

OLD SQUARE
CHAMBERS





**THE ANTI-DISCRIMINATION
DIRECTIVES: REMEDIES AND
SANCTIONS FOR
DISCRIMINATION**



ERA ACADEMY OF EUROPEAN LAW
in cooperation with the
EUROPEAN COMMISSION

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PHILIP MEAD

Barrister

Old Square Chambers, London
mead@oldsquare.co.uk



DIRECTIVES 2000/43 and 2000/78

Relevant provisions:

Article 7 (Article 9, Directive 2000/78)

Defence of rights

- 1. Member States shall ensure that judicial and/or administrative procedures, including where they deem it appropriate conciliation procedures, for the enforcement of obligations under this Directive are available to all persons who consider themselves wronged by failure to apply the principle of equal treatment to them, even after the relationship in which the discrimination is alleged to have occurred has ended.*

Article 9 (Article 11, Directive 2000/78)

Victimisation

Member States shall introduce into their national legal systems such measures as are necessary to protect individuals from any adverse treatment or adverse consequence as a reaction to a complaint or to proceedings aimed at enforcing compliance with the principle of equal treatment.



DIRECTIVES 2000/43 and 2000/78

Relevant provisions continued:

Article 15 (Article 17, Directive 2000/78)

Sanctions

Member States shall lay down the rules on sanctions applicable to infringements of the national provisions adopted pursuant to this Directive and shall take all measures necessary to ensure that they are applied. The sanctions, which may comprise the payment of compensation to the victim, must be effective, proportionate and dissuasive.

Case law from the ECJ:

Case 222/84, Johnston

Case C-271/91, Marshall (No. 2)

Case C-185/97, Coote



DIFFICULTIES IN DEFENDING AGAINST VICTIMISATION

Chief Constable of West Yorkshire v Khan [\[2001\] UKHL 48](#); [2001] IRLR 830.

Facts: The Claimant made complaint of race discrimination, and made an application to an Employment Tribunal. Before the complaint was heard, he applied for an inspector's post in the Norfolk Police. They asked the West Yorkshire Police for their opinion about Sergeant Khan's suitability. The Chief Constable replied that: "Sergeant Khan has an outstanding industrial tribunal application against the Chief Constable for failing to support his application for promotion. In light of that, the Chief Constable is unable to comment any further for fear of prejudicing his own case before the tribunal." A request for Sergeant Khan's most recent staff appraisals was also refused. As a result, Sergeant Khan amended his tribunal application to add a complaint of victimisation.



DIFFICULTIES IN DEFENDING AGAINST VICTIMISATION

St Helens Metropolitan Borough Council v Derbyshire [2007] UKHL 16; [2007] IRLR 540.

Facts: In this case, the relevant background concerned substantial equal pay litigation. Some two months before the equal pay claims were due to be heard, the authority's acting head of environmental protection sent two letters. The first was addressed to and sent to all members of the catering staff. It stated, amongst other things, that "the continuance of the current claims and a ruling against the council will have a severe impact on *all* staff", and explained in some detail why that would be so. The second letter was sent only to the 39 appellants (who had equal pay claims outstanding before the tribunal). It renewed an offer to settle proceedings and stated that the author was "greatly concerned about the likely outcome of this matter as stated in the letter to all catering staff".

Rank Nemo (DMS) Ltd v Coutinho [2009] EWCA Civ 454; [2009] IRLR 672.

Facts: A claim of victimisation was brought where the Claimant has successfully been awarded compensation for discrimination. Rank Nemo, however, did not honour the award. Mr Coutinho obtained an order in the county court for the total sum of £72,508.75. A county court judgment was required, as the tribunal had no power to enforce its own judgments. Rank Nemo still did not pay the compensation.



VICTIMISATION continued

- Greater difficulties in practice
- How to treat an employee who is “still on the books”
- Employers feel inhibited in handling a difficult employee
- Sanction or other detriment for behaviour or performance of the employee
- Employees feel threatened as a result of discrimination complaints being made
- Difference in treatment or perception of difference in treatment
- Positive discrimination

- Implementation of policies on complainants (whistle-blowing)
- Even-handed approach to performance management



REMEDIES OTHER THAN COMPENSATION

UK Legislation

Previously: “recommendation that the respondent take within a specified period action appearing to the tribunal to be practicable for the purpose of obviating or reducing the adverse effect on the complainant of any act of discrimination to which the complaint relates.”

Now: Equality Act 2010, Section 124(3): an appropriate recommendation is “a recommendation that within a specified period the respondent takes specified steps for the purpose of obviating or reducing the effect of any matter to which the proceedings relate – (a) on the complainant; (b) on any other person.”

Case law (under original legislation):

- Not permissible to recommend for the next suitable job
- Not permit positive discrimination
- Where complainant has left employment, query utility in making a recommendation
- No recommendation where compensation an adequate remedy



CAUSATION OF LOSS

Chagger v Abbey National plc [2009] EWCA Civ 1202; [2010] IRLR 47.

Issues: (1) Whether the tribunal ought to have reduced compensation to reflect the chance that Mr Chagger would have been dismissed for redundancy in any event; (2) Whether the tribunal ought to have limited the future compensation to the period during which Mr Chagger would have remained in employment with Abbey; (3) Whether Abbey should be liable for the so-called “stigma” consequences of the dismissal, namely the decision by third parties not to employ Mr Chagger because he had taken proceedings against his employer.

Court of Appeal judgment:

- Take into account prospects of C being dismissed in any event
- Loss of a chance
- Put C in position would have been absent discrimination; not same as asking what would have happened to employment relationship; prospects of obtaining a new job not same as if C had stayed
- Dismissal may alter career path of C
- C would only have left one job for another job at least as favourable
- Original employer liable for stigma where subsequent employers refuse to employ



PERSONAL INJURY CLAIMS

- Battle of competing jurisdictions
- Risk of res judicata
- Limitation periods
- Funding and cost risks
- Causation and expert evidence
- Familiarity with substantive issues on liability
- Need to prove a prescribed ground
- Disability discrimination: fact of disability; not reason why disabled



MEDIATION

Effectiveness in settling claims prior to liability hearing?

Points in favour of mediation include:

- Savings in cost
- Avoidance of tribunal hearing
- Potential availability of remedies not within the jurisdiction of the Employment Tribunal

Points against mediation include:

- By the time mediation is offered/available, it is too late - positions (or feelings) have become entrenched
- The necessity to compromise
- Cost/expenditure may already have been incurred
- No public accounting of behaviour
- No testing of the evidence on liability

Lose/lose cases; continuing employment

Over generous settlement and risk of victimisation: the hand that feeds being bit: see above



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Contact

London

10 - 11 Bedford Row

London WC1R 4BU

DX 1046 London / Chancery Lane

T +44 (0) 20 7269 0300

F +44 (0) 20 7405 1387

Bristol

3 Orchard Court, St Augustines Yard

Bristol BS1 5DP

DX 78229 Bristol 1

T +44 (0) 117 930 5100

F +44 (0) 117 927 3478

E clerks@oldsquare.co.uk

W www.oldsquare.co.uk