

# Equality Act 2010

## How to run a (non-employment) claim



26 October 2021

# Agenda

---

- Welcome and Introduction

# Presenter

---

## **Sonia Birdee | Barrister | Garden Court North Chambers**

Sonia is a housing law specialist with over 15 years experience and particular expertise in cases raising discrimination. She also represents claimants in discrimination claims across most aspects of the Equality Act 2010 and is on the Equality Human Rights Commission panel of preferred counsel.

To view Sonia's full bio, please visit: <https://gcnchambers.co.uk/barrister/sonia-birdee/>



# Introduction

---

- This seminar is aimed at practitioners and a basic knowledge of the Equality Act 2010 ('the Act') is assumed.
- Focus will be on the pre-action stage with some other useful pointers about running the claim.
- If you can get your house in order at pre-action stage you are more likely to be able to settle at an early stage or make a timely Part 36 offer.

# Funding

---

- ❖ Public funding for discrimination claims is available by para 43 of Schedule 1 of the Legal Aid Sentencing and Punishment of Offenders Act 2012 but this is restricted by schedule 2 (not s15).
- ❖ If your client's claim is out of scope, they may be eligible for exceptional case funding but only if there is a risk of breach of an individual's ECHR, rights under the Human Rights Act 1998 or retained EU law, provided that the individual also satisfies the ordinary eligibility criteria for legal aid. Normally A6 (right to a fair hearing) will be relevant.
- ❖ The LAA's ECF application form asks for information about ;
  - the importance of the issues at stake;
  - the complexity of procedure, area of law and evidence; and
  - the capability of the applicant to represent themselves.
- ❖ In all other cases, your client may be able to fund their case by way of conditional fee arrangement. However, this does not provide costs protection for them.

# Burden of proof

---

S136

- (1) This section applies to any proceedings relating to a contravention of this Act.
- (2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.
- (3) But subsection (2) does not apply if A shows that A did not contravene the provision...

# Burden of proof (2)

---

- ❖ The burden is on Claimant to establish facts from which it might be presumed there has been discrimination but once that is done, the burden shifts to the Defendant to show, on the balance of probabilities, that there was no discrimination.
- ❖ If the Defendant cannot show that there has not been discrimination, the court *must* allow the claim.
- ❖ Generally, the court should hear all of the evidence, then determine whether there is a *prima facie* case having regard only to that part of the Defendant's evidence that undermines the primary facts which establish the case. (*Hewage v Grampian Health Board* [2012] UKSC 37 at 31)
- ❖ The court can then go on to consider all of the Defendant's evidence and whether they have disproved the discrimination. There are some cases where a court might skip the first stage and move straight to conclude that the Defendant has discharged the burden by proving that treatment was not on the proscribed ground (*Brown v London Borough of Croydon* [2007] EWCA Civ 32).

# Preliminary issues

---

- If you think your client may have suffered discrimination in breach provision/s of the Act, your starting point will be to check that;
  - (i) Your client is entitled to the protection of the Act. Do they have a protected characteristic which is included in Part 2, Chpt 1, S4-12; and,
  - (ii) The other party is under a duty not to discriminate against your client i.e. do any of Parts 3-7 apply.
- You will then need to decide whether the actions of the other party might amount to any types of discrimination prohibited by the Act. They are listed in Part 2, Chapter 2, S4-31.
- You do not need to have a concluded opinion about any of these preliminary issues at this stage just a view that a *prima facie* case can be established. You can ask for further information.

# Pre action (1)

---

- ❖ There is no specific pre-action protocol so the CPR PD – Pre-action protocols and conduct applies.
- ❖ This requires sufficient exchange of information to allow you to achieve the objectives set out in paragraph 3;
  - (a) understand each other's position;
  - (b) make decisions about how to proceed;
  - (c) try to settle the issues without proceedings;
  - (d) consider a form of Alternative Dispute Resolution (ADR) to assist with settlement;
  - (e) support the efficient management of those proceedings; and
  - (f) reduce the costs of resolving the dispute.
- ❖ You must only take reasonable and proportionate steps to 'identify, narrow and resolve the legal, factual or expert issues' (4) and the costs of those steps must be proportionate or they will not be recoverable (5).

# Pre-action (2)

---

- You must send a pre-action letter which includes (i) the basis on which the claim is made (ii) a summary of the facts (iii) what the claimant wants from the defendant, and (iv) if money, how the amount is calculated (6(a)).
- The Defendant should reply within 14 days (straightforward cases) to 3 months (complex cases) and the reply should include confirmation as to whether the claim is accepted and, if it is not accepted, the reasons why, together with an explanation as to which facts and parts of the claim are disputed and whether the defendant is making a counterclaim as well as providing details of any counterclaim (6(b)).
- It is reasonable at pre-action stage for the parties to disclose key documents relevant to the issues in dispute (6(c)).

# The pre-action letter

---

- ❖ In addition to the guidance given in para 6(b) of the PD – Pre-action protocols and conduct there is government guidance ('Asking and responding to questions of discrimination in the provision of goods and services and public functions) which advises six areas for pre-action questioning. The guidance relates to Goods, Services and Public Functions but is useful beyond that;
  - step 1: set out your details and the details of the discriminating person/s and/ or organisation/s.
  - step 2: identify the reason your client has been discriminated against. Specifically identify which protected characteristic your client has and which duty is engaged in respect of the discriminator.
  - step 3: Describe the unfair treatment.
  - step 4: Identify the type of discrimination your client has experienced.
  - step 5: Give a breakdown of why the treatment was unlawful.
  - step 6: set out any requests for further information which might help.
- ❖ I would add a step 7 to deal with time limits if necessary.
- ❖ N.B – The time limits in Equality Act claims are so short that it may not be possible to comply with the protocol. Either consider extending time limits or take only the essential steps.

# Time limits (1)

---

- ⌚ Begin by checking when the limitation period expires by reference to the date of the discriminatory act. This will dictate what you can do in the early stages. If the act is still continuing the clock will not begin until it ends.
- ⌚ For a non-employment claim, the standard time-limit is 6 months minus 1 day (s118 (1)). This time limit can be extended if;
  - (i) Exceptions relating to Education and ADR are engaged (s118(2-3)) in which case the time limit is extended to 9 months, or;
  - (ii) The court thinks it is ‘just and equitable’ to extend the time limit.

## Time limits (2)

### Agreements between the parties

- ❖ It can be risky to leave it to the court to decide whether to extend the time limit. Consider whether your opponent will agree to any of the following;
  - (i) Limitation Amnesty: the parties agree that limitation should be extended to a specific agreed date.
  - (ii) By CPR 7.5 the claim form must be served on the calendar day four months after the date of issue of the claim form. Issue protectively and agree to extend the time for service of the claim (*Thomas v Home Office* [2006] EWCA Civ 1355).
- ❖ A good reason to extend time limits before serving is to make sure you have identified all of the correct Defendants. It can be very complicated and risky to add/substitute a Defendant after the limitation period has expired whereas the court's permission is not required to do this before service of the claim form (CPR 19.4(1)).

# Time limits (3)

---

- ❖ If you can't agree anything with your opponent. You may have to make an application to the court.
- ❖ The general discretion given to the court to extend the limitation period is 'the widest possible discretion' but always relevant will be (i) length and reasons for delay and (ii) whether the delay has prejudiced the respondent (*Abertawe Bro Morgannwg University Local Health Board v Morgan* [2018] EWCA Civ 640 at paras 18 and 19).
- ❖ An application to extend time for service of the claim is governed by CPR 7.6 and must be supported by evidence though it can be made without notice (CPR 7.6(4)). Your application will not succeed unless;
  - The court has failed to serve the claim form, or;
  - C has taken all reasonable steps to comply with CPR 7.5 but has been unable to do so, and
  - In either case, C has acted promptly in making the application.

*Foran v Secret Surgery Ltd* [2016] EWHC 1029 (QB) – if there is no good reason why claim is served late, the application will fail. Often difficult to establish why claim form could not have been served and app to extend time for service of POC etc.

# Equality Human Rights Commission

---

- You must comply with the CPR ‘Practice Direction – Proceedings under enactments relating to equality’.
- This applies to claims relating to conduct before 1 October 2010. For claims pre-dating this the Practice Direction under Enactments Relating to Discrimination applies (1.3).
- If your claim is made under s114 of the Act, you must give notice to the Equality Human Rights Commission and file a copy of the notice (2.1).
- There is no set format that the notice must take but the Commission recommends sending in the claim form and a letter setting out that you are giving notice of the issue of your proceedings and giving details of the other party.
- The Commission might decide to assist you in your case under s28 EA 2006 and this could extend to providing (i.e. paying for) legal assistance.
- Other provisions deal with secret proceedings (4.1-4.5) and expenses of the Commission (5.1-5.4).

# After issue

## Equality Act assessors (1)

- Once you have issued and served your claim you will be asking for directions. The court must appoint an Assessor;

“In any proceedings in the county court a judge of the court may, if he thinks fit, summon to his assistance, in such manner as may be prescribed, one or more persons of skill and experience in the matter to which the proceedings relate who may be willing to sit with in the county court a judge of the court and act as assessors.” (s63 County Courts Act 1984)

“In proceedings in England and Wales on a claim within subsection (1), the power under section 63(1) of the County Courts Act 1984 (appointment of assessors) must be exercised unless the judge is satisfied that there are good reasons for not doing so.” (s114(7) EA 2010)

# Equality Act assessors (2)

---

- ❖ Guidance is given by Court of Appeal by LJ Clarke in *Cary v Commissioner of Police for the Metropolis* [2014] EWCA Civ 987 in which confirmed that no special skill or experience is required to be an assessor just some in relation to 'the matter' [49].

"The *Code of Practice on Services, Public Functions and Association* issued under the *Equality Act 2006*, section 14, which a court "shall" take into account where it appears relevant, provides that assessors will be persons "*of skill and experience in discrimination issues who help to evaluate the evidence*". The Code notes that it is mandatory for assessors to be appointed, absent "*good reason*" and that it "*would not be a good reason that the court believes itself capable of hearing the issues in the case without an assessor or that having an assessor would lengthen proceedings*". [27]

- ❖ Problems: (i) There is no list of EA Assessors for the county court and (ii) there is often an issue determining who should pay.

# Disclosure

---

- You will start by considering what disclosure you will need to deal with the factual issues e.g. records, minutes, incident reports, CCTV.
- Are you dealing with disability or seeking to prove psychiatric or other injury? If so, you will need medical notes, hospital notes etc
- Statistical evidence – e.g. for indirect discrimination to show disadvantage e.g. A disabled woman in receipt of benefits is told by a letting agent that she cannot rent a flat because the agency operates a policy of not accepting housing benefit tenants. This indirectly discriminates against women and disabled people because those groups are more likely to be in receipt of housing benefit subject to argument on proportionality. Evidence of this is obtained in the form of reports and statistics.

# Value of claim

---

- ❖ You should be in a position to value the claim before you issue so that you can pay the appropriate fee. If the valuation changes during the course of litigation, an application can be made (N244) to amend the value of the claim.
- ❖ S119(4) of the Act specifically allows for a claim for damages for injured feelings.
- ❖ Valuation of the claim will refer to the bands set out in *Vento v Chief Constable of West Yorkshire Police* [2002] EWCA Civ 1871 which were amended on the 26 March 2021 by the Presidents of the Employment Tribunals in England and Wales and Scotland as follows;

Lower Band - £900 - £9,100 (less serious cases, typically one-off occurrences)

Middle Band - £9,100 - £27,400 (cases that do not warrant an award in the upper band)

Upper Band - £27,400 – £45,600 (most serious offences such as campaigns of discrimination)

- ❖ Remember to plead for all remedies including a declaration that the act was discriminatory and any injunction to restrain the other party from acting that way again.

# Part 36 offers

---

- ❖ Once you have valued the claim you will be in a position to make a Part 36 offer. These can be made at any time before issue until judgement is given.
- ❖ There will be costs benefits to making an early offer and this can encourage settlement but you will only be able to make an offer once you are sufficiently informed - another good reason to get as much information as you can at the pre-action stage.
- ❖ The requirements are set out in CPR 36.5;
  - the offer must be in writing (36.5(1)(a))
  - it must make clear that it is made pursuant to Part 36 (36.5(1)(b))
  - it must specify a period of not less than 21 days within which the defendant will be liable for the claimant's costs (the "**Relevant Period**") (36.5(1)(c))
  - it must state whether it applies to the whole or part of the claim (36.5(1)(d))
  - it must state whether it takes into account any counterclaim (36.5(1)(e))

# Multiple Defendants

---

- If you are claiming against multiple Defendants, you will need to consider whether you can apportion damages between them (is the damage suffered divisible?) or whether they should all be joint and severally liable. In the latter case, you will be claiming the full value against each Defendant.

“In this case the damage suffered by the claimant in consequence of victimisation in the treatment of her two job applications was indivisible, which means that, as against the claimant, no single tortfeasor is liable only for consequences peculiar to his acts. Each is jointly liable to the claimant for the full amount of the damage suffered by her...”

(*London Borough of Hackney v Sivanandan* [2013] EWCA Civ 22 at para 89).

# Thanks for watching!

Garden Court North Chambers

T: 0161 817 6377

E: [gcn@gcnchambers.co.uk](mailto:gcn@gcnchambers.co.uk)

W: <https://gcnchambers.co.uk>

DG Legal

T: 01509 214 999

E: [admin@dglegal.co.uk](mailto:admin@dglegal.co.uk)

W: <https://dglegal.co.uk>

