

# IMPLEMENTING EUROPEAN ANTI-DISCRIMINATION LAW



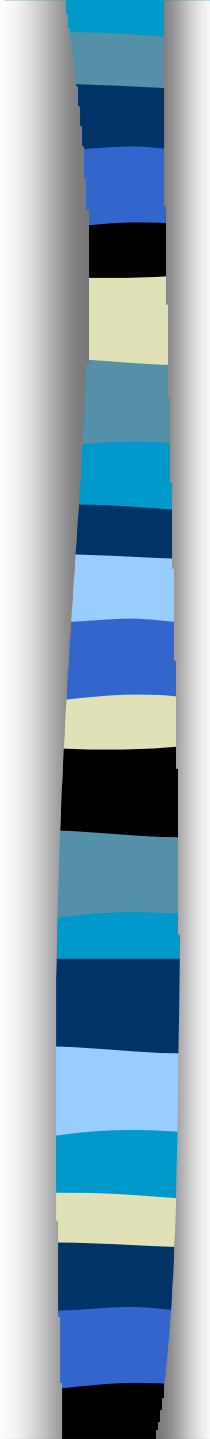
**2003**

**ROBIN ALLEN QC**



# My Task Today

- ✍ **Direct Discrimination**
- ✍ **Indirect Discrimination**
- ✍ **Occupational Requirements**



# THE EQUAL TREATMENT RULE

 **NO DIRECT OR INDIRECT  
DISCRIMINATION**

 ***WHATSOEVER***

 **Directive 76/207/EEC**



# DIRECT DISCRIMINATION

- ✍ **Article 2(2)(a) of each Directive: Direct Discrimination shall be taken to occur where**
- ✍ **One person is treated less favourably than another is, has been or would be treated,**
- ✍ **In a comparable situation,**
- ✍ **On grounds of racial origin, religion or belief, disability, age or sexual origin.**



# ON GROUNDS OF....

 **THE INDIVIDUAL COMPLAINANT**

 **ASSOCIATIVE GROUNDS**

 **PERCEIVED GROUNDS**



# THREE KINDS OF LESS FAVOURABLE TREATMENT




 **At present time**

 **In the Past**

 **Hypothetical**



# THE COMPARISON

-  **The Relevant Circumstances must be**
-  **The Same, or**
-  **Not Materially Different**



# THE HYPOTHETICAL COMPARISON

- ✍ **How is the Judge to approach the Hypothetical Comparator?**
- ✍ **Look for situations which are close?**
- ✍ **Look at the grounds for the action?**



# PROOF OF DIRECT DISCRIMINATION

- ✍ **Intention may be conscious**
- ✍ **Intention may be unconscious or subconscious**
- ✍ **A judicial assessment of the role or causative effect of the racial origins, religion or belief, et cetera...**



# How Judicial Decision Making Has Changed In The UK

- ✍ **Disbelief and scepticism by Courts and Tribunals**
- ✍ **Confusion between concepts of fairness and equality**
- ✍ **Very Poor Success Rates**
- ✍ **Lack of trust in the rule of law**
- ✍ **The contribution of monitoring**
- ✍ **New Techniques tried by advocates eg Colour reversal**
- ✍ **New guidance from the Courts**



# A NEW APPROACH TO DIRECT DISCRIMINATION

- ✍ **A recognition that it is unusual to find direct evidence of racial discrimination.**
- ✍ **A recognition that few employers will be prepared to admit such discrimination even to themselves.**
- ✍ **In some cases the discrimination will not be ill-intentioned but merely based on an assumption that "he or she would not have fitted in."**



# REASONING BY INFERENCE

- ✍ **The outcome of the case will usually depend on what inferences it is proper to draw from the primary facts found by the tribunal.**
- ✍ **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 questions.**
- ✍ **A finding of less favourable treatment and a finding of a difference in race will often point to the possibility of racial discrimination.**



# Proving Discrimination – Some Comments From UK Experience

## **Judicial training is vital**

- A equal treatment advisory committee
- Written guidance for judges and tribunal members
- “Walk – through”

## **Experience in the tribunal**

- Qualified lay assessors
- Tribunal members with experience of race equality



# INDIRECT DISCRIMINATION – 1

- ✍ **Barriers to equal participation**
- ✍ **Intention to discriminate may be present but does not need to be proved**



# INDIRECT DISCRIMINATION – 2

✍ AN *APPARENTLY* NEUTRAL  
PROVISION CRITERION OR  
PRACTICE

✍ A *PARTICULAR DISADVANTAGE*  
COMPARED TO OTHER PERSONS



# INDIRECT DISCRIMINATION - 3

- ✍ JUSTIFICATION
- ✍ A SIMILAR TEST AS FOR SEX DISCRIMINATION
- ✍ BROADER MARGIN WHERE LEGISLATIVE PROVISIONS PART OF A STATE SOCIAL POLICY IS UNDER SCRUTINY



# PROOF OF INDIRECT DISCRIMINATION

- ✍ **Statistics – See Recital (15) of each Directive**
- ✍ **Monitoring**
- ✍ **Equality Plans**
- ✍ **Patterns of discrimination**
- ✍ **Patterns of disadvantage**
- ✍ **Context**
- ✍ **Measuring expectations against actual treatment**



# JUSTIFICATION

 **Legitimate Aim**

 **Means must be**

– **Appropriate and**

– **Necessary**



# OCCUPATIONAL REQUIREMENTS – 1

## Article 4

 A form of Defence to a claim of  
Discrimination, so

 Must be *Genuine and Determining*



# OCCUPATIONAL REQUIREMENTS – 2

- ✍ **RECITALS GIVE EXAMPLES – ARMY  
POLICE IN RESPECT OF DISABILITY  
AND AGE**
- ✍ **FOCUS ON PARTICULAR  
OCCUPATIONAL PROVISION**



# THE TEST

- ✍ **THE NATURE OF THE CHARACTERISTIC**
- ✍ **OBJECTIVE MUST BE LEGITIMATE**
- ✍ **REQUIREMENT MUST BE PROPORTIONATE**
- ✍ **NOTE OF CAUTION – NON REGRESSION**