How to Prepare to Defend Big Discrimination and Whistleblowing Claims

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1 What we propose to do is to give a very general overview of the law as to direct discrimination and whistleblowing claims, and then talk about the practical steps we would suggest to prepare for the final hearing in such claims.

Legal overview

Direct discrimination

2 The starting point for direct discrimination is section 13 Equality Act 2010 ("EA"). By section 13(1) EA, person A discriminates against person B if, because of a protected characteristic, A treats B less favourably than A treats or would treat others. The protected characteristics include, among others, sex, disability, race, and religion or belief (section 4 EA).

3 Section 13 EA encompasses someone who is perceived to have a protected characteristic, even though they do not in fact have that protected characteristic: see the EHRC Code of Practice at [3.17]–[3.19].

4 The essential element which it is necessary to consider is whether the treatment complained of by the claimant is "*because of*" the fact of her sex, race and/or religion. There are two elements in direct discrimination:

a. The less favourable treatment; and
b. The reason for that treatment.

5 Direct discrimination also includes less favourable treatment of a person based on a stereotype relating to a protected characteristic, whether or not the stereotype is accurate: see the EHRC Code of Practice at [3.15].

6 To be treated less favourably necessarily implies some element of comparison. Accordingly, the claimant must have been treated differently to a comparator or comparators, be they actual or hypothetical.

7 It is necessary for the claimant to compare 'like with like' and the relevant circumstances of an actual or hypothetical comparator must not be materially different than those of the claimant: section 23 EA and ***Shamoon v Chief Constable of the Royal Ulster Constabulary*** [2003] ICR 337 (HL).

8 In ***Glasgow City Council v Zafar*** [1998] ICR 120, Lord Browne-Wilkinson put it this way (at 123):

> *"Although at the end of the day, … the Act … requires an answer to be given to a single question (viz has the complainant been treated less favourably than others on [the ground of that protected characteristic]?) … it is convenient for the purposes of analysis to split that question into two parts—(a) less favourable treatment; and (b) [on grounds of that protected characteristic]."*

9 Astructured approach to the issue of 'less favourable treatment' and the 'reason why' issue may be advisable, but it is not so in all cases. In ***Shamoon*** (at [7]-[8]), the House of Lords made it clear that sometimes it will not be possible to disentangle the issue of 'less favourable treatment' from the 'reason why' issue. If a tribunal decides that treatment was on the basis of the proscribed ground, then the finding of a suitable comparator is unlikely to prove much of a difficulty to the establishing of liability. Lord Nicholls said:

> *"7. When the claim is based on direct discrimination or victimisation, in practice tribunals in their decisions normally consider, first, whether the claimant received less favourable treatment than the appropriate comparator (the less favourable treatment issue) and then, secondly, whether the less favourable treatment was on the relevant proscribed ground (the 'reason why' issue). Tribunals proceed to consider the reason why issue only if the less favourable treatment issue is resolved in favour of the claimant. Thus the less favourable treatment issue is treated as a threshold the claimant*

must cross before the tribunal is called upon to decide why the claimant was afforded the treatment of which she is complaining.

8. No doubt there are cases where it is convenient and helpful to adopt this two-step approach to what is essentially a single question: did the claimant, on the proscribed ground, receive less favourable treatment than others? But, especially where the identity of the relevant comparator is a matter of dispute, this sequential analysis may give rise to needless problems. Sometimes the less favourable treatment issue cannot be resolved without, at the same time, deciding the reason why issue. The two issues are intertwined."

10 The reason for the conduct complained of will often be complicated because the factors underlying the unfavourable treatment may be 'because of' more than one reason and more than one protected characteristic. However, the protected characteristic does not have to be the only reason for the conduct, provided that it is an "*effective cause*" or "*significant influence*" for the treatment: ***Nagarajan v London Regional Transport*** [2000] 1 AC 501. The crucial question is "*why the complainant received less favourable treatment … was it on grounds of [a protected characteristic?]*" (at 510-511).

11 In ***Nagarajan*** their Lordships considered that if the protected characteristic (in that case, race) had a "*significant influence*" on the outcome, discrimination would be made out. In ***O'Neill v Governors of St Thomas More Roman Catholic Voluntary Aided Upper School*** [1997] ICR 33 the EAT said that the question the tribunal should ask is: "*What, out of the whole complex of facts … is the 'effective and predominant cause' or the 'real and efficient cause' of the act complained of?*" (at 43).

12 Important guidance was provided in the case of ***Barton v Investec Limited*** [2003] ICR 1205, where the Court of Appeal handed down 13 guidelines (at [25], albeit referencing the previous statutes which have been removed below for ease of reference):

"(1) … it is for the applicant to prove on the balance of probabilities facts from which the tribunal could conclude, in the absence of an adequate explanation, that the respondents have committed an act of discrimination which is unlawful as having been committed against the applicant. These are referred to below as 'such facts'.

(2) If the applicant does not prove such facts he or she will fail.

(3) It is important to bear in mind in deciding whether the applicant has proved such facts that it is unusual to find direct evidence of race discrimination. Few employers would be prepared to admit such discrimination, even to themselves. In some cases the discrimination will not be an intention but merely based on the assumption that 'he or she would not have fitted in'.

(4) In deciding whether the applicant has proved such facts, it is important to remember that the outcome at this stage of the analysis by the tribunal will therefore usually depend on what inferences it is proper to draw from the primary facts found by the tribunal.

(5) It is important to note the word is 'could'. At this stage the tribunal does not have to reach a definitive determination that such facts would lead it to the conclusion that there was an act of unlawful discrimination. At this stage a tribunal is looking at the primary facts proved by the applicant to see what inferences of secondary fact could be drawn from them.

(6) In considering what inferences or conclusions can be drawn from the primary facts, the tribunal must assume that there is no adequate explanation for those facts.

(7) These inferences can include, in appropriate cases, any inferences that it is just and equitable to draw … from an evasive or equivocal reply to a questionnaire …

> *(8) Likewise, the tribunal must decide whether any provision of any relevant code of practice is relevant and if so, take it into account in determining such facts … This means that inferences may also be drawn from any failure to comply with any relevant code of practice.*
>
> *(9) Where the applicant has proved facts from which inferences could be drawn that the respondents have treated the applicant less favourably on the grounds of [race], then the burden of proof moves to the respondent.*
>
> *(10) It is then for the respondent to prove that he did not commit, or as the case may be, is not to be treated as having committed that act.*
>
> *(11) To discharge that burden it is necessary for the respondent to prove, on the balance of probabilities, that the treatment was in no sense whatsoever on the grounds of [race], since 'no discrimination whatsoever' is compatible with the Burden of Proof Directive.*
>
> *(12) That requires a tribunal to assess not merely whether the respondent has proved an explanation for the facts from which such inferences can be drawn, but further that it is adequate to discharge the burden of proof on the balance of probabilities that [race] was not any part of the reasons for the treatment in question.*
>
> *(13) Since the facts necessary to prove an explanation would normally be in the possession of the respondent, a tribunal would normally expect cogent evidence to discharge that burden of proof. In particular the tribunal will need to examine carefully explanations for failure to deal with the questionnaire procedure and/or code of practice."* (emphasis added)

13 These guidelines include the amendment by ***Igen v Wong*** [2005] ICR 931, which added guideline (6) above.

14 The Supreme Court in ***Hewage v Grampian Health Board*** [2012] ICR 1054 endorsed the approach of the Court of Appeal in ***Igen*** and ***Madarassy v Nomura International plc*** [2007] ICR 867, with Lord Hope commenting (at [32]) that "*I see no need for any further guidance*".

15 In ***Madarassy***, Mummery LJ said that while it is for the claimant to prove facts from which, in the absence of an adequate explanation, it may be inferred that the respondent committed an unlawful act of discrimination, in considering whether a prima facie case was established the tribunal should not only consider evidence of a difference in status and treatment, but must also consider the reason for the differential treatment and evidence produced by the respondent contesting the complaint. He said (at [57]):

> *"'Could … conclude' in section 63A(2) must mean that 'a reasonable tribunal could properly conclude' from all the evidence before it. This would include evidence adduced by the complainant in support of the allegations of sex discrimination, such as evidence of a difference in status, a difference in treatment and the reason for the differential treatment. It would also include evidence adduced by the respondent contesting the complaint. Subject only to the statutory 'absence of an adequate explanation' at this stage … the tribunal would need to consider all the evidence relevant to the discrimination complaint; for example, evidence as to whether the act complained of occurred at all; evidence as to the actual comparators relied on by the complainant to prove less favourable treatment; evidence as to whether the comparisons being made by the complainant were of like with like as required by section 5(3) of the 1975 Act; and available evidence of the reasons for the differential treatment."*

16 As such, it is only once the tribunal has considered all the relevant evidence that a tribunal can reach a conclusion as to the first part of the first test. At that stage the burden of proof moves to the respondent to prove that it has not committed an act of unlawful discrimination.

17 It is unnecessary for a claimant to show a conscious motive or intent on the part of a respondent to treat her less favourably on proscribed grounds. In the case of direct discrimination, while the Employment Tribunal will be considering the motivation of the respondent and its employees, the motivation may be conscious or unconscious: ***Nagarajan***.

18 So, in claims of discrimination, if there are facts from which the tribunal could decide, in the absence of any other explanation, that person A contravened the provision concerned, then the tribunal must hold that the contravention occurred, unless A shows that A did not contravene the provision: section 136 EA. Essentially, if the claimant proves facts from which the tribunal could conclude, in the absence of an adequate explanation, that the respondent committed unlawful acts of discrimination against them then the burden shifts to the respondent to show that there is a lawful non-discriminatory explanation; and if the respondent fails to discharge that burden the claim will necessarily succeed: ***Ayodele v Citylink Ltd*** [2018] ICR 748, per Singh LJ at [36], [37], [54], and [106].

Whistleblowing

19 A'whistleblower' is someone who makes a protected disclosure. A purported whistleblower may bring a claim for 'whistleblowing detriment' (under section 48 Employment Rights Act 1996 ("ERA")), and if they are an employee may also bring a claim for automatic unfair dismissal (under section 103A ERA). The definition of protected disclosure is the same for both sorts of claim.

20 The term 'whistleblower' may also be used to describe somebody who does a protected act as defined in section 27 EA, which gives the definition of victimisation under that act. For reasons of time and space, this paper and its accompanying talk focus on the ERA scheme rather than the EA scheme. Please note that although some of the cases below refer to 'victimisation for having made protected disclosures', they are nonetheless referring to detriment claims made under the ERA rather than victimisation claims under section 27 EA.

21 Per section 43A ERA, a protected disclosure is a 'qualifying disclosure' made by a worker in accordance with any of sections 43C-H ERA. Five elements must be satisfied for there to have been a qualifying disclosure:

i) There was a disclosure of information;

ii) The worker believed that the disclosure was made in the public interest;

iii) The worker's belief that the disclosure was made in the public interest was reasonably held;

iv) The worker believed that the disclosure tended to show one or more of the matters listed in section 43B(1)(a) to s.43B(1)(f); and

v) If the workers belief that the disclosure tended to show one or more of the matters listed in section 43B(1)(a) to s.43B(1)(f) was reasonably held.

22 There must be an actual disclosure of information. Merely making an allegation (***Cavendish Munro v Geldud*** [2010] ICR 325, ***Kilraine v Wandsworth LBC*** [2016] IRLR 422 (EAT) and [2018] ICR 1850 (CA)), raising a personal grievance (***Smith v London Metropolitan University*** [2011] IRLR 884 (EAT)) and/or expressing an adverse opinion of what the employer was proposing to do (***Goode v Marks & Spencer plc*** UKEAT/0442/09) is insufficient.

23 ***Cavendish Munro*** makes it clear that there is no bright line divide between 'information' and 'allegation'; instead, there is a spectrum of possibilities, and the question is whether the putative disclosure contains sufficient information in all the circumstances to qualify: ***Kilraine*** (CA).

24 There is no requirement that the disclosure actually be in the public interest. Rather, the tribunal must consider whether the claimant subjectively believed it was in the public interest (***Morgan v Royal Mencap Society*** [2016] IRLR 428), and whether this belief was reasonably held taking into account the number of people whose interests the disclosure served, the nature of the interests affected and the extent of the effect, the nature of the wrongdoing disclosed, and the identity of the alleged wrongdoer (***Chesterton Global v Nurmohamed*** [2015] ICR 920, per Underhill LJ at [37]).

25 ***Blackbay Ventures v Gahir*** [2014] ICR 747 sets out the structured approach that an Employment Tribunal should adopt to identify protected disclosures (at [98]):

> *"1. Each disclosure should be identified by reference to date and content.*
>
> *2. The alleged failure or likely failure to comply with a legal obligation, or matter giving rise to the health and safety of an individual having been or likely to be endangered or as the case may be, should be identified.*
>
> *3. The basis on which the disclosure is said to be protected and qualifying should be addressed.*
>
> *4. Each failure or likely failure should be separately identified.*
>
> *5. Save in obvious cases, if a breach of a legal obligation is asserted, the source of the obligation should be identified and capable of verification by reference for example to statute or regulation. It is not sufficient as here for the employment tribunal to simply lump together a number of complaints, some of which may be culpable, but others of which may simply have been references to a check list of legal requirements or do not amount to disclosure of information tending to show breaches of legal obligations...*
>
> *6. The tribunal should then determine whether or not the claimant had the reasonable belief referred to in section 43B(1) and under the 'old' law whether each disclosure was made in good faith; and under the 'new' law whether it was made in the public interest.*
>
> *7. Where it is alleged that the claimant has suffered a detriment, short of dismissal it is necessary to identify the detriment in question and where relevant the date of the act or deliberate failure to act relied on by the claimant. This is particularly important in the case of deliberate failures to act because unless the date of a deliberate failure to act can be ascertained by direct evidence the failure of the respondent to act is deemed to take place when the period expired within which he might reasonably have been expected to do the failed act.*
>
> *8. The tribunal under the 'old' law should then determine whether or not the claimant acted in good faith and under the 'new' law whether the disclosure was made in the public interest."*

26 In ***Harrow LBC v Knight*** [2003] IRLR 140, Mr Recorder Underhill QC (as he then was) identified (at [5]) the three findings an Employment Tribunal would have to make for liability to be established, once the protected disclosures had been identified, namely that:

a. the worker has suffered an identifiable detriment or detriments;

b. there has been an act or deliberate failure to act by the respondent by which the worker has been subjected to the identified detriment or detriments. This therefore focuses on the link between the detriment and the act or omission; and

c. the act or deliberate failure to act was 'done on the ground that' the worker made the protected disclosure or disclosures. This focuses on the reason for the act or omission.

27 It is for the claimant to establish that she made a protected disclosure or disclosures and that there were acts or deliberate failures to act on the part of the respondent. If the claimant establishes that she made protected interest disclosures and that there were acts or deliberate failures to act on the part of the respondent, then it is for the respondent to show, on balance of probability, why it acted as it did i.e. to show the ground upon which any act or deliberate failure to act was done: section 48(2) ERA.

28 For the purposes of Part V ERA (protection from detriments in employment), the respondent must prove on the balance of probabilities that the act, or deliberate failure to act, complained of was not on the grounds that the employee had done the protected act, viz. that the protected interest disclosure(s) did not materially influence, in the sense of being more than a trivial influence, the respondent's treatment of the claimant: ***Fecitt v NHS Manchester*** [2012] ICR 372 (CA).

29 For the purposes of Part X ERA (unfair dismissal) and section 103A ERA, the respondent must prove on the balance of probabilities that the protected disclosures of the claimant were not the principal reasons for the acts or deliberate failures to act by the respondent: see ***Royal Mail Group Ltd v Jhuti*** [2018] ICR 982, per Underhill LJ at [20], [27], and [38].

30 Further, a respondent will not be liable if it can show that the reason for its act or deliberate omission was not the protected act as such, but rather one or more features and/or consequences of it which were properly and genuinely separable from it: see ***Martin v Devonshires Solicitors*** [2011] ICR 352 (EAT), ***Panayiotou v Kernaghan*** [2014] IRLR 500 (EAT), ***Bolton School v Evans*** [2007] ICR 641 (CA).

31 In ***Kuzel v Roche Products Limited*** [2007] ICR 945 the EAT summarised (at [47]) the proper approach to the burden of proof question in unfair dismissal cases as follows:

> *"(1) Has the claimant shown that there is a real issue as to whether the reason put forward by the employers … was not the true reason? Has she raised some doubt as to that reason by advancing the section 103A reason?*
>
> *(2) If so, have the employers proved their reason for dismissal?*
>
> *(3) If not, have the employers disproved the section 103A reason advanced by the claimant?*
>
> *(4) If not, dismissal is for the section 103A reason."*

32 This analysis was later approved by the Court of Appeal in ***Kuzel v Roche Products Limited*** [2008] ICR 799 at [62].

33 The liability inquiry must always be as to the mental processes of the decision maker (why it made the decision), and not as to a broad 'but for' analysis of events: ***Knight***. The Employment Tribunal must look at the motivation of the manager doing the act or deliberately failing to act and so imposing the detriment; only if he or she was motivated by the whistleblowing can the respondent be liable: see ***Reynolds v CLFIS UK Ltd*** [2015] ICR 1010.

Practical steps

34 What follows from this whistlestop (and necessarily incomplete) summary of the law is that respondents must be especially careful in preparing their evidence for the hearing. We will address this in more detail in our oral address under the following main headings:
a. Strike outs and preliminary issues.
b. Requests for further and better particulars.
c. Tabulating the issues.
d. Identifying the witnesses to address each of the issues.
e. Adequate conferences/consultations with the witnesses.
f. Preparing a witness timetable.
g. The final hearing.

35 We would also highlight the importance of not subjecting whistleblowers to misguided disciplinary proceedings: see Chapter 3 of the 2020 Home Office Guidance, which provides a short but useful overview of the responsibilities on those within the Police Service to challenge improper conduct, and the circumstances in which an allegation or concern could amount to a protected disclosure.