

# THE UNITED KINGDOM

Disclaimer: The national thematic studies were commissioned as background material for the comparative report on *Access to justice in Europe: an overview of challenges and opportunities* by the European Union Agency for Fundamental Rights (FRA). The views expressed in the summaries compiled from the national thematic studies do not necessarily reflect the views or the official position of the FRA. These summaries are made publicly available for information purposes only and do not constitute legal advice or legal opinion. They have not been edited.

## Contents

1.	National court system .....	1
2.	Restrictions regarding access to justice .....	6
3.	Length of judicial proceedings .....	9
4.	Are procedures concluded within a reasonable time? .....	11
5.	Does provision exist for speedy resolution of particular cases?.....	11
6.	Is it possible to waive the right of access to a judicial body?.....	11
7.	Access to non-judicial procedures .....	12
8.	Legal aid .....	15
9.	Forms of satisfaction available to a vindicated party .....	19
10.	Adequacy of compensation .....	21
11.	Rules relating to the payment of legal costs .....	22
12.	Rules on burden of proof .....	23

## 1. National court system

There are three separate court systems in the United Kingdom, for England and Wales, for Scotland and for Northern Ireland. Exceptions that are relevant to the present study are that the Asylum and Immigration Tribunal has jurisdiction over the whole of the United Kingdom and there is a common system of employment tribunals for England and Wales and Scotland. The Supreme Court of the United Kingdom is the highest court of appeal from all three sets of courts, except for some kinds of cases in which the Scottish courts have final jurisdiction.

The court systems for England and Wales, Scotland and Northern Ireland are considered separately in the following paragraphs.

### ***England and Wales***<sup>1</sup>

---

<sup>1</sup> See further F. Cownie, A. Bradney and M. Burton (2007) *English Legal System in Context* (4<sup>th</sup> edn, London, Butterworths/Lexis Nexis), chapters 2 and 3; J. Holland and J. Webb (2006) *Learning Legal Rules* (6<sup>th</sup> edn, Oxford, Oxford University Press) chapter 1; R. Ward and A. Akhtar (2008) *Walker and Walker's English Legal System* (10<sup>th</sup> edn, Oxford, Oxford University Press) chapters 1 and 7; and M. Zander (2007) *Cases and Materials on the English Legal System* (10<sup>th</sup> edn, Cambridge, Cambridge University Press) chapter 1.

## Magistrates' Courts

The principal function of the Magistrate's Court is to exercise criminal jurisdiction over summary offences (i.e. relatively minor criminal offences). Virtually all criminal cases begin in the Magistrate's Courts, and over 90% also end there. Where the magistrates do not dispose of the case entirely, they will commit the defendant to the Crown Court for either trial or sentence.

Magistrates' Courts also have jurisdiction to deal with a range of civil matters including liquor licensing and matters related to children and violence. Most magistrates (or justices of the peace) are lay, i.e., they have no formal legal qualifications. Magistrates are not salaried. The remainder are District Judges who are legally qualified, work on a salaried basis and have at least seven years experience as a legal practitioner.

Magistrates' Courts are usually made up of three lay magistrates, who are advised by a legally qualified Justices' clerk. District Judges hear cases on their own.

## The Crown Court

The Crown Court deals with almost exclusively with criminal trials and appeals. Cases in the Crown Court are presided over by a High Court Judge (mainly from the Queen's Bench Division), a Circuit Court judge or a recorder (i.e. part-time judge). Additionally, in trials there will be a jury.

## The County Court

The County Court deals exclusively with civil matters, and hears the bulk of civil disputes such as tort, contract, property, insolvency and bankruptcy, with the High Court reserved for a few special cases. County Courts include five specialist mercantile courts and a Patents County Court.

The jurisdiction of the County Court largely corresponds to the civil jurisdiction of the High Court (see below), although the County Court is local in nature. Historically, the jurisdiction of the High Court and the County Court has been separated largely by the value of the matter in dispute.

Two types of judges sit in the County Court: circuit judges (more senior) and district judges. Circuit judges can hear all sorts of civil cases, including those where claims are over £15,000; district judges preside over the Small Claims Court where the limit is £5,000.

## The High Court

The High Court is both an intermediate appellate court (hears appeals from lower courts) and a court of first instance (i.e. hears trials of the issues). It is split into three divisions: the Chancery Division, the Family Division and the Queen's Bench Division. Each Division has jurisdiction to hear cases at first instance. The Family and Chancery Divisions also have a Divisional Court. The Divisional Court constitutes the appellate 'part' of the High Court.

The main work of the High Court is civil, but it does possess an important criminal law function.

The Queen's Bench Division deals mainly with civil matters such as tort and contract. The Administrative Court in the Queen's Bench Division deals with a variety of judicial review issues. Judicial review allows for the supervision of public bodies. For example, it may be alleged that there has been a breach of proper procedure or an incorrect interpretation of the law on the part of a public body, a government minister, or someone who is carrying out public acts or duties. Judicial review allows the court to examine this. If the court subsequently finds that the individual or body was not acting within the constraints of the law, then it will declare the decision or action to be unlawful. The relevant individual must then go back and reconsider the issue. In its appellate capacity, the Queen's Bench Division hears appeals on a point of law from Magistrates' Courts, tribunals and the Crown Court.

The Chancery Division deals exclusively with civil cases. The Division's work deals particularly with matters relating to property law, disputes involving trust property and disputes arising from wills and the administration of the estates of those who have died. It also deals with bankruptcy and insolvency, as well as general company law matters. In the form of Divisional Court, the Chancery also has jurisdiction certain appeals from county Courts (including cases of bankruptcy and land registration).

The Family Division shares jurisdiction with the Magistrates' and County Courts over family and matrimonial law. It hears appeals from the Magistrates' Court and the County Courts on a wide variety of matters, and deals with judicial review of family matters.

## The Court of Appeal

The Court of Appeal is divided into two divisions: criminal and civil. The Civil Division of the Court of Appeal mainly hears appeals from the decisions of the High Court, as well as the

County Courts and certain tribunals such as the Employment Appeal Tribunal and the Immigration Appeal Tribunal. Three judges usually hear appeals.

### The Supreme Court

The Constitutional Reform Act 2005 established a new Supreme Court of the United Kingdom to replace the Appellate Committee of the House of Lords. The new Supreme Court has been established to create a separation of powers by removing the judges presiding in the United Kingdom's final court of appeal from the House of Lords, which is a parliamentary body. On 1 October 2009 the new Supreme Court took over jurisdiction as the highest domestic court. It is the final court of appeal on all but European Community matters.

The Supreme Court has almost exclusively appellate jurisdiction, and hears appeals from the Court of Appeal and, in civil cases (subject to statutory restrictions), direct from a decision of the High Court (this is known as the 'leapfrog' procedure, because it bypasses the Court of Appeal, but is rarely used). The Supreme Court also hears appeals from the Court of Session in Scotland and from civil and criminal cases from the Court of Appeal in Northern Ireland. The sole ground for obtaining leave to appeal to the new Supreme Court is when the case raises a point of law of general public importance.

### Court of Justice of the European Communities

The Court of Justice is responsible for the consistent interpretation of European Union law across Member States.

### Tribunals

England and Wales, like Scotland and Northern Ireland, has a system of administrative tribunals. As noted above, some tribunals are common to Great Britain or the whole of the United Kingdom. Tribunals were originally established to provide a quicker and cheaper route to justice. The aim was that individuals could represent themselves without the needing to go to the expense of obtaining legal representation. Tribunals are staffed by experts in the particular field, and can therefore usually reach a judgment more quickly than the normal court system.

### *Scotland*

### Sheriff Courts

These hear civil cases and have mostly co-extensive jurisdiction with the Court of Session. The pursuer, or plaintiff, may choose to have the case heard by either court, although the more complicated cases or those involving the most money are normally heard by the Court of Session. Appeals are to the Sheriff Principal or the Court of Session.

### Court of Session

This is the highest civil court in Scotland. It may hear civil cases at first instance (Outer House) or on appeal (Inner House).

### District Courts and Justice of the Peace Courts

District courts, staffed by lay Justices of the Peace, are local courts that hear less serious criminal offences in summary proceedings. There are gradually being replaced by Justice of the Peace Courts, which have more extensive jurisdiction.

### High Court of Justiciary

This is the highest criminal court, with jurisdiction to hear criminal cases at first instance and on appeal. There is no appeal to the Supreme Court of the United Kingdom in criminal cases.

## ***Northern Ireland***

### County Courts

These hear the lesser civil cases, with appeals to the Court of Appeal.

### Magistrates Courts and Crown Courts

These hear the less and more serious criminal cases respectively, with appeals to the Court of Appeal.

### Court of Appeal

This is the highest court in Northern Ireland. It hears appeals from lower civil and criminal courts. Appeal lies to the Supreme Court of the United Kingdom.

In employment discrimination cases, appeals from the employment tribunal lie to the Employment Appeal Tribunal (EAT) and from there to the Court of Appeal (the Court of Session in Scotland) and then to the Supreme Court (formerly known as the House of Lords).

Non-employment discrimination cases in the county court go on appeal directly to the Court of Appeal and from there to the Supreme Court. An appeal may only be made in respect of an error of law<sup>2</sup> – the appeal courts will not re-try issues of fact.

Employment judges are appointed by the Judicial Appointments Commission, an independent body composed of members drawn from the judiciary, the legal profession, tribunals, the magistracy and the public.<sup>3</sup> Employment tribunals are expressly made subject to the Article 6 ECHR standards for a fair trial by virtue of the Human Rights Act 1998.<sup>4</sup> The need for judges not only to be impartial but to maintain the appearance of impartiality has been recognised by case law. An employment judge will be obliged to stand down on the ground of apparent bias where a fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased.<sup>5</sup>

## 2. Restrictions regarding access to justice

In employment discrimination cases, there are two principal restrictions on access to justice: dispute resolution requirements and time limits.

On 1 October 2004, new procedural rules came into force, setting down a mandatory dispute resolution procedure to be observed before tribunal proceedings were instituted.<sup>6</sup> Among other things, the rules required individuals wishing to bring a complaint of discrimination in employment to first attempt to resolve their complaint with their employer by way of an internal grievance procedure. An individual would not be permitted to present a complaint to an employment tribunal unless he or she had first put that complaint in writing to his or her employer and waited 28 days.<sup>7</sup> If the individual attempted to present his or her claim to the employment tribunal before this requirement had been observed, the employment tribunal would be obliged to reject the claim for want of jurisdiction. Furthermore, if either party failed to observe any part of the minimum grievance procedure<sup>8</sup>, the employment tribunal

---

<sup>2</sup> UK/Employment Tribunals Act 1996 c.17 (22.05.1996) Section 21

<sup>3</sup> UK/Constitutional Reform Act 2005 c.4 (24.03.2005)

<sup>4</sup> UK/Human Rights Act 1998 c.42 (09.11.1998)

<sup>5</sup> *Lodwick v Southwark London Borough Council* UK/Court of Appeal/A1/2003/1697 (18.03.2004)

<sup>6</sup> UK/Employment Act 2002 c.22 (08.07.2002), available at: [http://www.opsi.gov.uk/acts/acts2002/ukpga\\_20020022\\_en\\_1](http://www.opsi.gov.uk/acts/acts2002/ukpga_20020022_en_1) (12 September 2009)

<sup>7</sup> UK/Employment Act 2002 c.22 (08.07.2002) Section 32

<sup>8</sup> UK/Employment Act 2002 c.22 (08.07.2002) Schedule 2

would be able to adjust any compensation award it made based on that complaint by between ten to 50 per cent.<sup>9</sup> So, for example, if an employee failed to avail him or herself of an appeal against an allegedly discriminatory decision made by the employer, and then went on to prove in an employment tribunal that the decision was discriminatory, the tribunal could reduce compensation by an appropriate amount to reflect the employee's failure to seek redress from his or her employer before instituting proceedings.

The purpose of these dispute resolution rules was to encourage aggrieved individuals to attempt informal dispute resolution in the workplace instead of proceeding straight to litigation, with the ultimate goal of reducing pressure on an over-burdened employment tribunal system.<sup>10</sup> However, a government-commissioned review of the rules just over two years into their life showed that they were having the unintended consequence of formalising disputes early on and imposing an unnecessarily high administrative burden on both parties.<sup>11</sup> The rules were therefore repealed on 06.04.2009.<sup>12</sup> Thus, there is no longer an absolute barrier on access to tribunals for complainants who do not raise their grievance with their employer first. However, the replacement legislative regime puts in place a statutory Code of Practice on resolving grievances,<sup>13</sup> which employees and employers are expected to follow. Unreasonable failure to comply with any part of the Code may result in any award of compensation arising out of the complaint being adjusted by up to 25 per cent.<sup>14</sup> An individual seeking redress for discrimination is therefore still encouraged – but no longer strictly obliged – to first have recourse to a non-judicial dispute resolution procedure before presenting his or her claim to an employment tribunal.

The UK non-discrimination legislation sets down a time limit within which proceedings to enforce non-discrimination rights must be brought. The discrimination legislation requires most employment complaints to be brought within three months of the date of the act

---

<sup>9</sup> UK/Employment Act 2002 c.22 (08.07.2002) Section 31

<sup>10</sup> UK/Department for Trade and Industry (2001) *Routes to Resolution: Improving dispute resolution in Great Britain*

<sup>11</sup> UK/Department for Trade and Industry (2007) *Better Dispute Resolution – A review of employment dispute resolution in Great Britain*, available at: <http://www.berr.gov.uk/files/file38516.pdf> (12.09.2009)

<sup>12</sup> UK/Employment Act 2008 c.24 (13.11.2008) available at: [http://www.opsi.gov.uk/acts/acts2008/ukpga\\_20080024\\_en\\_1](http://www.opsi.gov.uk/acts/acts2008/ukpga_20080024_en_1) (12.09.2009)

<sup>13</sup> UK/Advisory, Conciliation and Arbitration Service (2009) *Code of practice on Disciplinary and Grievance Procedures* available at: <http://www.acas.org.uk/dgcode2009> (12.09.2009)

<sup>14</sup> UK/Employment Act 2008 c.24 (13.11.2008) Section 3

complained of, although a tribunal has discretion to extend time where it is just and equitable to do so.

The non-employment complaints must be brought within six months. Complainants must make some effort at resolving the dispute – for example, by setting out the complaint in writing to the respondent – before commencing proceedings.

The sex discrimination legislation is typical of the non-discrimination legislation, in that it provides that an employment tribunal may not consider a complaint of discrimination unless proceedings are brought within three months of the date on which the act complained of was done.<sup>15</sup> Thus, there is an absolute bar on complaints that do not comply with the time limit. However, a complaint brought 'out of time' may nonetheless be heard if the employment tribunal considers that it is just and equitable to hear it. Although the burden is on the claimant to show a good reason why time should be extended, employment tribunals have a wide discretion to hear out of time claims. It has been established that time may be extended where, for example, the delay is the fault of the claimant's legal representative<sup>16</sup> or where there has been a misunderstanding of the law.<sup>17</sup> There has been no legal challenge to these rules on the grounds of effectiveness or equivalence. It does not appear these rules unduly restrict access to justice – while three months is a much more restrictive time limit than applies in the ordinary civil courts, the less formal procedure in the employment tribunal (see below) must be weighed in the balance.

All the legislation outlawing discrimination in employment contains the same time limit provision except for the Equal Pay Act 1970,<sup>18</sup> which deals specifically with sex discrimination in contractual terms. In a 'standard' equal pay case, the claim must be brought within six months of the end of the employment to which the claim relates.<sup>19</sup> Special provision is made for cases where the employer has concealed the discrimination in question, where the employee has a disability, or where there was a 'stable employment relationship' covering two or more separate contracts of employment.<sup>20</sup> However, unlike the other

---

<sup>15</sup> UK/Sex Discrimination Act 1975 c.65 (12.11.1975) Section 76, and similar provision in the other non-discrimination legislation

<sup>16</sup> *Virdi v Commissioner of Police of the Metropolis* UK/EAT/0363/06 (18.10.2006)

<sup>17</sup> *British Coal Corporation v Keeble and ors* UK/EAT/496/97 (26.03.1997)

<sup>18</sup> UK/Equal Pay Act 1970 c.41 (29.05.1970)

<sup>19</sup> UK/Equal Pay Act 1970 c.41 (29.05.1970) Sections 2(4) and 2ZA

<sup>20</sup> UK/Equal Pay Act 1970 c.41 (29.05.1970) Section 2ZA



discrimination legislation, there is no provision allowing an employment tribunal to hear an 'out of time' claim on the basis that it is just and equitable to do so – the six-month limit is absolute. It has been established by case law that these rules comply with the principles of effectiveness and equivalence.<sup>21</sup>

However, there is very little guidance from organisations such as the Equality and Human Rights Commission (EHRC) or Government departments on non-employment discrimination and how to pursue such claims. However, available guidance on enforcing rights under non-discrimination legislation is heavily weighted towards employment cases. The lack of user-friendly guidance on enforcing non-discrimination rights outside employment is a potential hindrance on access to justice.

### 3. Length of judicial proceedings

In employment discrimination cases, claims identified for the purpose of the Report took between five months and 75 months to complete. In general, all claims that did not involve an appeal were completed in 20 months or fewer. Cases that involved at least one level of appeal took a minimum of 11 months to complete, although most took over two years.

No information was available for county court cases.

Employment tribunal proceedings in discrimination cases took between five months and two-and-a-half years to complete. As a broad generalisation it is possible to say that a claimant bringing discrimination proceedings in the employment tribunal can expect to have a judgment and a determination of remedy within a year to 18 months. It is not uncommon for straightforward cases to be resolved in a much shorter period. For example, one sex discrimination claim was decided, and remedy determined, within five months, and several were similarly concluded within a year. However, a large number of cases took between a year and two years to complete proceedings at first instance. Furthermore, particularly complex equal pay and race discrimination cases took 29 and 31 months to reach a final decision.

In most cases, liability and remedy were determined on the same day or within a few months of each other. However, where complicated assessments were involved – for example,

---

<sup>21</sup> *Preston and ors v Wolverhampton Healthcare NHS Trust and ors (No.2)* UK/House of Lords/2001/UKHL/5 (08.02.2001)

calculating long-ranging loss of earnings – it could take up to a further eight months after the liability judgment for the remedy to be decided.

Where claims have been subject to an appeal, there is also a wide range in the delay a claimant can expect until final judgment. Appeals to the Employment Appeal Tribunal (EAT) took between a further five months and two years to complete, although the majority involved delays of less than a year. The range for further appeals to the Court of Appeal was between four and 12 months following judgment of the EAT. In the one case where appeals went as far as the House of Lords, the final court of appeal in the UK, the case took over six years from start to finish, with the final stage between the Court of Appeal's judgment and that of the House of Lords taking nearly two years.

It can be observed that some of the longest-running cases involve equal pay claims. This is the result of several factors. Equal pay claims tend to be more complex than other employment tribunal claims, given the variety of ways a claim may be brought – on the basis of like work, work rated as equivalent or work of equal value<sup>22</sup> and the abundance of case law on every aspect of the Equal Pay Act 1970. The potential for complainants to allege systemic discrimination in pay systems, such as has occurred in the mass litigation in the National Health Service<sup>23</sup>, has also made for protracted and complex hearings.

The examination of employment tribunal cases does not give an indication of what delay can be expected between the date of judgment and execution of that judgment. It has been recognised by the UK Government that difficulties exist in enforcing employment tribunal awards. A survey of 1,002 claimants who had been awarded a monetary payment between January 2007 and April 2008 showed that at the time of interview (which in all cases was more than 42 days after the award was made) 39 per cent of successful claimants had not received their award at all.<sup>24</sup> Just over half (53 per cent) had been paid in full and a further 8 per cent had been paid in part.

Given the paucity of reported decisions on non-employment discrimination cases it has not been possible to conduct analysis of the time such disputes usually take to resolve. While

---

<sup>22</sup> UK/Equal Pay Act 1970 c.41 (29.05.1970) Section 1(2)

<sup>23</sup> See, for example, *Hartley and ors v Northumbria Healthcare NHS Foundation Trust and ors* UK/Employment Tribunal No.2507033/07 (06.04.2009)

<sup>24</sup> UK/Ministry of Justice (2009) *Research into enforcement of employment tribunal awards in England and Wales*, available at: <http://www.justice.gov.uk/publications/docs/employment-tribunal-awards.pdf> (15.09.2009)

employment tribunal judgments are collated at a central office, no similar central database exists for county court judgments.

#### 4. Are procedures concluded within a reasonable time?

It cannot be said that, in general, the time taken to conclude judicial procedures for breach of the anti-discrimination legislation is not reasonable. Broadly speaking there did not appear to be excessive delays. The majority of cases examined concluded within two to two-and-a-half years which would seem reasonable.

No information was available for county court cases.

#### 5. Does provision exist for speedy resolution of particular cases?

No provision exists for expedited procedures in employment discrimination matters.

#### 6. Is it possible to waive the right of access to a judicial body?

There are limited circumstances in which a victim of discrimination in employment sphere can waive his or her right to access to a judicial body. Each of the discrimination provisions prevents individuals 'contracting out' of their rights. The sex discrimination legislation is typical in that it provides that a contractual term that purports to exclude or limit any provision of the Act is unenforceable.<sup>25</sup> However, there are two exceptions<sup>26</sup> to this rule:

Compromise agreements: these are contracts concluded between a complainant and a company or another individual, by which the complainant agrees not to bring or continue proceedings against the company or individual, usually in return for an agreed sum. The non-

---

<sup>25</sup> UK/Sex Discrimination Act 1975 c.65 (12.11.1975) Section 76 and similar provision in the other non-discrimination legislation

<sup>26</sup> UK/Sex Discrimination Act 1975 c.65 (12.11.1975) Section 77 and similar provision in the other non-discrimination legislation

discrimination legislation sets out various conditions that must be met in order for such an agreement to be valid. These include that the complainant must have received advice from a relevant independent adviser – such as a qualified lawyer or a trade union official – who is covered by a professional indemnity or insurance scheme, and who is identified in the agreement. Only if these conditions are satisfied will the agreement be valid to prevent the complainant bringing the claim to which the agreement relates.

Conciliated settlements: these are contracts similar to compromise agreements, except that they are concluded with the assistance of a 'conciliation officer'. A conciliation officer is an employee of the Advisory, Conciliation and Arbitration Service (Acas), a government-funded service providing advice and mediation services in employment disputes.

## 7. Access to non-judicial procedures

In non-discrimination cases, there are no non-judicial mechanisms for enforcing rights under the discrimination legislation. Individual non-discrimination rights may only be enforced by way of a complaint to the employment tribunal or the county court. Although the Equality and Human Rights Commission (EHRC) has power to investigate suspected acts of unlawful discrimination it is not competent to resolve complaints between private individuals.

The EHRC came into being on 1 October 2007. It took over the role and functions of the three existing equality commissions – the Equal Opportunities Commission (EOC), the Commission for Racial Equality (CRE) and the Disability Rights Commission (DRC) – with regard to sex, race and disability discrimination, and assumed responsibility in the areas of sexual orientation, religion or belief, and age discrimination, as well as for the promotion of human rights. The EHRC is independent of the Government and is the largest body of its kind in the world.<sup>27</sup>

The powers of the EHRC<sup>28</sup> go well beyond the minimum required by Article 13 of the Directive. It may provide assistance to victims of racial discrimination, and may conduct independent surveys and formal investigations and publish reports. It may secure action to improve equality without the need to conduct a detailed investigation of past action. This gives flexibility and speed. It has powers to require information. The EHRC has the additional

---

<sup>27</sup> T. Phillips, speech to Employment Lawyers' Association, available at: <http://www.equalityhumanrights.com/en/newsandcomment/speeches/Pages/TrevorPhillipsspeechtojointconferenceofEmploymentLawyersAssociation.aspx> (15.03.2009).

<sup>28</sup> UK/Equality Act 2006 c.3 (16.02.2006)

power in all cases to bring proceedings in its own name, including judicial review proceedings, and/or to intervene in proceedings relevant to its equality and human rights work. This is important in so-called ‘victimless’ situations where no identified individual wishes to institute proceedings, and also where the alleged discrimination affects a whole class of persons. It can conduct investigations where it suspects unlawful acts and serve an unlawful act notice. It can also enter into enforceable agreements to stop acts of discrimination or breaches of the public sector equality duties, and conduct assessments of compliance with the public sector equality duties. It can serve compliance notices for breach of the public sector equality duties, and has powers to require the production of information, documents or oral evidence in inquiries, investigations or assessments. It also has powers to apply for injunctions to restrain or prohibit the commission of an unlawful act. These are important powers which enable the EHRC to end discrimination and enforce the positive duties.

The EHRC’s legal strategy is to focus on work which will bring about positive change. There are three strands to this strategy. Firstly, the EHRC carries out legal policy work which draws on the outcomes from enforcement and litigation, and enables the Commission to monitor the effectiveness of the equality law, thereby seeking to influence the development of future legislation. Legal policy work is undertaken where it would

- address significant disadvantage, or major abuse of the law;
- have a significant impact on a sector with a poor racial equality record, or the potential to have a major impact on equality;
- assist in the development of positive policies promoting racial equality;
- involve multi/intersectional discrimination or equality and human rights;
- strengthen the application and impact of the positive duties in the public sector;
- secure the greater understanding of rights and obligations under the race equality legislation;
- expand protection under domestic, European or international law;
- assist the UK in meeting its obligations under European and international equality law.

The Commission's enforcement powers enable it to examine, expose, challenge and secure change in racial equality in and across organisations. The Commission can undertake enquiries to gather evidence to raise awareness of racial equality within a sector or across a range of organisations in more than one sector, and to make recommendations to bring about change.

The Commission also has the power to conduct investigations based on a suspicion that unlawful discrimination has taken place. In these investigations the Commission has the power to serve a non-discrimination notice to cease unlawful acts, including compliance with an action plan for this purpose. The Commission's powers include that to require any person to provide written or oral evidence and documents.

The Commission may make assessments to scrutinise compliance of particular public authorities with their general or positive duties to provide racial equality. The Commission's priorities in relation to racial equality in employment are to clarify:

- who is protected within ethnic group, with reference to Scottish gypsies/travellers;
- the definition of 'racial or ethnic origin' in the Race Directive 2000/43/EC;
- the definition of 'persistent discrimination' at all employment stages;
- segregation by grade and work type;
- treatment of migrant workers by employers and employment agencies;
- third party harassment;
- language requirements for recruitment.

In relation to non-employment, the Commission's priorities in education are to focus on:

- institutional racism and exclusions in schools, and differential achievement rates;
- education of gypsy and traveller children;
- education of asylum-seekers, refugees and the children of migrant workers.

The priorities in housing are to focus on access to decent accommodation by travellers, and the pressure on local authorities to discriminate against Gypsies and Travellers in exercising planning controls.

In public functions the Commission is to give priority to

- racial profiling, and disproportionate stop and search, search of premises, and arrest by the police;
- responses to racist incidents;
- prisons, young offender institutions and immigration detention centres;
- the impact of exemptions from the Race Relations Act for immigration functions
- effectiveness of the law on racially aggravated offences, and the impact of anti-terrorist measures on the Muslim community.

Importantly, the EHRC may also issue statutory Codes of Practice in the areas of equal pay, sex, race, religion or belief, sexual orientation, disability and age discrimination.<sup>29</sup> Failure to comply with a provision of a Code will not itself give rise to legal proceedings but will be admissible in such proceedings and must be taken into account by a court or tribunal if the court or tribunal considers it relevant. Codes of Practice already exist in relation to sex, disability and race and are available on the EHRC's website,<sup>30</sup> along with a wide range of advice and guidance on individuals' rights under discrimination law, including information on the questionnaire and equal value procedures noted above.

## 8. Legal aid

In employment discrimination cases, legal aid is not available for representation in the employment tribunals. However, assistance is available for complainants in the employment tribunal who might otherwise be disadvantaged. For example, the Tribunals Service meets the reasonable cost of interpreters for those who are deaf or hard of hearing.<sup>31</sup> Foreign language interpreters can also be paid for.<sup>32</sup> However, there are no specific procedures in place to help those with diminished intellectual capabilities – while procedures exist in the ordinary civil

---

<sup>29</sup> UK/Equality Act 2006 c.3 (16.02.2006) Section 14

<sup>30</sup> See <http://www.equalityhumanrights.com> (15.09.2009)

<sup>31</sup> UK/Tribunals Service (2004) *Guidance for tribunal users who are deaf or hard of hearing*, available at: <http://www.employmenttribunals.gov.uk/Documents/Publications/GuideForDeafHardOfHearing.pdf> (12.09.2009)

<sup>32</sup> UK/Tribunals Service (2009) *Your claim – What next?*, available at: <http://www.employmenttribunals.gov.uk/Documents/Publications/TheHearingClaim.pdf> (12.09.2009)

courts for investigating a claimant's mental capacity and appointing a 'litigation friend' where necessary, it has been established that there is no comparable procedure in the employment tribunals.<sup>33</sup>

Claimants before the employment tribunal have a wider choice of representative than those bringing claim in the 'ordinary' civil courts. Rights of audience in the ordinary courts are generally restricted to qualified advocates. In the employment tribunal, by contrast, a complainant is entitled to be represented by an advocate, a solicitor, a trade union representative or any other person.<sup>34</sup> There is no requirement that the representative be legally qualified, or even educated in discrimination law, and it has been established that the tribunal has no power to remove a representative, even where the tribunal considers that representative's participation to be a hindrance to proceedings.<sup>35</sup> While this gives rise to a risk of amateurism in the employment tribunals, it also means that unrepresented litigants may be represented by unqualified but legally educated individuals (such as trainee lawyers), offering their services for free through organisations such as the Free Representation Unit.<sup>36</sup> Furthermore, while publicly funded representation is not available in the employment tribunal, it is available in the Employment Appeal Tribunal and higher courts.<sup>37</sup>

In non-employment discrimination cases, legal aid for representation is available in limited circumstances in the county court, but not in small claims. Where it is available, entitlement to legal aid is based on means testing, which takes account of disposable income and capital. However, as in employment tribunals, lay representatives (i.e. not legally qualified) are permitted in small claims.

Higher value claims (i.e. over £5,000) in the county court may qualify for publicly-funded legal representation. Whether legal aid will be granted depends on the claimant's means. The assessment will take account of the claimant's disposable income and capital, and also the merits of his or her claim.<sup>38</sup> However, lay representatives are not permitted in such claims

---

<sup>33</sup> *Johnson v Edwardian International Hotels Ltd* UK/EAT/0588/07 (02.05.2008)

<sup>34</sup> UK/Employment Tribunals Act 1996 c.17 (22.05.1996) Section 6

<sup>35</sup> *Bache v Essex County Council* UK/Court of Appeal/EATRF/98/1012/A1 (21.01.2000)

<sup>36</sup> See <http://www.freerepresentationunit.org.uk> (15.09.2009)

<sup>37</sup> UK/Access to Justice Act 1999 c.22 (27.07.1999), Schedule 2, Paragraph 2

<sup>38</sup> Guidance from Community Legal Advice, available at <http://www.communitylegaladvice.org.uk/en/legalaid/index.jsp> (09.12.2009)



(although the claimant is permitted to represent him or herself). Furthermore, such claims carry the risk of costs awards against the losing party.

To conclude, publicly funded legal representation is not available in the employment tribunal or the small claims track of the county court. This potential weakness in the enforcement regime for non-discrimination rights is balanced out by the less restrictive rules on rights of audience in the tribunals, so that representation may be given by an experienced but not legally qualified voluntary representative. Legal aid is also unavailable for determining many other civil rights, the majority of which are determined in courts with more restrictive rights of audience than in employment tribunals or the small claims track in the county court. This include matters such as personal injury; negligently caused damage to property; conveyancing; boundary disputes; making a will; trust law; defamation or malicious falsehood; company or partnership law; matters arising out of carrying on a business; or attending an interview or an asylum claim.<sup>39</sup> Thus, the unavailability of legal aid is not a problem peculiar to discrimination cases.

The Equality and Human Rights Commission (EHRC) gives assistance, support, advice and legal representation to people who wish to complain of racial discrimination. An important EHRC power is to assist individuals in proceedings. It can assist victims of discrimination by giving legal advice, legal representation, facilities for settlement or any other assistance. The EHRC can arrange for the provision of conciliation services for issues which would otherwise be litigated and can itself initiate legal proceedings and judicial reviews. Experience has demonstrated that where cases were supported by the Commission, they were more likely to provide effective support than other organisations, partly because of their expertise and also because they provide moral support, discouraging withdrawals, and finally because in the case of the CRE, they selected stronger cases.

The EHRC runs national helplines to provide advice and information to people on their rights. This may include responding to requests for particular documents or information to providing legal advice on individual cases.

There are 22 Race Equality Councils (RECs), funded largely by the EHRC. Race Equality Councils have formed an umbrella group, the British Federation of Racial Equality Councils (BFREC), to represent their interests.<sup>40</sup> They have argued that funding for race equality work will be reduced under the new EHRC because of the need to fund organisations dealing with

---

<sup>39</sup> UK/Legal Services Commission (2008) *A Step-by-Step Guide to Legal Aid*, available at: [http://www.legalservices.gov.uk/docs/cls\\_main/LSCG2\\_Dec08.pdf](http://www.legalservices.gov.uk/docs/cls_main/LSCG2_Dec08.pdf) (15.09.2009)

<sup>40</sup> [www.bforec.co.uk/National\\_Forum\\_Membership.htm](http://www.bforec.co.uk/National_Forum_Membership.htm) (15.03.2009)

the other equality strands for which the EHRC is responsible. The BFREC argued that additional resources are required to support work on fighting racial discrimination through information, advice and representation by RECs, and point to an increase in racial discrimination claims.

The EHRC has said that some RECs are changing into multi-strand equality organisations which may dilute the resources available to racial equality. In recent years the main sources of support and assistance for victims of racial discrimination have been trade unions, law centres and Citizens Advice Bureau (CABs), which provide advice, assistance and, in some cases, legal representation.

Moreover, many NGOs also provide assistance to victims of racial discrimination. There is a network of specialised NGOs providing legal support through advice, assistance and sometimes, legal representation to complainants.

Finally, the trade unions have played an important role in anti-discrimination procedures. For many years, unions have been involved in fighting racial discrimination and in supporting members who are victims of discrimination. The trade unions have also played a leading role in promoting equal opportunities in the workplace. They have given active support to victims of discrimination, especially those representing employees in the public sector. It must be borne in mind however that trade union membership has declined significantly in the private sector, and that most employees in private employment do not have the protection of a trade union.

The Trades Union Congress (TUC) has regularly published information on levels of reported racial discrimination. The TUC has also been encouraging unions to appoint workplace equality representatives and has been pressing the Government – in particular the Department for Business, to give equality representatives statutory recognition, consistent with other workplace representatives including safety and learning representatives, so that they can secure recognition of the work they are doing and time off from their employers.

The TUC has a Race Relations Committee and an Equal Rights Department with dedicated officials responsible for Racial Equality. Current campaigns include support for the right of asylum seekers to work, and recognition of equality representatives.

The TUC web-site includes guidance on equality rights and the legislation for members and officials.<sup>41</sup>

---

<sup>41</sup> <http://www.tuc.org.uk/index.cfm> (15.03.2009).

Many trades unions also post guidance on the racial equality legislation on their web-sites. For example, Unison, representing public sector workers, has a Race Equality Officer, and a Black Members Conference. There is guidance on the *Race Relations Act 1976* and the *Race Relations (Amendment) Act 2000*, and on negotiating equality. There is a link to the firm of solicitors which acts for union members in matters of racial discrimination.<sup>42</sup>

Another example, Amicus which represents more workers in the private sector, also gives guidance on rights under the *Race Relations Act 1976*, including Combating Racism in the Workplace and Negotiating Race equality at Work, guidance for representatives on good workplace practice.<sup>43</sup>

Although there are no published statistics on the number of race discrimination cases in which the applicant is supported by a trade union representative, it was said that the increasing legalisation of the Employment Tribunal hearings and processes have meant that fewer Trade Union representatives represent claimants at Employment Tribunals than in previous years. More unions now brief specialist legal firms. As mentioned, union web-sites have a link to outside legal firms which specialise in race discrimination cases. It will depend on the rules of a particular union as to whether it will support non-members, but usually the union will expect the individual to be or become a member.

## 9. Forms of satisfaction available to a vindicated party

A successful complainant in employment proceedings under the discrimination legislation is entitled to any of the following remedies that the employment tribunal considers 'just and equitable':

- a declaration that his or her rights have been breached;
- an order of compensation;
- a recommendation that the employer take, within a specified period, action that the tribunal considers to be practicable in order to obviate or reduce the adverse effect of the discrimination.

---

<sup>42</sup> <http://www.unison.org.uk> (15.03.2009).

<sup>43</sup> <http://www.amicustheunion.org> (15.03.2009).

A declaration is usually included in the tribunal's judgment, being simply a statement that the employer has violated the employee's rights. Recommendations are fairly rare, and their effect is limited to the individual bringing the complaint – a tribunal may not order that an employer's discriminatory practice must cease.<sup>44</sup>

Awards of compensation are made on the basis of the damages that could be awarded by a county court (or a Sheriff Court in Scotland) for a claim in tort or for breach of a statutory duty.<sup>45</sup> This rule allows for a wide range of loss to be compensated, including financial loss, psychiatric damage, injury to feelings and aggravated damages.<sup>46</sup> Although it is yet to be conclusively established, it is thought that tribunals may award exemplary or punitive damages if the compensation that would otherwise be awarded would be inadequate to punish the guilty party.<sup>47</sup> The basis on which damages are calculated is restitutionary, i.e. the aim is that, as best as money can do it, the claimant is put in the position he or she would have been in but for the unlawful conduct.<sup>48</sup> There is no limit on the amount of compensation that may be awarded, in contrast to certain other remedies available in an employment tribunal – for example, compensation for unfair dismissal is capped at £66,200.<sup>49</sup> Case law has, however, imposed binding guidance on the amount that may be awarded in respect of various degrees of injury to feelings, with an overall limit of £25,000.<sup>50</sup>

Compensation in respect of acts of unlawful discrimination is potentially unlimited. The cases examined for the purpose of the Report indicate a range in the total compensation award of £635 to £90,000. (An award of £217,000 was the subject of a successful appeal and will have been reduced on remission to the tribunal.) The median award, based on the cases in which information on compensation was available, was around £4,500, with the interquartile range between £2,500 and £20,000. In the majority of cases, awards were made up of a mixture of economic and non-economic loss.

---

<sup>44</sup> *Ministry of Defence v Jeremiah* UK Court of Appeal (19.10.1979)

<sup>45</sup> UK/Sex Discrimination Act 1975 c.65 (12.11.1975) Section 65(1)(b), and similar provision in the other anti-discrimination legislation

<sup>46</sup> *Sheriff v Klyne Tugs (Lowestoft) Ltd* UK Court of Appeal/CCRTI 98/1436/2 (24.06.1999)

<sup>47</sup> *IDS (2008) Sex Discrimination*, London: Incomes Data Services Ltd

<sup>48</sup> *Ministry of Defence v Cannock and ors* UK/EAT/110/94 and other appeals (29.07.1994)

<sup>49</sup> UK/Employment Rights Act 1996 c.18 (22.05.1996) Section 123

<sup>50</sup> *Vento v Chief Constable of West Yorkshire Police* UK/Court of Appeal/A1/2001/2866 (20.12.2002)

The range of awards reflects the official statistics relating to tribunal awards. Official statistics for 2007-08<sup>51</sup> show the range of total compensation awards for various categories of discrimination.

Compensation for equal pay is subject to different rules to those that apply to compensation for other forms of discrimination. This is a consequence of the contractual basis of an equal pay claim.<sup>52</sup> An individual who succeeds in an equal pay claim can seek arrears of pay in respect of the difference between the rate he or she was paid and the non-discriminatory rate he or she should have been paid, by reference to a comparator of the opposite sex employed on equal work. Arrears are limited in time, in the standard case, to six years before the date the claim was brought.<sup>53</sup> Being a contractual claim, the successful claimant is also entitled to have the discriminatory term in his or her contract modified to be no less favourable than that of his or her chosen comparator.<sup>54</sup> So, the tribunal's determination will normally result in the claimant's pay being increased to the non-discriminatory rate.

## 10. Adequacy of compensation

There is no reason to doubt *a priori* the adequacy of the ordinary civil rules concerning the quantum of compensation. In employment discrimination cases, there is no evidence to suggest that compensation is inadequate. Compensation is awarded on a restitutionary basis so that employment tribunals must aim to provide an adequate remedy for damage, in so far as money can do that. However, tribunals may only award exemplary or punitive damages if the compensation that would otherwise be awarded would be inadequate to punish the guilty party.

---

<sup>51</sup> UK/Tribunals Service (2008) *Employment Tribunal and EAT Statistics (GB) 1 April 2007 to 31 March 2008* available at: [http://www.employmenttribunals.gov.uk/Documents/Publications/EmploymentTribunal\\_and\\_EAT\\_Statistics\\_v9.pdf](http://www.employmenttribunals.gov.uk/Documents/Publications/EmploymentTribunal_and_EAT_Statistics_v9.pdf) (15.09.2009)

<sup>52</sup> UK/Equal Pay Act 1970 c.41 (29.05.1970) Section 1

<sup>53</sup> UK/Equal Pay Act 1970 c.41 (29.05.1970) Sections 2(5) and 2ZB

<sup>54</sup> UK/Equal Pay Act 1970 c.41 (29.05.1970) Section 1

# 11. Rules relating to the payment of legal costs

There is a presumption in normal county court proceedings that the loser pays the successful party's costs. However, this rule does not apply to small claims (those valued at £5,000 or less).

The costs regime in the employment tribunal is different to that which prevails in the ordinary civil courts. While in the ordinary courts costs tend to 'follow judgment', costs may only be awarded by an employment tribunal in limited circumstances. These are that a party has caused a hearing to be postponed or adjourned; has failed to comply with an order or a practice direction; has acted vexatious, abusively, disruptively or otherwise unreasonably in bringing or conducting the proceedings; or the bringing or conducting of proceedings has been misconceived.<sup>55</sup> There is a limit of £10,000 on the amount of costs that can be ordered, and the tribunal is entitled to take into account a party's ability to pay when making an award.<sup>56</sup> Under an innovation introduced in 2004, the tribunal may also make a 'preparation time order' in respect of the time spent by an unrepresented litigant in preparing for the hearing.<sup>57</sup> Generally speaking, there is no presumption that the losing party will pay the victor's costs.

The Equality and Human Rights Commission (EHRC) advises applicants of the difficulties they may face in finding advice and assistance to make a discrimination claim. There is a Community Legal Service (CLS) Directory with a list of specialist employment advisers, but free or low cost help funded by the Community Legal service is means tested and only available to clients with low incomes. Moreover advice funded by the CLS is not extended to representation at a hearing, only for drafting a claim.

---

<sup>55</sup> UK/Employment Tribunals (Constitution and Rules of Procedure) Regulations SI 2004/1861 (19.07.2004), Schedule 1, Paragraph 40

<sup>56</sup> UK/Employment Tribunals (Constitution and Rules of Procedure) Regulations SI 2004/1861 (19.07.2004), Schedule 1, Paragraph 41

<sup>57</sup> UK/Employment Tribunals (Constitution and Rules of Procedure) Regulations SI 2004/1861 (19.07.2004), Schedule 1, Paragraph 42

## 12. Rules on burden of proof

The Government introduced the *Race Relations Act 1976 (Amendment) Regulations 2003*<sup>58</sup> to ensure that the UK met the standards in the Council Directive 2000/43/EC. With regards to the shift of the burden of proof, the requirements of the Directive have been enacted in the 2003 Regulations. Section 43 (2) states that when a claim of racial discrimination is brought, ‘Where (...)the complainant proves facts from which the court could, (...) conclude in the absence of an adequate explanation (...) the court shall uphold the claim unless the respondent proves that he did not commit (...) that act.

There are however some shortcomings of national legislation: there are confusing discrepancies and inconsistencies between the numerous legislative instruments on racial discrimination in Great Britain. One reason for these is that the Race Equality Directive was implemented in 2003, under legislation which allows the implementation of EU Directives, rather than in primary legislation. As a result, changes to the burden of proof and the definition of indirect discrimination and harassment introduced by the Race Equality Directive were not applied to discrimination on grounds of colour or nationality which are outside the scope of the Race Equality Directive. The CRE at the time argued that these differences would create legal uncertainty and a two-tier structure.

This means that British race relations legislation now contains two definitions of indirect discrimination, two definitions of racial harassment, and two different burdens of proof. In addition, the 2003 Regulations do not include public functions as defined in the Race Relations (Amendment) Act 2000. However in one recent case the Employment Appeal Tribunal held that the test of indirect discrimination in the 2003 Regulations did apply to them.<sup>59</sup>

Statistical monitoring by ethnic origin is an established feature of the law and good practice in the UK. Many organisations collect data on ethnic origin to measure the impact of their practices and to assess whether they are providing equal opportunities. Similarly data on ethnic origin is a standard feature of many national surveys and has been included in the census for over twenty years. This data has been important for informing policies and action to improve racial equality and for community cohesion.

---

<sup>58</sup> UK/ Race Relations Act 1976 (Amendment) Regulations 2003 SI No.1626 (19.07.2003), available at: <http://www.opsi.gov.uk/si/si2003/20031626.htm> (11.03.2009).

<sup>59</sup> *Chagger v Abbey National plc* [2008] All ER (D) 157.

