

10 March 2011 Central Law Training, Race Discrimination

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### **Introduction – statistics**

1. The Tribunals Service statistics shows that in 2009-2010, some 5,700 race discrimination claims were received (about 8% of all single claims). It processed 4,500 cases of which 38% achieved ACAS conciliated settlements, 30% were withdrawn (settlement status not known), 7% were struck out (not at a hearing) and 5% were dismissed at a preliminary hearing.
2. Of the 830 cases that made it to a full tribunal hearing, 15% were unsuccessful. Just 3% of race complainants, or 130 people, succeeded at tribunal. This is about par with other protected status jurisdictions: higher than sex, religious belief and age (all at 2%), the same as disability, but lower than sexual orientation (5%). The median award, based on records of just 68 cases, was £5,392. The maximum was £374,922.

### **THE REASON WHY**

#### ***Arhin v Enfield PCT EAT/296/09***

3. ***Arhin v Enfield PCT EAT/296/09***, Langstaff J The employment tribunal had found Dr Arhin had been unfairly dismissed but rejected her claim that the dismissal was racially discriminatory. On a genuine downsizing exercise, with 4 posts being reduced to 2, Dr Arhin's post disappeared. Instead of conducting a competitive selection process, the PCT had slotted one of the other post holders into one of the remaining posts.
4. The PCT's case was that despite the similarity of job descriptions, the two did very different jobs with only the comparator 'slotting in', making it sensible for him to carry on doing the same work in the future as he had done in the past – so no competitive interview was required. In finding the dismissal unfair, the tribunal had rejected that case, but went on to find that the PCT's decision on slotting in was a 'mistake'.
5. As the nature of the mistake was unclear, it could, eg, have been that the PCT genuinely but mistakenly believed that the two jobs were very different in

practice, the discrimination claim was remitted to a fresh tribunal. In doing so, Langstaff J discusses the effect of mistake and the approach to be taken where mistake is said or found to be ‘the reason why’

*“... If the reason for less favourable treatment in an allegation of direct discrimination is not race but is some other reason, then the allegation is not made out. If the employer satisfies the Tribunal that there is some other reason, it does not have itself to be an inherently justifiable one. It does not have to be a good reason in a moral sense. It simply has to be a reason which has nothing to do with race. Where, for instance, treatment has been given by mistake which might on the face of it appear to have been directed towards the recipient by reason of her race, then the fact that it had been given by mistake is an entirely sufficient reason provided the mistake itself has nothing to do with race.” [13]*

6. Where mistake is raised as an explanation, *“it demands necessarily close scrutiny. ... [requiring] ... a focus by the Tribunal upon the likelihood of the mistake having been a genuine accident which in turn requires a Tribunal to think in many cases as to what systems there may be within the employer which tend to prevent such a mistake being made. That may include, for instance, the impact of having a human resources department and the advice which a human resources manager may give or has given.... A Tribunal must be scrupulous to ensure that “mistake” is not just a handy cloak for discrimination.....” [27]*

## **SHIFTING THE BURDEN OF PROOF**

7. It has been clear since ***Madarassy v Nomura International plc [2007] IRLR 246*** that to establish a prima facie case of discrimination so as to shift the burden of proof requires more than a difference in status (eg race) and a difference in treatment. There has to be something more, some added factor that could suggest there is a prohibited reason for the impugned treatment, in order to turn the case from merely raising the possibility of discrimination to one in which a tribunal has sufficient material from which it could properly conclude, in the absence of an adequate explanation from the employer, discrimination on the prohibited ground. As ***Madarassy*** makes clear, it is only at the latter stage that the burden shifts on to the employer.

### ***Commissioner of Police of the Metropolis v Osinaike EAT/373/09***

8. ***Commissioner of Police of the Metropolis v Osinaike EAT/373/09, HHJ Reid QC***, illustrates the danger of applying too mechanistic an approach to the shifting burden of proof and the importance of always asking the ‘reason why’ something happened.

9. Here the employment tribunal had rejected all but one of a number of race claims. It had found that on an allegation of harassment the burden of proof had shifted to the employer. The allegation was that the Senior Management Team had told the claimant she needed to see a psychiatrist. The tribunal had relied on five matters each of which the EAT disposed of before finally dismissing the harassment claim.
10. The first matter relied upon was a 'difference in race'. That was wrong in law, it cannot of itself lead to an inference of race discrimination – at [42] the EAT relied on **Bahl [2003] IRLR 640 @ para 94**
11. The second matter relied upon was the "failure to anticipate the effect on the claimant' of that information. On its own, there is no basis for using this as a ground for finding that the onus had shifted. It says nothing about race. If the tribunal had intended to find that the Respondent:
 

*"..... lacked awareness of racial or cultural differences and did not appreciate the cultural differences manifested by the Claimant, it ought to have said so and set out the facts which led it to this conclusion: see **Bradford Hospitals NHS Trust v Al-Shabib [2003] IRLR 4, EAT at para 21."** [43]*
12. The third factor was a straightforward factual mistake by the tribunal – it thought the Respondent had denied telling the claimant she needed to see a psychiatrist.
13. The fourth factor was the persistence in the view that the claimant needed to see a psychiatrist and that it was based on an exaggerated and inaccurate picture painted of the claimant in the OH referral. Coupling this with the fifth factor, of failing to appreciate the work related history, the EAT observes that they do not on the face of them have any racial connotation at all. [45]
14. The tribunal seem to have thought that unreasonable or unfair behaviour was enough to trigger the transfer of the burden of proof. That is wrong.
 

*"... If unreasonable conduct occurs alongside other indications that there is or might be discrimination on racial grounds the position is different, but the indications must relate to the prohibited treatment..."* [47]
15. When looking for a **Madarassy** 'added factor', it is thus not enough, for example, to identify unfairness, or unreasonable behaviour, or a mismatch between policy and practice, there must be something that suggests that the unfairness etc was because of a protected status.

**Hammonds LLP v Mwitta EAT/26/10**

16. Another case where the employment tribunal wrongly transferred the burden of proof is **Hammonds LLP v Mwitta EAT/26/10, Slade J**. Here the error was

to pick as the key factor something that in truth was no more than a difference in race and a difference in treatment. The tribunal had found that a prima facie case was:

*“... established on the basis of a difference in race and significantly less work being given to Ms Mwitwa than to her comparators showing a pattern of marginalisation. These facts indicate a difference in race and a difference in treatment and, at most, as Mr Brennan contended, a possibility that the Appellants **could have** discriminated on grounds of race in allocating work but not that they **had** committed such an act. As was made clear by Mummery LJ in paragraph 56 of **Madarassy** this would be an insufficient basis from which an ET could draw an inference that a respondent had committed an act of unlawful race discrimination. For a prima facie case to be established, the ET would have to find facts from which they could conclude properly that Ms Mwitwa **had** been discriminated against on grounds of her race.” [77]*

17. Furthermore,

*“ If at the first stage the ET inferred that a prima facie case had been established in whole or in part from what they regarded as a lack of explanation for the paucity of work provided to Ms Mwitwa, they would have erred.” [81]*

18. However, as is also clear from **Madarassy**, a tribunal should have regard to all the evidence when deciding whether there is a prima facie case that requires an explanation. The facts going to the explanation, whether adequate or inadequate, are part of the first stage material. So every fact that the Respondents put forward about the distribution of work and the tribunal’s findings on those facts would be part of the first stage material. The only factor excluded as part of the first stage material is the simple fact of the ‘absence of an adequate explanation.’ As Mummery LJ pointed out: *“Although no doubt logical, there is an air of unreality about all of this.” [70]*

### **ISS Mediclean Ltd v Elkiyari EAT/205/10**

19. Yet another case demonstrates the same error, of transferring the burden of proof on the basis only of a difference in status and a difference in treatment. In **ISS Mediclean Ltd v Elkiyari EAT/205/10**, *HHJ Hand QC*, the employment tribunal had found that the claimant had been dismissed for taking and eating food without permission, yet others of different national origins, who had also taken food had not been dismissed. The EAT upheld the tribunal’s finding of unfair dismissal on the basis that the reason for dismissal was conduct – and rejected a submission that the reason for dismissal for unfair dismissal purposes and the reason for less favourable treatment had to be the same. However, the case was remitted for the

tribunal to reconsider whether there was a prima facie case of race discrimination in light of the broader context surrounding the events.

***Nazir v Nottinghamshire Black Partnership EAT/332/09***

20. In ***Nazir v Nottinghamshire Black Partnership EAT/332/09***, HHJ Richardson, the tribunal had made a more fundamental error in transferring the burden of proof. In a case involving allegations of both race and sex discrimination, the tribunal had excluded not only the absence of an adequate explanation but also all consideration of context, of the facts going to the explanation. As HHJ Richardson put it:

*“We think a simple illustration will suffice to show why [not excluding context] must be the law. Suppose that Y, a man, shouts and swears loudly at Z, a woman. He does so immediately after Z accidentally spills a cup of coffee over his clothing; and prior to this Y had never shouted or sworn at Z. It would be absurd to ignore the spilling of the cup of coffee on Y when deciding if there is a prima facie case that he harassed Z on the grounds of sex. The spilling of the coffee is not merely explanation; it is also part of the context in which the Tribunal must decide whether there is a prima facie case of sexual harassment. And this is the case whether or not Y’s conduct is thought to be reasonable.” [71]*

21. The EAT also remind us that:

*“It is not the purpose of such legislation to address all forms of bullying or anti-social behaviour in the workplace. The legislation therefore does not prohibit all harassment, still less every argument or dispute in the workplace; it is concerned only with harassment which is related to a characteristic protected by equality law – such as a person’s race and gender.” [69]*

***Cooperative Centrale Raiffeisen Boerenleenbank BA v Docker EAT/88/10***

22. In contrast to the above cases, ***Cooperative Centrale Raiffeisen Boerenleenbank BA v Docker EAT/88/10***, HHJ Peter Clark, illustrates a tribunal getting it right. The employment tribunal here had relied on two ‘added factors’ in shifting the burden of proof onto the Dutch bank. As part of a redundancy and restructuring programme, the bank decided to move its London Securities Finance Team to Holland, merging it with another team to form a new group headed by a Dutch national, one Mr Klasse.

23. The first ‘added factor’ arose out of what happened when the London team were put on garden leave. One person was left holding the fort. Mr Klasse described him as *‘the Dutch guy on the desk’*: he was the only Dutch employee working in the London team.

24. Mr Klasse had selected him to remain to look after the book without consulting the Claimant, the immediate line manager who headed the London Team. Had the Claimant been asked, he would have put forward another member of the team as a stronger candidate.
25. The second 'added factor' was the changed racial make-up of the Heads of Department, with the reorganization creating more Dutch Heads than before.
26. That was enough to shift the burden and the tribunal went on to reject the bank's explanation on the facts, finding Mr Klasse's credibility wanting. A salutary message to Respondents is that the 'reason why' needs to be addressed fearlessly. A Dutchman was slotted into a post that would otherwise have been suitable for the claimant, without advertising that post, or ascertaining whether the claimant was willing to move to Holland. As a former colleague of Mr Klasse, living in the same village and socializing to the extent of having dinner together, he could have been put forward as an old and trusted friend, with nationality having nothing to do with his appointment. However, the bank had expressly not advanced that as a reason in evidence or argument. As such the tribunal did not have to deal with it.

### ***Nagi v Sheffield Black Drugs Service EAT/233/09***

27. Another case where the appellant challenged the factors relied upon to shift the burden of proof is ***Nagi v Sheffield Black Drugs Service EAT/233/09, Underhill J.*** Here, the EAT express themselves as not being sure that they would all have found that the facts were sufficient to reverse the burden of proof and upheld the tribunal as the pleaded challenges did not demonstrate error of law. The EAT also observe that the tribunal's reasons may not have fully reflected the facts on which it relied.
28. The tribunal had relied on the contrast between the institution of disciplinary proceedings against the claimant and the later non-institution of disciplinary proceedings against a white member of staff; the fact that the claimant and two colleagues had been banned from speaking Arabic in the office (although Urdu and Patwa were spoken); and thirdly on the contrast between the vigour with which the allegations of sexual harassment had been pursued against the claimant (until dismissed for insufficient evidence) and the hostility expressed towards the claimant for pursuing his own grievance.
29. In terms of the ***Madarassy*** 'added factor' in the context of a race claim, the likeliest candidate must be the ban on speaking Arabic, with the lack of explanation for that or for permitting Urdu and Patwa to be spoken. The other two seem to reflect no more than a difference in status and treatment.

## **DISCRIMINATION BY OTHERS THAN EMPLOYERS**

**Leeds City Council v Woodhouse [2010] IRLR 625, CA**

30. Oddly the assessment within discrimination law of the effect of the hiving off of local authority housing management duties into arms length management organizations, or 'ALMOs' has taken some time to emerge. ALMOs were first established in 2002 and currently 65 ALMOs manage about a million council homes across 61 local authorities. The relationship between authority and ALMO is close but separate, with ALMOs as limited companies formally and legally independent of the authority. The authority retains ownership of the properties and control of the allocations policy but through its status as sole shareholder and through its councillor members of ALMO Boards has direct input into management of the ALMO. Additionally, service or management agreements provide the formal framework for the operational relationship between ALMO and authority. ALMOs may also sub-contract part of their work, on occasion, as in **Leeds City Council v Woodhouse [2010] IRLR 625, CA**, back to the authority.
31. In **Leeds City Council v Woodhouse** Mr Woodhouse was employed by the ALMO, not the authority. He was employed as a principal regeneration officer, his responsibilities included checking the quality of building maintenance services work that had been sub-contracted to the Property Services Division of the authority and membership of a joint ALMO/PSD committee. That brought him into contact with one Mr Chapman, employed by the authority. Mr Woodhouse alleged that Mr Chapman had made racially derogatory comments about him at committee meetings. He brought employment tribunal proceedings against Leeds, complaining of discrimination by Mr Chapman. Leeds took the jurisdiction point which was dealt with as a preliminary issue.
32. The ET found that Mr Woodhouse was a contract worker of the authority for the purposes of s.7 of the Race Relations Act 1976. The EAT and the Court of Appeal both upheld the ET decision:

*"... Each case is fact-sensitive; merely because the facts are not similar to a previous case does not mean that they cannot fall within s.7. The authorities suggest that where the principal and the employer of the applicant are in the relationship of contractor and subcontractor, the mere fact that the applicant does work under the subcontract from which the principal will derive some benefit is not enough to bring the applicant within s.7. It may well be that, if it can be shown that the principal can exercise an element of influence or control, that will be enough to bring the case within s.7. But that is not to say that influence or control must be demonstrated in all cases. The judge in the present case considered that, due to the extreme closeness of the relationship between the contracting parties, it could properly be said that Mr Woodhouse's work was being done for the council, regardless of the exercise of control or influence. In my view, control and influence are not necessary elements, and it matters*

*not that they have not been demonstrated in the present case.” [22] per Smith LJ*

33. The fact-sensitive nature of the exercise means one cannot assume that all ALMO employees will be protected in this way from discrimination by authority employees. One should consider all aspects of the relationship, including, for example, the processes by which a grievance was dealt with. Helpfully, the Court of Appeal recommend taking a s.7 issue as part of the entire case, rather than hiving it off, so as to consider the effect of all material that emerges as relevant during the course of the hearing.

***Muschett v HM Prison [2010] IRLR 451***

34. Just over a month before ***Woodhouse*** was decided, a slightly different division of the Court of Appeal (Thorpe LJ in common) in ***Muschett v HM Prison [2010] IRLR 451***, dealt with a case of discrimination against an agency worker by the end user and dismissed that claim holding that he was neither an employee nor a worker. A s.7 RRA (now s41 EqA) (contract worker) claim was not in issue as it had been dismissed earlier – apparently because the ET and EAT had held that because he was not employed by the agency, s.7 could not apply. However, although many agency agreements are drafted to prevent an umbrella contract of employment arising during the times when no work is supplied, for the duration of each work assignment, the worker is an employee of the agency – see, eg, ***McMeechan v Secretary of State for Employment [1997] IRLR 353***. That should be enough to trigger the protection of s.7. It is unfortunate that the s.7 argument was not run – it prevents agency workers slipping through the safety net.

***May & Baker Ltd (t/a Sanofi-Adventis Pharma v Okerago [2010] IRLR 394, EAT***

35. In ***May & Baker Ltd (t/a Sanofi-Adventis Pharma v Okerago [2010] IRLR 394***, the EAT dealt with discrimination by an agency worker. This case is not a ‘get out of jail free’ card for those employers whose workforce may seem to depend on agency workers. In any event, s.40 of the Equality Act 2010 covers this type of situation, but only where there have been at least two previous incidents of harassment by a third party and the employer had failed to take such steps as would have been reasonably practicable to prevent the third or latest incident.
36. ***May & Baker*** illustrates the factual/legal hurdles that must be overcome to bring a claim of direct discrimination. The tribunal had based its finding that the employer was liable for that discrimination on the basis that: *‘To all intents and purposes [the agency worker] was treated as an employee on a day-to-day basis and acted as one.’* That approach was impermissible. In fact the tribunal had failed to make the required findings of fact; they had not

considered agency at all. The EAT held that for an employer to be liable under s.32(1) RRA 1976 for the acts of a worker, it is necessary for the worker to be an employee, as defined by s.78. To base liability under s.32(2), it is necessary for the worker to be an agent of the employer. A strict common law analysis of agency principles is required and not a more general purposive interpretation – see ***Yearwood v Commissioner of Police for the Metropolis*** [2004] ICR 1660 at [35-40] where the EAT adopted the definition in *Bowstead and Reynolds on Agency* at para. 1-001 (17th edn, 2001)

37. As for s.33 (aiding unlawful acts) there should have been findings of fact to support each limb of the test but, in any event, it failed as a precondition was that the agency worker's act had to itself be unlawful within the RRA. Furthermore, the tribunal was wrong to see permitting a discriminatory state of affairs as 'aiding'.

### **INJURY TO FEELINGS**

38. In ***Taylor v XLN Telecom Ltd*** [2010] IRLR 499, EAT, Underhill J, the employment tribunal had refused to award any amount for injury to feelings on the basis that the claimant had not known that his dismissal was discriminatory. This view was based on *Skyrail Oceanic Ltd v Coleman* [1981] IRLR 398, CA, which said, in terms that '*any injury to feelings must result from the knowledge that it was an act of sex discrimination that brought about a dismissal*'. In a careful decision the EAT unpick the context of *Skyrail*, showing that its apparent meaning is a misunderstanding. Starting from the point that knowledge is unnecessary in tortious claims for injury to health and moving on to the illogic of treating injury to feelings differently, the EAT hold that in any discrimination claim, a claimant can recover compensation for any injury to feelings and psychiatric injury which is attributable to the act complained of. That entitlement is irrespective of his knowledge or otherwise of the discriminatory motivation of the employer.

### **TIME LIMITS**

#### ***Khetab v Aga Medical Ltd* EAT/313/10**

39. In ***Khetab v Aga Medical Ltd*** EAT/313/10, HHJ Peter Clark, the ET1 covered a range of factual matters, constructive dismissal being in time but many acts being out of time. There was no express contention that any of the out of time acts formed a 'continuing act'. On a pre-hearing review, an Employment Judge took a pure pleading point and had ruled that there was no allegation of an act extending over a period, refused an amendment to add such an allegation and held that it was not just and equitable to extend time.

40. The EAT focus on the substance of the matter:

*“At this point in the story it is worth taking a step back. What is the purpose of pleadings in the Employment Tribunal? It is so that the other party and the Employment Tribunal understand the case being advanced by each party so that his opponent has a proper opportunity to meet it. In this case the Respondents’ solicitor, when settling their response to the various claims raised by the Claimant in his form ET1, properly raised a partial limitation defence and additionally countered any suggestion that the incidents complained of by the Claimant amounted to a continuing act.” [15]*

41. In essence, the Respondent had been put on sufficient notice of a claim of a continuing act in the ET1 to have countered that claim in its response. There was no need for amendment.

### **RACE EQUALITY DUTY**

42. Only a few cases in the past year have addressed the race equality duty. However, the consistent message from these and cases from other equality strands is the fairly widespread failure to carry out appropriate equality impact assessments. Although there is no obligation to carry out an EIA, to do so is likely to demonstrate having due regard to the relevant equality duty – and vice versa.
43. In ***R (EHRC) v Secretary of State for Justice & Secretary of State for the Home Department [2010] EWHC 147 Admin, 17.2.10, Wyn Williams J***, the challenge was to the process by which the National Offender Management Service had entered a service level agreement with the UK Border Agency on the management and removal of foreign national prisoners.
44. The evidence put before the court did not begin to demonstrate that the Secretary of State had carried out the sort of systematic assessments suggested as being necessary for compliance with the race and disability equality duties by the statutory codes of the Commission for Racial Equality and the Disability Rights Commission. That led to a finding that the Secretary of State did not have due regard to the equality duties before introducing the SLA, although he had done so later. There is no obligation to carry out an equality impact assessment, only to have due regard to the duties, so the court could not grant a declaration that the EIA was flawed
45. In ***R (Medical Justice) v Secretary of State for the Home Department [2010] EWHC 1925 Admin, 26.7.10, Silber J***, Medical Justice’s challenge was to a Home Office policy on not giving the standard minimum 72 hours notice when removing individuals who had made unsuccessful claims to enter or stay in the UK. An equality impact assessment had been undertaken but it had not addressed two factors which had been introduced in an earlier version of the policy and in respect of which no EIA had ever been done. In a trenchant and detailed judgment, Silber J held that the policy did not take

account of the need to safeguard and ensure proper access to the courts. As such the policy was unenforceable. It also failed because the secretary of state had not monitored the policy – so could not show that the exceptions were being operated in a lawful manner, ***R (on the application of European Roma Rights Centre) v Immigration Officer, Prague Airport*** (2005) 2 AC.

46. On a different issue, in the context of a planning decision on developing a site including a multi ethnic indoor market, the Court of Appeal give some useful guidance on the test. In ***R (Harris) v London Borough of Haringey [2010] EWCA Civ 703***, the local authority's policies did not address specifically the requirements imposed by the race equality duty. The report to committee and its deliberations did not even mention the race equality duty. The decision making process failed to demonstrate 'due regard'. Instead it considered, among other things, the aim of promoting the welfare of ethnic minority communities. However, having 'due regard' did not require actually promoting equality of opportunity. Instead, it required an analysis of the material before the authority so as to enable the issues arising on the particular planning application in relation to the equality duty to form a real and integral part of the decision-making process. That was not shown in this case.

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