

CLT EMPLOYMENT CONFERENCES

**THE 6TH ANNUAL
EMPLOYMENT LAW UP-DATE 2004**

**SEX, RACE AND DISABILITY
DISCRIMINATION – RECENT
DEVELOPMENTS**

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Sex, Race and Disability Discrimination: General Up-Date

Who Can Claim?

1. It is well known that the definition of 'employment' in the discrimination legislation is much wider than that in the Employment Rights Act 1996. Once the statutory definition is understood and also that ultimately the question is whether personal service by the individual was the 'dominant purpose' of the contract (***Mirror Group Newspapers v Gunning*** [1986] ICR 145, CA), the rest will usually be questions of fact and example. The following cases (both brought under the RRA) provide examples that will be of interest to many whose employment status might be difficult to categorise.
2. In ***North Essex HA v David-John*** [2004] ICR 112, it was held that a GP providing medical services to the respondent health authority was not within either the 1996 Act or the 1976 Act definitions and so could not claim unfair dismissal or race discrimination when he resigned in the course of a dispute. The medical services were supplied under statute (the NHS (General Medical Services) Regulations 1992) and the purpose of any contract which arose (which was doubted) was not to provide personal services but to take full responsibility for the treatment of patients.
3. In ***Mingeley v Pennock & Ivory, t/a Amber Cars*** (2004) Times, 4 March, it was held that a self-employed taxi driver was not an 'employee' for these purposes; the dominant purpose of the contract between him and the taxi firm was for the payment by him of a weekly sum for access to the firm's radio and computer systems. The actual work was carried on under collateral contracts with the passengers who paid the fares.
4. In ***Dave v Robinska*** [2003] ICR 1248, the EAT had to consider the case of a partner in a two-partner medical practice who wanted to pursue a complaint of sex discrimination arising out of the dissolution of the partnership at the time of her pregnancy. The EAT concluded that Section 11 of the Sex Discrimination Act gave a right to a single partner to bring proceedings against the partnership and such proceedings were properly constituted if brought against any named partners.
5. It is, of course, for an applicant to demonstrate that s/he can meet the threshold requirements of the relevant statute. In many cases, it is the applicant's failure to adduce the appropriate evidence that is fatal. Thus, for example, in ***Booth v Oldham MBC*** EAT 25 May 2004, the EAT upheld the Employment Tribunal's finding that the applicant had not established that he was disabled within the meaning of the DDA notwithstanding the fact that he had been off work for over a year due to stress prior to his dismissal. The employer conceded that Mr Booth

had a mental impairment but denied that it had had a substantial or long-term adverse effect on his ability to carry out his normal day-to-day activities. The tribunal found in the employer's favour. The EAT upheld the decision, as the applicant had failed to adduce sufficient evidence in respect of the impact of his mental impairment on his ability to carry out his normal day-to-day activities in order to substantiate his claim.

The Approach

6. In ***Rihal v Ealing LBC*** [2004] EWCA Civ 623, the Court of Appeal confirmed that a tribunal was entitled and indeed obliged to look at all the material put before it which was relevant to the determination of the issue whether acts or decisions complained of were on racial grounds, which might include evidence about the conduct of the alleged discriminator before or after the act about which complaint was made. The tribunal had, in that context, to look at the total picture. Where there were allegations of discrimination by an employer over a substantial period of time, it would be wrong for a tribunal to treat the individual incidents complained of in isolation from one another. That would be a fragmented approach and would overlook the relevance which the wider picture might have to the decisions to be reached on individual complaints. In the instant case, the tribunal had been entitled to adopt the approach that it had in considering the wider picture in determining whether racial factors had been involved in the treatment of the employee and to have used its conclusions on that to inform its assessment of whether in respect of each of the complaints he had been less favourably treated than a white employee in the department in similar circumstances would have been. (***Qureshi v Victoria University of Manchester*** [2001] ICR 863 applied).
7. Turning to particular issues arising under the DDA, in ***Paul v National Probation Service*** [2004] IRLR 190, the EAT had to consider the question of "justification" in the case of a job applicant who disclosed his history of chronic depressive illness when applying for a part-time (one day a week) position. He had been offered the post, subject to a satisfactory occupational health report. On seeing the medical questionnaire, the employer's occupational health adviser asked for a report from his GP, but did not seek advice from his consultant. On this basis she recommended that he be offered a lesser (less stressful) post for which he had also applied, and that after three months in that post he should be reassessed for the first post. On that basis, the offer of that post was withdrawn. The ET had found that there had been discrimination in respect of the 'arrangements' for employment, in the sense of the requirement for all posts to be subject to occupational health clearance. In relation to that, however, they found justification (on the approach laid down in ***Jones v Post Office*** [2001] IRLR 384, CA) in the employer's decision to accept the Occupational Health report and to agree to a review after three months. The EAT disagreed, holding that the ET had misconstrued the 'arrangements' in question

here. They should have concentrated on the disadvantage to the applicant from the OHA's assessment of the stress problem; this should have led them to consider the reasonableness of other steps that could have been taken by the employer, such as obtaining specialist advice from the consultant, consulting the applicant further and taking steps to adjust the job. Moreover, the EAT went on to say that, on that basis, reliance on **Jones** had been misplaced because that case can only apply to these matters where the employer has conducted a proper risk assessment.

8. What might seem to be a harsher (for the applicant) or more realistic (for the employer) approach was taken in **Archibald v Fife Council** [2004] IRLR 197, where the Court of Session (Inner House) had to consider the case of a road sweeper who was unfortunately rendered almost unable to walk by medical treatment. The employers took medical advice on her prognosis and alternative work was considered. The problem was that all the posts in question (and in a three month period she applied for over a hundred) were at a higher level, which on council policy required competitive interviewing. Her union suggested that this might be dropped in her case, but the council refused. After two years the council decided that the redeployment procedure was exhausted and dismissed her. Ms Archibold's complaint of disability discrimination was rejected by the tribunal, on the basis that the only adjustment would have been to transfer her to another post, but to have done so without a competitive interview would have infringed s 6(7) which provides that the Act does not require more favourable treatment for a disabled person. The EAT rejected her appeal, and so too did the Inner House in terms suggesting a rather robust approach to reasonable adjustment in a case such as this. They held that there was no failure to adjust where the alleged failure related to the very nature of the job itself, i.e. there is an irreducible minimum to any job and the duty to adjust only applies to terms, conditions and arrangements imposed by the employer on that job which have the effect of substantially disadvantaging the disabled employee or applicant. Physical fitness and ability to walk were part of the irreducible minimum of the job of road sweeper, not one of the amendable terms, etc, on which it was offered. The argument that the competitive recruitment should have been suspended was given short shrift, Lord McClusky stating that '*I do not read [the Act] as conferring on the disabled any right to preference in being selected for job vacancies over those who are equally qualified but not disabled*'. Moreover, Lord Hamilton stated that there is no legal obligation on a court to follow the Disability Code of Practice when *interpreting* the Act as a matter of law.

Procedural Points

9. Given the informality and flexibility of ET procedure, questions as to the admissibility of evidence rarely trouble Employment Tribunals. In **XXX v YYY** [2004] IRLR 471, however, a preliminary issue arose as to the

admissibility of a video in a sex discrimination complaint. The claim had been brought by a nanny who was alleging that she had been sexually harassed by the father of the child she cared for. She sought to adduce in evidence a video she had covertly made in the kitchen of the family home allegedly showing her being subjected to sexual advances but also showing footage of the child. The issue arose as to whether the child's human rights would be infringed if the video was played in public. The employment tribunal held that this would be a lawful interference, but went on to hold that the video was not admissible in any event because it had no probative value in the sex discrimination claim (in that it was consistent with the father's case that there was a consensual sexual relationship). The EAT overruled this on grounds that it was not clear when the sexual relationship ceased so that the conduct depicted in the video might have occurred after that time. Taking a pragmatic (if not uncontroversial) view of the conduct of the hearing, the EAT ruled that an employment tribunal should sit in private if sitting in public would lead to an infringement of human rights under the European Convention. The Court of Appeal, however, agreed with the ET, that the video had no probative value, reminding the parties that "*the first and most important rule of the law of evidence ... is that evidence is only admissible if it is relevant to an issue between the parties.*"

10. In **English v Emery Reimbold & Strick Ltd** [2003] IRLR 710, the Court of Appeal gave guidance as to the requirements of judgements given in the County Court and as to how inadequacy of reasons might be rectified without overturning the whole decision. That approach is being followed by the EAT in discrimination cases, see **Bax Global Ltd v French** [2004] ICR (2) x (recent points) and **Burns v Consignia plc** [2004] IRLR. In both cases the EAT was mindful of the prejudice that would be suffered if the case had to be remitted for complete re-hearing when it was merely that inadequate reasons had been given for the initial decision.
11. A pragmatic approach was also adopted by the EAT in **Mayo-Deman v Lewisham College** [2004] ICR (2) xi (recent points) in a case where the Employment Tribunal had received written submissions from the parties with no provision for exchange. Whilst this gave rise to a technical breach of the rules of natural justice, the appellant could point to no substantive prejudice so the appeal was dismissed.

Equal Pay and Pensions

12. The Equal Pay Act was passed in 1970 but only came into force in 1975: purposefully allowing employers five years to get their houses in order. In 1970 it had still been considered acceptable for some

employers to maintain separate pay scales for men and women performing precisely the same work¹.

13. Some thirty years later, the Equal Pay Act has still not managed to abolish pay differentials between men and women. Girls may still be getting the better qualifications but it will be their male counterparts who end up getting the better wage in later years.
14. In 2002 the pay gap between men and women in full-time work stood at 18.8%² (up from 18% in 2001). A survey by PayFinder.com presents a bleaker picture, calculating (on a survey of some 125,000 workers) the pay gap between men and women to be around 24% - a gap that widens yet further in certain regions. Women who work part-time continue to earn less than 60% of the average hourly rate for full-time men – a figure that has barely changed for quarter of a century.
15. Cabinet Office figures released in 2000 indicated that, over a life-time, highly skilled women lost £143,000 simply by virtue of being women, middle skilled women £241,000 and low skilled women £197,000. The cost of child-bearing - £19,000, £140,000 and £285,000 respectively for high, medium and low skilled women – was *in addition* to the sex penalty.
16. Recent research³ suggested that almost a third (29%) of the gender-pay gap is attributable to women being paid less simply because they are women, more than 50% of the remainder resulting from the differences in the length of women's full-time work experience, the more interrupted nature of women's working lives and women's greater tendency to work part-time. Only a relatively small proportion of the gap (13%) was attributed to occupational segregation and a minimal 6% to differences in educational attainment.
17. New protections for workers may have the indirect effect of reducing the pay gap between men and women (e.g. protections for part-time workers, those on fixed-term contracts, the NMWA and WRT, improvements to maternity protection and benefits, new anti-discrimination legislation etc). The government has, however, also attempted to address some of the procedural issues that might be seen to arise under the Act in such as way as to weaken the mechanism by which complainants can seek redress.
18. On 6 April 2003, the Equal Pay (Questions and Replies) Order 2003 came into effect, providing for forms to be used by employees to question an employer in an equal pay claim and by employers to respond. Like the corresponding Orders in race, sex and disability

¹ The Least Successful Equal Pay Advertisement: In 1976 the European Economic Community pointed out to the Irish Government that it had not yet implemented the agreed sex equality legislation. The Dublin Government immediately advertised for an equal pay enforcement officer. The advertisement offered different salary scales for men and women.

² 2003 Equal Opportunities Review

³ By Sylvia Walby and Wendy Olsen for the Government's Women's and Equality Unit.

discrimination cases, the tribunal may draw inferences from a failure to respond or from an evasive or equivocal reply to such a questionnaire (EqPA s 7B(4)⁴).

19. The service of an Equal Pay Questionnaire may give rise to conflicting obligations for an employer: on the one hand, to provide the information sought to the complainant considering bringing an equal pay case; on the other, the obligation to keep confidential pay-related information in respect of other employees. As is acknowledged by the guidance notes accompanying the questionnaire, this may give rise to issues relating to confidence and the employer's obligations under the Data Protection Act 1998.
20. Questions concerning equal pay continue to give rise to a significant amount of new case-law, demonstrating both the extent of the problem and the difficulty of interpreting the laws that are meant to prevent it.
21. In ***Allonby v Accrington and Rossendale College*** [2004 IRLR 224, the ECJ followed its earlier ruling in ***Lawrence v Regent Office Care Ltd*** C-320/00 [2002] IRLR 822, holding that, although a cross-employer comparison is possible under art 141, that will only be in a case where the differences in pay can be attributed to a 'single source' (i.e. in practice where that source would have the power to put it right). In this case the dispute had arisen after the college that had employed Ms Allonby as a part-timer until 1996 then decided to subcontract the work to an educational provider through which her services were then immediately re-offered to the college, on a self-employed basis. In those circumstances, the ECJ held there was no "single source": although the employment with the college and the self-employment through the provider were contiguous (and there was an immediate decrease in pay with the latter), the college and the provider were sufficiently separate *not* to constitute a single source.
22. Interestingly, the ECJ did not consider that Ms Allonby's (self) employment status undermined her right to pursue her claim. Normally EC law leaves employment status to the member state but here the ECJ considered that a Community meaning was to be given to the definition of "workers" for the purposes of Article 141, that is a person who (for a certain period of time) performs services for and under the direction of another person for which they receive remuneration. This economic and factual "subordination" test will not cover independent providers of services who are not in a relationship of subordination with the person who receives the services. On the other hand, the ECJ apparently did not consider that any mutuality of obligation would be required to meet the definition: '*The fact that no obligation is imposed on them to accept an assignment is of no consequence in that context....*'.

⁴ And see ***Barton v Investec Henderson Crosthwaite Securities Ltd*** [2003] IRLR 332, which stresses the relevance of considering the response to such a questionnaire in determining where the burden of proof should lie.

23. The ECJ also held that whilst Ms Allonby's claim in respect of her membership of the teachers' pension scheme (only open to those under a contract of employment) could not be pursued as a straightforward equal pay claim based on a man still in the college's employment, the state legislation could be challenged on grounds of sex discrimination *if* the applicant could show a disproportionate effect on women of the 'contract of employment only' rule *and* the Department could not establish objective justification for it. In such an action, the applicant would not have to show an actual comparator, but could instead rely on statistics.

24. In ***Alabaster v Woolwich plc and Secretary of State for Social Security*** [2004] IRLR 486, the ECJ held that UK statutory maternity pay (SMP) legislation does not comply with EU law in that a woman who receives a pay increase before the start of her maternity leave must be entitled to have the increase taken into consideration in the calculation of the earnings-related element of her statutory maternity pay, even though the pay rise was not backdated to the relevant reference period for calculating her entitlement under the Statutory Maternity Pay (General) Regulations. Under the current rules, a pay increase during maternity leave is only taken into account in the SMP calculation if it is backdated. The ECJ reasons that the principle of non-discrimination requires that a woman who still has a contract of employment or an employment relationship during maternity leave must, like any other worker, benefit from any pay rise which is awarded between the beginning of the reference period and the end of maternity leave. "*To deny such an increase to a woman on maternity leave would discriminate against her since, had she not been pregnant, she would have received the pay rise.*" Since the decision was based on the equal pay provisions of Article 141 of the Treaty, it is directly enforceable against all employers, regardless of when the Government changes the SMP rules. This means that if a pay increase takes effect between the start of the SMP reference period and the end of the period during which SMP is received, the woman should be awarded the pay increase with effect from the same date as other staff. Interesting issues will now arise as to the rights of women who were incorrectly paid SMP by their employers and the time limits on any retrospective claims.

25. The latest stage of the litigation in the part-timers pension claims (brought by over 60,000 applicants) saw rulings by the EAT in ***Preston v Wolverhampton Healthcare NHS Trust (No. 3)*** [2004] IRLR 96 on various issues of general importance. Given the inevitability of further appeals in these cases, a summary of the EAT's rulings is probably sufficient at this stage:

- Where there has been a TUPE transfer during the course of the relevant employment, time does not start to run for an equal pay claim until the end of the employment with the transferee, in an

action against the transferor (this point had of course been complicated by the non-transfer of pension rights (TUPE reg 7), but it was held that this factor was outweighed by the general regime of automatic continuance with the transferee under reg 5).

- When the ECJ talks of the time limitation flowing from the end of a 'stable relationship' (in the case of a series of short-term contracts), the tests for such a relationship are that there is (a) a succession of short-term contracts, meaning three or more for an academic year or shorter; (b) concluded at regular intervals, clearly predictable and calculable precisely, or where the employee is called on frequently whenever a need arises; (c) relating to the same employment; and (d) to which the same pension scheme applies.
- There is a breach of the EqPA where pension scheme membership is compulsory for full-time staff but part-time staff are excluded
- There is no breach of the Act where pension scheme membership is compulsory for full-time staff but is optional for part-time staff
- It is not a breach of the Act (continuing or otherwise) if an employer has failed to inform staff of the removal of a barrier to scheme membership. It was observed that there might in such circumstances be a breach of an implied contractual duty to inform, under ***Scallly v Southern Health and Social Services Board*** [1991] IRLR 522, HL, but that would sound in different proceedings, not as an adjunct to an equal pay action.

26. One controversy in equal pay law that simply will not go away is whether in maintaining the defence in the Eq PA s1(3) that the difference in pay was due to a material factor other than sex it is necessary for the employer to show only the genuine existence of that factor, or whether the employer has to go further and show that the use of that factor was objectively justified. Domestic authority has favoured the former, ever since ***Tyldesley v TML Plastics Ltd*** [1996] IRLR 395, EAT, where it was held that objective justification only applies where the applicant goes further and shows that that factor was itself indirectly discriminatory against his or her sex. That approach was applied by the House of Lords in ***Strathclyde Regional Council v Wallace*** [1998] IRLR 146 and ***Glasgow City Council v Marshall*** [2000] IRLR 272. That seemed to settle the matter finally, but some commentators took comfort in the ECJ's decision in ***Brunnhofer*** C-381/99 [2001] IRLR 571, arguing that there were dicta there suggesting that EC law requires objective justification for any pay differentials. The EAT had to consider this argument in the case of ***Parliamentary Commissioner for Administration v Fernandez*** [2004] IRLR 22. The Employment Tribunal had held that objective justification was required, even though there was no evidence of indirect discrimination. The EAT disagreed and allowed the employer's appeal on this point, by a majority. They

held that **Brunnhofer** does *not* effect a major change in the law, which remains as stated by the House of Lords.

27. Furthermore, it remains incumbent upon an applicant to demonstrate prima facie sex discrimination before any burden to objectively justify is imposed upon the employer, see **Nelson v Carillion Services Ltd** [2003] ICR 1256 CA. This is notwithstanding the shift in the burden of proof under the Sex Discrimination Act.
28. Where, however, objective justification is required then financial difficulties will not suffice. That is the effect of the ECJ's decision in **Steinicke v Bundesanstalt für Arbeit** C/77/02 [2003] IRLR 892, where it was recognised that a member state has a wide margin of discretion in matters of social policy, but held that this must not be allowed to frustrate community law on equality. More specifically, even at state level, justification cannot be established on a cost basis alone.
29. On the other hand, if the explanation for the pay difference in question is length of service, then no further justification is required. That, at least is the effect of the EAT's ruling in **HSE v Cadman** [2004] IRLR 29. In that case, the applicant, a female H & S inspector, was paid between £4,000 and £9,000 less than her comparator inspectors in the same pay band. The reason for this was that they had longer service (thus giving them longer to progress up the pay band, or allowing them to join it at a higher level). In this case, indirect discrimination was shown, because the average length of service of the 17 female inspectors in the band was 4.4 years, whereas the average length of service of the 119 male inspectors was 16.3 years. The question arose as to the extent to which justification had to be shown on these particular facts because of longstanding case authority from the ECJ in **Danfoss** C-109/88 [1989] IRLR 532 that the use of length of service generally is justified, and does not have to be specifically justified on the facts of each case; this was because the ECJ equated length of service with greater experience which itself can attract higher payment. It was, however, argued by the applicant that subsequent case law had softened this line, requiring specific justification which (in her view) had not been shown in this case. After very full consideration of that case law (particularly **Nimz** C-184/89 [1991] IRLR 222, ECJ, **Enderby** C-127/92 [1995] IRLR 591, ECJ and **Hill v Revenue Commissioners** C-243/95 [1998] IRLR 466, ECJ) the EAT reaffirmed the traditional view in **Danfoss** as still being good law, especially as those cases primarily concerned comparisons between full-time and part-time employees. In comparison between full-time employees, the principle remains that length of service factors will in effect be deemed to be justified. The case is currently being appealed to the Court of Appeal (to be heard in July) and the applicant is seeking a reference to the ECJ to resolve this matter.

Sex and the City: Recent “Glass Ceiling” Cases and the Lessons to be Learned

30. The recent publicity surrounding the case brought by Stephanie Villalba against the investment bank Merrill Lynch is just the latest in a line of high-profile “City” cases brought by high-earning women complaining of unequal pay, demeaning conduct, and sexist and loutish language. In a recent article in The Times, such women have been described as “suffragettes of the 21st century”.
31. In the case of ***Heard and Fellows v Sinclair Roche and Temperley*** female partners pursued complaints of sex discrimination against the rest of the partnership. The Tribunal up-held their complaints and awarded damages against the rest of the partners (on a joint and several basis) but not the applicants themselves. This is a case that raises questions as to the proper attribution of damages in partnership cases (a point that will be considered on the firm’s appeal to the EAT later on this year) – an issue that has rarely troubled the Tribunals before, perhaps due to the failure of many women to reach partnership level until recent years.
32. In ***Barton v Investec Henderson Crosthwaite Securities Ltd*** [2003] IRLR, the EAT laid down guidance as to the correct approach to be taken in discrimination cases with the change in the burden of proof:
 - It is for an applicant in a sex discrimination case to prove facts from which the ET could, in the absence of an adequate explanation, conclude sex discrimination.
 - In deciding whether the applicant has proved such facts, it is important to remember that it would be unusual to find direct evidence of such facts and to remember that the outcome at this stage of the analysis depends on what inferences it is proper to draw from the primary facts as found by the ET.
 - The ET does not have to reach a definitive conclusion that such facts would lead to the conclusion that there was an act of discrimination. The ET is merely looking at the primary facts to see what inferences of secondary fact could be drawn.
 - Those inferences could include, in appropriate cases, any inferences it is just and equitable to draw from an evasive or equivocal reply to a questionnaire or any other questions that fell within s 74(2) of the 1975 Act.
 - The ET has to decide whether compliance with any code of practice is relevant, and, if so, to take that into account in determining such facts pursuant to s 56A(10) of the 1975 Act.
 - Where the applicant has proved such facts, the burden of proof moves to the respondent.

- To discharge the burden it is necessary for the respondent to prove that the treatment was in no sense whatsoever on the grounds of sex. Since the respondent would normally be expected to be in possession of such facts, the ET ought to expect cogent evidence to discharge the burden of proof. In particular, the ET ought to look carefully at explanations for failure to deal with the questionnaire procedure and/or code of practice.

33. Given the burden upon employers where the applicant can demonstrate a difference of treatment and a difference of sex, City institutions would be well-advised to take issues of equality of opportunity and diversity a lot more seriously. That requires the adoption, review and up-dating of policies, proper training, the introduction of transparent pay systems and a complaints procedure that inspires trust rather than hostility.

Damages for Unlawful Discrimination

34. In *Essa v Laing Ltd* (2004) *The Times*, 29 January, the Court of Appeal (by a majority of 2 to 1) upheld the approach adopted by the EAT to the assessment of damages in discrimination cases. In a discrimination case the applicant need only show a direct causal link between the unlawful acts of discrimination and the damage claimed; s/he does not have to go further and show that that damage was reasonably foreseeable by the employer. This is particularly important in the case of damages for injury to feelings, as on the facts of the case itself (given that, if the injury to feelings was sufficient to warrant an action in tort for psychiatric illness, there *would* be a requirement for reasonable foreseeability under the ordinary rules on remoteness of damage).

35. As to the amount that might be awarded by way of compensation for injury to feelings, Tribunals have continued to follow the guidelines set out by the Court of Appeal in *Chief Constable of West Yorkshire Police v Vento* [2003] IRLR 102. The Employment Tribunal had awarded Ms Vento just over £250,000 compensation including £50,000 for injury to feelings, £15,000 by way of aggravated damages and £9,000 for personal injuries when her claim for sex discrimination was upheld. The damages were reduced by the EAT and Ms Vento appealed to the Court of Appeal. The appeal court restored the tribunal's decision in relation to future loss of earnings, but agreed with the EAT that the damages for non-pecuniary loss were so excessive that they amounted to an error of law. A figure of £32,000 was substituted made up of £18,000 for injury to feeling, £5000 aggravated damages and £9000 for psychiatric damage. The Court of Appeal, giving general guidance, stated that three bands of compensation for injury for feelings can be identified: (1) awards of between £15,000 and £25,000 to be awarded in the most serious cases, such as where there has been a lengthy campaign of discriminatory harassment on the ground of sex or race (only in the most exceptional case should an

award of compensation for injury to feelings exceed £25,000); (2) a middle band of between £5,000 and £15,000 for serious cases, which do not merit an award in the highest band, and (3), awards of between £500 and £5,000 are appropriate for less serious cases, such as where the act of discrimination is an isolated or one off occurrence. The Court added that, in general, awards of less than £500 are to be avoided altogether, as they risk being regarded as so low as not to be a proper recognition of injury to feelings.

36. A minimum level of award was also suggested by the EAT in ***Doshoki v Draeger Ltd*** 2002 IRLR 340, when it was held to constitute an error of law for an employment tribunal to award £750 compensation for injury to feelings by reason of taunts and insults (which amounted to discrimination on grounds of race) as this was “*inadequate to a degree where it was wrong in law.*” £750 was held to fall “*at the very bottom, or very close to the very bottom, of the entire scale of awards of compensation for injury to feelings.*” Drawing an analogy with personal injury awards, Mr Justice Bell observed that “*£750 would nowadays be the minimum, or very close to the minimum, award for the very slightest physical injury deserving of damages at all.*” The EAT concluded that the award for injury to feelings in this case should be increased to £4,000.
37. The basis of an award of aggravated damages was considered by the EAT in ***Zaiwalla & Co v Walia*** [2002] IRLR 697, the case of a paralegal who was found to have been discriminated against and harassed on the ground of her sex when she was not given substantial legal work, was not assessed for a training contract, was not given proper supervision, and was found to have been treated in “a demeaning and discriminatory manner”. The tribunal awarded compensation of just under £45,000 including £15,000 injury to feelings and £7500 aggravated damages. The level of the award for injury to feelings was successfully challenged in the EAT. However, the challenge to the award for aggravated damages was unsuccessful. It had been argued by the employer, that the way in which a party conducts tribunal proceedings cannot sound in aggravated damages, but this submission was rejected by the EAT, which held that if a respondent misconducts itself in the defence of a discrimination case, it may amount to victimisation of the applicant in respect of the protected act of bringing the claim and it would be regrettable if this could only be compensated by the commencement of further proceedings. There were therefore sound policy reasons for allowing aggravated damages for the way in which proceedings had been conducted.
38. The question whether exemplary damages might be available in discrimination cases may have been resurrected by the decision in ***Kuddus v Chief Constable of Leicestershire Constabulary*** 2001 3 All ER 193, but this will only be so if compensation is insufficient to punish the wrongdoer and if the conduct is either (a) oppressive, arbitrary or unconstitutional action by the agents of government, or (b)

where the defendant's conduct has been calculated by him to make a profit which may well exceed the compensation payable to the applicant.

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