

## ENFORCEMENT OF ANTI-DISCRIMINATION LAW

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### 1. Is Anti-discrimination Law Enforced?

#### *Introduction*

Yes. UK anti-discrimination law is enforced – albeit primarily by means of private individuals bringing tort-style claims against alleged discriminators under the relevant provisions of the UK’s anti-discrimination legislation, rather than by enforcement action initiated by NGOs or public bodies such as the Equality and Human Rights Commission (EHRC).

More detail follows on this below, as well as on recent developments which may be having a negative impact on enforcement of the law in this area. However, to provide some context for this information, it is necessary at the outset to outline some of the key features of anti-discrimination law in the UK.

#### *The Legislative Framework*

The framework of legal norms that make up British anti-discrimination law has been laid down in progressive stages, from the enactment of the (limited) Race Relations Acts 1965 and 1968 to the much more comprehensive Equal Pay Act 1970 (covering pay differentials linked to gender), the Sex Discrimination Act 1975 and the Race Relations Act 1976, and subsequently through to the enactment of the Disability Discrimination Act 1995, the implementation via regulations in 2003 and 2006 of the EU Framework Equality Directive 2000/78/EC which prohibited for the first time discrimination in employment on the grounds of age, religion or belief and sexual orientation, and ultimately to the enactment of the comprehensive and codifying Equality Act 2010. Direct and indirect discrimination, victimisation and harassment on the basis of a number of ‘protected characteristics’, namely age, disability, gender reassignment, marital status, religion or belief, race and ethnicity, sex and sexual orientation, are prohibited by the 2010 Act.<sup>1</sup> (A different legislative framework applies to Northern Ireland, whose broad contours are nevertheless similar to that applying to Britain – with the significant exception that discrimination on the basis of political opinion is also prohibited.) Supplementary legislation regulates matters such as maternity, paternity and paternal leave and associated rights.

Legislation is thus the primary source of UK anti-discrimination law. In contrast, the common law has played little or no meaningful role in this regard. However, the provisions of the European Convention on Human Rights (ECHR), as interpreted by the Strasbourg-based European Court of Human Rights (ECtHR) and/or the UK courts giving effect to the Human Rights Act 1998 which have made Convention rights enforceable in national law, have plugged some gaps in protection – as in the ‘gays in the military’ case of *Smith and Grady v UK*, where the ECtHR held that the UK’s ban on gays serving in the armed forces breached the right to private life as protected by Article 8 ECHR.<sup>2</sup>

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<sup>1</sup> For the scope of the 2010 Act, see below.

<sup>2</sup> (1999) 29 EHRR 493. The UK is obliged under Article 46 of the ECHR to give effect to judgments of the Court. This international law obligation has significant normative force in the European context.

More significantly, the requirements of EU law have played an important role in extending protection against discrimination in the UK: all UK legislation pending Brexit has to be interpreted with reference to the non-discrimination provisions of the EU treaties and anti-discrimination directives, as interpreted by the Court of Justice of the EU (CJEU) - whose purposive approach to the interpretation of these EU norms has resulted in various aspects of UK law being struck down or re-interpreted to ensure conformity with their requirements.<sup>3</sup>

### *Awareness of the Law*

Thanks to the influence of EU law, and the manner in which the Equality Act 2010 standardised key elements of the legislative framework, UK anti-discrimination law is now comparatively detailed, clear and well-developed. It also enjoys a high profile. Private employers, service providers, trade unions, legal advice centres and public authorities will in general have some awareness of the basic requirements of anti-discrimination law, in particular as it relates to employment. Anti-discrimination cases are regularly appealed to the superior courts, including the UK Supreme Court (which for example is hearing two high-profile actions relating to the scope of indirect discrimination in November 2016). Anti-discrimination law is often taught as a core element of EU law, employment law and human rights law courses in UK law schools, and activist NGOs and other campaigning groups regularly invoke its provisions. Furthermore, the UK media also regularly run stories about particularly important or controversial cases.

### *Patterns of Individual Enforcement*

As a consequence, anti-discrimination law generates a relatively high level of litigation – in particular in the employment context - and has done so for several decades now. For example, 34,606 discrimination claims were initiated before employment tribunals in England and Wales in 2012/3.<sup>4</sup> Gender-related cases made up the clear majority of these claims, followed by disability, age and race claims in descending order, with religion/belief and sexual orientation claims bringing up the rear.<sup>5</sup> These figures are broadly consistent with data from previous years, dating back to the 1980s and early 1990s when UK anti-discrimination law first ‘bedded down’ and became influenced by the more expansive scope of EU equality law.

Claimants bringing discrimination claims face considerable hurdles. Many employment discrimination claims are often withdrawn before a final judicial determination (30% according to a 2014 survey).<sup>6</sup> Furthermore, the success rate in employment discrimination cases is notoriously low: the 2014 survey concluded that only 22% of claims that proceed to a full hearing before an employment tribunal were successful,<sup>7</sup> while in 2012 another study concluded that only 3% of all

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<sup>3</sup> See e.g. Case C-303/06, *Coleman v Attridge Law* [2008] IRLR 722. The influence of EU law over UK anti-discrimination law will presumably be cut off if and when the process of ‘Brexit’ from the EU is completed.

<sup>4</sup> This set of statistics from 2012/3 is used as it predates the introduction of tribunal fees in 2013 – see below.

<sup>5</sup> In 2012/3, 17,406 sex discrimination claims together with 451 maternity/paternity-specific cases were initiated, compared to 6,985 disability claims, 4,679 age claims, 2,523 race claims, 948 religion or belief claims, and 614 sexual orientation claims. See Ministry of Justice, *Tribunal Statistics, Annex C: Management Information on Employment Tribunal Receipts, 2012-15*, available at <https://www.gov.uk/government/statistics/tribunals-and-gender-recognition-certificate-statistics-quarterly-january-to-march-2015>.

<sup>6</sup> Department of Business Innovation and Skills, *Findings from the Survey of Employment Tribunal Applicants*, June 2014, available at [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/316704/bis-14-708-survey-of-employment-tribunal-applications-2013.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/316704/bis-14-708-survey-of-employment-tribunal-applications-2013.pdf) (‘SETA 2014’), p. 181, Table 5.2.

<sup>7</sup> *Ibid.*

discrimination claims initiated in the employment sphere resulted in a positive finding by a tribunal that discrimination had taken place.<sup>8</sup> Tight time limits are imposed, which only give claimants three months to initiate an employment claim and six months to initiate a goods and services claim. Legal aid is not available in employment claims: claimants are supposed to be able to represent themselves before the employment tribunals, which adopt simplified rules of proceeding as opposed to courts - but, in practice, litigating discrimination claims can be difficult to do without legal assistance. Furthermore, as discussed in further detail below, no class actions in the US sense of the term are possible in UK law. This means that discrimination claims must be brought on an individualised basis – which in turn means that individuals who lack access to legal advice and support, or who are particularly vulnerable to retaliatory action and/or to being depicted as ‘troublemakers’ in their field of employment, may be deterred from initiating claims.

However, despite these problems, it is widely accepted that UK anti-discrimination law in general has real enforcement ‘teeth’. This is due to the frequency with which individuals (often supported by trade unions, legal advice centres or the equality commissions<sup>9</sup>) have been prepared to bring actions against employers and service providers for apparent breaches of the legislation. A legal culture has been established, in which discrimination claims are relatively commonplace – and, as a consequence, discrimination law has acquired real regulatory influence. An important factor in this regard is the adverse media attention that a finding of discrimination will often attract: this embarrassment factor plays a significant role in encouraging compliance with the legislation.

In this respect, it is significant that employment cases could until recently be initiated and litigated without claimants having to pay a fee, or (in general) running the risk of having costs awarded against them.<sup>10</sup> This ensured that the employment tribunal system was accessible, which in turn generated a steady supply of enforcement actions. Furthermore, while as noted above the success rate of discrimination claims litigated to trial is very low, the employment tribunal system has historically still generated positive outcomes for many claimants. In this respect, it is significant that many discrimination claims are settled pre-trial: in 2012, 58% of initiated discrimination claims were settled.<sup>11</sup> Anecdotal evidence from leading practitioners in this field suggests that it is common for ‘clear cut’ cases of discrimination to be settled in favour of the claimant rather than litigated to trial.

The situation is a little different when it comes to discrimination in access to goods and services, housing, education and other non-employment areas of activity. Such claims are processed by the ordinary court system, where legal costs can be awarded against a complainant. This possibility appears to seriously limit the number of enforcement actions brought in this context. As a result, the

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<sup>8</sup> According to figures gathered by GQ Employment Law, just 710 out of 3,210 discrimination cases which were heard and determined by an employment tribunal were successful in 2014. In contrast, 18,847 ‘other’ non-discrimination employment law claims succeeded before a tribunal in the same year, out of a total of 30,498. However, the figures do not reveal the number of claims that were settled. See ‘Low Rate of Success for Discrimination Claims’, *New Law Journal*, 27 Nov 2014. In part, this low success rate may reflect the complexity of discrimination claims and the difficulty in proving that a protected characteristic was a ‘ground’ of unequal treatment. It may also reflect the fact that anecdotal evidence suggests that a certain proportion of discrimination claims are initiated as a way of putting pressure on employers to settle employment-related disputes which may have at best a tangential relationship with ‘discrimination’ as defined under law: the absence of a cap on damages in discrimination cases, and the extra moral opprobrium associated with discrimination as distinct from other forms of employment actions, may encourage this tendency.

<sup>9</sup> In 2012, 61% of persons bringing a discrimination claim received ‘assistance’ (broadly defined) on a day-to-day basis with the claim process: see SETA 2014, p.131, Table 3.14.

<sup>10</sup> Costs can be awarded where a claim is deemed to be ‘vexatious’.

<sup>11</sup> SETA, 2014, p. 181, Table 5.2. Only 11% go to a full hearing – see p. 184, Table 5.4.

volume of claims is low - usually in double or low triple figures annually.<sup>12</sup> However, NGOs and the equality commissions in Britain and Northern Ireland play an important role in helping to correct for this low volume of individual enforcement actions - generally through their support of test cases, or targeted legal action. As a consequence, it is relatively common for discriminatory policies and practices to be challenged even outside of the employment sphere, especially when public authorities are involved.

### *Recent Developments*

Given the UK's reliance on individual enforcement, in particular in the employment context, it is significant that a requirement has recently been introduced in 2013 that complainants must pay a fee of up to £950 to access the employment tribunal system.<sup>13</sup> These fees can be remitted where individuals are in receipt of certain forms of welfare support, but are applied in the clear majority of cases (an estimated 75% or so). Their imposition appears to have generated a significant decrease in discrimination claims being brought before employment tribunals – amounting to a drop of 68% in England and Wales in the first two years after they were introduced, with the number of sex discrimination claims being particularly affected.<sup>14</sup>

The imposition of these fees is highly controversial, and has been challenged before the courts on the basis that they interfere with access to justice contrary to the requirements of the common law, EU law and the ECHR.<sup>15</sup> It remains to be seen whether the decision to impose these fees will be reversed.<sup>16</sup> However, for now, there exists real concern that the precipitous decline in the number of employment discrimination cases being brought by individual complainants will seriously weaken enforcement of UK anti-discrimination law.

These concerns have been amplified by recent cuts of 25% or more to the budget of the EHRC, who play a residual role in enforcing anti-discrimination law by supporting individual cases, intervening in ongoing legal actions, and using their (infrequently deployed) investigative and inquiry powers - as

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<sup>12</sup> There is a paucity of statistics on the volume of non-employment discrimination claims. However, it seems as if 111 such cases were initiated in 2014: see the discussion by D. Pulley, 'Disability Discrimination: Number of Cases', 22 October 2015, available at <https://www.kingqueen.org.uk/disability-discrimination-number-of-cases/>.

<sup>13</sup> For details, see the guidance available at <https://www.gov.uk/employment-tribunals/make-a-claim>.

<sup>14</sup> In 2014/5, a total of 11,224 discrimination claims were initiated in England and Wales – compare this to the figure of 34,606 discrimination claims initiated in England and Wales in 2012/3 as mentioned above. More specifically, sex discrimination claims have fallen by 75%, sexual orientation and religion or belief claims by 71% and 66% respectively; race, disability and age claims by 58%, 59% and 61% respectively; and pregnancy and maternity claims by 49%. See Ministry of Justice, *Tribunal Statistics*, Annex C: Management Information on Employment Tribunal Receipts, 2012-15, Table C.4, available at <https://www.gov.uk/government/statistics/tribunals-and-gender-recognition-certificate-statistics-quarterly-january-to-march-2015>. Evidence from the Advisory, Conciliation and Arbitration Service (ACAS), who play an important role in resolving discrimination claims, suggests that the single most important reason given by claimants for not pursuing their claim was the costs imposed by tribunal fees: See Acas, *Research Paper: Evaluation of Acas Early Conciliation 2015*, p. 96-98 (Acas: London, 2015), available at <http://www.acas.org.uk/media/pdf/5/4/Evaluation-of-Acas-Early-Conciliation-2015.pdf>, which suggests that 26% of claimants were deterred by the new fee system.

<sup>15</sup> *R (Unison) v Lord Chancellor (No 2)* [2015] IRLR 911 (appeal pending to the Supreme Court).

<sup>16</sup> For an overview of the debate, see House of Commons Library, Briefing Paper No. 7081, *Employment Tribunal Fees*, 22 June 2016. The Scottish Government has announced that it intends to abolish this fee requirement as it applies in Scotland.

discussed further below. These budget cuts have substantially limited the ability of the EHRC to provide legal support to all but a handful of individual cases.<sup>17</sup>

### *An Alternative Model? Positive Duties*

Academic experts have for some time now identified this reliance on individual enforcement as a structural weakness of this area of British law. In response, a range of positive duties have been imposed on public authorities, requiring them to (i) take steps to promote equality of opportunity and (ii) to consult and publicise the measures they are taking to give effect to this obligation.<sup>18</sup> A failure by a public authority to comply with these obligations can be judicially reviewed. This has allowed NGOs and trade unions to challenge decisions by public authorities which neglected to give due weight to the requirements of these duties – thereby opening up a new enforcement route.

However, these positive duty requirements are ultimately procedural in nature.<sup>19</sup> Also, they only apply to the public sector – with the exception of the positive duty imposed on public and private employers in Northern Ireland to take steps to promote equality of opportunity between Catholics and Protestants,<sup>20</sup> and a soon to be introduced equal pay reporting duty imposed on large employers requiring them to publish their average mean and media gender pay gaps from 2018.<sup>21</sup>

As a consequence, the positive duty model remains for now a supplement to individual enforcement, notwithstanding the possibility that the latter mode of enforcement may in the future prove less effective than it has been in the past.

### *Conclusion*

In general, it remains to be seen whether UK anti-discrimination law will continue to be as effectively enforced as it has been over the last few decades. The introduction of employment tribunal fees, coming on top of other access to justice barriers, risks undermining the UK's comprehensive anti-discrimination legal framework by deterring the individual litigants who bear the burden of its enforcement.

## **2. How is Anti-discrimination Law Enforced?**

As the above analysis makes clear, UK anti-discrimination law is primarily enforced by individuals bringing tort-style claims under the Equality Act 2010 and associated legislation, in which they seek compensation and/or declaratory relief for alleged acts of unlawful discrimination which they have suffered. Such claims can be initiated before employment tribunals or county courts, depending on whether they relate to employment or other areas of social activity coming within the scope of discrimination law. However, no class actions in the US sense of the term are possible in UK law, meaning that discrimination claims must be lodged and litigated on an individual basis – although such claims may be grouped together and adjudicated on a combined basis, as happens in particular with equal pay claims.

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<sup>17</sup> See the Early Day Motion 382, *Budget for Equality and human Rights Commission*, House of Commons Session 2016-7, 21/07/2016, available at <https://www.parliament.uk/edm/2016-17/382>.

<sup>18</sup> S. 149 of the Equality Act 2010; s. 75 of the Northern Ireland Act 1998.

<sup>19</sup> A. McColgan, 'Litigating the Public Sector Equality Duty: The Story So Far' (2015) 35 *Oxford Journal of Legal Studies* 453.

<sup>20</sup> See the Fair Employment and Treatment Order (Northern Ireland) 1998.

<sup>21</sup> See Government Equalities Office, *Mandatory Gender Pay Gap Reporting*, Consultation Paper, February 2016, available at [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/504398/GPG\\_consultation\\_v8.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/504398/GPG_consultation_v8.pdf).

In such individual enforcement claims, UK legislation in line with the requirements of EU law provides for a shift of the burden of proof: if a claimant establishes facts on the balance of probabilities from which a court or tribunal could, in the absence of any other explanation, conclude that unlawful discrimination occurred, then the court or tribunal must conclude that discrimination did occur unless the alleged discriminator can prove otherwise.<sup>22</sup> This shift is designed to ensure more effective enforcement of discrimination law: it recognises that proof of discrimination can be notoriously difficult to obtain, and is designed to redress the scales in this respect.

Claimants also used to be able to require alleged discriminators to answer a questionnaire relating to the facts at issue in their claim, and courts and tribunals could draw negative inferences from evasive or incomplete answers. This procedure was been controversially abolished in 2014 as part of a government assault on 'red tape'. However, guidance provided by the Advisory, Conciliation and Arbitration Service (ACAS) indicates that claimants are still entitled to ask detailed questions from alleged discriminators – and that courts and tribunals may continue to draw negative inferences from inadequate answers.<sup>23</sup>

Compliance by public authorities with anti-discrimination law – or associated norms of human rights and (for now) EU law, as well as the requirements of the positive equality duties discussed above – can also be enforced via judicial review proceedings by individuals or NGOs with an interest in the matter at hand. The UK's equality commissions – the EHRC in Britain, and the Equality Commission for Northern Ireland (ECNI) – can also initiate judicial review proceedings in this regard. The equality commissions can also 'support' individual actions, by providing claimants with legal support and assistance, or 'intervene' in ongoing cases to advocate a particular interpretation or application of the legal framework.<sup>24</sup>

Equality commissions also have the power to initiative 'investigations' into whether particular public or private bodies are complying with anti-discrimination law. Such investigations can be commenced by equality commissions if they consider that evidence exists that a particular body is failing to comply with its obligations under anti-discrimination law. The investigating commission will then conduct a fact-finding exercise, in the course of which it can require alleged discriminators to give evidence, and may lead to a finding by the commission of non-compliance with the requirements of anti-discrimination law.<sup>25</sup>

However, these findings are not legally binding: if the alleged discriminator refuses to accept the commission's findings or give effect to any recommended remedial action, the commission will have to seek a court order upholding its determination. Furthermore, the procedural requirements of this process are relatively onerous – and a failure by a commission to comply with these requirements will expose it to legal challenge. When the UK equality commissions first began to exercise this power in the mid to late 1970s, they ran into numerous legal hurdles and faced judicial hostility directed at what one prominent judge described as the 'inquisitorial' nature of this process. As a consequence, the investigative powers of the equality commissions never assumed the central role

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<sup>22</sup> See s. 139 of the Equality Act 2010: also *Igen Ltd & Ors v Wong* [2005] EWCA Civ 142.

<sup>23</sup> ACAS, *Asking and Responding to Questions of Discrimination in the Workplace* (ACAS, 2014), available at <http://www.acas.org.uk/media/pdf/m/p/Asking-and-responding-to-questions-of-discrimination-in-the-workplace.pdf> (last accessed 12 October 2016).

<sup>24</sup> See in general C. O'Conneide, 'The Commission For Equality And Human Rights: A New Institution For New And Uncertain Times' (2007) 36(2) *Industrial Law Journal* 141-162.

<sup>25</sup> *Ibid.*

in enforcing anti-discrimination law that the original architects of the UK's 1970s anti-discrimination legislation wanted them to play.<sup>26</sup>

Instead, the equality commissions have tended to make use of their power to launch more wide-ranging 'inquiries' into how anti-discrimination law is being enforced and applied in particular areas of social or economic activity. Unlike investigations, such inquiries cannot lead to a finding of non-discrimination being made against a particular discriminator: instead, they serve as vehicles for highlighting the existence of compliance gaps in specific areas of business or public sector activity. This inquiry mechanism is therefore not an enforcement power as such. However, in tandem with NGO activism and media reporting, it can be effective in encouraging employers and service providers to comply with anti-discrimination law.

### **3. Who Enforces Anti-discrimination Law?**

As outlined above, UK anti-discrimination law is primarily enforced by individual claimants alleging they were subject to discrimination in the course of employment. NGOs, trade unions, the equality commissions and other associations may provide legal advice and support, but may not in general initiate claims on behalf of alleged individual victims of discrimination – unless the dispute in question involves the exercise of public power by a public authority, when they can bring a judicial review action to challenge such discrimination if they are deemed to have a 'sufficient interest' in the matter at hand.

As a result, the equality commissions play at best a residual role in enforcing anti-discrimination law, by supporting or intervening in individual actions or through the (very occasional) exercise of their investigative and inquiry powers as discussed above. However, the commissions, along with the unions, NGOs and other civil society associations, often provide claimants with legal assistance and advice.

Individual claimants come from a wide variety of backgrounds. Historically disadvantaged groups such as women and persons from black and minority ethnic (BME) groups are the prime 'users' of the law, as might be expected. However, the picture is a little complicated by regional variations: by way of example, a significant proportion of race discrimination cases initiated in Scotland are brought by persons of English ethnicity alleging discrimination on that basis.<sup>27</sup> Older men are more likely to bring age discrimination claims than other groups, while members of minority religious groups such as Muslims and Sikhs are proportionately more likely to bring religious discrimination claims than Christians/non-believers. There are some indications that public sector workers are more likely to bring discrimination claims than their private sector counterparts – perhaps reflecting higher levels of unionisation.

In contrast to many European states, ombudsmen do not play a significant role in enforcing anti-discrimination legislation. There exist several different ombudsmen offices in the UK, dealing with various types of issues – but their profile is relatively low, and their focus is on redressing administrative injustices rather than securing compliance with the law as such. As a result, it is very rare for discrimination issues to be adjudicated by them in the UK.

### **4. Who Benefits from the Enforcement of Anti-discrimination Law?**

Different groups are viewed as benefiting from the enforcement of UK anti-discrimination law, depending upon the grounds of claim at issue. Race discrimination law has provided 'visible' black

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<sup>26</sup> Ibid.

<sup>27</sup> See e.g. *BBC v Souster* [2001] IRLR 150.

and minority ethnic groups with a shield against prejudice – but the Irish, Poles and other white European minorities have also benefited. Many of the most prominent religious discrimination cases have been brought by Sikhs and Muslims, but evangelical Christians have also invoked the protection of the law in a number of recent very high-profile cases – often however without much success. Older persons have been the prime beneficiary of age discrimination claims, in particular older male middle-class employees working in relatively high-earning professions such as law – and in general younger workers are proportionately less likely to initiate discrimination claims.<sup>28</sup> Trade union members are proportionately more likely to initiate discrimination claims – as are women, members of religious and (in particular) ethnic minorities.<sup>29</sup>

LGBT persons have benefited considerably from the enforcement of anti-discrimination law over the decades, in particular via the quasi-constitutional protection afforded by the ECHR. Women have also been beneficiaries – in particular pregnant women or mothers, and women employed in occupationally segregated parts of the labour force who have benefited from some high-profile and high-value equal pay claims over the years (usually involving the public sector). However, concern remains that pregnancy discrimination remains all too common and that the law in this regard is insufficiently enforced.<sup>30</sup>

Disability discrimination law has been invoked by a range of different groups of persons with disabilities, including individuals with mental health problems. Many disability claims fail on the basis that the claimant is insufficiently disabled to qualify for protection under the legislation, mainly because their impairment is deemed to not to impair their day-to-day functioning to a substantial degree, or is not ‘long term’ in nature. This has raised concerns that the ‘moderately’ disabled may, perhaps paradoxically, be excluded from the protection of the legislation.

In Northern Ireland, members of the Catholic/Nationalist minority are viewed as the major beneficiaries of the ‘fair employment legislation in place there – and in particular of the positive duties it imposes on employers to take steps to promote equality of opportunity, which appear to have played a significant role in closing the sizeable gap that used to exist between the two communities when it came to employment and earning opportunities.

The enforcement activities of equality commissions, in tandem with their promotional work, is generally focused on securing greater equality of opportunity and equal treatment for members of disadvantaged groups such as women, BME and LGBT persons and people with disabilities. However, the commissions have been at pains to emphasise that everyone is potentially a beneficiary of the protection afforded by anti-discrimination law – pointing to the scope of age and disability discrimination law in particular in this regard.

## **5. Who is Harmed by the Enforcement of Anti-discrimination Law?**

Responses to this question will differ greatly, depending on how one defines ‘harm’. Certain disadvantaged groups appear to benefit less than others from enforcement of anti-discrimination

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<sup>28</sup> In 2012, only 5% of discrimination claims were initiated by persons 24 and younger: in contrast, 17% were initiated by persons in the 55-64 age range.

<sup>29</sup> In 2012, 73% of initiators of discrimination claims were of ‘white’ ethnicity: in contrast, 90% of British employees are ‘white’; 13% were of minority religious faith, as compared to 9% of employees; 54% were female, in contrast to 51% of all employees; 44% were members of trade union or staff association, as compared to 27% or so of all employees. See SETA, 2014.

<sup>30</sup> See EHRC, *Pregnancy and Maternity Discrimination Research Findings* 21 October 2016, available at <https://www.equalityhumanrights.com/en/managing-pregnancy-and-maternity-workplace/pregnancy-and-maternity-discrimination-research-findings>.

law than perhaps they should, such as pregnant women and persons with ‘moderate’ disabilities as discussed above. Other groups struggle to obtain what they would regard as favourable outcomes from discrimination law litigation – evangelical Christians would be a good example, again as previously noted.

Under-use of anti-discrimination law might also be viewed as a species of ‘harm’. As noted above, younger workers bring proportionately much fewer age discrimination claims than their older counterparts. Members of the white English ethnic majority also invoke race discrimination law to a comparatively lower degree than other ethnic groups, although as noted above the situation is more complicated in Scotland.

The operation of the positive duties in Britain – and the equal opportunities duty in Northern Ireland – seems to favour disadvantaged groups, as was their intention. From the perspective of traditionally dominant groups such as Protestant/Unionists in Northern Ireland, or white males across the UK, this may qualify as ‘harm’ if one adopts a zero-sum perspective on the matter. However, it should be noted that the UK and EU courts have adopted a largely symmetrical interpretation of anti-discrimination law, and UK law provides limited scope for positive action measures which favour disadvantaged groups.<sup>31</sup>

Public sector employers attract proportionately higher levels of discrimination claims.<sup>32</sup> So too do large employers.<sup>33</sup> In both cases, this may reflect the higher levels of unionisation in the public sector and in larger employers, which may help to generate a more protective environment for employees who bring a discrimination claim.

## **6. What Remedies are Provided by the Enforcement of Anti-discrimination Law?**

Under ss.119 and 124 of the Equality Act 2010, courts and employment tribunals may, if they find that unlawful discrimination has occurred, make a declaration as to the rights of the claimant and order the payment of appropriate compensation. Courts can also grant injunctive relief, requiring discriminators to refrain from engaging in on-going or future unlawful conduct.<sup>34</sup> Employment tribunals do not have this power, but can make recommendations to what a discriminating employer should do in the future to avoid any further breaches of the rights of the claimant. (The 2010 Act had originally given employment tribunals the further power to make recommendations relating to how employers were treating their wider workforce at large, but this power was controversially removed by subsequent legislation in 2015.<sup>35</sup>)

Damages may be awarded for direct discrimination, harassment and victimisation, irrespective of intention. In the case of indirect discrimination, if the defendant proves that the act of discrimination at issue was unintentional, then a tribunal or court must consider the adequacy of alternative remedies first before deciding to award damages.<sup>36</sup>

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<sup>31</sup> Sections 158-159 of the Equality Act 2010.

<sup>32</sup> In 2012, 56% of claims were initiated against private employers and 30% against public sector employers – which compares with 70% and 19% respectively of unfair dismissal claims. (Claims made against voluntary sector employees make up the rest.) SETA, 2014, p. 259, Table 8.6.

<sup>33</sup> SETA, 2014, p. 88.

<sup>34</sup> Discriminatory decisions by public authorities can also be overturned by judicial review, with the exception of Acts of Parliament: see e.g. s. 6 Human Rights Act 1998.

<sup>35</sup> S. 2 Deregulation Act 2015.

<sup>36</sup> S. 119(5)-(6) of the Equality Act 2010.

The compensation awarded under anti-discrimination legislation can include both pecuniary loss (e.g. non-payment of wages, loss of future earnings) and non-pecuniary loss (e.g. hurt to feelings, psychiatric harm). Compensation awards are governed by broadly the same legal principles that apply to other employment or tort claims. This means that the award of aggravated or punitive damages is rare, and awards in general remain relatively low, at least as compared to the size of US claims – which is a general feature of British tort law, i.e. not specific to the field of discrimination law, or even to employment law in general.

In 2012, monetary compensation was awarded in 80% of all successful claims, with £18,667 being the mean award.<sup>37</sup> However, it is possible for high awards to be made – depending upon the circumstances of a particular case, including in particular the salary of the claimant and the extent of any aggravated damages awarded. Compensation awards in excess of £1,000,000 are not unknown.<sup>38</sup> In this regard, it is significant to note that, in line with the requirements of EU law, there is no cap on the level of damages that can be awarded following a finding of unlawful discrimination: this is important, as it gives real teeth to discrimination law and ensures that it ‘bites’ even in areas such as financial services where a system of capped awards might deprive the legislation of any real effect. One of the consequences of this absence of a cap is that monetary compensation awards are on average notably higher in employment discrimination cases than for other types of employment law claims.<sup>39</sup>

In general, UK anti-discrimination law does not provide for employers and service providers to be excluded from public procurement tendering for breaches of anti-discrimination law. However, employers in Northern Ireland who fail to comply with their reporting and monitoring obligations imposed by the fair employment legislation in place there can be barred from tendering for public authority contracts – a sanction which is regarded as having considerable dissuasive effect.<sup>40</sup>

## **7. Who Supports the Enforcement of Anti-discrimination Law?**

The application of anti-discrimination law is generally quite uncontroversial in the UK, which contrasts interestingly with the highly charged political debates that surround other areas of human rights law such as the ECHR and HRA. While certain aspects of the legislation and the outcome of particular cases attract criticism (as noted in the following section), all mainstream British political parties would claim to be supportive of the Equality Act 2010 and committed to ensuring that its provisions are effectively enforced.

This reflects the fact that anti-discrimination legislation has come to be viewed as an essential regulatory tool in an increasingly multicultural state: politicians from both the left and right of the political spectrum acknowledge both the importance of the right to non-discrimination and the key role played by the legislation in securing this right. Support for the effective enforcement of anti-discrimination legislation would be particularly strong on the left of British politics, in particular within the Labour and Liberal Democratic parties – but the centre-right Conservative party would

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<sup>37</sup> SETA, 2014, Tables 5.5 and 5.9, p. 186 and 190. Note however that this mean is notably higher than other types of employment award, with £11,000 being the mean in unfair dismissal actions.

<sup>38</sup> See S. Cox, ‘£3m Sex Discrimination Case Winner: “Everyone Loses”’, *BBC Radio 4*, 30 April 2015, available at <http://www.bbc.co.uk/news/business-32514908>.

<sup>39</sup> Ministry of Justice, Tribunal and Gender Recognition Certificate Statistics Quarterly, April-June 2016, Employment Tribunal Tables E.1-E.11, available at <https://www.gov.uk/government/statistics/tribunals-and-gender-recognition-certificate-statistics-quarterly-april-to-june-2016>.

<sup>40</sup> See in general C. McCrudden et al, ‘Legal Regulation of Affirmative Action in Northern Ireland: An Empirical Assessment’ (2004) 24(3) *Oxford Journal of Legal Studies* 363-415.

also claim to support full enforcement of the legislation, notwithstanding its support for the introduction of employment tribunal fees in 2013.

Similarly, trade unions tend to be particularly vocal supporters of the anti-discrimination legislation and place great emphasis on the need to secure its effective enforcement. However, employer organisations are also generally supportive of the legislation and its various enforcement mechanisms – although, as noted in the following section, they are critical of what they would see as the potential for the employment tribunal system to be abused. The legal profession is also supportive of the enforcement of anti-discrimination law, with the leading professional bodies such as the Law Society and Bar Council being highly critical of the recent imposition of employment tribunal fees.

There is little hard evidence of general attitudes amongst the general public. However, it is widely assumed that women, disabled persons, members of minority non-Christian religious groups and persons of BME ethnicity are particularly supportive of the effective enforcement of the legislation – an assumption that tends to be reflected in the reluctance of mainstream politicians to criticise anti-discrimination law and the necessity of its enforcement in a direct manner.

## **8. Who Opposes the Enforcement of Anti-discrimination Law?**

At the political level, only the hard-right UK Independence Party has queried the need for anti-discrimination legislation. However, MPs from the centre-right Conservative and Unionist parties have periodically expressed concern about what they see as the excessively far-reaching and onerous requirements imposed on employers, service providers and public authorities by the legislation and, in particular, the manner in which it is applied and enforced. Certain media organs – in particular the right-wing newspapers *The Daily Mail* and *Daily Express* – have criticised the implementation of the legislation as contributing to a culture of ‘political correctness gone mad’. The odd judge has expressed similar concerns: however, in general,

Employer organisations have been critical of the functioning of the employment tribunal system in general – which in their view is too accommodating of ‘weak’ or poorly-supported claims. These concerns influenced the introduction of tribunal fees in 2013, in tandem with the desire of the then Conservative-Liberal Democrat coalition government to cut costs by making the tribunal system recoup its own costs of functioning from users of the system. Although this view is not usually publicly articulated, the imposition of fees is viewed by many employers as a mechanism for deterring uncertain or borderline claims.

Concern about the regulatory impact of anti-discrimination legislation has also made successive governments reluctant to impose positive equality duties on the private sector, or to expand the enforcement powers of the equality commissions. Some high-profile policy advisers linked to the Conservative party have argued for radical reforms to be made to employment law, including the abolition of maternity leave.<sup>41</sup> Leading Conservative politicians, including the current Prime Minister Theresa May MP, have called for repeal of the HRA and even UK withdrawal from the ECHR – which would weaken protection against discrimination and limit the scope of available remedies against public authorities.

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<sup>41</sup> See e.g. *Daily Telegraph*, ‘David Cameron’s Senior Adviser Steve Hilton Suggests UK Should Abolish Maternity Leave’, 28 July 2011, <http://www.telegraph.co.uk/news/politics/david-cameron/8667058/David-Camerons-senior-adviser-Steve-Hilton-suggests-UK-should-abolish-maternity-leave.html>.

Concerns that the enforcement of anti-discrimination legislation impose undue constraints upon religious freedom have also surfaced in public debate: conservative Christian groups have been particularly critical of how the legislation has been interpreted and applied in a number of cases involving clashes between the right to non-discrimination on grounds of sexual orientation and the right to express one's religious beliefs.<sup>42</sup>

As yet, these critical perspectives have not exerted much impact on the national policy agenda in the field of equality and non-discrimination. However, it remains to be seen how the situation will develop over the next few years, especially now the UK will be exiting the EU and presumably will thus no longer be subject to any legal requirement to give effect to the requirements of EU equality law.

### **9. How Broad is the Coverage of Anti-discrimination Law?**

As outlined above, UK anti-discrimination legislation in the form of the Equality Act 2010 covers the 'protected characteristics' of age, disability, gender reassignment, marital status, religion or belief, race and ethnicity, sex and sexual orientation – with the Northern Irish legislation also covering political opinion. Supplementary rights are secured by the legislation regulating maternity leave and associated matters, with the HRA providing a quasi-constitutional layer of protection for the right to non-discrimination set out in Article 14 ECHR.

The 2010 Act and its Northern Irish counterparts prohibits direct and indirect discrimination, harassment and victimisation throughout all sectors of private and public employment, self-employment and occupation - including military service, contract work, self-employment and the discharge of statutory office.<sup>43</sup> This prohibition on discrimination in employment and occupation covers access (including selection criteria and recruitment conditions), promotion at all levels, employment and working conditions (including pay and dismissals), occupational benefits (including pensions and social security), access to vocational training and guidance, and membership of unions and other employment-linked organisations.

Certain limited statutory exceptions exist to this general prohibition of discrimination in employment and occupation. For example, the prohibition of age and disability discrimination does not apply to the armed forces.<sup>44</sup> Occupation in a purely voluntary capacity, as when a person volunteers to work for a NGO, fall outside the scope of the anti-discrimination legislation – as confirmed by the UK Supreme Court in *X v Mid-Sussex Citizens Advice Bureau*.<sup>45</sup> Furthermore, in the case of *Jivraj v Hashwani*,<sup>46</sup> the Supreme Court ruled that arbitrators were not 'employed', on the basis that they were not employed or otherwise in a position of subordination to the parties involved in the arbitration: the scope of this 'non-subordinate' exception is not clear, and may be clarified by further litigation.

The legislation also applies to the provision of goods and services, education, housing (including rental arrangements), transport, membership of associations and the performance of public functions – the latter including matters such as policing, social security, health care and related governmental activities performed by or on behalf of the state.<sup>47</sup> The UK legislation thus replicates

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<sup>42</sup> See e.g. *Bull v Hall* [2013] UKSC 73.

<sup>43</sup> See e.g. sections 39-83 Equality Act 2010.

<sup>44</sup> Sch.9, para 4(3) Equality Act 2010, and equivalent provisions in the Northern Irish legislation.

<sup>45</sup> [2013] UKSC 59. This restriction may not conform to the requirements of EU law: see UK National Report 2015-6, EU Network of Discrimination Law Experts.

<sup>46</sup> [2011] UKSC 40.

<sup>47</sup> See in general 28-31, 32-38, 84-107/160-187,

and goes beyond the provisions of the key EU non-discrimination directives: it covers most forms of social activities.

Again, however, some limited exceptions exist relating to certain protected characteristics to the otherwise comprehensive and wide-ranging scope of this legislation: they concern issues such as national security and border control, the entitlement of bodies possessing a particular 'religious ethos' to protect this ethos, genuine occupational requirements and so on.<sup>48</sup> Schedules 22 and 23(1) of the Equality Act 2010 also clarifies that anti-discrimination legislation does not make unlawful something permitted by another statute: discriminatory provisions in other statutes can only be challenged via the HRA and ECHR, or (for now) by reference to EU law.

#### **10. Does the Enforcement of Anti-discrimination Law Vary According to the Ground of Discrimination?**

As noted above, data from 20102 indicate that sex discrimination and related issues (maternity leave etc.) accounted for the majority of anti-discrimination claims brought in that year – reflecting a general pattern which has been consistent for many years now. Disability and age discrimination are the next biggest categories, followed by race, and then by religion or belief and sexual orientation.<sup>49</sup> However, it should be noted that there are also regional variations in these patterns, reflecting in particular BME patterns of settlement across the UK.

In general, a similar approach is adopted by courts and tribunals in applying anti-discrimination law across the different protected grounds: key concepts such as the definitions of direct and indirect discrimination are applied on a more or less consistent manner throughout the case-law.<sup>50</sup> Concern has however been expressed that the courts have adopted a narrower approach to the interpretation of the prohibition on direct discrimination on the basis of religion or belief than they do in other contexts.<sup>51</sup>

Furthermore, the success rate in race and religious discrimination cases tend to be significantly less than for certain other types of anti-discrimination claim: for example, in 2010-11, only 16% of race discrimination claims and 18% of religious discrimination claims which received a full hearing before an employment tribunal were successful, as compared to 37% of sex discrimination claims.<sup>52</sup> The low rate of success for religious discrimination claims is widely attributed to the complex nature of such claims and the currently unsettled state of the case-law in this regard. However, the case-law in

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<sup>48</sup> See e.g. Schedules 3, 5, 9, 11, 16 and 23 of the Equality Act 2010.

<sup>49</sup> As also noted above, the sharp decrease in the number of claims being brought following the introduction of tribunal fees has particularly impacted on the numbers of sex discrimination claims – but this down-turn has also impacted across the board.

<sup>50</sup> See e.g. *Bull v Hall* [2013] UKSC 73.

<sup>51</sup> A. McColgan, 'Class Wars? Religion and (In) equality in the Workplace' (2009) 38 *Industrial Law Journal* 1-29.

<sup>52</sup> 780 sex discrimination claims received a full hearing, with 290 being successful - a success rate of 37%. 84 sexual orientation claims were heard, with 22 being successful – a success rate of 26%. For disability, 830 claims were heard, with 190 being successful – a rate of 23%. For age, 410 were heard and 90 were successful – a rate of 22%. For religion or belief, 147 claims were heard, with 27 being successful – a rate of 18%. For race, 950 claims were heard, 150 successful – a rate of 16%. See *Employment Tribunals and EAT Statistics, 2010-2011* (London: HM Courts & Tribunals Service, 2011), p.8. This reflects a set annual pattern: J. Aston et al, *The Experience of Claimants in Race Discrimination Employment Tribunal Cases*, Employment Relations Research Series No. 55, Department of Trade and Industry/Institute for Employment Studies, 2006.

respect of race discrimination is relatively settled – which has generated claims that a ‘culture of disbelief’ exists in respect of such cases.<sup>53</sup>

Interestingly, however, the median awards in race discrimination claims tend not to vary to a significant degree from the median awards for other types of claim. In 2015-6, the median award for race discrimination cases was £13,760: in contrast, for sex discrimination it was £13,500; £11,309 for disability discrimination; £8,417 for age discrimination; £16,174 for religious discrimination; and £20,192 for sexual orientation discrimination.<sup>54</sup>

#### **11. What is the Relationship between the Enforcement of Anti-discrimination Law and the Quest for Equality on Both an Individual and Systemic Level?**

UK anti-discrimination legislation is primarily structured around a symmetrical and individualist model of equality. Some scope exists for positive action,<sup>55</sup> and the positive duties discussed above impose certain positive obligations upon public authorities (and, in Northern Ireland, private employers). The 2010 Act imposes express reasonable accommodation requirements are imposed upon employers and service-providers in respect of disability, and similar obligations can arise as a side-effect of the prohibition on indirect discrimination.<sup>56</sup> However, in general, the legislation is focused on prohibiting unequal treatment on the basis of protected grounds as between individual employees, service users and so on: while the legislation can be effective in combating certain forms of group disadvantage, it remains largely wedded to a ‘formal equality’ model of regulation.

The reliance placed on individual enforcement in the UK system reflects this orientation. Victims of discrimination are supposed to seek a remedy on an individualised basis through the ordinary court and tribunal processes, without having the benefit of class actions. Furthermore, the equality commissions have limited enforcement powers – and cannot bring actions on behalf of individual victims, as is also the case with trade unions and other bodies. As discussed in depth above, individuals face substantial obstacles in securing a remedy for discriminatory treatment – and the imposition of employment tribunal fees has worsened the situation. If this erodes the culture of compliance that has evolved in the UK over the last few decades, it will be interesting to see whether this will generate pressure for a shift to a more asymmetrical, substantive equality model of regulation.

#### **12. IS THE ENFORCEMENT OF ANTI-DISCRIMINATION LAW REGARDED AS DIFFERENT from the enforcement of other laws?**

In general, the enforcement of anti-discrimination law is viewed as being analogous to the enforcement of other forms of civil law regulation. Employment discrimination cases are processed in a similar manner as other types of employment law claim. Similarly, discrimination claims brought in relation to access to goods and services are processed through the county court system like other forms of tort claims.

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<sup>53</sup> See D. Renton, ‘A Culture of Disbelief’, Institute for Race Relations, 24 January 2013, available at <http://www.irr.org.uk/news/culture-of-disbelief-why-race-discrimination-claims-fail-in-the-employment-tribunal/>.

<sup>54</sup> Ministry of Justice, *Tribunal and Gender Recognition Certificate Statistics Quarterly, April-June 2016*, Employment Tribunal Tables E.6-E.11, available at <https://www.gov.uk/government/statistics/tribunals-and-gender-recognition-certificate-statistics-quarterly-april-to-june-2016>.

<sup>55</sup> See e.g. Ss. 158-9 of the Equality Act 2010.

<sup>56</sup> *London Underground Ltd v Edwards (No 2)* [1997] IRLR 157.

Some concessions are made to the particular problems associated with discrimination claims – in particular the provision for a shift of the burden of proof (albeit this was introduced to conform with the requirements of EU law), the introduction of the positive duties, and the limited special enforcement powers given to the equality commissions. However, in the main, the enforcement of anti-discrimination law is channelled through the standard legal routes through which other types of claim are processed.

Academic commentators and NGOs are at times critical of this, arguing that the importance of the interests at stake in discrimination claims should entail the adoption of more specific arrangements for discrimination cases, similar to the burden of proof shift – in particular, they tend to call for the enforcement powers and resources of the equality commissions to be beefed up, and for existing positive duties to be extended to the private sector. However, these criticisms often fail to achieve much purchase in policy debates. For example, there has been little or no discussion in recent years of whether US-style class actions might have a useful role to play in enhancing compliance with anti-discrimination legislation – or whether specialist tribunals with particular expertise in discrimination law could be established to adjudicate other employment and service provision claims (as was done in Ireland in the late 1990s).

### **13. WHAT DOES THE ENFORCEMENT OF ANTI-DISCRIMINATION LAW REVEAL about the nature of your legal system or about the enforcement of laws in your legal system**

The reliance placed on individual enforcement in the UK in this context highlights the manner in which the UK legal system is reluctant to embrace class actions or other forms of collective action, or to give statutory bodies such as the equality commissions wide regulatory powers. Instead, considerable faith is vested in the ability of individuals to assert their legal rights before courts and tribunals. Furthermore, there is a reluctance to expose employers and service providers to ‘undue’ regulation and a desire to minimise the costs to the public purse of litigation – which is reflected in the introduction of the employment tribunal fees. There also exists a complacency about the functioning of the legal system, that presumes that norms like anti-discrimination law will continue to be effectively enforced via individual claims even as access to justice becomes more difficult. These traits are not just confined to the discrimination law context – but they perhaps are highlighted here.