

A summary of the law on:  
**Race Discrimination**



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The Race Relations Act (Northern Ireland) Order 1997 (RRO) outlaws discrimination on the ground of race in employment, education, transport and the provision of goods and services.

This information sheet is solely concerned with the employment aspects of the RRO.

## Who does it apply to and when?

The RRO applies to all employees and workers (including job applicants), apprentices, contract and agency workers, office holders, the police, the self-employed and members of the armed forces.

There is no qualifying period of service required under the RRO, so a worker is protected from the time they apply for a job. Ex-employees can also make a claim against a former employer, if they are complaining about something that was closely connected to that period of employment such as something detrimental that was said in a reference. It applies to all discrimination in the workplace such as selection for a job, terms and conditions of employment, promotion or transfer, training, employment benefits and dismissal or any other disadvantage such as harassment.

It also protects anyone who has refused to carry out an instruction which they believe is contrary to the RRO. For instance, a white amusement arcade manager who was dismissed because he refused to carry out a racist instruction was held by the Tribunal to have been discriminated against on racial grounds.

## What protection does the Act provide?

The RRO protects against discrimination on the basis of race, ethnic or national origins, colour or nationality. It also specifically protects members of the Irish Traveller community.

It does not, however, protect people discriminated against on the ground of their religion (although Jews, Sikhs and Roma have been accepted as racial groups whereas Muslims and Christians have not because of the wide geographical spread of these religions). Instead, these claims have to be brought as claims of religious discrimination under the Fair Employment and Treatment (NI) Order 1998.

## Who is liable?

Responsibility for race discrimination usually lies with the employer, but if another employee or worker is found to have discriminated, then the employer will normally be "vicariously" liable for them as well. This covers not only incidents of discrimination occurring in the actual work place, but may also extend to out of work activities such as Christmas parties and drinks in the pub after work. If the alleged discrimination relates to the conduct of another employee, then it is advisable to name them as well as the employer in the any application to the Tribunal.

Employers can defend a complaint of discrimination if they can show that they took all reasonably practicable steps to prevent the discrimination occurring. It is rare for employers to succeed with this defence. But even if they do, Claimants can still pursue their claim against the individual employee who discriminated against them.

## Types of Discrimination

There are four types of unlawful race discrimination in relation to employment – direct discrimination; indirect discrimination; harassment; and victimisation.

It applies:

- To arrangements for deciding who should be offered employment
- To the terms on which employment is offered
- To situations in which an employer refuses or deliberately does not offer someone a job
- To the way in which access to opportunities for promotion, transfer or training, or any other benefit, facilities or services is provided
- To dismissal or where someone has been subjected to any other disadvantage

## Direct Discrimination

Direct discrimination is when an employer treats one person less favourably than someone else on racial grounds. The onus is initially on the worker bringing the claim to show that they were treated differently to someone else of a different racial group (either actual or hypothetical). This can often be very difficult as employers will almost always deny that the alleged discrimination had anything to do with race.

It is irrelevant whether or not the employer intended to discriminate against them. The onus then shifts to the employer to produce evidence that they would have behaved in a similar way to someone who was not of the same racial group. A vague argument that they would behave the same way with everyone is unlikely to be good enough. The Tribunal then has to decide the true reason for the employer's action. Once the person has shown that the employer did discriminate against them directly, employers cannot offer a defence as none exists for these claims. Segregating an individual/s in the workforce on racial grounds is specifically identified as direct discrimination.

## Indirect Discrimination

Indirect discrimination occurs when the employer operates a "provision, criterion or practice" which, on the face of it, seems neutral in relation to race, but in practice, works to the disadvantage of one (or more) racial group. To prove a case of indirect discrimination, the claimant has to show that the practice had a detrimental effect on them, or put them at a particular disadvantage, in comparison to people of other races. As with direct discrimination, employers do not have to have intended to discriminate, to be caught by the legislation. But, unlike direct discrimination, they can justify it if they can show that the provision, criterion or practice they applied is, when looked at objectively, proportionate to the aim they were trying to achieve. This involves balancing the interests of the employer against those of the worker.

For instance, a Liverpool furniture store refused to consider applicants from Liverpool 8, which had a high rate of unemployment, because it said unemployed friends of staff from that district would loiter outside and discourage custom. Fifty per cent of the population of Liverpool 8 were black compared with two per cent in Merseyside as a whole. The Tribunal held this to be an unlawful requirement or condition because it applied to one racial group more than another and could not be justified. The definition of indirect discrimination covers both formal and informal practices and provisions.

## Harassment

Unlawful harassment occurs when someone is subjected to unwanted conduct that has the purpose or effect of violating their dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment and the treatment is on the grounds of race, national or ethnic origin. Conduct will only be regarded as harassment when all the circumstances are taken into account (including the perception of the person at the receiving end) and if it is reasonable to conclude that it could have had this effect. The law gets complicated in this area because parts of the RRO have been amended and other parts have not.

The result is that some harassment claims cannot rely on this definition and have to be presented as direct discrimination claims. The safest approach is to mention both grounds for all claims. The definition of harassment is wide enough to include abusive language, excessive monitoring of work, excessive criticism of someone's work, and exclusion from work-related events including social events.

## Victimisation

Some workers may be deterred from exercising their rights under the RRO or from supporting others who wish to exercise their rights in case they are victimised by their employer. The RRO guards against this by making it unlawful for an employer to victimise an individual because they have brought a discrimination claim, given evidence in a discrimination case or made an allegation of race discrimination (whether it has been upheld or not). To succeed in a victimisation case, the person has to show that they were treated less favourably than someone who had not taken any of these steps, and that their treatment was because they had pursued a discrimination case, had given evidence or had made allegations of discrimination.

## Exceptions

Again, the RRO can be complicated because some parts have been amended and others have not. The result is that there are now two main types of exceptions – these are called genuine occupational requirements (GORs) and genuine occupational qualifications (GOQs).

For a GOR exception to apply, employers have to show that the reason for wanting someone of a particular race or ethnic or national origin is a genuine and decisive requirement for that job; that the requirement is proportionate; and that the person either does not meet the requirement, or the employer is not satisfied that they do.

For a GOQ exception, employers just have to show that they need someone of a particular colour or nationality, for example, to play a certain part in a play or to provide personal welfare services.

Employers cannot rely on GOQ exceptions if they already have enough staff from the specific racial group who could take on the duties of the job without too much inconvenience. For instance, a London borough advertised two managerial posts in the housing department specifying that, as over half of the tenants dealt with by the department were of African-Caribbean or Asian origin and the posts provided personal welfare services, the posts would be confined to African-Caribbean and Asian applicants. The council's claim that the advertisement was covered by the GOQ defence failed on two points.

Firstly, the Employment Appeal Tribunal held that the racial group in question was not sufficiently identified. Secondly, that neither of the posts involved 'personal services'.

However, a local authority which advertised for an African-Caribbean worker for a play-group was covered by the GOQ provisions. The worker would provide 'personal services' to African-Caribbean children in maintaining cultural links, such as reading and talking in dialect.

In effect, however, the courts have made clear that the exceptions under the GOQ provisions cannot be used by employers to implement positive discrimination, however desirable that might appear to be.

## Proving Race Discrimination

Proving race discrimination is not straightforward. The onus is on the person making the claim to prove, on the balance of probabilities, that their employer discriminated against them to establish that discrimination has occurred. This means that the Tribunal does not have to be certain, but it has to think it more likely than not that the treatment was on the grounds of the person's race.

Once the claimant has established facts from which a Tribunal could conclude that there has been discrimination then the burden shifts to the employer to prove otherwise.

Where, for example, an employee complains that their employer failed to promote them on racial grounds, the evidence may point to the possibility of racial discrimination. If the employer has no explanation, or if the Tribunal finds their explanation inadequate or unsatisfactory, it can infer that the discrimination was on racial grounds.

## Serving a Questionnaire

Given the difficulty of proving discrimination, claimants are allowed to serve a Questionnaire on their employer to obtain information to ascertain the strength of their claim and to establish as far as possible, what the facts are and the reason for their treatment. This information can be used as evidence at any Tribunal hearing. If the employer fails to answer the questions within eight weeks, or does so in an evasive or equivocal manner, a Tribunal may use such facts to draw an inference of unlawful discrimination. Questionnaires have to be served within three months of the act of discrimination, or within 21 days of lodging a Tribunal application (although an extension of time can be sought from the Tribunal if this is missed). Serving a Questionnaire does not count as raising a formal grievance.

## Tribunal Claims and Time Limits

The time limit for lodging a claim with the Tribunal is three months from the act complained of (or the last act complained of if a series of acts can be considered as a single continuing act of discrimination e.g. ongoing racial harassment). No extensions are available unless the Tribunal considers it just and equitable in the circumstances of the case. This is relatively rare.

## Lodging a Grievance

While it is not a legal requirement that a person lodges an internal grievance prior to bringing a claim for race discrimination, it is strongly advisable to do so. This creates the possibility that the matter might be successfully resolved in the workplace. In the first instance a worker should try to resolve the matter informally with their employer. If it is not possible to resolve the matter informally, the worker should, without unreasonable delay, raise the matter formally, in writing, setting out the nature of the grievance and how it might be resolved. Even if any such workplace resolution is unlikely, it is still advisable to lodge a grievance with the employer as any failure to do so may result in any compensation awarded if the claim is successful being reduced by up to 50%.

It should be noted that lodging a grievance does not result in the time limit being extended - the time limit remains three months from the act complained of even if the grievance proceedings are not completed when the three month deadline expires.

## Code of Practice

The Equality Commission produces a Code of Practice for the elimination of race discrimination and Guidance on the prevention of racial harassment. While these do not impose formal legal obligations, evidence of any departure by the employer from good practice as recommended by the Code can be put in evidence before Tribunals and must be taken into account. While a Tribunal is not obliged to take account of any departures from the Guidance, it will generally do so. Copies can be obtained from the Equality Commission for Northern Ireland: [www.equalityni.org](http://www.equalityni.org).

## What remedies are available?

There are three remedies available to a Tribunal:

- Declaration
- Compensation
- Recommendations

## Declaration

A declaration states the rights of the claimant and sets out how the employer and/or any employee involved has acted unlawfully.

## Compensation

Compensation can be awarded for injury to feelings and financial losses, if there are any. There is no limit on the amount of compensation, which can include loss of earnings (past and future), loss of pension, interest and any other outlays associated with the discrimination. The amount of compensation for injury to feelings can vary enormously. The person's age and vulnerability may be considered, and also the severity of the discrimination. Claimants can also ask for compensation for personal injury if they have been seriously affected by the discrimination, particularly in harassment cases which can lead to illness and depression. If so, claimants need to produce a medical report to support their claim. Compensation may be reduced by up to 50% if the claimant failed to use the internal grievance procedure.

## Recommendations

The Tribunal's powers to make recommendations are limited to actions that will benefit the individual employee and lessen the effect of the discrimination on them. They must be practical, have a time limit and avoid or reduce the effect of the discrimination that they complained about. For instance, they might include a requirement for all members of management to be trained in equal opportunities, or for the employee who has been discriminated against to be provided with additional training or mentoring, or to be invited to interview in relation to future job applications. If the employer fails to comply with a recommendation, then the Tribunal may order the compensation to be increased.

## Race Equality Duty

In addition to obligations under the RRO, Section 75 of the Northern Ireland Act 1998, places public authorities under a duty to have due regard to the need to promote equality of opportunity between various groups including between different racial groups.

This means that service providers and public sector employers have to design employment and services with the needs of different racial groups in mind.

**This information sheet provides a summary of the rights of employees in relation to Race Discrimination. This information should not be taken as a comprehensive statement of the law in this area. You are advised to take advice from your union representative before taking any action based on this information.**

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