⁰ See e.g. Case C-184/89, Court of Justice of the European Communities *Nimz v. Freie und Hansestadt Hamburg* [1991] ECR I-00297, 7 February 1991 <http://www.bailii.org/eu/cases/EUECJ/1991/C18489.html> accessed 7 June 2016.

¹⁷¹ Court of Appeal [2009] EWCA Civ 387, [2009] IRLR 576, 14 May 2009 <http://www.bailii.org/ew/cases/EWCA/Civ/2009/387.html>, accessed 7 June 2016. The case is curious in that the employer was arguing that their own redundancy scheme was unlawful in order to end the existing collective agreement and to negotiate another one more favourable to the employer's interests, while the union was defending the scheme.

In *Woodcock v Cumbria Primary Care Trust* the Court of Appeal accepted that the employers had justified age discrimination consisting in the decision prematurely to dismiss the claimant on grounds of redundancy in order to avoid his eligibility for early retirement, thereby saving between £500,000 and £1 million.¹⁷² The Court accepted that costs could be a factor (though not the only factor) justifying even direct age discrimination. And in *HM Land Registry v Benson & Ors* the EAT accepted that an employer could base its selection criteria for redundancy primarily on cost notwithstanding the fact that this disadvantaged employees aged between 50 and 54 who might have wished to be made redundant. The respondent wished to make as many voluntary redundancies as possible within a fixed budget. Workers aged 50-54 would have been the most expensive to make redundant as they would have been entitled to “compulsory early retirement”, which would have entitled them to extensive benefits under the Civil Service Compensation Scheme. The EAT accepted that the aim pursued by the redundancy exercise was to reduce headcount as much as possible within a fixed budget, that the respondent was entitled to pursue this aim, and that there was no alternative criterion for the employer to adopt except the “cheapness” of the selection. The employer did not have to prove that the additional £19.7 million which it would have cost to make all those who volunteered redundant was “unaffordable”, or the indirect discrimination “absolutely”, as distinct from “reasonably”, necessary. The impact of the discriminatory criterion was not as severe as in many cases since the claimants did not lose their jobs, or anything except the chance to take advantage of a “windfall”.

b) Age taken into account for redundancy compensation

In the UK national law provides compensation for redundancy. It may be affected by the age of the worker. Older workers may receive higher levels of redundancy payment (Sch 9, para 13 EqA/ reg 35 SOR 2003). The UK government considers that this exemption is objectively justified under the Directive, given that older workers have less future earning potential than younger workers but this remains controversial.

Age discrimination is capable of justification so could be taken into account in redundancy decisions, subject to the employer’s ability to justify it. Taking into account seniority may amount to indirect age discrimination but this, again, is capable of justification (see 4.7.1 above). In *Lockwood v Department for Work and Pensions* the claimant challenged the calculation of compensation payments made under the Civil Service Compensation Scheme which (like the statutory redundancy payments scheme, partly depended on age).¹⁷³ She was 26. Older workers received larger payments because it was assumed that they would have more difficulty finding alternative work. The Court of Appeal accepted that the differential treatment in the redundancy scheme was objectively justified by the evidence that younger workers had greater flexibility in finding jobs and fewer financial and family obligations.

4.8 Public security, public order, criminal offences, protection of health, protection of the rights and freedoms of others (Article 2(5), Directive 2000/78)

In the UK national law includes exceptions that seek to rely on Article 2(5) of the Employment Equality Directive.

The EqA provides (s192) that “A person does not contravene this Act only by doing, for the purpose of safeguarding national security, anything it is proportionate to do for that purpose”. The Act makes no reference to protecting public safety or public order.

¹⁷² Court of Appeal [2012] EWCA Civ 330 [2012] IRLR 491 [2012] EqLR 463, 22 March 2012 <http://www.bailii.org/ew/cases/EWCA/Civ/2012/330.html>, accessed 7 June 2016.

¹⁷³ Court of Appeal [2013] EWCA Civ 1195, [2013] IRLR 941, 11 October 2013 <http://www.bailii.org/ew/cases/EWCA/Civ/2013/1195.html>, accessed 7 June 2016.

The RRO (art 41), FETO (art 79), the SOR 2003 (reg 26), and Age Regs (reg 29) provide an exception for an act done for the purpose of protecting public safety or public order: "Nothing ... shall render unlawful an act done for the purpose of safeguarding national security or of protecting public safety or public order" and "the doing of the act is justified by that purpose".

4.9 Any other exceptions

In the UK other exceptions to the prohibition of discrimination (on any ground) provided in national law are the following:

- The DDA, which applies in NI, contains an exception (s59) for acts done in pursuance of primary legislation, including any passed after the date of the DDA or to comply with secondary legislation made after the date of the DDA or any condition or requirement imposed by a Minister of the Crown. Such an exception, which (unlike the statutory authority exceptions in the EqA) applies to discrimination falling within the scope of EU law, may be in breach of the Employment Equality Directive (art 16).
- Outside of the scope of the directives the EqA, the RRO and the Age Regulations retain exceptions for all acts done under statutory authority.¹⁷⁴

¹⁷⁴ Sch 22 para 1, Art 40 and reg 28.

5 POSITIVE ACTION (Article 5 Directive 2000/43, Article 7 Directive 2000/78)

a) Scope for positive action measures

In the UK positive action in respect of racial or ethnic origin, religion or belief, disability, age and sexual orientation is provided for in national law.

In GB the EqA provides quite broad provisions permitting the taking of any proportionate positive action where a person “reasonably thinks that— (a) persons who share a protected characteristic suffer a disadvantage connected to the characteristic, (b) persons who share a protected characteristic have needs that are different from the needs of persons who do not share it, or (c) participation in an activity by persons who share a protected characteristic is disproportionately low” (s158). Where employment is concerned, s159 allows more favourable treatment of those from a disadvantaged or under-represented group as regards recruitment or promotion where (but only where) the person appointed/promoted is as qualified as others over whom s/he is preferred. These provisions (in particular s159) were relatively controversial in the debates about the Equality Bill (as it then was) but have generated little discussion since.

The EqA also makes provision (s104) for positive action across all the protected grounds in the selection of candidates for election, something which previously was available only in relation to gender. Those provisions are intended to enable parties in GB to take a wider range of positive action measures in relation to matters regarding their constitution, organisation and administration. They are not, however, permitted to adopt wide-ranging positive action measures to ensure the selection of ethnic minority candidates for parliamentary seats such as by introducing all-minority shortlists for candidate selection in certain constituencies. (Women-only shortlists, by contrast, are and will remain lawful.)

In NI, as in GB, only disabled persons are protected from discrimination related to disability so all positive action related to disability is lawful. In addition, some limited training and encouragement measures are permitted in the employment context in relation to race/ethnicity and sexual orientation (RRO arts 35, 37, SOR 2003 reg 29). Reg 32 of the Age Regs provides a specific exception is made for positive action that gives persons of a particular age access to training facilities to help them take on particular work, or that allows them to take advantage of opportunities for doing particular work, where it seems reasonably necessary to introduce these measures to prevent or compensate for disadvantages linked to age but because the DDA prohibits disability-related discrimination only against those recognised by the Act as “disabled”, there was no need to include in the DDA specific positive action provisions like those in other anti-discrimination legislation that operate as exceptions to the prohibition of discrimination.

Prior to the implementation of the positive action provisions of the EqA, the most comprehensive positive action provisions relating to employment in the UK were found in FETO, whose provisions resulted from US pressure on successive UK Governments to take steps to deal with the entrenched economic inequality experienced by Northern Irish Catholics. Article 4 FETO permits and in certain cases requires employers to take “affirmative action” which is defined as:

“...action designed to secure fair participation in employment by members of the Protestant, or members of the Roman Catholic, community in Northern Ireland by means including –

- 1) The adoption of practices encouraging such participation; and
- 2) The modification or abandonment of practices that have or may have the effect of restricting or discouraging such participation.

b) Main positive action measures in place on national level

The UK does not have positive action measures in place at the national level except, arguably, in relation to disability in the field of education, where the statementing system mentioned at 3.2.8 above arguably amounts to or involves positive action. Until 2011 there was also positive action in the police system in NI designed to integrate Catholics into a formerly Protestant service but this is no longer in place.

The PSED, which is discussed at 2.3.1, should, however prompt public authorities to consider whether positive action measures are necessary and appropriate in the exercise of their functions. And a number of positive action programmes are in place in individual public and private sector organisations. By way of example:

- Her Majesty's Revenue & Customs has a career development programme targeted at Black and Minority Ethnic (BAME) employees and designed to address the disproportionately low members of BAME staff in management and leadership positions in HMRC. The programme includes training and mentorship over a 9 month period during which employees are entitled to 22.5 days leave from ordinary duties for development activities.
- Barclays Group has a deliberate outreach policy to BAME students with an aim to becoming the financial graduate employer of choice among BAME students. The programme includes training sessions, internship and mentoring with selectors receiving unconscious bias training and all selection panels being ethnically diverse.
- EDF Energy has introduced a mentoring scheme for BAME employees.
- Teach First, a charity which encourages graduates into teaching, has adopted positive action measures including one-to-one support, training and the accommodation of religious beliefs and disabilities.

6 REMEDIES AND ENFORCEMENT

6.1 Judicial and/or administrative procedures (Article 7 Directive 2000/43, Article 9 Directive 2000/78)

a) Available procedures for enforcing the principle of equal treatment

In the United Kingdom the following procedures exist for enforcing the principle of equal treatment (judicial/ administrative/alternative dispute resolution such as mediation).

The UK anti-discrimination legislation (EqA, Part 9; RRO arts 51-54; DDA ss17A and 25; FETO arts 38-40; SOR regs 34-38; NI Age Regs Part 6) includes provisions enabling individuals who consider they have been discriminated against contrary to the Act/Order/Regulations to bring legal proceedings; complaints concerning employment-related discrimination (public sector and private sector) can be made to the employment tribunal (industrial tribunal or Fair Employment Tribunal in NI), and complaints concerning any other unlawful discrimination (by public sector or private sector bodies) can be made to the civil court (county court in England, Wales and NI and sheriff court in Scotland). The court/tribunal procedures are available to any person who considers s/he has suffered unlawful discrimination.

Employment/industrial tribunals were established to consider the full range of employment disputes. Each tribunal has a legally qualified chairman and two lay members, one broadly representing employers and the other employees. In the county/sheriff court, cases are decided by a single judge; for cases under the EqA, however, the judge must generally be assisted by two lay assessors: people selected from a list maintained by the Secretary of State, unless the parties agree that the judge should sit without assessors (s.114). Decisions of tribunals and courts are binding, subject to any successful appeal by the losing party.

All claims to the employment tribunal for unfair dismissal or unlawful discrimination are referred to the Advisory Conciliation and Arbitration Service (ACAS), or in NI the Labour Relations Agency, which have statutory duties to promote settlements. Claimants in GB must contact ACAS with a view to determining whether early conciliation is possible. Settlements agreed through ACAS or the Labour Relations Agency are binding on the parties. Employment cases may also, with the agreement of the parties, be selected for judicial mediation which is also available in the county courts. There are no labour inspectorates and the schools inspectorates do not engage in discrimination dispute settlement.

b) Barriers and other deterrents faced by litigants seeking redress

Research consistently reveals that the majority of people who consider they have been victims of unlawful discrimination or harassment are very slow to seek legal redress. The main reasons are generally lack of confidence that they will be believed or fear that they will face some form of retaliation or victimisation.¹⁷⁵ Individuals who are confident and determined enough to consider bringing legal proceedings face a number of barriers. There are statutory time limits for the initiating of complaints of discrimination (3 months for employment-related cases and 6 months in the county/sheriff court, though the court or tribunal may consider an application submitted outside these time limits if in all of the circumstances it considers that it is just and equitable to do so). In addition, since July 2013 claimants in employment tribunals have been required to pay fees of £250 to file discrimination cases and a further £950 in advance of hearing. Fees can be remitted for the very low-earning (an estimated 24% of claimants), but employment claims reduced

¹⁷⁵ Aston J, Hill D, Tackey N. (2006), *The Experience of Claimants in Race Discrimination Employment Tribunal Cases*, Department of Trade and Industry, Employment Relations Research Series, ERRS55.

dramatically since the introduction of these fees.¹⁷⁶ (Fees have always been payable in the ordinary courts.)

Employment tribunals do not normally order the unsuccessful party to pay the costs of the winner, though a tribunal may order costs against a party who has acted “vexatiously, abusively, disruptively or otherwise unreasonably”, or whose bringing or conduct of the proceedings is “misconceived”, i.e. has no reasonable prospect of success. The maximum amount of such costs was raised from EUR 11800 (£10 000) to EUR 23600 (£20 000) in 2012. It may be difficult for unrepresented claimants to know if their case is “misconceived”. In the county/sheriff court, with few exceptions, an unsuccessful applicant will be ordered to meet the costs of the respondent. It is difficult to over-state how much of a barrier this places in practice to litigation.

The number of costs awards made both in favour of and against claimants in tribunal cases doubled from 2007/8 to 2014/15.¹⁷⁷ In 2007/8 a total of 134 costs awards were made to claimants and 327 against them (ranging from 22 and 33 awards respectively below EUR 280 (£200) to 3 and 2 respectively of over EUR 13 800 (£10 000), with median, average and maximum awards of EUR 1380 (£1 000), 2900 (£2095) and 24 500 (£17 775) respectively). In 2014/15, 536 awards were made in favour of and 334 against claimants, with median, average and maximum awards of EUR 1380 (£1 000), 3994 (£3 228) and 291788 (£235 776). The number of awards in excess of EUR 13 800 (£10 000) had increased to 17 in favour of and 46 against claimants by 2014/15.

Disabled people may have additional barriers to seeking legal redress; while the courts have a duty as service providers to make reasonable adjustments in anticipation of the needs of disabled people (s.19, 20B & 21B DDA, ss20 & 29 EqA), there continue to be occasions when disabled people are significantly disadvantaged. Some courts and tribunals are not physically accessible and there are examples where no interpreters or unsuitable interpreters were provided or documents not provided in alternative formats, e.g. Braille, large font size.

A person may bring a case after the employment relationship has ended subject to the applicable time limits. S108 of the EqA provides that “A person (A) must not discriminate against another (B) [or harass B] if— (a) the discrimination arises out of and is closely connected to a relationship which used to exist between them, and (b) conduct of a description constituting the discrimination would, if it occurred during the relationship, contravene this Act”. S.108(4) provides further that “A duty to make reasonable adjustments applies to A [if B is] placed at a substantial disadvantage as mentioned in section 20”. Similar provision is made in NI.¹⁷⁸

A final barrier for discrimination claimants is the lack of skilled, experience advice and assistance. Discrimination law is increasingly complex. Not only is most of the evidence in the hands of the respondent, but, in most cases, the respondent will have access to legal or other professional advice and representation; without comparable access to skilled case preparation and representation complainants are far less likely to succeed.

Success rates for discrimination complaints are not high, even with representation; complaints of race discrimination are least likely to succeed, but on any of the grounds the rate of success for cases that are given a full hearing in the employment tribunal is likely

¹⁷⁶ This according to the official statistics of October to December 2015, <https://www.gov.uk/government/statistics/tribunal-and-gender-recognition-statistics-quarterly-october-to-december-2015>, accessed 7 April 2016.

¹⁷⁷ Employment Tribunal and EAT statistics 2014-15 (GB), available at <https://www.gov.uk/government/statistics/tribunal-and-gender-recognition-statistics-quarterly-october-to-december-2015>, accessed 7 April 2016 These figures relate to employment tribunal cases generally rather than discrimination cases.

¹⁷⁸ RRO Art 27A, FETO Art 33A, SOR 2003 reg 23; Age Regs reg 25; DDA s16A.

to be between 20 – 30%.¹⁷⁹ The equality commissions, later the EHRC, have over the last few years assisted relatively few applicants; public funding generally involves strict means testing and is not available for legal representation in tribunals. The lack of available skilled advice, assistance and representation in discrimination cases is a matter of growing concern.

c) Number of discrimination cases brought to justice

In the United Kingdom there are no available statistics on the number of cases related to discrimination brought to justice. The following are the statistics showing the discrimination claims which were accepted by the employment tribunals from 2010-2015. There is no equivalent data on the amount of goods and services cases brought before the county courts. The figures suggest the decrease with the introduction of fees in July 2013.

Employment Tribunal Claims, 2009-15¹⁸⁰

Year	2010-11	2011-12	2012-13	2013- 14	2014-15
Disability discrimination	7 241	7 676	7 492	5 196	3 106
Race discrimination	4 992	4 843	4 818	3 064	1 858
Age discrimination	6 821	3 715	2 818	1 994	1 087
Religion/ belief discrimination	878	939	979	584	339
Sexual orientation discrimination	638	613	639	361	189

The following tables indicate the outcome of cases **disposed of** by the employment tribunals in 2011-2015. The very low rate of success is noteworthy.¹⁸¹

Outcome of Employment Tribunal cases, 2011-12¹⁸²

Nature of Claim	No of claims	Withdrawn	Formally settled	Full hearing	
				Successful	Unsuccessful
Disability discrimination	7300	31%	45%	3%	11%
Race discrimination	4700	30%	36%	3%	17%
Age discrimination	3800	43%	31%	1%	8%
Religion/ belief discrimination	850	31%	34%	3%	16%
Sexual orientation discrimination	590	29%	42%	3%	10%

Outcome of Employment Tribunal cases, 2012-13¹⁸³

Nature of Claim	No of claims	Withdrawn	Formally settled	Full hearing	
				Successful	Unsuccessful
Disability discrimination	7260	31%	45%	3%	10%
Race discrimination	4887	29%	43%	3%	16%
Age discrimination	2674	32%	43%	4%	11%
Religion/ belief discrimination	1024	27%	29%	3%	14%

¹⁷⁹ Figures taken from research for the year 2001 published in Labour Research, April 2002.

¹⁸⁰ Source Ministry of Justice annual statistics and Employment Tribunal Statistics <https://www.gov.uk/government/statistics/tribunal-and-gender-recognition-statistics-quarterly-october-to-december-2015>, accessed 8 April 2016.

¹⁸¹ Totals do not amount to 100% as a varied number of cases were subject to other forms of disposal such as dismissed without full trial; struck out (not at a hearing); and dismissed at a preliminary hearing.

¹⁸² <https://www.gov.uk/government/statistics/tribunal-and-gender-recognition-statistics-quarterly-october-to-december-2015>, accessed 8 April 2016.

¹⁸³ <https://www.gov.uk/government/statistics/tribunal-and-gender-recognition-statistics-quarterly-october-to-december-2015>, accessed 8 April 2016.

Sexual orientation discrimination	603	33%	39%	3%	8%
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Outcome of Employment Tribunal cases, 2013-14¹⁸⁴

Nature of Claim	No of claims	Withdrawn	Formally settled	Full hearing	
				Successful	Unsuccessful
Disability discrimination	6872	25%	42%	3%	11%
Race discrimination	4168	26%	33%	3%	17%
Age discrimination	4259	63%	19%	2%	7%
Religion/ belief discrimination	818	27%	31%	3%	15%
Sexual orientation discrimination	509	27%	39%	2%	4%

Outcome of Employment Tribunal cases, 2014-15¹⁸⁵

Nature of Claim	No of claims	Withdrawn	Formally settled	Full hearing	
				Successful	Unsuccessful
Disability discrimination	3868	21%	44%	5%	13%
Race discrimination	2166	21%	31%	4%	21%
Age discrimination	1528	42%	28%	2%	12%
Religion/ belief discrimination	394	19%	32%	3%	20%
Sexual orientation discrimination	251	23%	43%	6%	8%

d) Registration of discrimination cases by national courts

In the United Kingdom discrimination cases are registered as such by national courts (see above).

6.2 Legal standing and associations (Article 7(2) Directive 2000/43, Article 9(2) Directive 2000/78)

a) Engaging on behalf of victims of discrimination (representing them)

In the United Kingdom associations/organisations/trade unions are not entitled to act on behalf of victims of discrimination. Associations may support and assist, but may not engage in litigation on behalf of, victims of discrimination and may not speak on the victim's behalf, much less stand in his or her shoes for the purposes of any claim. Further, as regards judicial review proceedings, any legal or natural person with "sufficient interest" in a matter may bring a claim whether in NI, England and Wales or Scotland; the exact approaches to judicial review varies across these jurisdictions but the test for standing is materially similar.

b) Engaging in support of victims of discrimination

In the United Kingdom associations/organisations/trade unions are entitled to act in support of victims of discrimination. There are no restrictions on the type of organisation which may offer support to victims. There is, however, scope for intervention in litigation by bodies or persons recognised by the court hearing the litigation as appropriate to

¹⁸⁴ <https://www.gov.uk/government/statistics/tribunal-and-gender-recognition-statistics-quarterly-october-to-december-2015>, accessed 8 April 2016.

¹⁸⁵ <https://www.gov.uk/government/statistics/tribunal-and-gender-recognition-statistics-quarterly-october-to-december-2015>, accessed 8 April 2016.

intervene. The various rules of civil procedure and common law precedent which regulate proceedings in UK courts and employment tribunals limit the circumstances in which associations may intervene in an ongoing case as independent parties in support of a claimant. The rules of procedure vary across the jurisdictions (England and Wales, Scotland and Northern Ireland), but the test for standing is materially similar.

c) *Actio popularis*

Again the rules of procedure vary across the jurisdictions (England and Wales, Scotland and Northern Ireland), but in each jurisdiction associations / organisations / trade unions may act in the public interest on their own behalf, without a specific victim to support or represent (**actio popularis**), only where the association etc. has a "sufficient interest" (*locus standi*) in the matter in dispute to bring a claim for Judicial Review (such claims being available only against public authorities).¹⁸⁶ This requirement of sufficient interest has been given a generous interpretation in recent years by the UK courts and trade unions, NGOs and the equality commissions have brought important actions against public authorities through judicial review proceedings, such as the *R (Amicus) v Secretary of State for Trade and Industry* case.¹⁸⁷ There are no rules setting out what type of organisation may litigate but, where an association etc. purports to represent the interests of a class of persons, the court will want to be satisfied that it is a suitable representative as distinct from a "busy body" (*R v Secretary of State for the Environment ex p Rose Theatre Trust*).¹⁸⁸ There are no special rules concerning the shifting burden of proof in this context. As to remedies, in public law cases these generally consist of declarations that the public authority has acted unlawfully and/ or of orders that the authority do or cease to do something, but awards of damages are generally not made (except where someone is litigating as a victim of a breach of European Convention rights). There are no differences between GB and NI in this matter.

d) Class action

Again the rules of procedure vary across the jurisdictions (England and Wales, Scotland and Northern Ireland), but in no jurisdiction may associations / organisations / trade unions act in the interest of more than one individual victim (**class action**) for claims arising from the same event.

Organisations cannot bring representative or "class" actions in the name of victims. In this respect rules of procedure across the UK may not be fully compliant with the directives (arts. 7(2)/9(2)). However, s 24 of the Equality Act 2006¹⁸⁹ permits the EHRC to seek injunctive relief to prevent a person from committing an unlawful act (see, similarly, RRO art 59, FETO Art 41). This power is not used in practice.

6.3 Burden of proof (Article 8 Directive 2000/43, Article 10 Directive 2000/78)

In the United Kingdom national law requires a shift of the burden of proof from the complainant to the respondent.

All UK anti-discrimination legislation provides for shift of the burden of proof in relation to each of the grounds of discrimination, either (in GB) across the material scope of the EqA or (in NI) in relation to all of the activities considered to be within the scope of the

¹⁸⁶ S31(1) Senior Courts Act 1981.

¹⁸⁷ High Court *R (Amicus & Ors) v Secretary of State for Trade and Industry*, [2004] EWHC 860 (Admin), [2007] ICR 1176, [2004] IRLR 430, 26 April 2004
<http://www.bailii.org/ew/cases/EWHC/Admin/2004/860.html>, accessed 7 June 2016.

¹⁸⁸ Queen's Bench Division [1990] 1 All ER 754; [1990] 1 QB 504, 17 July 1989.

¹⁸⁹ <http://www.legislation.gov.uk/ukpga/2006/3/contents> Date of adoption: 16 February 2006 accessed 7 June 2016.

directives.¹⁹⁰ By way of example, s136 EqA provides that “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” unless A shows that s/he did not contravene the provision.¹⁹¹ DDA s17A(1C); FETO arts 38A and 40A, RRO arts 52A and 54B; SOR, regs 35 and 38 and Age Regs regs 42 and 45 are in materially similar terms.

The approach to the application of the burden of proof was established in *Igen Ltd & Ors v Wong* in which the Court of Appeal set out the following guidelines:¹⁹²

- (1) It is for the claimant who complains of discrimination to prove on the balance of probabilities facts from which the tribunal could conclude, in the absence of an adequate explanation, that the respondent has committed an act of discrimination against the claimant which is unlawful.
- (2) If the claimant does not prove such facts he or she will fail.
- (3) It is unusual to find direct evidence of discrimination. Few employers would be prepared to admit such discrimination, even to themselves. In some cases the discrimination will not be an intention but merely based on the assumption that “he or she would not have fitted in”.
- (4) In deciding whether the claimant has proved such facts, it is important to remember that the outcome at this stage of the analysis by the tribunal will therefore usually depend on what inferences it is proper to draw from the primary facts found by the tribunal.
- (5) At this stage the tribunal does not have to reach a definitive determination that such facts would lead it to the conclusion that there was an act of unlawful discrimination, rather to determine to see what inferences of secondary fact *could* be drawn from them.
- (6) In considering what inferences or conclusions can be drawn from the primary facts, the tribunal must assume that there is no adequate explanation for those facts.
- (7) These inferences can include, in appropriate cases, any inferences that it is just and equitable to draw from an evasive or equivocal reply to a questionnaire.
- (8) Likewise, the tribunal must decide whether any provision of any relevant code of practice is relevant and if so, take it into account in determining, such facts. This means that inferences may also be drawn from any failure to comply with any relevant code of practice.
- (9) Where the claimant has proved facts from which conclusions could be drawn that the respondent has treated the claimant less favourably on the ground of sex, then the burden of proof moves to the respondent.
- (10) It is then for the respondent to prove that he did not commit, or as the case may be, is not to be treated as having committed, that act.
- (11) To discharge that burden it is necessary for the respondent to prove, on the balance of probabilities, that the treatment was in no sense whatsoever on the protected ground of sex.
- (12) That requires a tribunal to assess not merely whether the respondent has proved an explanation for the facts from which such inferences can be drawn, but further that it is adequate to discharge the burden of proof on the balance of probabilities that the relevant protected ground was not a ground for the treatment in question.
- (13) Since the facts necessary to prove an explanation would normally be in the possession of the respondent, a tribunal would normally expect cogent evidence to discharge that burden of proof. In particular, the tribunal will need to examine

¹⁹⁰ The shift of the burden of proof does not apply in cases under the RRO where the alleged discrimination is on grounds of colour or nationality, in cases under the Fair Employment and Treatment Order for activities outside art. 3(2B) and in cases under the DDA other than under Part II or employment services (s.21A).

¹⁹¹ This does not apply to the very limited number of criminal offences created by the Act (s136(5)).

¹⁹² Court of Appeal [2005] EWCA Civ 142, [2005] IRLR 258, [2005] ICR 931, 18 February 2005 <http://www.bailii.org/ew/cases/EWCA/Civ/2005/142.html>, accessed 7 June 2016.

carefully explanations for failure to deal with the questionnaire procedure and/or code of practice.

The Court of Appeal also confirmed that it was possible for employment tribunals to find that unreasonable behaviour by an employer that appeared to be linked to one of the grounds covered by the directives could by itself result in the burden shifting to the employer to show an adequate non-discriminatory explanation for the behaviour in question. In *Madarassy v Nomura International Plc* the Court of Appeal clarified elements of the approach set out in *Igen v Wong*, stating that the burden of proof should only shift to the respondent when the claimant had provided sufficient material from which a reasonable tribunal could properly conclude that, on the balance of probabilities, the respondent had committed an unlawful act of discrimination. If the respondent was unable to provide an adequate explanation for the behaviour in question, this only became relevant if a *prima facie* case is proved by the complainant, i.e. the respondent's inability to give a satisfactory explanation for his conduct would only establish liability when sufficient evidence existed to shift the burden.¹⁹³ The Court of Appeal also concluded that the same approach to the burden of proof should apply where a hypothetical comparator was used.

6.4 Victimisation (Article 9 Directive 2000/43, Article 11 Directive 2000/78)

In the United Kingdom there are legal measures of protection against victimisation. The EqA, which applies in GB across all the protected grounds, prohibits the subjection to a detriment of any person because s/he has, or is believed to have, done a protected act, or because it is thought that s/he may do such an act (s27). "Protected acts" are then defined by reference to bringing proceedings, giving evidence or information in connection with proceedings, doing any other thing for the purposes of or in connection with the discrimination legislation or making an allegation of its breach. There is an exception where both evidence is given or an allegation made in bad faith and is false. The same rules concerning the burden of proof apply to victimisation as to discrimination.

In NI the provision made by FETO, the RRO, DDA, SOR and Age Regs is broadly similar, except that victimisation requires "less favourable treatment" because the person victimised has done, or is thought to have done or be about to do, a protected act.¹⁹⁴ The EqA approach is an improvement on that which applies in NI because case law has demonstrated how difficult it is for an individual to establish that because she/he had done one of the protected acts, she or he was treated "less favourably", that is to find an appropriate comparator.¹⁹⁵ The NI requirement for a comparator-driven approach may not be consistent with that in the directives which state simply that a person should not receive "adverse treatment or adverse consequences as a reaction to a complaint or to proceedings aimed at enforcing compliance with the principle of equal treatment".

In *Woodhouse v West North West Homes* the EAT ruled that a claimant who was dismissed after bringing multiple internal grievances and unsuccessful tribunal claims alleging race discrimination had not been subject to victimisation. The EAT ruled that there were "exceptional cases" in which employers might be entitled to argue that unfavourable treatment resulted not from the fact that an employee had done protected acts (in complaining of discrimination) but because of the manner in which they were done. But it went on to "emphasise the word exceptional... It is a slippery slope towards neutering the concept of victimisation if the irrationality and multiplicity of grievances can lead, as a

¹⁹³ Court of Appeal [2007] EWCA Civ 33, [2007] ICR 867, [2007] IRLR 246, 26 January 2007 <http://www.bailii.org/ew/cases/EWCA/Civ/2007/33.html>, accessed 7 June 2016.

¹⁹⁴ DDA s55. RRO Art 4; FETO Art 3(4); SOR 2003 reg 4; Age Regs reg 4.

¹⁹⁵ See, for example, Court of Appeal *Aziz v Trinity Taxis*, [1988] QB 463 26 February 1988 <http://www.bailii.org/ew/cases/EWCA/Civ/1988/12.html>, accessed 7 June 2016 and House of Lords *Chief Constable of the West Yorkshire Police v Khan*, [2001] IRLR 830, 11 October 2001 <http://www.bailii.org/uk/cases/UKHL/2001/48.html>, accessed 7 June 2016

matter of routine, to the case” falling outside the protection of the prohibition on victimisation.¹⁹⁶

6.5 Sanctions and remedies (Article 15 Directive 2000/43, Article 17 Directive 2000/78)

a) Applicable sanctions in cases of discrimination – in law and in practice

The anti-discrimination legislation specifies the remedies available where complaints of discrimination or harassment are upheld by a court or tribunal.¹⁹⁷ The same remedies are available against public sector and private sector respondents. The main remedy is damages, which are calculated as in civil proceedings for tort, and may include “compensation for injury to feelings” whether or not damages are awarded for any other reason. Damages may be awarded for direct discrimination and harassment whether it was intentional or unintentional. In the case of indirect discrimination, if the employer or other respondent proves that the discrimination was unintentional, damages may only be awarded if the tribunal or court considers it “just and equitable” to do so.

b) Ceiling and amount of compensation

There is no upper limit to the amount of compensation that can be awarded. In some cases, awards in excess of EUR 1million have been made to successful claimants. Such cases include such as *Chagger v Abbey National plc*, a race claim, in which an award of EUR 1 619 808 (£1 325 322) was made for future loss on the basis that the claimant would never again be able to work in the financial services industry.¹⁹⁸ And in *Browne v Central Manchester University NHS Foundation*, also a race case, an award of almost £1 million (1,110,186 euro) was made to a claimant aged 55 who had been unfairly dismissed from his position as a director at Central Manchester University NHS Foundation. He had worked for the National Health Service for 34 years and had been subjected to race discrimination over a period of years. The pay-out reflected the fact that the discriminatory treatment which he suffered, and his eventual dismissal, resulted in serious damage to his health. The large majority of the payment related to future loss of earnings and pension.¹⁹⁹ In the vast majority of cases, however, awards are much more modest (see the tables below, which refer to tribunal awards in England, Wales and Scotland).

Employment tribunal awards **age** 2010-2015²⁰⁰

Year	Average award	Median award	Maximum award
2010-11	£30 289	£12 697	£144 100
2011-12	£19 327	£6 065	£144 100
2012-13	£8 079	£4 499	£72 500
2013-14	£18 801	£6 000	£137 000
2014-15	£11 211	£7 500	£28 428

Employment tribunal awards **disability** 2010-2015²⁰¹

Year	Average award	Median award	Maximum award
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¹⁹⁶ Employment Appeal Tribunal [2013] IRLR 773, 5 June 2013

http://www.bailii.org/uk/cases/UKCAT/2013/0007_12_0506.html, accessed 7 June 2016.

¹⁹⁷ EqA ss119, 124-126, 132-143, 139; DDA s17A & Sch 3; RRO Art 53; FETO Art 39; SOR 2003 reg 36, Age Regs reg 43.

¹⁹⁸ Court of Appeal [2009] EWCA Civ 1202, [2010] ICR 397, [2010] IRLR 47, 13 November 2009 <http://www.bailii.org/ew/cases/EWCA/Civ/2009/1202.html>, accessed 7 June 2016.

¹⁹⁹ 8 December 2011, Case Nos. ET/2407264/07, ET/2405865/08, ET/2408501/08, unreported.

²⁰⁰ Source Ministry of Justice annual statistics and Employment Tribunal Statistics, <https://www.gov.uk/government/statistics/tribunal-and-gender-recognition-statistics-quarterly-october-to-december-2015>, accessed 6 April 2016.

²⁰¹ Source Ministry of Justice annual statistics and Employment Tribunal Statistics, <https://www.gov.uk/government/statistics/tribunal-and-gender-recognition-statistics-quarterly-october-to-december-2015>, accessed 6 April 2016.

2010-11	£14 137	£6 142	£181 083
2011-12	£22 183	£8 928	£390 871
2012-13	£16 320	£7 536	£387 472
2013-14	£14 502	£7 518	£236 922
2014-15	£17 319	£8 646	£239 913

Employment tribunal awards **race** 2010-2015²⁰²

Year	Average award	Median award	Maximum award
2010-11	£12 108	£6 277	£65 530
2011-12	£102 259	£5 256	£4 445 023
2012-13	£8 945	£4 831	£65 172
2013-14	£11 203	£5 513	£162 593
2014-15	£17 040	£8 025	£209 188

Employment tribunal awards **religion/belief** 2010-2015²⁰³

Year	Average award	Median award	Maximum award
2010-11	£8 515	£6 892	£20 221
2011-12	£16 725	£4 267	£59 522
2012-13	£6 137	£4 759	£24 004
2013-14	£8 131	£3 191	£27 659
2014-15	£1 080	£1 080	£1 080

Employment tribunal awards **sexual orientation** 2010-2015²⁰⁴

Year	Average award	Median award	Maximum award
2010-11	£11 671	£5 500	£47 633
2011-12	£14 623	£13 505	£27 473
2012-13	£11 671	£5 500	£28 251
2013-14	£11 671	£5 500	£47 633
2014-15	£17 515	£6 000	£80 783

Most successful discrimination cases result at least in an award of compensation for injury to feelings. In 2002, the Court of Appeal²⁰⁵ fixed a wide range for injury to feelings compensation – from EUR 690-35 000 (£500 to £25,000) – divided into three bands depending on the seriousness of the case.²⁰⁶ An award can include aggravated damages to take account of the way the respondent treated the complainant or conducted their case. More recent case law suggests that the appropriate brackets now range from about EUR 100-42 000 (£660 to £33 000).²⁰⁷

County/sheriff courts, in addition to the power to award damages (including damages for injury to feelings and aggravated damages), have all of the powers they would have in any other action in tort (also called “delict” in Scotland) or for breach of statutory duty (in Scotland “reparation” of statutory duty). Levels of compensation in county/sheriff court claims are generally lower than in the employment tribunals (primarily because in most

²⁰² Source Ministry of Justice annual statistics and Employment Tribunal Statistics, <https://www.gov.uk/government/statistics/tribunal-and-gender-recognition-statistics-quarterly-october-to-december-2015>, accessed 6 April 2016.

²⁰³ Source Ministry of Justice annual statistics and Employment Tribunal Statistics, <https://www.gov.uk/government/statistics/tribunal-and-gender-recognition-statistics-quarterly-october-to-december-2015>, accessed 6 April 2016.

²⁰⁴ Source Ministry of Justice annual statistics and Employment Tribunal Statistics, <https://www.gov.uk/government/statistics/tribunal-and-gender-recognition-statistics-quarterly-october-to-december-2015>, accessed 6 April 2016.

²⁰⁵ Court of Appeal *Vento v Chief Constable of West Yorkshire Police (No.2)*, [2003] IRLR 102, 20 December 2002 <http://www.bailii.org/ew/cases/EWCA/Civ/2002/1871.html>, accessed 7 June 2016.

²⁰⁶ These guidelines are applicable across the UK.

²⁰⁷ Employment Appeal Tribunal *Da'Bell v NSPCC*, [2010] IRLR 19 and *Cadogan Hotel v Ozog*, (2014) UAEAT/0001/14, [2014] EqLR 691, 15 May 2014 http://www.bailii.org/uk/cases/UKEAT/2014/0001_14_1505.html, accessed 7 June 2016.

cases the victim's actual loss is likely to be less) and there is little evidence that the courts often use their powers to issue injunctions or other orders regulating the relationship of the parties. There are no reported cases of which the author is aware in which the court has ordered the defendant to take any measures to prevent future discrimination.

In addition to a declaration of the rights of the parties and an order for compensation, the employment/industrial/fair employment tribunal may make recommendations to protect the position of the complainant. The EqA provides (s.124(3)) that: "An appropriate recommendation is a recommendation that within a specified period the respondent takes specified steps for the purpose of obviating or reducing the adverse effect on the complainant"²⁰⁸ s.124(7) providing that "If a respondent fails, without reasonable excuse, to comply with an appropriate recommendation the tribunal may— (a) if an order was made under subsection (2)(b), increase the amount of compensation to be paid; (b) if no such order was made, make one".

In NI, except under the FETO, tribunals may only make recommendations to "obviate or reduce the adverse effect on the complainant of any act of discrimination to which the complaint relates", although the Fair Employment Tribunal has the additional power, when upholding a complaint, to make a recommendation that the respondent take action to prevent or reduce the adverse effect *on a person other than the complainant* (the author's emphasis) of any unlawful discrimination or harassment to which the complaint relates. None of the legislation gives a tribunal the power to order a respondent to hire, promote or reinstate (after dismissal) the complainant or to take any steps to prevent discrimination in future.

Adverse media publicity following a successful complaint, in particular, of race discrimination, can often be a more effective and dissuasive sanction than any formal order by a court or tribunal. In practice, it is the fear of adverse publicity that often influences respondents to settle complaints in advance of a hearing; the equality bodies have used the negotiations to settle cases as a means of securing agreement by respondents to take action to prevent future acts of discrimination. The effectiveness of such agreements depends, of course, on how well they are monitored once the ink is dry.

There is nothing in the UK anti-discrimination legislation that directly penalises organisations found persistently to discriminate, for example by excluding them from the opportunity to be awarded government contracts. The equality commissions are able to use their powers of formal investigation to investigate organisations they believe are discriminating and, where they are satisfied that unlawful acts have been committed, can serve binding non-discrimination notices requiring organisations to stop discriminating and to take action by specified dates to prevent discrimination from recurring. These same bodies can apply to the county/sheriff court for an injunction to prevent discrimination occurring.

FETO does contain sanctions on employers, including exclusion from public authority contracts, not for persistent discrimination but for failure to meet statutory reporting and workforce monitoring requirements, or for failure to comply with ECNI directions related to affirmative action; most commentators regard these as having a greater, long-term dissuasive impact than the sanctions available following successful litigation.

c) Assessment of the sanctions

There are concerns that the existing remedies do not meet the standard of "effective, proportionate and dissuasive" set by the directives. Arguably this is intrinsic in a scheme in which remedies are based on the principle of restitution, which is concerned to put the victim in the position s/he would have been had the act of discrimination not been

²⁰⁸ The power to make recommendations extending beyond the respondent's treatment of the claimant was repealed under the Deregulation Act 2015 from 1 October 2015.

committed. Of course the payment of damages could have a deterrent effect, but the fact that certain organisations are repeatedly subject to discrimination proceedings suggests that more “dissuasive” sanctions are required. The repeal by the Deregulation Act 2015²⁰⁹ of the power to make recommendations extending beyond the respondent’s treatment of the claimant will further weaken the effectiveness of available sanctions.²¹⁰

²⁰⁹ <http://www.legislation.gov.uk/ukpga/2015/20/contents> 26 March 2015 accessed 7 June 2016.

²¹⁰ Deregulation Act 2015.

7 BODIES FOR THE PROMOTION OF EQUAL TREATMENT (Article 13 Directive 2000/43)

- a) Body/bodies designated for the promotion of equal treatment irrespective of racial/ethnic origin according to Article 13 of the Racial Equality Directive

The Equality and Human Rights Commission

The Equality Act 2006 established a new single equalities and human rights body for GB, the Commission for Equality and Human Rights (CEHR), which came into formal existence in October 2007 and now calls itself the Equality and Human Rights Commission (EHRC). The EHRC has taken over the powers and functions of the three previous GB equality commissions and also has functions in relation to sexual orientation, religion, belief and age, as well as in relation to human rights in general. It therefore has responsibility for promoting equal treatment on the grounds of race/ethnicity in GB, and is now the designated body for GB in relation to Article 13 of Directive 2000/43/EC (succeeding the CRE). In recent years there have been draconian cuts to the funding of the EHRC. The Commission has devolved authorities in Wales and in Scotland and there is a Scottish Human Rights Commission which shares the human rights remit of the EHRC in Scotland.

The Equality Commission for Northern Ireland (ECNI)

The Equality Commission for Northern Ireland (ECNI) was established under the Northern Ireland Act 1998 (s.73) to take over the functions of the predecessor bodies. This meant that the ECNI has duties and powers comparable to the EHRC in relation to race, religious belief and political opinion, sex and disability and, now, since the NI Sexual Orientation Regulations (regs30–32), and Part 5 of the Age Regs, many of the same powers and duties in relation to sexual orientation and age. It therefore has responsibility for promoting equal treatment on the grounds of race/ethnicity in GB, and is the designated body for NI in relation to Article 13 of Directive 2000/43/EC.

- b) Status of the designated body/bodies – general independence

EHRC

Members of the EHRC are appointed by a Secretary of State to serve for a fixed term. The appointment process is not fully transparent, in that little information is available on the criteria applied by the Secretary of State in selecting members of the Commission.

Funding is determined by the designated Secretary of State out of his or her departmental budget, and the EHRC is therefore accountable to the Secretary of State, to whom it reports annually. These reports are laid before Parliament, to ensure that the Commission has some link to parliamentary processes. (Members of Parliament can choose to stage a debate on the contents of the report, but this rarely if ever happens.) In addition, the Joint Committee on Human Rights of the UK Parliament has the ability to inquire into the work of the EHRC and its relationship to the Secretary of State. The first such inquiry resulted in a very critical report published in March 2010.²¹¹ The EHRC's funding has been slashed from £70 million in 2007 to £17 million in 2015-16 (EUR 97 million to EUR 24 million)

ECNI

Members of the ECNI are appointed by the Secretary of State for Northern Ireland to serve for a fixed term. As with the EHRC, the appointment process is not fully transparent, in that little information is available on the criteria applied by the Secretary of State in selecting members of the Commission. However, the Secretary of State is often subject to pressure from civil society to select well-qualified candidates with a good record on equality issues, which ensures that appointments to some degree reflect the expectations of civil society and disadvantaged groups. In addition, substantial political pressures exist in NI

²¹¹ JCHR 13th Report of Session 2009-10, "Equality and Human Rights Commission", available at <http://www.publications.parliament.uk/pa/jt200910/jtselect/jtrights/72/72.pdf>, accessed 8 April 2016.

for the two major communities in NI (Protestants/ Loyalists and Catholics/ Nationalists) to be well represented on the Commission.

Funding is determined by the designated Secretary of State out of his or her departmental budget, and the ECNI reports annually to him/her. These reports are laid before Parliament, to ensure that the Commission has some link to parliamentary processes. (Again, as with the EHRC, this rarely generates active parliamentary debate.) In addition, committees of the UK Parliament have the ability to inquire into the work of the ECNI and its relationship with the Secretary of State, although so far this has not taken place to any significant degree.

c) Grounds covered by the designated body/bodies

Both Commissions cover all the protected grounds covered by Directives 2000/43 and 2000/78, as well as nationality (which is included within "race"), sex, pregnancy, gender reassignment, marriage and civil partnership.

d) Competences of the designated body/bodies – and their independent exercise

Both Commissions have the competence (if not necessarily the resources) to provide independent assistance to victims, to conduct independent surveys and to publish independent reports. The Commissions have the power to issue non-discrimination notices on completion of formal investigations into discrimination. These competences are exercised in an independent manner, in practice, although ongoing constraints on funding in particular of the EHRC have resulted in increasing and significant limitations on its functioning.

e) Legal standing of the designated body/bodies

In the United Kingdom the designated bodies have legal standing to bring discrimination complaints (though not on behalf of identified victim(s)) and to intervene in legal cases concerning discrimination.

The EHRC has powers to bring proceedings in relation to discriminatory advertisements and instructions or inducement to discriminate and to take enforcement action against public authorities which fail to comply with their positive duties.

S30 EqA 2006 makes explicit statutory provision in respect of the EHRC's ability to apply for judicial review and to intervene in court proceedings that relate to discrimination.²¹² The ECNI has similar powers and functions as the EHRC as regards discrimination.

f) Quasi-judicial competences

In the United Kingdom neither of the equality commissions is a quasi-judicial institution. Their role is to promote equality and enforce discrimination law, not to act as adjudicatory bodies. Both commissions can as noted above, however, carry out formal investigations as to whether persons and/or organisations are complying with discrimination law (including the positive equality duties). If, following such an investigation, the EHRC or the ECNI considers that an individual or an organisation is violating the law, it may issue an enforcement or compliance notice stating the necessary action required to ensure conformity with the discrimination legislation (the terminology varies according to the investigatory power being used).

²¹² The absence of such an explicit power to intervene in court proceedings in the legislation establishing the Northern Irish Human Rights Commission required a decision by the House of Lords to confirm that the Commission did have this power: see House of Lords, *In re the Northern Ireland Human Rights Commission* [2002] UKHL 25, [2002] NI 236 20 June 2002 available at <http://www.bailii.org/uk/cases/UKHL/2002/25.html> accessed 1 June 2016.

Such notices are not legally binding: if the individual or organisation concerned refuses to comply with the notice, the EHRC or the ECNI needs to go to the courts to seek an order requiring compliance (or in the case of the ECNI when investigating compliance with the Fair Employment and Treatment Order duty, the Secretary of State, who can prohibit non-compliant companies from obtaining government contracts.) These powers are mainly used at present to ensure conformity with the positive equality duties: in that context, notices issued by the commissions are usually complied with without the need for a court order.

g) Registration by the body/bodies of complaints and decisions

In the United Kingdom the equality commissions do not register the number of complaints and decisions (by ground, field, type of discrimination, etc.) because they do not receive complaints and make decisions as such. They do provide evidence of their activities in Annual Reports.

h) Roma and Travellers

EHRC

The Equality and Human Rights Commission has made support for Travellers and Roma a central part of its legal strategy.²¹³ It has also identified their concerns about housing and discrimination as a significant part of its policy agenda over the next years. The Commission intends to support appropriate cases using both anti-discrimination law and the ECHR and to continue to campaign in the media and in the elected parliaments for Traveller and Roma rights. It has published several authoritative research publications on the treatment of Traveller families in the UK, which can be accessed via the Commission's website.²¹⁴

ECNI

The ECNI has also identified Roma and Traveller issues as a priority issue and has worked to develop a strategy for promoting equality for Travellers in education,²¹⁵ as well as emphasising Traveller issues in much of its case-work and legal reform campaigning.

²¹³ See https://www.equalityhumanrights.com/sites/default/files/strategic_plan_-_web_accessible.pdf accessed 6 April 2016.

²¹⁴ See https://www.equalityhumanrights.com/en/file/6506/download?token=8L_E32Zg,https://www.equalityhumanrights.com/sites/default/files/research-report-68-assessing-local-authorities-progress-gypsy-and-traveller-accommodation-england-and-wales-execsummary-2010update.pdf, accessed 8 April 2016.

²¹⁵ See <http://www.equalityni.org/ECNI/media/ECNI/Publications/Delivering%20Equality/MainstreamingequalityforTravellerchildreninschools2008.pdf?ext=.pdf>, accessed 5 June 2016.

8 IMPLEMENTATION ISSUES

8.1 Dissemination of information, dialogue with NGOs and between social partners

Dissemination of information about legal protection against discrimination including Measures to encourage dialogue with NGOs

The government committed itself to wide consultation on its proposals for implementation in GB of Directives 2000/43 and 2000/78. Well in excess of 10,000 copies of the first consultation document, were sent to a diverse range of organisations, including employers' organisations, public and private sector employers, trade unions, NGOs with a particular interest in any of the areas of discrimination within the directives, lawyers' organisations, academics and others.

To a considerable extent the Governments in GB and NI rely on the equality commissions (including the devolved commissions in Scotland and Wales) to increase public awareness of existing anti-discrimination laws and the directives. The previous GB commissions and the ECNI have published a great deal of information about current protection against discrimination; all generated an extensive range of publications, information and guidance, much of which is available in hard copy from the EHRC and the ECNI, and which is also on the EHRC and ECNI websites. Some criticism was directed at the EHRC for initially failing to duplicate much of the material made available by its predecessor commissions on its website, the transition to the new commission structure having resulted in material becoming less accessible.

As consultation requires a baseline of information, the steps above have served as a way to facilitate consultation with NGOs. In 2002-3 the government consulted in more detail on proposals for transposition, "Equality and Diversity – the Way Ahead". A separate consultation involving NGOs and others regarding legislation on age discrimination, "Age Matters", was carried out later in 2003; the government invited views on some of the difficult issues associated with age and employment. A similar consultation in NI was carried out between October 2003 and January 2004, "Prohibiting age discrimination in employment and training – Legislation for NI". Following the publication of the draft age regulations in 2005, an extensive consultation resulted in some significant alterations in the final text of the 2006 GB and NI age regulations. The Discrimination Law Review also involved a very extensive consultation process as did the development of the EqA.

The government used its websites to make its consultation documents available to anyone interested, with links to versions of the consultation documents in Arabic, Hindi, Chinese and Gujarati, and a version prepared for persons with learning difficulties. The consultation documents are also available in Braille, large print and on tape. Similar steps have been taken for the draft age regulations, which have attracted a wide-ranging set of responses.

There was some press coverage when the implementing legislation came into force with the government making available £625,000 (736,865 euros) in 2003-4 and £1.45 million (1,709,973 euros) in 2004-5 to fund NGO awareness raising projects in relation to the implementation of the prohibitions on sexual orientation discrimination. A further £2.5m (2,948,245 euros) was provided for the period 2005-07. ACAS produced useful guidance on the legislation prohibiting sexual orientation and religion/ belief discrimination in 2003 and similar steps were undertaken in 2006 in relation to age discrimination provisions.

There exist in the UK a very large number of NGOs that represent or support particular groups or communities or special interests and are concerned to combat discrimination. Some receive some financial support from central or local government while most are dependent on non-government funding. There has been nothing to indicate that arrangements for consultation or "dialogue" have been initiated in GB or NI specifically to

meet the requirements of Article 12; it is more likely that the greater attention paid to NGOs has been to inform Government and to seek to secure wider acceptance of its policies.

As indicated above, the Government sought wide distribution of its consultation documents on transposition of the directives, and encouraged responses from NGOs. This was particularly true in respect of the draft age discrimination and disability discrimination legislation, on which the Government worked very closely with NGOs on a range of matters.

There are no formal structures for central (or devolved) Government dialogue with NGOs, but there are no barriers to such dialogue. Government departments often establish ad-hoc groups by means of which Ministers or senior officials can consult with NGOs on difficult or controversial issues. For example, after disturbances involving Asian and white youths in several towns in the North of England in 2001, a number of groups were called together to discuss community cohesion, including representatives from NGOs as well as representatives from relevant public authorities. The positive race and disability duties require public authorities to consult on the equality impact of their policies and practices, which has encouraged greater engagement with civil society and local communities.

Implementation of the s.75 positive duty in NI has seen widespread consultation with community groups. In NI, NGOs have established themselves as significant stakeholders in any discussions on equality issues. They were involved in the initial consultation on a Single Equality Bill and in later consultations in which proposals reflected some of the earlier response. They have also played an active role in consultation on measures to transpose the directives. NGOs act as effective watchdogs of the performance by public authorities of their equality duties under s. 75 of the Northern Ireland Act 1998, which requires public authorities to consult on the equality impact of their policies and practices, and many NGOs with specialised interest, for example in disability issues, are more likely to be listened to within the equality impact assessment carried out by NI public authorities.

An extensive consultation with NGOs and stakeholders was carried out after the publication of the Discrimination Law Review in 2007, which informed the UK government's preparation of the EqA in GB.

Measures to promote dialogue between social partners

There are no particular measures designed to promote dialogue between social partners.

In the various consultation documents concerning transposition of the directives and establishment of a single equality body in GB, it appears that one aim of the Government has been to reassure business and employers generally that neither the existing nor the proposed legislation should be unduly burdensome, that guidance and support will be available and, more positively, that equality is good for business. This message has not included a role for trade unions in combating discrimination or promoting equality in the workplace, through collective agreements, joint working or any other methods. Again, however, the positive equality duties may have an impact in this respect.

Roma and Travellers

Formal consultation with Traveller groups is increasingly common, both at central government level and also within the devolved administrations (see, for example, the Scottish Government's Gypsy/ Traveller Strategy).²¹⁶ The Gypsy and Traveller Unit within the Department for Communities and Local Government acts as a point of contact with Traveller communities within central government. The term "Traveller" or "Gypsy" in this context would include Roma, whether English Roma or more recent immigrants.

²¹⁶ www.gov.scot/Topics/People/Equality/gypsiestravellers/strategy accessed 8 April 2016.

There is no specific body appointed at national level to address Roma issues but these issues would fall within the scope of the EHRC and there are a number of charitable organisations dedicated to improving the plight of Gypsies and Travellers generally and Roma specifically. Among these are the Friends Families and Travellers,²¹⁷ the Community Law Partnership²¹⁸ and the Roma Support Group.²¹⁹

8.2 Compliance (Article 14 Directive 2000/43, Article 16 Directive 2000/78)

a) Mechanisms

S142 EqA provides, in GB, that contractual terms are unenforceable insofar as they “constitute[], promote[] or provide[] for treatment of [a]... person that is of a description prohibited by this Act”. Similar provision is made by s145 of the Act as regards collectively agreed terms and rules of undertakings. Discrimination in the rules governing independent occupations, professions, workers' associations or employers' associations falls within the provisions of the EqA also. The same is true in NI under the various equality provisions there in force.²²⁰

b) Rules contrary to the principle of equality

It is not unreasonable to assume that there are laws, regulation or rules contrary to the principle of equality that are still in force; nothing in the UK anti-discrimination legislation has the effect of striking out or disapplying primary or secondary legislation.

However, as part of the transposition process, government departments were required to review the legislation for which they are responsible to ensure that any which was contrary to the directives' principles of equal treatment in relation to disability, religion or belief and sexual orientation was repealed or amended. That procedure was repeated in respect of age. Legislative provisions found contrary to the principle of equal treatment on grounds of age have been repealed or, retained, where they can be objectively justified under the provisions of the directive.

The EqA states, however, (Sch.11, para 5) that its prohibitions on discrimination related to religion/ belief are without prejudice to ss58–60 of the School Standards and Framework Act 1998 (which permit religious discrimination in appointment and dismissal of teachers in schools with a religious character, without the need to show legitimate aim or proportionality – see also s21 of the Education (Scotland) Act 1980 (management of denominational schools)).

²¹⁷ <http://www.gypsy-traveller.org/> , accessed 11 July 2016.

²¹⁸ <http://www.communitylawpartnership.co.uk/>, accessed 11 July 2016.

²¹⁹ romasupportgroup.org.uk accessed 8 April 2016.

²²⁰ In particular, Arts 68 and 68A RRO applying in respect of contractual and collectively agreed terms and rules of undertakings; The corresponding provisions of the SOR are reg 42 and Sch 4; of FETO are Arts 99 and 100A; of the DDA are ss16B and 16C and of the Age Regs are reg 49.

9 COORDINATION AT NATIONAL LEVEL

At governmental level in GB there has traditionally been less than complete clarity as to which government department was responsible for anti-discrimination measures, and there has been a history of constantly shifting responsibility between different departments to reflect the differing interests of different ministers. The Government Equalities Office, formed in October 2007 is now a cross cutting Government department which has its “home” in the Department for Education. The Office has responsibility within Government for equality strategy and legislation in the UK.²²¹

There is no anti-racism or anti-discrimination National Action Plan in the United Kingdom.

²²¹ <https://www.gov.uk/government/organisations/government-equalities-office/about#who-we-work-with> accessed 8 April 2016.

10 CURRENT BEST PRACTICES

- The positive duties imposed on public authorities by the Public Sector Equality Duty (s149 EqA) in GB and s75 Northern Ireland Act 1998 (in NI) (see 2.3.1);
- The wide scope of vicarious liability under domestic law for discrimination/harassment by employees (see 2.5);
- The broad coverage in the UK of discrimination on grounds of disability, sexual orientation, religion or belief (and, in GB, age) (see 3.2.6-3.2.10);
- The potential coverage by the EqA of discrimination on grounds of caste (see 2.1.1).

11 SENSITIVE OR CONTROVERSIAL ISSUES

- In NI there is currently controversy over the apparent tension between religious freedom and the right not to be subject to sexual orientation discrimination in the “Ashers bakery” case (a Christian bakery company being sued in respect of a refusal to make a cake explicitly celebrating same-sex marriage). The case is symptomatic of a degree of discomfort among a number of Christians about a perceived “hierarchy” of rights.²²²

11.1 Potential breaches of the directives (if any)

- One pressing difficulty concerns the high levels of fee payable in employment tribunals and the impact of this on access to justice (see 6.1(b)). In the author’s view this is incompatible with the principle of effectiveness.
- Also of concern is the wide scope for schools to discriminate against teachers on grounds of religion which is in the author’s view incompatible with Art 2 of Directive 2000/78 (see 4.1).
- There is some concern over whether UK law adequately protects self-employed workers as required by arts 2 & 3 of Directives 2000/43 and 2000/78 (see 3.2.1).
- There are concerns that the existing remedies do not meet the standard of “effective, proportionate and dissuasive” set by the directives. The repeal by the Deregulation Act 2015 of the power to make recommendations extending beyond the respondent’s treatment of the claimant will further weaken the effectiveness of available sanctions. (see 6.5.c).

11.2 Other issues of concern

- See above; the most pressing difficulty concerns the high levels of fee payable in employment tribunals and the impact of this on access to justice.

²²² The conflict is “apparent” rather than real in the author’s view because in cases such as *Ladele* the indirect discrimination on grounds of the discriminator’s religious or other beliefs is outweighed by the direct discrimination which would otherwise be entailed on grounds of sexual orientation. The decision in the *Asher* case, discussed below, in fact created a conflict by characterising the discrimination against the claimant as direct discrimination with the effect (in the author’s view) that the freedom of expression and religion of the family-operated bakery was curtailed. The case is subject to appeal. See *Lee v Ashers & Ors* [2015] NICty 2 19 May 2015 http://www.equalityni.org/ECNI/media/ECNI/Cases%20and%20Settlements/2015/Lee-v-Ashers_Judgement.pdf, accessed 6 June 2016.

12 LATEST DEVELOPMENTS IN 2015

12.1 Legislative amendments

N/A

Remedies - Power to make recommendations

In terms of remedies under the EqA, s.124(3) provides a power to tribunals to make recommendations. The power to make recommendations extending beyond the respondent's treatment of the claimant was repealed under the Deregulation Act 2015 from 1 October 2015.

Internet Source: <http://www.legislation.gov.uk/ukpga/2015/20/contents/enacted>

12.2 Case law

Ethnicity

Name of the court: High Court

Date of decision: 21 January 2015

Name of the parties: R (Moore & Coates) v Secretary of State for Communities & Local Government & Ors

Reference number: 2015] EWHC 44 (Admin)

Address of the webpage: <http://www.bailii.org/ew/cases/EWHC/Admin/2015/44.html>

Brief summary: The Claimants, who were Roma and Irish Travellers, challenged the policy of the Secretary of State by which first all and subsequently 75 % of applications for 'traveller pitches' on 'Green Belt' land (upon which building is generally not permitted) were 'called in' (recovered) to the Secretary of State for his decision, rather than being determined by Planning Inspectors (as is the case for over 90 % of all planning applications). The effect of the policy was, as the judge pointed out at §39, that 'a traveller wanting to live on a pitch in the Green Belt, but not erect any buildings, could now expect that his or her case would be [determined by the Secretary of State], whereas a person proposing to build one or more dwellings would not. That was true even in cases where the application or permission would be temporary...' The Claimants challenged the policy by way of an application for Judicial Review in the High Court. They, and the Equality and Human Rights Commission which intervened, argued inter alia that the policy was contrary to the prohibition on race and ethnic origin discrimination and to the Public Sector Equality Duty. The disadvantage they suffered as a result of the policy was that they had to wait much longer for decisions than would have been the case had their applications been decided by a Planning Inspector. The Court ruled that the policy disparately impacted on travellers (comprising in this case Roma and Irish Travellers) and that it was not justified by the aim of the policy, which the Court found to have been the reduction of successful planning applications on the Green Belt. Such an aim could have been achieved by non-discriminatory means. The policy therefore breached s. 19 of the Equality Act 2010. In addition, the Secretary of State had failed to comply with the duty of 'due regard' imposed by s. 149 of the Act in adopting the policy. In fact, he had had no regard at all. The court ordered that the calling in ('recoveries') in the two cases be quashed.

Name of the court: Employment Appeal Tribunal

Date of decision: 19 December 2014 EAT, July 2015 ET

Name of the parties: Chandhok v Turkey

Reference number: UKEAT/0190/14/KN/; Case number 3400174/2013

Address of the webpage:

http://www.bailii.org/uk/cases/UKEAT/2014/0190_14_1912.html;

<https://drive.google.com/file/d/0Bw20oNMQGJI2bEl3YmRYcHFUbWc/view?pli=1>

Brief summary: This case was brought by a domestic servant who complained, inter alia, that she had been discriminated against because of her race, religion and caste (she was of the "Adavasi" or servant caste) by her employers who had subjected her to harassment, failed to pay her the national minimum wage and unfairly dismissed her. It was unclear whether the Equality Act 2010, which prohibits discrimination inter alia because of national or ethnic origins, colour or nationality, prohibited such discrimination. The Equality Act was amended in 2013 to require the prohibition of caste discrimination by regulation but those regulations are still awaited. The Employment Appeal Tribunal (EAT) confirmed that, although caste discrimination was not yet regulated as such by the Act, many aspects of "caste" might fall within it, particularly because "ethnic origins" has a wide and flexible ambit and included characteristics determined by "descent". It was agreed by the parties at the EAT that the matters upon which the claimant relied might fall within "ethnic origin", and the case was returned to an employment tribunal for determination.

The Tribunal accepted that the Claimant had been subjected to indirect religious discrimination. It also ruled that she had been paid radically less than the statutory minimum and had been denied the holidays and other rest periods to which she was lawfully entitled, as well as being subjected to other detriments. The Tribunal accepted that the Claimant had been treated in the manner in which she was treated by the respondents in part because of her caste position: they had recruited her "not because of her skills but because she was by birth, by virtue of her inherited position in society, and by virtue of her upbringing – i.e. because of her ethnic origins – a person whose expectations in life were no higher than to be a domestic servant ... The treatment afforded to the Claimant ... was because she was a low caste, Indian national, who could not speak English [sic] and by upbringing and by her inherited position in Indian society expected and was expected by others to do no more than serve others..."

The EAT did not rule that caste was a form of race for the purposes of the Equality Act 2010, rather that aspects of caste overlapped with aspects of race and so the facts of a particular caste-related case may be caught within the Act. The Tribunal accepted that the ill-treatment to which she had been subjected amounted to harassment on grounds of race without specifically addressing the relationship between caste and race. Remedies were ordered to be determined at a separate hearing.

Religion or belief

Name of the court: Belfast County Court

Date of decision: 19 May 2015

Name of the parties: Lee v Ashers & Ors

Reference number: [2015] NICty 2

Address of the webpage:

http://www.equalityni.org/ECNI/media/ECNI/Cases%20and%20Settlements/2015/Lee-v-Ashers_Judgement.pdf

Brief summary: The 'Gay cake case' concerned a challenge to the refusal of the Respondents, a baking company run by a conservative Christian family, to make a cake for the Claimant. The cake in question was to bear the slogan 'Support Gay Marriage', and the Claimant wanted it in connection with a public event. A County Court in Northern Ireland ruled that the bakery (Ashers) had discriminated on grounds of sexual orientation, religious belief and political opinion when it refused to bake a cake at the request of the Claimant, Gareth Lee, because the cake was to bear the slogan 'Support Gay Marriage'. The County Court awarded damages in the agreed sum of GBP 500 (EUR 635). The Judge found that the bakery 'cancelled this order as they oppose same sex marriage for the reason that they regard it as sinful and contrary to their genuinely held religious beliefs'. But because the bakery was 'not a religious organisation' the Judge found that it had discriminated unlawfully and directly against the Claimant, and that there was no justification defence. The Judge also rejected the argument that the decision breached the ECHR rights of the bakery. Ashers are to appeal.

Age

Name of the court: Employment Appeal Tribunal

Date of decision: 5 June 2015

Name of the parties: EAD Solicitors LLP and ors v Abrams UKEAT/0054/15/DM

Reference number: UKEAT/0054/15/DM

Address of the webpage:

http://www.bailii.org/uk/cases/UKEAT/2015/0054_15_0506.html

Brief summary: Mr Abrams, previously a partner in the firm EAD Solicitors set up and was the sole director of a firm 'Gary Abrams Limited'. The firm was to take his place as a partner in EAD Solicitors, for tax reasons. The limited company then contracted with EAD Solicitors to provide the services of Mr Abrams as a fee earner. The partnership agreement contained a retirement clause, requiring members of the partnership to retire at the age of 62. When Mr Abrams reached the age of 62, he was required to stop work and his company was no longer allowed to be a member of the partnership. It was claimed that this was unlawful direct discrimination against the company, by association, because of Mr Abrams's age. The EAT upheld his claim, on the basis that nothing in the EqA prevents a company from bringing such a claim. The EAT confirmed that the word "person" in the EqA should be interpreted to include legal persons.

The EAT upheld his claim, on the basis that nothing in the EqA prevents a company from bringing such a claim. The EAT confirmed that the word "person" in the EqA should be interpreted to include legal persons.

Name of the court: Employment Appeal Tribunal

Date of decision: 8 July 2015

Name of the parties: Chief Constable of West Midlands Police v Harrod

Reference number: UKEAT/0189/14/DA

Address of the webpage:

http://www.bailii.org/uk/cases/UKEAT/2015/0189_14_0807.html

Brief summary: Special rules applying to Police Officers allow them to be made to retire where their retirement would be in the general interest of the efficiency of the force. However these rules only apply to those officers who had served long enough to receive two thirds of their annual pensionable pay. As a result, only those officers over the age of 48 could be forced to retire. Where five police forces had to make staff cuts, only those older officers were made to retire. The claimants claimed that this amounted to indirect age discrimination. They were successful in the initial claim before the Employment Tribunal. However, the EAT allowed the appeal. It held that the employment tribunal had failed to have regard to the fact that discrimination was inherent in the retirement regulation: it had been the choice of Parliament to introduce the legislation and its application by the police forces had not added to the discriminatory impact. Although potentially discriminatory to force only older officers to retire, the decision could be justified. There was no other way to make police officers redundant; and there were social policy reasons which underpinned the restriction of the use of the forced retirement to those who had an immediate pension entitlement.

Disability

Name of the court: Northern Ireland's Fair Employment Tribunal

Date of decision: 9 December 2014

Name of the parties: Bickerstaff v Butcher

Reference number: [2015] 92/14 FET

Address of the webpage: This decision is not available except on commercial websites

Brief summary: The Claimant had a BMI of 48.5. He had sleep apnoea and gout. He was harassed by Mr Butcher, a work colleague, in connection with his weight. Mr Butcher said of him both that he was 'so fat he could hardly walk' and that he was 'so fat he would hardly feel a knife being stuck into him'. He claimed that he had been subject to disability-

related harassment contrary to the Disability Discrimination Act 1995 (which still applies in Northern Ireland, but whose relevant provisions are materially identical to those of the Equality Act 2010 which applies in Great Britain). Unusually, the claim was brought against Mr Butcher alone and not against the employer, which had dismissed Mr Butcher in connection with the behaviour of which the Claimant complained.

The Tribunal referred to the decision of the CJEU in the Kaltoft case (C-354/13) and ruled that the Claimant was disabled, rejecting the argument put for Mr Butcher that the condition was self-inflicted.

Name of the court: Court of Appeal

Date of decision: 10 December 2015

Name of the parties: Griffiths v Secretary of State for Work and Pensions

Reference number: [2015] EWCA Civ 1265

Address of the webpage: <http://www.bailii.org/ew/cases/EWCA/Civ/2015/1265.html>

Brief summary: The claimant had post-viral fatigue and fibromyalgia. She had significant periods off sick which the respondent responded to in accordance with its Attendance Policy. Her absence gave rise to a written improvement warning under the attendance policy. The claimant raised a grievance, contending that due to her disabled status, the employer should make two adjustments to the application of the policy. First, that because the absence was due to her disability, it should be disregarded for the purposes of the Attendance Policy, so that the warning be withdrawn. Second, that the policy should be modified to increase the number of days' of absence which would activate the usual Attendance Policy provisions. These requests were refused. She claimed that this refusal breached the duty to make reasonable adjustments under s20 EqA. The Tribunal found no breach of the duty. The EAT upheld this decision, which was then appealed to the Court of Appeal. The Court of Appeal dismissed the appeal. However the Court did note that "*both the majority in the ET and the EAT were wrong to hold that the section 20 duty was not engaged simply because the Policy applied equally to everyone. The duty arises once there is evidence that the arrangements placed the disabled person at a substantial disadvantage because of her disability*". However, the court dismissed the appeal on the ground that the ET was entitled to hold that the proposed adjustments were not steps which the employer could reasonably be expected to take.

Indirect Discrimination

Name of the court: Court of Appeal

Date of decision: 22nd June 2015

Name of the parties: Home Office (UK Border Agency) v Essop and others.

Reference number: [2015] EWCA Civ 609

Address of the webpage: <http://www.bailii.org/ew/cases/EWCA/Civ/2015/609.html>

Brief summary: The case was brought by civil servants who had failed a generic "Core Skills Assessment" ("CSA") test which all civil servants were required to pass in order to become eligible for promotion. The CSA bore no correlation to the post for which a candidate intended to apply (and in respect of which a candidate who had passed the CSA would have to pass a second, job-specific test). The evidence was that the success rate of Black and Minority Ethnic (BME) candidates was 40.3% of the White selection rate. For older candidates the rate was 37.4% of the younger candidate selection rate. In each case there was a 0.1% risk that this could happen by chance, so it was likely to be a non-random explanation, but neither the Home Office nor the claimants knew what the explanation was.

The Court of Appeal ruled that it was insufficient for the claimants to establish a statistical disparity in success rates in the CSA in order to bring a prima facie claim of age and race discrimination. Rather, they would have to point to the reason why the CSA had disadvantaged them as BME and older candidates. The Court reached this conclusion because, it said, it was impossible to prove that a provision, criterion or practice (PCP) put

a group at a particular disadvantage, and also put a claimant at that disadvantage (this being the language of s19 Equality Act 2010) without establishing the reason why the PCP was said to put the group (and the individual) at the disadvantage. This is likely to impose obstacles for indirect discrimination claimants, as additional hurdles have been placed on claimants before they can make out a claim. In addition to showing that a provision, criterion or practice has put the group at a disadvantage, they must now also identify the reason for why the group was put at that disadvantage. ThusAs a result, claiming indirect discrimination will be more difficult as in addition to showing that disadvantage was caused to a group by a PCP, claimants will also have to find an explanation for that disadvantage.

Public Sector Equality Duty and Indirect Discrimination

Name of the court: Court of Appeal

Date of decision: 26 August 2015

Name of the parties: Unison v Lord Chancellor

Reference number: [2015] EWCA Civ 935

Address of the webpage: <http://www.bailii.org/ew/cases/EWCA/Civ/2015/935.html>

Brief summary: This is the latest in a series of decisions arising from challenges brought by Unison (a trade union) to the tribunal fees that were imposed in 2013. In 2013 Unison sought to challenge a Fees Order made pursuant to the Tribunals, Courts and Enforcement Act 2007,²²³ Sections 42(1) and 43(3), which required fees to be paid in respect of claims and appeals brought by employment tribunals and the Employment Appeal Tribunal. The Fees Order allowed the remission of fees dependent on the disposable capital and income of the claimant/appellant and contained a discretionary provision for dispensing with fees in exceptional circumstances. This claim had failed but Unison had been granted permission to appeal. Prior to the appeal being heard the appeal was stayed while Unison launched a second application for judicial review of the same Order (after evidence became available as to its impact on the number of cases brought). The second application for judicial review failed and relates to the union's appeal on both decisions below.

The Court of Appeal has rejected the appeals brought by the trade union Unison against the rejection of its challenges to the imposition of tribunal fees in 2013. The Court of Appeal agreed with the lower courts that the imposition of fees, although they had reduced the number of discrimination cases by around 80%, did not breach the principle of effectiveness and did not amount to unlawful discrimination. The Supreme Court has granted permission for Unison to appeal the Court of Appeal's decision in this matter.

²²³ <http://www.legislation.gov.uk/ukpga/2007/15/contents>. Date of adoption: 19 July 2007 accessed 7 June 2016.

ANNEX 1: TABLE OF KEY NATIONAL ANTI-DISCRIMINATION LEGISLATION

Country: United Kingdom

Date: 31 December 2015

UK Equality Act 2006	Act	Abbreviation: EqA 2006
		Date of adoption: 16.2.2006
		Latest amendments: 1.10.2010
		Entry into force: various from 6 April 2007
		Web link: (this is not up to date) http://www.legislation.gov.uk/ukpga/2006/3/contents
GB Equality Act 2010	Act	sex (incl. gender reassignment, married/ civilly partnered status/ pregnancy), colour, nationality (including citizenship), ethnic origins, national origins, disability, sexual orientation, religion or belief, age
		Civil law
		Material scope: Enforcement and promotion; goods and services, housing; education; functions of public authorities. Applies to GB only insofar as it establishes the EHRC. It also provides the basis for the enactment in NI of regulations prohibiting sexual orientation discrimination outside employment.
		Principal content: Extended protection against discrimination on grounds of sexual orientation to provision of goods and services, housing, education, public functions. Also established the EHRC
		Abbreviation: EqA
NI Disability Discrimination Act 1995	Act	Date of adoption: 8.4.2010
		Latest amendments: 5.4.2013
		Entry into force: 1.10.2010
		Web link: http://www.legislation.gov.uk/ukpga/2010/15/contents (this is not up to date)
		Grounds protected: sex (incl. gender reassignment, married/ civilly partnered status/ pregnancy), colour, nationality (including citizenship), ethnic origins, national origins, disability, sexual orientation, religion or belief, age
NI Disability Discrimination Act 1995	Act	Civil law
		Material scope: All sectors of employment and employment related activities, access to goods facilities and services (thereby covering most areas of social advantages and social protection), disposal and management of premises, education. Applies only to GB.
		Principal content: Prohibits direct, indirect discrimination and victimisation, harassment and instructions to discriminate, imposes positive obligations on public authorities, provides individual rights of redress
		Abbreviation: DDA
		Date of adoption: 8.11.1995
NI Disability Discrimination Act 1995	Act	Latest amendments: 1.8.2011
		Entry into force: various dates from November 1995
		Webpage address: http://www.legislation.gov.uk/ukpga/1995/50/contents (this is not up to date)
		Grounds covered: disability
		Civil law
NI Disability Discrimination Act 1995	Act	Material scope: All sectors of employment and employment related activities, access to goods, facilities and services, further and higher education, some aspects of transport. Now applies only to NI.
		Principal content: Prohibits discrimination and requires reasonable adjustments. Prohibits victimisation and instructions to discrimination and provides right to seek legal redress

NI Race Relations (NI) Order 1997	Abbreviation: RRO Date of adoption: 19.3.1997 Latest amendments: 9.7.2012 Entry into force: various dates from March 1997 Web link: www.legislation.gov.uk/nisi/1997/869/contents/made (this is not up to date) Grounds covered: race, colour, nationality (including citizenship), ethnic origins, national origins and belonging to Irish Traveller community
	Civil law
	Material scope: All sectors of employment and employment related activities, education, access to goods facilities and services, disposal and management of premises. Applies only to NI.
	Principal content: Prohibits direct, indirect discrimination and victimisation, harassment and instructions to discriminate, Rights of individual to seek legal redress.
NI Fair Employment and Treatment Order 1998	Abbreviation: FETO Date of adoption: 16.12.1998 Latest amendments: 10.12.2003 Entry into force: 1.3.1999 Web link: www.legislation.gov.uk/nisi/1998 (this is not up to date) Grounds covered: religion/ belief/ political belief
	Civil law
	Material scope: All sectors of employment and employment related activities, education, access to goods facilities and services, disposal and management of premises. Applies only to NI.
	Principal content: Prohibits direct, indirect discrimination and victimisation, harassment and instructions to discriminate, provides rights to individuals to seek legal redress, and affirmative action and reporting provisions
NI Employment Equality (Sexual Orientation) Regulations (NI) 2003	Abbreviation: SOR 2003 Date of adoption: 1.12.2003 Latest amendments: 5.12.2005 Entry into force: 2.12.2003 Web link: http://www.legislation.gov.uk/nisr/2003/497/contents/made (this is not up to date) Grounds covered: Sexual orientation
	Civil law
	Material scope: All sectors of employment, employment related activities, further & higher education. Applies only to NI.
	Principal content: Prohibits direct, indirect discrimination and victimisation, harassment and instructions to discriminate, Provides rights to individual to seek legal redress
NI Employment Equality (Age) Regulations (NI) 2006	Abbreviation: Age Regs Date of adoption: 14.06.2006 Latest amendments: 6.4.2011 Entry into force: 1.10.2006 Web link: www.legislation.gov.uk/nisr/2006/261/contents/made (this is not up to date) Grounds covered: age
	Civil law
	Material scope: All sectors of employment, employment related activities, further & higher education. Applies only to NI.

	Principal content: Prohibits direct, indirect discrimination and victimisation, harassment and instructions to discriminate and provides rights to individuals to seek legal redress.
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ANNEX 2: TABLE OF INTERNATIONAL INSTRUMENTS

Country: United Kingdom

Date: 31 December 2015

Instrument	Date of signature (if not signed please indicate) Dd/mm/yyyy	Date of ratification (if not ratified please indicate) Dd/mm/yyyy	Derogations / reservations relevant to equality and non-discrimination	Right of individual petition accepted?	Can this instrument be directly relied upon in domestic courts by individuals?
European Convention on Human Rights (ECHR)	4.11.1950	8.3.1951	A derogation from article 5(1) to permit the UK to detain foreign nationals indefinitely under the Anti-Terrorism, Crime and Security Act 2001 was withdrawn on 16 March 2005	Yes	Incorporated into UK law by Human Rights Act 1998, Northern Ireland Act 1998, Scotland Act 1998 and Government of Wales Act 2006.
Protocol 12, ECHR	No	No	None	No	No
Revised European Social Charter	7.11.1997	No	N/A	Ratified collective complaints protocol? No.	No
International Covenant on Civil and Political Rights	16 Sep 1968	20 May 1976	Yes	No.	No.
Framework Convention for the Protection of National Minorities	16.9.1968	20.5.1976	None	No	No
International Covenant on Economic, Social and Cultural Rights	1.12.1995	15.1.1998	None	No	No

Convention on the Elimination of All Forms of Racial Discrimination	16.9.1968	20.5.1976	None	No	No
Convention on the Elimination of Discrimination Against Women	22.7.1981	7.4.1986	None	Proposed but not yet approved – but inquiry procedure has been acceded to 17 December 2004.	No
ILO Convention No. 111 on Discrimination		8.6.1999	None	No	No
Convention on the Rights of the Child	19.4.1990	16.12.1991	A reservation applies as regards the obligation to detain children and adults separately	No	No
Convention on the Rights of Persons with Disabilities	30.3.2007	8.6.2009	Reservations apply as regards access to the Military; the special education of children with disabilities; and immigration	30.3.2007	8.6.2009

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