

**Remedies and Sanctions for Discrimination**

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## **I Overview of legal framework**

1. As factors of production in a common market, individuals in the European Community were viewed as economic rather than social beings and the protections initially provided to them stemmed from this basic premise. Along with the free movement of goods, services and capital there was the free movement of persons, meaning the free movement of workers for economic purposes. The principle of non-discrimination enshrined in the Treaty of Rome was non discrimination on the grounds of nationality. Apart from that EC law originally focused on eliminating one type of social inequality: that between men and women as a distortion of the market and thus, until recently, it was discrimination solely on the grounds of sex and nationality which were expressly covered by EC law.
2. In the case of *Konstantinidis v Stadt Altensteig* C 168/191 , Advocate General Jacobs argued:

‘In my opinion, a Community national who goes to another member state as a worker or self-employed person under articles 48,52 or 59 of the Treaty is entitled not just to pursue his trade or profession and to enjoy the same living and working conditions of the nationals of the host State, he is in addition entitled to assume that, wherever he goes to earn his living in the European community, he will be treated in accordance with a common code of fundamental values, in particular those laid down in the European Convention on Human Rights. In other words, he is entitled to say ‘civis europeus sum’ and to invoke that status in order to oppose any violation of his fundamental rights.’

3. His position was not adopted by the court.

4. We have moved on from that day. There are now two parallel and overlapping aspects to equality in the European Union:

- Equality for European nationals and companies;
- Equality for individuals within the union simply because non-discrimination is a fundamental norm of Europe because indeed 'civis europeus sum'.

The Treaty of Amsterdam provided:

*Without prejudice to the other provisions of this Treaty and within the limits of the powers conferred by it upon the Community, the Council, acting unanimously on a proposal from the Commission and after consulting the European Parliament, may take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation.*

5. In November 1999 the European Commission presented its initial package of proposals under article 13. There were three key elements:

- a proposal for a Council directive establishing a general framework directive for equal treatment in employment and occupation'; to forbid employment discrimination on the grounds of racial or ethnic origin, religion or belief, age disability or sexual orientation;

- a proposal for a Council directive implementing equal treatment between persons irrespective of racial or ethnic origin; to prohibit racial discrimination in employment, social protection, education, access to goods and services and cultural activities.

- a proposal for a Council decision establishing a Community Action Programme to combat discrimination 2001-2006.

6. On 29 June 2000 the Council of European Communities adopted a Council Directive implementing the principle of equal treatment between persons irrespective of racial origin. The concepts will be familiar to employment lawyers. The burden of proof is expressed in these terms:

*Member States shall take such measures as are necessary in accordance with*

*their national judicial systems, to ensure that when persons who consider themselves wronged because the principle of equal treatment has not been applied to them to establish, before a court or other competent authority, facts from which it may be presumed that there has been direct or indirect discrimination, it shall be for the respondent to prove that there has been no breach of the principle of equal treatment.*

7. Paragraph 8(5) provides that this clause does not have to be applied to proceedings where it is for the court or competent body to investigate the facts of the case. Member States had three years to implement the directive.

### ***The race directive***

8. The Directive does not apply to differences of treatment based on nationality: article 3(2). It covers employment and working conditions, including dismissals and pay as well as social protection and social advantages:

#### *Scope of the directive*

*Within the limits of the powers conferred upon the Community, this Directive shall apply to all persons, as regards both the public and private sectors, including public bodies, in relation to:*

*(a) conditions for access to employment, to self-employment and to occupation, including selection criteria and recruitment conditions, whatever the branch of activity and at all levels of the professional hierarchy, including promotion;*

*(b) access to all types and to all levels of vocational guidance, vocational training, advanced vocational training and retraining, including practical work experience;*

*c) employment and working conditions, including dismissal and pay;*

*d) membership of and involvement in an organisation of workers or employers,*

*or any organisation whose members carry on a particular profession, including the benefits provided for by such organisations;*

*e) social protection, including social security and health care;*

*f) social advantages;*

*g) education*

*h) access to and supply of goods and services which are available to the public, including housing*

### ***The concept of discrimination***

9. The Directive does not define the concept of 'racial or ethnic origin'. The preamble states that the European Union rejects theories which attempt to determine the existence of separate human races. The use of the term 'racial origin' in this directive does not imply an acceptance of such theories. The UK courts have adopted a flexible 'distinct community test' which permits some degree of self-identification and allows the concept of ethnic origin.

***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 or ethnic origin;

***b) indirect discrimination*** shall be taken to occur where an apparently neutral provision, criterion or practice would put persons of a racial or ethnic origin at a particular disadvantage compared with other person, unless that

*provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary*

**Harassment** shall be deemed to be discrimination ...when unwanted conduct related to racial or ethnic origin takes place with the purpose or effect of violating the dignity of a person and of creating an intimidating, hostile, degrading, humiliating or offensive environment. In this context, the concept of harassment may be defined in accordance with the national laws and practice of the member states.

10. Victimization is not defined directly in this article but is included under a heading that a duty is placed on Member States 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’*.

11. The directive also makes provision for genuine and determining occupational requirements where employers are entitled to specify that individuals of a certain racial origin are needed for a particular post.

12. Article 5 permits positive action to prevent or compensate for disadvantages linked to racial or ethnic origin.

13. By article 6 Member States may introduce or maintain provision which are more favourable to the protection of the principle of equal treatment than those laid down in this directive.

### ***The Framework Directive***

14. In November 2000 the Council of Ministers adopted Council Directive 2000/78 establishing a general framework for equal treatment in employment and

occupation: the framework directive. In its field of application is closer to the earlier Equal Treatment Directive than to the race directive. It deals only with employment issues while the race directive recognises that discrimination may affect individuals in the areas of social security, access to housing, education and health care provision. It provides protection from discrimination on the grounds of age, disability, sexual orientation, age, and religion or belief.

15. The provisions mirror those in the Race Directive and are very familiar to us now and will be considered by other speakers. I will turn accordingly to remedies and sanctions under these two directives.

## ***Chapter II: Remedies and enforcement***

### *Article 9*

#### *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.*

*2. Member States shall ensure that associations, organisations or other legal entities which have, in accordance with the criteria laid down by their national law, a legitimate interest in ensuring that the provisions of this Directive are complied with, may engage, either on behalf or in support of the complainant, with his or her approval, in any judicial and/or administrative procedure provided for the enforcement of obligations under this Directive.*

*3. Paragraphs 1 and 2 are without prejudice to national rules relating to time limits for bringing actions as regards the principle of equality of treatment.*

2. *Paragraph 1 shall not prevent Member States from introducing rules of evidence which are more favourable to plaintiffs.*

### *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.*

16. In this context it is worth bearing in mind the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of international Humanitarian Law. Articles 15-20 deal with the types of compensation and remedy that should be available for gross violations of international human rights law. Compensation should include any economically assessable damage such as:

- i. Physical or mental harm;
- ii. Loss opportunities, including employment, education and social benefits
- iii. Material damages and loss of earnings, including loss of earning potential;
- iv. Moral damage,
- v. Costs required for legal or experts assistance, medicine and medical services, and psychological and social services.

## **II Overview of European case law**

17. It is self-evident that the majority of cases will be at national level but as always in the European project the European Court of Justice has played an important role in setting the pace and direction of progress in this area, in a way that national courts are sometimes reluctant to do. It has been criticised on occasion for its judicial activism. The case law based on these two directives has been relatively slow. In an article entitled 'A case odyssey into 10 years of anti-discrimination law' Thien Uyen Do has noted:

*'In terms of the highest number of cases by ground, age discrimination ranks first, with nine judgments rendered since 2005, the date of the first ruling. The explosive Mangold case was not only the first ruling ever made on the basis of the Employment Equality Directive but also constituted a progressive twist in the EU legal order...In short, Mangold expanded the direct effect of directives as the Court held that the principle of non-discrimination, as given expression by the Employment Equality Directive, must be regarded as a general principle of EU law which can apply to horizontal private employment relations between individuals.'*

18. There have been two important decisions on disability, namely *Chacon Navas C-13/05* and *Coleman v Attridge C-303/06*. *Chacon Navas C 13/05* provided a definition of the concept of disability binding on all member States whereas *Coleman* recognises by virtue of discrimination by association that the Employment Equality Directive is not limited only to the protection of people who are themselves disabled but can also apply to the carers of disabled relatives.

19. Cases dealing with sexual orientation and racial or ethnic origin have been thinner on the ground: *Maruko v Versorgungsanstalt [2008] ECR I-01757* and *Centrum v Firma Feryn [2008] ECR I-05187*. At national level, however, race discrimination has accounted for the largest number of claims with a significant proportion involving treatment of Roma people. *Firma Feryn* raised the important issue of who can sue where discriminatory practices might go unchallenged if there was no actual claimant affected by the actions of the

perpetrator. In that case a company which made it obvious that it would not hire migrant workers was operating a racist policy. No migrant workers would bother to apply for the jobs available and thus the practice could continue unchallenged. The ECJ noted that public equality bodies would have locus standi to prevent such flagrant practices continuing.

20. There is no point having a legal right without proper access to justice and occasionally there is a challenge to the administrative requirements of the member state which should be no more stringent than those in respect of other legal claims.

### *Access to justice*

#### *Case C-246/09 Susanne Bulicke v Deutsche Buro Service GmbH*

21. The Applicant, aged 41, was unsuccessful when she applied for a job which had been advertised with a stated preference for candidates between the ages of 18 and 35 years of age. Her claim was rejected by the Hamburg Labour Court because she had not filed it within the two month time limit required by national law for employment cases. A reference was made to the ECJ on this issue, namely, whether this provision was compatible with the principles of effectiveness and equivalence. The Advocate-General noted that it did not seem at first glance that the time limit laid down was less favourable than provisions concerning similar domestic actions in employment law but this was something that the national court was best placed to assess. The role of the procedural rule, its place in proceedings, its special features must be taken into account as well as the basic principles of the domestic judicial system such as the principle of legal certainty.

### **III Examples of domestic case law**

22. The cases referred to here are some of the more unusual ones cited in European Anti- Discrimination Law Review 2011 produced by the European Network of Legal Experts in the non-discrimination field. They have thrown up some recurring issues in different jurisdictions, I will touch briefly on four of these:

- The use of criminal sanctions in context of discrimination;
- The role of religion in secular and multicultural societies;
- Compensation for non-pecuniary loss
- The use of indirect discrimination to fashion the way society works.

### ***Criminal sanctions***

23. It is possible to have either civil or criminal sanctions to meet the requirements of the directives. Whatever method is chosen must be effective, proportionate and dissuasive. Thus many jurisdictions employ a mix of both. Criminal sanctions would be applied where the discrimination is an aggravating feature of the offence, for instance where an individual carries out a violent racist, homophobic attack on an individual. Criminal offences are usually punished by a fine or by imprisonment. While they can be an effective deterrent to do not compensate the victim necessarily.

24. In Belgium, the former Prime Minister and Federal Minister of Equal Opportunities were convicted for failure to implement 'situation testing'

25. Mr. Sarrokh, a Moroccan, was denied entry to a nightclub on 3 occasions while his girlfriend of European background was allowed in. Under the Federal anti-discrimination Act of 2003, 'situation testing' was in theory accepted in court as proof of discrimination but in practice the Belgian government never adopted regulations setting the conditions under which such evidence might be admitted before the courts and this provision was revoked under new legislation.

In a civil action challenging the government for this failure the Prime Minister had been cleared but the Minister of Equal Opportunities had been fined 1 euro for failure to implement the act. On appeal, Mr. Sarrokh was awarded 3,000 euros and the stated was ordered to pay over 3,000 euros in court costs and 1,300 in lawyers' fees.

### ***Religion in a secular society***

26. While there have been no claims to the ECJ relating to religious discrimination, national courts have been kept busy in the UK, France, Belgium and the Netherlands particularly in relation to dress codes and the wearing of religious symbols. Out of 45 disputes reported in the employment field, 16 related to wearing of religious clothing or signs such as *Eweida v British Airways*[2010] EWCA Civ 80 in the UK. We have also had cases where there is an apparent clash between religious beliefs and sexual orientation where an employee is disciplined for allowing his religious views to influence his behaviour in the work place.

27. In Belgium a maths teacher was unsuccessful in her claim for religious discrimination against a school which had dismissed her for wearing a headscarf on school premises. Before the Conseil d'Etat she alleged that the City Council had exceeded its powers and could not adopt a regulation prohibiting teachers from displaying any conspicuous religious, political or philosophical symbol at school. The Conseil d'Etat recalled that three Belgian Language Communities are responsible for the organization of education pursuant to the Constitution. The City Council was entitled to clarify teachers' duties in the context of the principle of neutrality by prohibiting the wearing of any conspicuous religious, political or philosophical sign at school. The measure adopted had been adopted for a legitimate purpose to ensure the principle of neutrality in local secondary schools in order to respect the freedom of conscience of students. This meant that there was no violation of the principle of equality and non-discrimination.

28. This theme continued in France where in September 2010 the Senate passed a law prohibiting the wearing of garments covering an individual's face in public spaces.

29. As many of these claims are brought as indirect rather than direct discrimination it may be that securing an effective remedy is more difficult where one is balancing often equally important interests: the need to protect religious freedom and the needs of a democratic society to protect other values or a deliberately secular approach to civil society.

### ***Race – non pecuniary loss***

30. Compensation for discrimination can include financial loss flowing from the loss of a job, or a job opportunity but also non-pecuniary loss for hurt feelings.

31. In Hungary the Debrecen Court of Appeal held that the Local Council of Miskolc had violated the principle of equal treatment where schools' catchment areas meant that Roma children remained segregated in certain schools and were not allowed to enroll at predominantly non-Roma schools. The Supreme Court overruled a decision of the lower courts that no 'non-material damage' could be proven. It stated that segregation in itself always entails 'non material damage' and awarded each Claimant 370 euros (100 000 HUF).

### ***Indirect discrimination***

32. In Ireland the Equality Tribunal found that a school's admissions policy indirectly discriminated against Travellers because the school prioritised applicants who had a sibling who attended the school or who was the child of a past pupil or had close family ties with the school. The Claimant argued that as his father was a member of the Traveller community he was statistically much

less likely to have attended secondary school. Having reviewed the evidence, the tribunal concluded that Travellers of the father's generation were most unlikely to have attended secondary school and that a policy giving priority to sons of former pupils put the Claimant at a particular disadvantage.

33. Indirect discrimination can provide an effective tool and thus remedy when employers or other respondents are not mindful of the impact certain policies or procedures may have on minority groups in the absence of evidence of direct discrimination.

#### **IV Remedies and sanctions - the UK experience**

34. The emphasis in the UK has been on providing primarily civil remedies for individuals who may obtain:

- i. an order for financial compensation including damages for non-pecuniary loss;
- ii. a declaration that they have been discriminated against;
- iii. a recommendation as to what steps should be taken by the respondent to obviate or reduce the adverse effects of the discrimination on the Claimant

35. It is clear that there is no hierarchy in relation to the six main protected characteristics:

*'Discrimination is equally pernicious, whether it is on religious grounds, sexual grounds or racial grounds, and those who suffer from it on any of these grounds must feel equally distressed and hurt. I can discern no basis for saying that the distress and hurt caused by it varies with the type of discrimination rather than with the treatment of the victim'*

*Per Carswell LCJ in McConnell v Police Authority for Northern Ireland [1997] IRLR 625*

36. Following on the seminal judgment in the case of *Marshall v Southampton and South West Hampshire Area Health Authority (Teaching) (No 2) [1983] ICR 893* there has been no upper limit for compensation in discrimination claims in the UK where the government considered it inequitable to have different rules for sex and race discrimination (the only other relevant strand at that time). This position has not been adopted by all EU countries. The measure of damages is tortious and must provide full compensation for the injury done. This means that the tribunal must consider the various heads of damage and determine, in its own discretion, what constitutes adequate compensation. Apart from an award for loss of earnings, important features of remedies in the UK are:

- an award for injury to feelings;
- awards of aggravated and exemplary damages;
- a developing concept of stigma damages.

***Non-pecuniary loss - injury to feelings***

37. Tribunals have been invited to bear in mind the awards which are made in the field of personal injury and should ensure that any sum awarded is not excessive. The award is meant to compensate the applicant and not punish the Respondent.

In *Alexander v Home Office [1988] IRLR 190*, the Court of Appeal noted:

*‘Although damages for racial discrimination will in many cases be analogous to those for defamation, they are not necessarily the same. In the latter the principal injury to be compensated is that to the plaintiff’s reputation: I doubt whether this will play a large part in the former. On*

*the other hand, if the plaintiff knows of the racial discrimination and that he has thereby been held up to 'hatred, ridicule or contempt' then the injury to his feelings will be an important element in the damages. That the injury to feelings for which compensation is sought must have resulted from knowledge of the discrimination is clear'*

38. The Court of Appeal went on to say:

*'As with any other awards of damages, the objective of an award for unlawful racial discrimination is restitution. Where the discrimination has caused actual pecuniary loss... then the damages referable to this can be readily calculated. For the injury to feelings, however for the humiliation, for the insult, it is impossible to say what is restitution and the answer must depend on the experience and good sense of the judge and his assessors.'*

39. The Court of Appeal continued that awards should be restrained and that further *'injury to feelings, which is likely to be of a relatively short duration is less serious than physical injury to the body or the mind which may persist for months, in many cases for life.'*

40. In *Armitage, Marsden and HM Prison Service v Johnson* [1997] IRLR 162 EAT 64 the Court held:

- i. Awards for injury to feelings should be compensatory;
- ii. Awards should not be too low, as that would diminish respect for the policy of the anti-discrimination legislation;
- iii. Awards should bear some broad general similarity to the range of awards in personal injury cases. 'We do not think this should be done by reference to any particular type of personal injury award; rather to the whole range of such awards.'
- iv. In exercising their discretion in assessing a sum, tribunals should

remind themselves of the value in everyday life of the sum they have in mind.

- v. Finally, tribunals should bear in mind Lord Bingham's reference to the need for public respect for the level of awards made.

41. The Court of Appeal has sought to limit the awards made by tribunals by fitting claims into three bands – lowest band where injury to feelings is moderate, the middle band where it is significant and the top band reserved for the most serious cases. In such circumstances awards for injury to feelings should not exceed £30,000: *Vento v Chief Constable of West Yorkshire [2002] EWCA Civ 187* as updated by *Da'Bell v NSPCC UKEAT 0227/2009*

### ***Exemplary damages and aggravated damages***

42. Exemplary damages are punitive damages and may be awarded where the court considers that a compensatory award is not sufficient to meet the justice of the case. In the leading case of *Rooks v Barnard [1964] AC 1129* Lord Devlin stated that exemplary damages should be available where there has been oppressive, arbitrary or unconstitutional action by servants of the government; where there has been wrongful conduct which has been calculated by the defendant to make a profit for himself which may well exceed the compensation payable to the plaintiff; where such an award is expressly authorised by statute.

43. It is now clear that such damages may be awarded in discrimination cases.

44. Aggravated damages are awarded where there are particular features of the case and the conduct of the Respondent which worsen or aggravate the damage or hurt suffered by the Claimant.

*Ministry of Defence v Fletcher [2010] 25 EAT*

45. Kerry Fletcher, a lance bombardier, alleged that she was discriminated against and harassed by a male Sergeant on grounds of her sexual orientation and on grounds of her sex. An employment tribunal upheld her claims under the Sex Discrimination Act and found that she had been victimised contrary to the Sexual Orientation Regulations.

46. It held that she had been subjected to appallingly inappropriate behaviour by her superior and that unsubstantiated disciplinary allegations were made against her following complaints that she brought under the Army Act. Medical advice was then utilised to provide a basis for discharge on disadvantageous terms at a time when Ms Fletcher was not suffering from any serious mental illness but was merely seeking to pursue a legitimate grievance. The tribunal concluded that the claimant *'had suffered sexual harassment from a person in a position of command and responsibility above her, that her applications for redress had been dealt with below the level of General Officer Commanding in a high handed and arbitrary fashion, and in a way that is unsupported by the procedures regarding the proper method of investigation of grievances.'*

47. An award of aggravated damages had been based in part on the manner in which the MOD defended the proceedings at the tribunal, in that Ms Fletcher was challenged in relation to the truth of her allegations and was subjected to a particularly unpleasant cross-examination about her early psychiatric history and her sexual orientation. The EAT accepted that aggravated damages may be awarded to reflect the way in which litigation is conducted, and that the tribunal was entitled to find that the conduct of the proceedings by the MOD had been objectionable.

48. In addition, the use of disciplinary sanctions against Ms Fletcher and the manner in which her complaints had been dealt with were also reflected in the award of aggravated damages of £8,000 (instead of £20,000) to avoid double recovery.

49. The EAT set aside the whole of the award for exemplary damages. It was accepted that in order to merit an award of exemplary damages falling within this

category, the conduct of the wrongdoer must be '*conscious and contumelious*'. Exemplary damages, are to be reserved for the very worst cases of oppressive use of power by public authorities. The EAT concluded that although the ET characterised the Army's behaviour as oppressive, arbitrary and unconstitutional it did not consider that their conduct had crossed the threshold for an award of exemplary damages.

### ***Stigma damages***

50. In recent case of *Abbey National v Chagger [2009] EWCA 1202* the Court of Appeal held that the employer who had dismissed on discriminatory grounds should be liable for the fact that a certain stigma attached to a Claimant in such circumstances who had to take his employer to court and it might take his longer to gain another job as he could be victimized for so doing by other prospective employers. It was unreasonable to expect him to sue others for victimization in these circumstances.

## **V Recent legislative developments in the UK - Equality Act 2010**

### ***Recommendations***

51. Under previous legislation, the employment tribunal had the power to make recommendations only in respect of reducing the negative impact on an individual claimant. Section 124(3) of the Equality Act 2010 now extends the power to make recommendations in respect of the complainant and *any other person*. The recommendation can require the respondent to take specific steps within a specified time frame such as the introduction or review of particular policies eg in relation to recruitment or training. The difficulty which arises is in relation to enforcement. Previously, the Claimant has an interest in ensuring that the employer complies with any recommendation made by the tribunal. Where the Claimant is no longer employed by the respondent, there will not necessarily

be anyone still working with the company with knowledge of the situation and a desire to see it implemented speedily. Where the union has been involved in the case, then there may be some pressure brought to bear or future claimants may inquire in their questionnaires whether such recommendations have been made and respected.

### ***Positive action***

52. The race directive leaves open the possibility for states to adopt '*specific measures to prevent or compensate for disadvantages linked to racial or ethnic origin*'. Analogous provisions in the area of sex discrimination directives have been interpreted by the ECJ to permit but not require states to adopt positive action measures, where they are limited in time to a period necessary to overcome the disadvantage targeted and sufficiently flexible to allow exceptions in particular cases: *Kalanke* and *Marschall v Land Nordrhein-Westfalen Case C-409/95*. *Kalanke* concerned a law on positive discrimination in the German state of Bremen which, in the case of a tiebreak situation, gave priority to an equally qualified woman over a man if women were under-represented (i.e if according to the law, women did not make up at least half the staff in the individual pay, remuneration and salary brackets in the relevant personnel group within a department. This legislation was criticized by the ECJ because it was considered that the measure departed from the principle of individual merit since they guaranteed women absolute and unconditional priority for appointment or promotion. In *Marschall*, the legislation provided that priority will be given to women '*unless reasons specific to individual (male) candidate tilt the balance in his favour*'.

53. Section 158 of the Equality Act broadens the scope of the voluntary positive action provisions under current anti-discrimination legislation, which are limited to "training and encouragement" for under-represented groups. The new provision will allow employers to take proportionate measures not merely to train or encourage under-represented groups to apply for jobs, but also to overcome a

perceived disadvantage or to meet specific needs based on a protected characteristic. This could in theory cover such things as: providing prayer facilities at work exclusively to meet the needs of a religious minority, or providing free English language lessons to non-English-speaking employees.

54. Section 159 extends the existing powers by allowing positive action in respect of recruitment and promotion: where the employer ‘reasonably thinks’ that there is under-representation of those with a particular protected characteristic, or that those with that characteristic are at a disadvantage, then the employer may appoint or promote a member of that under-represented group provided that he or she is “as qualified” as any unsuccessful candidate. However, it is expressly stated that an employer should not have a policy of treating persons with a shared protected characteristic more favourably in terms of recruitment or promotion.

### ***Inter-sectional discrimination***

55. The Act also contains a section which is as yet unimplemented by the Coalition government but which was an interesting development from the previous Labour administration which sought to address the issue of ‘double disadvantage’ suffered by those who share two or more protected characteristics. The section is limited in scope as it covers direct discrimination only where two personal characteristics are involved; some characteristics cannot be combined under this provision eg. pregnancy discrimination cannot form the basis of a dual discrimination claim as it is alleged that there is no evidence to suggest that such protection is needed; nor does it include an indirect discrimination provision. However, it is not unusual to find litigants with three such personal characteristics. No rationale is given for this decision. It is also easy to see that older pregnant women or pregnant women from certain ethnic or religious groups may be stigmatized more than others in the workplace because of assumptions about their cultural background and willingness to return to work might be made. Young Asian/Muslim and/ or Black men may find indirect discrimination claims

more appropriate where they are targeted for greater scrutiny than other individuals.

### ***Public sector duty***

56. Previously, duties placed on public authorities to eliminate discrimination and promote equality applied only to race, gender and disability, the single duty covers all the protected characteristics apart from marriage and civil partnership. The new extended single equality duty contained in section 149 of the Equality Act differs in emphasis from the earlier duties in so far as it requires public authorities to have due regard to the need to advance equality of opportunity (previous wording referred to the need to promote equality).

#### *Extract from explanatory notes*

*This section imposes a duty on the public bodies listed to have due regard to three specified matters when exercising their functions. The three matters are:*

- eliminating conduct that is prohibited by the Act, including breaches of non-discrimination rules in occupational pension schemes and equality clauses or rules which are read, respectively into a person's terms of work and into occupational pension schemes;*
- advancing equality of opportunity between people who share a protected characteristic and people who do not share it; and*
- fostering good relations between people who share a protected characteristic and people who do not share it.*

*The second and third matters apply to the protected characteristics of age, disability, gender reassignment, pregnancy and maternity, race, religion or belief, sex and sexual orientation. They do not apply to the protected characteristic of marriage and civil partnership.*

*As well as the public bodies listed in Schedule 19, the section also imposes the public sector equality duty on others that exercise public functions, but only in*

*respect of their public functions. Section 150 explains what is meant by “public function”.*

*Subsections (3), (4) and (5) expand on what it means to have due regard to the need to advance equality of opportunity and foster good relations. In particular, subsection (4) makes clear that having due regard to the need to advance equality of opportunity between disabled people and non-disabled people includes consideration of the need to take steps to take account of disabled people’s disabilities. Subsection (6) makes clear that complying with the duty might mean treating some people more favourably than others, where doing so is allowed by the Act. This includes treating disabled people more favourably than non-disabled people and making reasonable adjustments for them, making use of exceptions which permit different treatment, and using the positive action provisions in Chapter 2 of this Part where they are available.*

*Schedule 18 sets out persons and functions to which the equality duty does not apply.*

#### *Examples*

- The duty could lead a police authority to review its recruitment procedures to ensure they do not unintentionally deter applicants from ethnic minorities, with the aim of eliminating unlawful discrimination.*
- The duty could lead a local authority to target training and mentoring schemes at disabled people to enable them to stand as local councillors, with the aim of advancing equality of opportunity for different groups of people who have the same disability, and in particular encouraging their participation in public life.*
- The duty could lead a local authority to provide funding for a black women’s refuge for victims of domestic violence, with the aim of advancing equality of opportunity for women, and in particular meeting the different needs of women from different racial groups.*
- The duty could lead a large government department, in its capacity as an employer, to provide staff with education and guidance, with the aim of*

*fostering good relations between its transsexual staff and its non-transsexual staff.*

- *The duty could lead a local authority to review its use of internet-only access to council services; or focus “Introduction to Information Technology” adult learning courses on older people, with the aim of advancing equality of opportunity, in particular meeting different needs, for older people.*
- *The duty could lead a school to review its anti-bullying strategy to ensure that it addresses the issue of homophobic bullying, with the aim of fostering good relations, and in particular tackling prejudice against gay and lesbian people.*
- *The duty could lead a local authority to introduce measures to facilitate understanding and conciliation between Sunni and Shi’a Muslims living in a particular area, with the aim of fostering good relations between people of different religious beliefs.*

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