A Central London Law Centre publication

Identifying employment cases:

checklists for diagnosis and interviews

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Introduction

This guide is aimed at generalist advisers or those new to employment law, who are uncertain where to start when faced with an employment problem or who are afraid they may miss something. The checklists are designed around the most common problems likely to be presented by clients, eg redundancy, dismissal for misconduct, problems around part-time working or the need for time-off. Each checklist summarises the relevant law and evidence, with suggestions as to questions to ask your client and key time-limits.

This guide is not attempting the impossible task of condensing the whole of employment law into 24 checklists, and inevitably certain areas are simplified or omitted. No legal advice should be given solely relying on this guide. The idea is that by looking at the relevant checklists in this guide first, you will get an idea of the overall picture and structure that you need to follow. As a starting point for further research, cross-references are given to relevant legislation and chapters in 'Employment Law: An adviser's handbook' by the same author (bibliography, p97).

The possible application of discrimination law is woven into the whole guide, as this area is frequently overlooked. However, in increasing your awareness that discrimination law might apply, you also need to be careful that sufficient evidence to support a case does exist. Central London Law Centre has published a number of specialist guides relevant to gathering evidence in discrimination cases (bibliography, p97).

Employment law gives a combination of rights derived from your client's contract of employment and those from Acts of Parliament (statutory rights). Statutory rights each have their own eligibility criteria. For example, it is necessary to be an employee working under a contract of employment to claim unfair dismissal. This is not necessary to claim discrimination. It is necessary to have at least one year's service for ordinary unfair dismissal. Again this is unnecessary to claim discrimination. It is as important to check your client's eligibility to make different claims as it is to assess the chances of proving unfairness or different treatment.

This guide is based on the law as known at 1 January 2008.

Acknowledgements

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Nuffield

I must once again thank the Nuffield Foundation, which has provided such solid support in funding so many of our guides as well as this new one, and has made so much possible.

How to use the guide

Your starting point should be the problem presented to you by your client, eg s/he has been dismissed or made redundant, or s/he asks you about pregnancy and maternity rights. If you see a relevant checklist in the index, you can start there. If you don't understand any jargon, try the glossary on p99.

In most cases, you will need to read several checklists. It is suggested that you start with the relevant overview (eg **dismissal overview**; **unfair dismissal overview**; **discrimination overview**; or **disability discrimination**) and then move onto the checklist which focuses on the precise concern (eg **dismissal for misconduct**; **discrimination: promotion**).

If your client has been dismissed:

dismissal overview ➠ **unfair dismissal** ➠ (as applicable) **dismissal for misconduct; dismissal for poor performance; dismissal for ill-health; redundancy dismissal** ➠ **time-limits**

dismissal overview ➠ **discrimination overview** ➠ (if applicable) **disability discrimination overview** ➠ **discrimination interview tips** ➠ (as applicable) **dismissal for misconduct; dismissal for poor performance; dismissal for ill-health; redundancy dismissal** ➠ **time-limits**

If your client complains of discrimination (not dismissal):

discrimination overview ➠ (if applicable) **disability discrimination overview** ➠ **discrimination interview tips** ➠ (as applicable) **discrimination: recruitment; discrimination: promotion; sexual harassment; equal pay; pregnancy and maternity** ➠ **time-limits**

If your client complains that the employer wants to change his/her contract, this is very difficult because it entails an understanding of large areas of employment law, including unfair dismissal, discrimination, and contract. Either start with the unilateral variation checklist and read other checklists as they are cross-referred and applicable. Or to give yourself a wider background picture if this is very unfamiliar, start by following this order:

contract of employment ➠ **constructive dismissal** ➠ **unfair dismissal overview** ➠ **unilateral variation** ➠ **discrimination overview**

Although there are no checklists specifically for clients complaining about disciplinary action, you could consider:

if discrimination is a possibility, start with the **discrimination overview** and **discrimination: interview tips**. Then look at the discrimination element of the specific dismissal checklists for misconduct, poor performance or ill-health.

if there is no discrimination, but ultimately dismissal is a risk, it is useful to consider what factors may make a dismissal unfair. Many of these factors will also be relevant to highlight in any appeal against disciplinary action. Therefore look at the checklists mentioned for dismissal and unfair dismissal above.

Contract of employment

1. What is a contract of employment?

- Every employee has a contract of employment. See definitions of 'employee' and 'worker' in glossary, p99.
- The contract may or may not be in writing. An unwritten contract is just as valid, but is harder to prove.
- A contract is made up of terms and conditions, eg related to hours, pay, location and benefits.
- Under section 1 of the Employment Rights Act 1996, certain contract terms should be put in writing and given to the employee within 2 months of the start of employment. Note that:
  - a term is not invalid because it is not put in writing. It is just harder to prove or work out what it is.
  - if the employee has not received the section 1 terms in writing, s/he can ask a tribunal to decide what they are. (Be careful – the tribunal may make a decision that the employee does not like. It can also antagonise the employer – a less confrontational approach may be better.)

2. How do you work out what the contract terms are?

- Express terms are those agreed in writing or verbally. Written terms take precedence over simultaneous verbal agreements.
- Implied terms are used where there is no express term, eg contractual sick pay entitlement was never put in writing and was never discussed.
- The law has various ways of working out what implied terms must be, eg the business efficacy test (it's necessary to make the contract work); the officious bystander test (it's obvious); custom and practice (it's the same term for the whole workforce); past performance (how the employer has treated your client previously).
- Universal implied terms exist in all contracts, eg that neither the employer nor the employee will destroy the other's trust and confidence.

- Statutory terms. These are uncommon, but in a few instances, Parliament requires certain terms to be implied, eg minimum notice of dismissal.
- Being sure what the terms of a contract are can be very difficult because:
  - written terms may be contained in documents which are not labelled 'contract of employment'.
  - written terms may be ambiguous in their wording or modified by another term somewhere else in the contract.
  - the test for implying terms can be difficult to apply in practice.
  - contracts change over time and the changes are not always recorded in writing.

3. How can a contract be changed?

- A contract can only be changed by agreement. The agreement may be explicit or may have occurred unintentionally.
- If an employer imposes a contractual change and the employee fails to object, s/he may eventually be deemed to have agreed to the change. See unilateral variation checklist, p11.
- Under section 4 of the Employment Rights Act 1996, an employer should give written notification within 1 month of any change in the section 1 terms. Note that a change is not invalid just because it was never put in writing.

4. Special types of contract

There are many forms of irregular contract. Here are some examples. Apart from fixed-term contracts, the following do not have precise legal definitions and only an approximate description is given.

- A fixed-term contract is one with a fixed termination date or which ends on the completion of a specified task.
- A 'zero-hours' contract sets an hourly-rate of pay but no minimum hours are guaranteed. Your client must work 'as and when required'. S/he gets paid for the hours s/he works.

- An 'annualised hours' contract specifies the total number of hours to be worked in a year, but usually has no break-down into weeks or days. Such contracts are usually aimed at seasonal fluctuations.
- A 'global' or 'umbrella' or 'overarching' contract applies where your client works on individual engagements with gaps in between, but is regarded as an employee even through those gaps.

Note: The above contracts may not be contracts *of* employment and your client may not be an employee. (See 'employee' and 'worker' in glossary, p99.)

5. Why does it matter what the contract says?

- It is usually necessary to know what your client's contract says, but very few employment problems are solved by this. Unfair dismissal and discrimination law is usually more important to your client's rights.
- Compensation for breach of contract is not usually worth much money unless your client is highly paid. Examples of breach of contract claims are:
  - for notice pay (see dismissal checklist, p15).
  - to recover a cut in pay, although a tribunal claim for an unlawful deduction from wages is usually simpler.
- If your client intends to insist on his/her contract being complied with, remember s/he may be dismissed. If s/he is dismissed, his/her main remedy will usually be unfair dismissal – provided s/he is eligible. S/he will not necessarily win. (See unilateral variation checklist, p11.)
- If your client intends to resign and claim constructive unfair dismissal, s/he will need to prove his/her contract has been broken (see constructive dismissal checklist, p9). However, this does not necessarily mean the dismissal was unfair.
- Your client can in theory refuse to agree a change of contract, but if the employer imposes such change, the practical question is usually whether your client's actual dismissal or constructive dismissal over the matter would be unfair or discriminatory. (See unilateral variation checklist, p11.)

6. Fixed-term employees

- A fixed-term employee (FTE) is an employee working on a contract of employment which will terminate on a specific date or on completion of a particular task.
- Under the Fixed-term Employees' Regulations, an FTE has the right not to be treated less favourably than a comparable permanent employee just because s/he is an FTE.
- The employer has a defence if the less favourable treatment can be justified on objective grounds, eg it may be justified excluding an FTE on a four-week contract from an expensive training course.

  Note: This does not mean FTEs have no right to be trained – do not generalise from this example.
- An FTE has the right to be informed of any available permanent vacancies. It is sufficient if the vacancy is contained in an advertisement which the employee has a reasonable opportunity of reading.
- Once an FTE has been continuously employed on two or more fixed-term contracts for four years (excluding any employment before 10 July 2002), the contract becomes permanent unless keeping the employee on a fixed-term contract is objectively justified. Note: it is unclear whether this occurs on the 4th anniversary or only when the contract is next renewed.

Relevant law

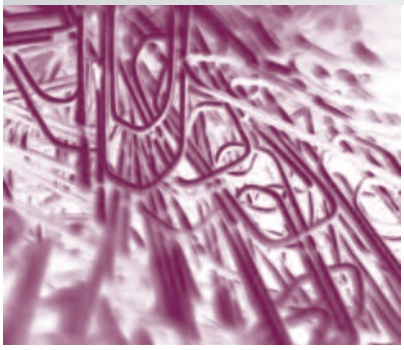
- Written contract terms: Employment Rights Act 1996, s1 and s4.
- Fixed-term employees: The Fixed-term Employees (Prevention of Less Favourable Treatment) Regulations 2002, SI No 2034.

Other relevant checklists

- Constructive dismissal: p9.
- Unilateral variation: p11.

For more detail, see

Chapter 1 (for contract of employment) and Chapter 6 (for eligibility to claim unfair dismissal – cases on global and umbrella contracts) in 'Employment Law: An Adviser's Handbook' (bibliography, p97)



Constructive dismissal

1. What is constructive dismissal?

- Constructive dismissal occurs when an employee resigns because his/her employer has broken his/her contract of employment in a very serious way, eg by a major pay-cut or change in contractual hours. This is called fundamental or repudiatory breach.
- This enables the employee to treat him/herself as 'dismissed' in law. For example, an employee can claim (constructive) unfair dismissal.
- The employer may break a concrete contract term, eg by cutting pay, or may break a universally implied term, such as the implied term of trust and confidence.

2. Why is it risky to claim constructive dismissal?

- Your client must be sure that his/her contract has been broken before s/he resigns. There is often a dispute as to what an employee's contract says or whether the contract has been broken. (See contract checklist, p5.)
- The contract must be broken in a serious and not a trivial way. For example, a trivial change in duties or a tiny pay-cut of 50p/week may be breach of contract, but it is unlikely to be a fundamental breach.
- It is particularly difficult to judge whether the employer has broken the implied term of trust and confidence. Mere unreasonable or unfair behaviour is not enough.
- Your client must decide fairly quickly whether or not to resign. If s/he delays too long, s/he may be taken to have 'affirmed' ie accepted the employer's conduct. It then becomes too late to resign.
- If your client's intention is to claim constructive unfair dismissal, s/he must still be eligible to claim unfair dismissal in the usual way (see unfair dismissal checklist, p20).

- Your client will also need to prove the constructive dismissal was unfair. It is not necessarily unfair dismissal for an employer to change or break your client's contract if there are overwhelming business reasons for doing so. For more on this, see unilateral variation checklist, p11.
- Even if your client wins the unfair dismissal case, will s/he get sufficient compensation to compensate for having lost his/her job? Would it have been better not to resign and to look for another job while still employed?

3. What should you advise?

- It is simpler where your client has already resigned by the time s/he comes to you. Analyse the facts and decide whether s/he can bring a case. Don't assume that it is always 'impossible to prove constructive dismissal' just because it is difficult.
- If your client has not yet resigned and is asking your advice, you need to be very cautious, for the reasons already explained. Your client needs to know all the risks.
- The timing of resignation and letters from your client in the lead up to it can be critical. If you are inexperienced, take specialist advice on how to build up to the resignation.
- Always consider whether other options are preferable. What are the pros and cons of waiting to see whether your client is dismissed rather than resigning and having the extra complication of proving fundamental breach of contract?

Unilateral variation of contract

1. What is unilateral variation?

- In theory, the terms of a contract of employment can only be changed by agreement between the employer and employee.
- Employers sometimes try to impose a change without the employee's agreement. This is known as 'unilateral variation' of contract.
- The employee needs to be careful. Even if s/he does not explicitly agree to the change, his/her actions – or even inaction – can legally be taken as agreement.
- It is commonly believed that employers only need to give 90 days' notice of a change. This is not in fact true, the employee's consent is still necessary.

2. Facts and considerations:

- Check your client's contract of employment. Is its meaning clear? Is the employer really changing the contract (eg as to hours or location) or is it a change which the contract allows? (See contract checklist, p5.)
- If the contractual position is uncertain, it may be possible to go to an employment tribunal for clarification, provided the disputed term is one of those which must be listed under section 1 of the Employment Rights Act 1996. Note that:
  - this may not be practical in terms of time.
  - this option is irrelevant if the employer agrees the contractual position, and simply states an intention to change the contract.
  - if your client is afraid to 'rock the boat', remember this step will antagonise the employer and may lead to harassment or dismissal.
- Is your client eligible to claim unfair dismissal if s/he is sacked or resigns due to a contractual change? (See unfair dismissal checklist, p20.) If not, his/her position is very weak.

- Even if your client is eligible to make an unfair dismissal claim in such circumstances, is s/he likely to win it? This is extremely hard to predict. It is more likely to be unfair if:
  - the employer did not follow fair procedures in implementing the change? (Advance notice; consultation; flexibility.)
  - it was not reasonable for the employer to impose the change: (the employer could not demonstrate a real business need for the change; taking account of the negative impact on your client, the benefits to the employer were not sufficiently important; the employer ignored better alternatives; other employees also opposed the change; there are special circumstances why the change has particularly adverse impact on your client or why s/he could be exempted from the change.)
- Is your client willing to risk losing his/her job over this?
- What compensation is your client likely to receive?
- What is your client's chance of getting a new job? Will s/he get a bad reference? Note: an ET has no power to order the employer to write a reference.
- Compare the problem of working under the varied contract with any alternative/job prospects.
- Has your client been discriminated against in the change, directly or indirectly? (See Discrimination overview checklist, p47.)
  - is s/he covered by the discrimination legislation?
  - is there any indirect sex discrimination, eg, introducing flexi-shifts or other changes interfering with childcare?
  - is there any indirect race discrimination, eg, introducing duties requiring sophisticated written English skills?
  - are the changes imposed on some staff but not on others? Is this direct discrimination? For example, an employer may make an exception for a white worker unable to work flexi-shifts for health reasons, but refuse to make an exception for a black worker with equally valid reasons.
  - has the employer introduced duties which are hard for a disabled worker to undertake?

3. Your client's options

- Agree the change (orally or in writing).
- State disagreement with the change (preferably in writing, by informal letter or by formal grievance) and attempt to negotiate.

Note: Once negotiation has clearly become futile, the grievance procedure is exhausted, and the employer is still insisting on the change, your client needs to make up his/her mind swiftly whether or not s/he accepts the change. Otherwise s/he can lose the right to resign because s/he has 'affirmed' (ie, implicitly agreed to the change by taking no action against it). S/he cannot work 'under protest' indefinitely.

- If relevant, a claim under section 11 may clarify a disputed contractual term within section 1 of the Employment Rights Act 1996 and add negotiating pressure on the employer. If the employee is dismissed as a result, s/he may be able to claim this is automatic unfair dismissal for asserting a statutory right.
- Refuse to accept the change. If it amounts to a pay deduction, make a tribunal claim for an unlawful deduction. If it is a change in duties, refuse to carry out the change. Remember that these steps risk dismissal.
- Resign and claim unfair constructive dismissal. There are many legal pitfalls for this (see constructive dismissal checklist, p9).
- Make a discrimination claim if applicable. This can be done whether or not s/he resigns, but it does risk victimisation or dismissal. If the statutory dispute resolution procedures apply (see p100), s/he will need to bring a grievance before going to the tribunal.
- Your client may be entitled to a redundancy payment if s/he loses her job in circumstances which fit the legal definition of redundancy and has worked there at least 2 years.
- If the employer imposes the change by dismissing your client with correct notice and then offering a new contract on different terms, your client may be able to accept the new contract while claiming unfair dismissal in respect of the old contract.

- If the employer imposes a very radical change, the law may deem this as a dismissal and again your client can claim unfair dismissal while remaining in the new job.
- It will be more effective if a large number of employees simultaneously bring legal action. Collective opposition and negotiation will usually be the best bet. If available, gain trade union support.
- Remember that where options lead to dismissal, your client needs to be an employee of at least one year's service to claim unfair dismissal. S/he also needs to prove the dismissal was unfair.

Relevant law

- Unfair dismissal: Employment Rights Act 1996, s98.
- Discrimination: Race Relations Act 1976, Sex Discrimination Act 1975 or other discrimination legislation as relevant.
- Establishing certain contract terms: Employment Rights Act 1996, s1, s4 and s11.

Other relevant checklists

- Contract of Employment: p5.
- Constructive dismissal: p9.
- Unfair dismissal overview: p20.
- Discrimination overview: p47.
- Disability discrimination: p53.

For more detail, see

Chapter 1 (for contracts), Chapter 6 (for unfair dismissal) and Chapter 13 (for discrimination definitions) in 'Employment Law: An Adviser's Handbook' (bibliography, p97)

Dismissal overview

See diagram on p19. After reading this overview, go to the unfair dismissal overview, p20 and/or the discrimination overview, p47, as relevant.

1. Notice pay

- Check notice entitlement:
  - Contractual entitlement.
  - Statutory minimum notice.
- Check whether correct notice or pay in lieu was given.
- Your client is not entitled to notice if s/he was dismissed for gross misconduct, eg theft. Employers sometimes erroneously call ordinary misconduct 'gross misconduct'.

2. Unfair dismissal

A. Check eligibility to claim unfair dismissal

- Your client must be an employee as opposed to another form of worker.
- Your client must have at least one year's continuous service.

Note: No minimum service is required for certain of the automatic grounds of unfair dismissal

- Your client must have been dismissed. This can include failure to renew a fixed-term contract on its expiry or, in limited circumstances, resignation.
- Don't be put off by the label. Casuals, agency and contract workers can sometimes claim unfair dismissal if they meet the above eligibility requirements.
- See p20 for more detail.

B. Does your client have reasonable chances of winning his/her unfair dismissal case?

- Establish the reasons given by the employer for dismissal, preferably in writing. Obtain the client's comments.
- Assess whether the employer can prove there was a fair reason for dismissal.
- Assess whether fair procedures were followed during the dismissal process. If not, would fair procedures have made any difference?
- (Until they are abolished) check whether the employer has followed the statutory dispute resolution procedures.
- For more detail, see unfair dismissal overview checklist, p20.

C. What compensation will your client receive if s/he wins his/her unfair dismissal case?

- Advise your client of the tribunal's powers and how compensation is calculated.
- Advise that the tribunal usually expects an employee to mitigate his/her loss. Your client should therefore look for new work and keep records.
- If your client want his/her job back, put the employer on notice immediately.
- For more detail, see unfair dismissal overview checklist, p20.

3. Discrimination

A. Is your client eligible to claim discrimination?

- Your client need not be an employee.
- There is no minimum service.
- See p47 for more details.

B. What is discrimination?

- Discrimination law covers discrimination related to race, colour, nationality, national or ethnic origin, sex, gender reassignment, marital or civil partnership status, pregnancy, sexual orientation, religion, belief, lack of religion, disability, age. For ease of reference, this checklist will refer to all these strands as 'race or sex etc'.
- If your client belongs to a group likely to be discriminated against, and is complaining of unfairness, consider whether discrimination has occurred, even if the client does not raise it first.
- Direct discrimination: Has your client been dismissed on grounds of his/her race or sex etc? Has s/he been dismissed because of someone else's race, religion or sexual orientation?
  - do you think the employer would have dismissed your client, if s/he was of a different race or sex etc?
  - how have others been treated in similar circumstances?
- Victimisation: Has your client been dismissed because s/he previously complained about discrimination?
- Indirect discrimination: Has your client been dismissed because of some (unjustifiable) general rule which would tend to disadvantage those of his/her race or sex etc, eg
  - she can't work full-time for childcare reasons.
  - redundancy selection criteria favoured those with long service.
- See p47 for more details.

C. Does your client have reasonable chances of winning his/her discrimination case?

- See p47 for more details.

D. What compensation will your client receive if s/he wins his/her discrimination case?

- Financial loss for as long as the tribunal thinks appropriate.
- Injury to feelings or, if severe, injury to health.
- Interest.

4. Written reasons for dismissal

- Has your client received a letter setting out in sufficient detail the reasons for his/her dismissal? If not, consider requesting such a letter now.
- Is your client eligible to request written reasons under section 92 of the Employment Rights Act 1996? If not, s/he can still ask, but has no compensation claim if s/he is refused.

5. Section 1 statement

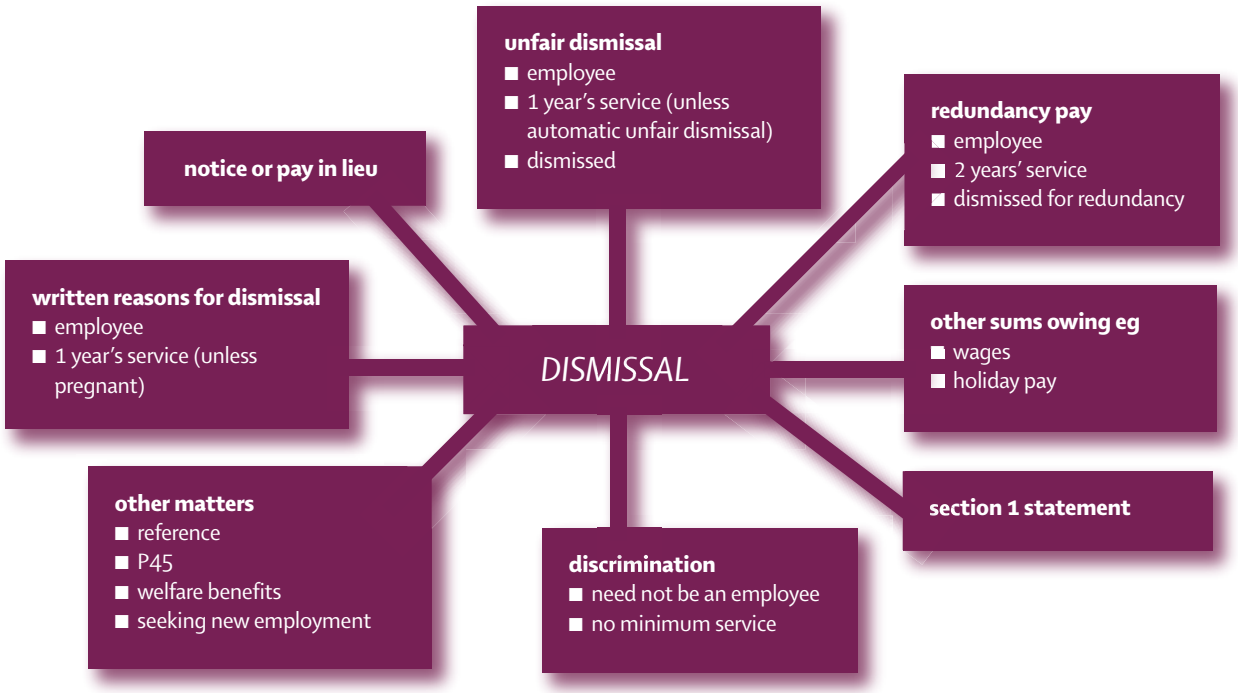
- Under section 1 of the Employment Rights Act 1996, employees are entitled to receive a written statement of the key terms and conditions of their employment within two months of the start of their employment. Changes to the contract should be notified within one month of the change under section 4. (See contract of employment checklist, p5.)
- Usually there is no compensation for the employer failing to comply with section 1 or 4, and it is not worth making a claim solely on this ground unless your client needs to ascertain a specific contract term.
- There is an exception if your client brings any claim to which the statutory dispute resolution procedures apply, eg unfair dismissal. If at the time those proceedings were started, the employer was in breach of section 1, the tribunal can award 2 – 4 weeks gross pay (subject to the statutory maximum).

Note: It is uncertain whether this rule will remain once the statutory dispute resolution procedures are abolished as is proposed.

6. Summary of matters on which client should be advised

- Any potential legal case s/he has.
- The chances of success.

- The potential remedies / compensation.
- The tribunal time-limit. (See p90.)
- In discrimination cases, the questionnaire time-limit. (See p93.)
- The tribunal process and time-scale.
- The nature of help that you can offer and the cost.
- Obtaining a reference.
- P45.
- Welfare benefits.



Unfair dismissal overview

1. Eligibility

- Your client must have been an employee as opposed to another form of worker.

  Factors include:

  - was the employer obliged to offer your client work?
  - was your client obliged to accept the work?
  - how much control was exercised by the employer over your client?
  - was your client expected to do the work him/herself as opposed to getting any substitute?

- Check that your client had at least one year's continuous service.

(Note that shorter fixed-term contracts can be added together, provided they cover at least part of each successive week.)

- If your client is absent on holiday or sick leave, this does not break his/her service. His/her service will be broken only if his/her contract of employment is terminated, whether by agreement, resignation or dismissal, and s/he is subsequently re-employed.
- If your client had a break in his/her service, his/her employment may nevertheless be continuous under the rules.

  For example:

  - the break was due to a temporary cessation of work.
  - your client was regarded as still employed by custom or arrangement.
  - your client was absent because of sickness or injury and for a period of no more than 26 weeks.
  - your client was reinstated following dismissal in specified circumstances.

- If your client does not have one year's service, check whether the reason for dismissal was one of the automatic grounds for which no minimum service is required (see p23 below).
- Check whether your client was dismissed. This can include:

  - ordinary dismissal, with or without notice.
  - failure to renew a fixed-term contract when it expires.

- your client resigned in circumstances of constructive dismissal (see p9)
- your client was forced to resign, eg s/he was told that otherwise s/he would be dismissed. (If verbal, this is very hard to prove.)
- your client resigned in the heat of the moment and attempted to retract shortly afterwards.

- Your client cannot claim unfair dismissal if:
  - s/he resigned in other circumstances.
  - s/he agreed to leave.
- If there is no letter dismissing your client, the employer may claim s/he resigned and deny s/he was dismissed. This can be hard to disprove.

A. Points which might require further investigation:

- If your client works overseas.
- If there may be an illegal contract, eg because your client has participated in a fraud on HMRC or does not have a work permit when required.
- If your client has been forced to retire.
- If your client was an agency worker, was s/he employed by the agency or the end-user or neither?

B. Facts which may surprise you:

- 'Casuals', 'temps' and 'contract workers' may be able to claim unfair dismissal if they meet the usual eligibility requirements as set out above.
- Workers on fixed-term contracts can claim unfair dismissal when their contracts come to an end provided they meet the usual eligibility requirements.
- Even if the employer dismisses your client for an extremely unfair reason, your client cannot claim ordinary unfair dismissal unless s/he has one year's service.

Note: Discrimination claims do not require any minimum service. However, such claims should be brought only if supported by the evidence and not just because the client does not qualify for unfair dismissal. (See discrimination overview checklist, p47.)

2. Factors which make a dismissal unfair

- Find out the reason the employer has given for dismissing your client. Is it in writing?
- What comments does your client have on the reasons?
- The employer must prove the reason for dismissal.
- The employment tribunal will consider whether it was unreasonable for the employer to have dismissed your client for that reason.
- There is a 'band of reasonable responses' test, ie it is not enough that the tribunal or some employers would have been more lenient. The tribunal must find that no reasonable employer would have chosen to dismiss your client.
- Except for gross misconduct, it is normally unfair to dismiss for a first offence.
- Seriously unfair procedures can make a dismissal unfair, even if there was a good reason to dismiss your client. However, your client's compensation may be heavily reduced in this situation. This was established by a case commonly referred to as *Polkey* (*Polkey v A E Dayton Services* [1987] IRLR 503, HL.).
- Examples of unfair procedures during the dismissal process:
  - failure to consult with your client or listen to his/her viewpoint.
  - failure to comply with the contractual disciplinary procedure.
  - failure to comply with guidelines in the ACAS Code of Guidance on Disciplinary and Grievance Procedures.
- Under section 98A of the Employment Rights Act 1996:
  - the dismissal is automatically unfair if the employer failed to follow the statutory disciplinary and dismissal procedure (DDP) set out in the statutory dispute resolution procedures (see glossary, p100).
  - even if the employer correctly followed the DDP, the dismissal may be unfair because the employer failed to follow other fair procedures, eg those in the ACAS Code or the employer's disciplinary procedure.
  - in the latter case, the dismissal will not be unfair if the employer would still have decided to dismiss, even if s/he had followed those additional fair procedures.

- The Employment Bill (at the time of writing) proposes to abolish the statutory dispute resolution procedures and ERA s98A. It is proposed that the position will then revert to that under *Polkey* (see 7th and 8th square bullet, p22). The employer will be penalised in compensation if s/he does not follow guidance in a revised ACAS Code.'.
- For factors which make dismissals unfair in different circumstances, see checklists on pages 25 - 35. If the reason was redundancy, see p40.

3. Automatic unfair dismissal

- If your client was dismissed or selected for redundancy for certain specified reasons, the dismissal will automatically be unfair.
- For most, but not all of these reasons, your client does not need any minimum service.
- For many of the reasons, it is also unlawful to subject your client to a detriment short of dismissal.
- For many, but not all of the reasons, workers who are not employees are also protected against being dismissed.
- It is automatically unfair to dismiss your client for a number of reasons. The following are the most common:
  - for reasons related to pregnancy or maternity.
  - for making a request for flexible-working.
  - for membership or non-membership of a trade union.
  - for asserting a statutory right, eg asking for pay-slips or a section 1 statement of terms and conditions.
  - in connection with his/her rights under the Working Time Regulations or for a minimum wage.
  - for whistleblowing in the prescribed manner.
  - due to the transfer of an undertaking (with some exceptions).
- For full list and who is eligible, see chapter 6 of 'Employment Law: An Adviser's Handbook', (bibliography, p97).

4. Compensation and remedies

- The tribunal can order reinstatement or reengagement. The tribunal cannot force the employer to take someone back. If the employer refuses, the tribunal can order more compensation as an additional award.
- The basic award. This is calculated like redundancy pay. It is a formula based on age, number of years' service and gross weekly pay subject to a maximum of £330/week (for dismissals in the year starting 1st February 2008).
- The compensatory award. This mainly comprises loss of net earnings and loss of pension for a period the tribunal thinks fit. It is subject to an overall ceiling of £63,000 (for dismissals in the year starting 1st February 2008).
- Failure to mitigate: if the tribunal thinks your client has not tried hard enough to find a new job, it will not award his/her full loss of earnings.
- The tribunal can reduce compensation if:
  - the unfairness is mainly procedural but the reason for the dismissal is fair.
  - your client's conduct contributed to his/her dismissal.
- Under the Employment Bill, it is proposed that compensation can be increased or reduced by up to 25% if either the employer or employee fails to follow procedural guidance in a Code to be issued.
- The Department for Work and Pensions will recoup benefits claimed by your client, eg job seekers' allowance, from the award for loss of earnings.

Relevant law

- Unfair dismissal: Employment Rights Act 1996, s98.

Time-limits

- 3 months from the effective date of termination.
- Extension of time is possible if the statutory dispute resolution procedures apply.
- See p90 for overview of time-limits.

Other relevant checklists

- Dismissal: p15.
- Constructive dismissal: p9.
- Dismissal for misconduct: p25.
- Dismissal for poor performance: p30.
- Dismissal for ill-health: p35.
- Redundancy dismissal: p40.

For more detail, see

Chapter 6 (for unfair dismissal eligibility and automatic unfair dismissal) and Chapter 7 (for different types of unfair dismissal) in 'Employment Law: An Adviser's Handbook' (bibliography, p97)

Dismissal for misconduct: unfair dismissal or discrimination

1. Law and evidence

A. Unfair dismissal

- Check whether your client is eligible to claim unfair dismissal (see p20).
- One or more of the following factors may make the dismissal unfair:
  - no reasonable employer would have dismissed your client for that particular offence in those circumstances.
  - your client has had no previous warnings (unless the dismissal is for gross misconduct).
  - the employer has applied a rigid rule and not considered the individual circumstances of your client's case.
  - poor dismissal procedures; in particular, the employer did not carry out an adequate investigation; your client was not informed adequately of the allegations against him/her and not given adequate opportunity to state his/her case.
  - (until abolished) failure to follow the statutory dispute resolution procedures (glossary, p100).
- Note: the test for whether a conduct dismissal is unfair is not whether your client in fact committed the misconduct. The test established by *British Home Stores v Burchell* [1978] IRLR 379 is that the employer must:
  - genuinely believe that the employee was dishonest;
  - hold that belief on reasonable grounds; and
  - have carried out proper and adequate investigations (eg spoken to witnesses; allowed your client to comment on the allegations and evidence).
- Consider the amount of compensation your client will receive if s/he wins (see p24). Note: the tribunal is unlikely to order reinstatement if your client is found to have contributed towards his/her dismissal by his/her misconduct.

B. Discrimination

- Consider whether your client is eligible to claim discrimination (see p47).
- Consider which type of discrimination may be involved, eg race, sex, age etc (see p47). In this checklist, 'race, sex, age etc' is shorthand for all forms of unlawful discrimination.
- Direct discrimination means your client was dismissed on grounds of his/her race, sex, age etc. If your client was of a different race, sex, age etc, s/he would not have been dismissed.
- Evidence which helps to prove direct discrimination, although no factor is conclusive in itself:
  - your client's misconduct was not so bad that it warranted dismissal. (This is unlikely to be sufficient evidence of discrimination in itself.)
  - the employer handled matters extremely unfairly. (This will not prove discrimination in itself, unless the employer is entirely unable to explain its actions.)
  - comparators: other employees of a different race, sex, age etc have committed equal or similar misconduct but have not been dismissed. If the employer cannot provide an innocent explanation, this is the best evidence of discrimination.
  - overt racist, sexist, ageist etc remarks.
  - statistics: generally in the workplace, those of a different race, sex, age etc to the client are favoured, eg in terms of status, disciplinary action, dismissal, recruitment.
  - the employer cannot give a credible explanation as to why your client was dismissed. (Note: it is not evidence of discrimination that the employer gives an unfair reason, if that reason is nevertheless credible.)
- There is no defence if the employer has directly discriminated against your client, unless it is direct age discrimination.
- For more on the definition of direct discrimination, see p48.
- It is victimisation if your client was dismissed as a result of complaining about discrimination in the past.
- Evidence which helps to prove victimisation (although no single factor will be enough in itself):
  - the previous complaint of discrimination was not too long ago.
  - the decision-maker was aware of the previous complaint.
  - the organisation – and particularly the decision-maker – were upset about the previous complaint.
  - it wasn't logical to have dismissed the client for what s/he did.
  - comparators: other employees, who have never complained of discrimination, have committed similar offences and not been dismissed.

- For more on the definition of victimisation, see p48.
- Consider what compensation a tribunal may award if your client wins his/her discrimination case.

C. Possible other legal claims

- Notice pay.
- Outstanding wages and holiday pay.
- Failure to provide written reasons for dismissal in response to a request.
- Section 1 statement if worthwhile (see comments, p18).

2. Interviewing your client

A. Find out background facts

- Find out your client's start and finish date. (This is relevant to whether s/he has one year's minimum service for unfair dismissal and also to the time-limit for starting a claim.)
- If uncertain, ask questions to establish whether your client was an employee so that s/he is eligible to claim unfair dismissal.
- Find out about the workplace: departments; management hierarchies; jobs
- Establish the reason for dismissal. Obtain dismissal letter and any prior letters calling your client to a disciplinary.
- Find out the disciplinary process which was followed. Check it conforms with the employer's disciplinary procedure and any required statutory steps.
- Ask your client's comments on the reasons given for dismissal.
- Ascertain your client's prior disciplinary record. Are any previous warnings live or have they expired? Were any previous warnings for the same form of misconduct?
- Have the criticisms made at the time of dismissal been raised before, even informally?

B. Check whether direct discrimination is possible

- Why does your client think s/he was dismissed? (This is a useful question to establish whether the client thinks it is due to discrimination or for some other reason, which may or may not be unlawful.)
- Does your client think s/he would have been dismissed if s/he was of a different race, age, sex etc? If so, what leads your client to that conclusion? (Make sure you express this in a constructive way and not in a way which sounds like you are disputing your client's opinion.)
- Has the employer made any discriminatory comments?
- How does your client get on generally with his/her manager and, if different, the manager who decided to dismiss him/her? Is there any other evidence of racism, sexism, ageism etc (as relevant) in the workplace generally or specifically by the decision-maker? Who appointed your client?
- Comparators: are there other workers who have committed the same or equally serious misconduct, but who have not been dismissed? Are they of a different race, age, sex etc (as relevant) to your client? How similar is their situation? What explanation would the employer give for treating them more leniently?
- What are the general workplace statistics, loosely speaking, in relation to race, sex, age etc? What are the patterns of employment, disciplinary action, dismissal?
- Does your client feel s/he has been discriminated against in any previous incidents? If so, when? (This is relevant to time-limits.)

C. Check for victimisation

- Has your client previously alleged discrimination based on race, sex, age etc?
- If so, what was the allegation and against whom?
- How long ago? Was it in writing or can it otherwise be proved?
- What was the outcome? Is there any indication that management were unhappy, at the time or since, that the allegation had been made?
- Would those involved in dismissing your client have been aware of the previous allegation?

D. Relevant documents in your client's hands

- Dismissal letter.
- All documents related to the disciplinary action.
- Contract of employment.
- Previous warnings.

Relevant law

- Unfair dismissal: Employment Rights Act 1996, s98.
- Discrimination: Race Relations Act 1976, Sex Discrimination Act 1975 or other discrimination legislation as relevant

Time-limits

- Unfair dismissal: within 3 months from the effective date of termination.
- Discrimination: within 3 months of the act of discrimination. In a dismissal claim, this is usually, 3 months from the termination date. If there were prior acts of discrimination eg discriminatory warnings, count the 3 months from the earliest of those (unless already out of time).
- Extension of time is possible if the statutory dispute resolution procedures apply.
- See p90 for overview of time-limits.

Other relevant checklists

- Dismissal: p15.
- Unfair dismissal overview: p20.
- Discrimination overview: p47.
- Disability discrimination: p53.

For more detail, see

- Chapter 7 (for unfair conduct dismissals) and Chapter 16 (for evidence in discrimination cases) in 'Employment Law: An Adviser's Handbook' (bibliography, p97).

Dismissal for poor performance: unfair dismissal or discrimination

1. Law and evidence

A. Unfair dismissal

- Check whether your client is eligible to claim unfair dismissal (see p20).
- One or more of the following factors may make the dismissal unfair:
  - no reasonable employer would have dismissed your client for that particular reason in those circumstances.
  - your client has had no previous warnings (unless the dismissal is for gross negligence).
  - the employer has not given your client adequate training, support, supervision and opportunity to improve.
  - the employer has applied a rigid rule and not considered the individual circumstances of your client's case.
  - mismanagement caused the poor performance.
  - poor dismissal procedures; in particular, the employer did not carry out an adequate investigation and did not give your client an opportunity to state his/her case.
  - (until abolished), failure to follow the statutory dispute resolution procedures (glossary, p100).
- Note that the test for whether a performance dismissal is unfair is not whether your client in fact was incapable of doing the work. The test is that the employer must:
  - genuinely believe that the employee performed poorly or could not do the job;
  - hold that belief on reasonable grounds; and
  - have carried out proper and adequate investigations.
- Consider the amount of compensation your client will receive if s/he wins (see p24).

B. Discrimination

- Consider whether your client is eligible to claim discrimination (see p47).
- Consider which type of discrimination may be involved, eg race, sex, age etc (see p47). In this checklist, 'race, sex, age etc' is shorthand for all forms of unlawful discrimination.

- Direct discrimination means your client was dismissed on grounds of his/her race, sex, age etc. If your client was of a different race, sex, age etc, s/he would not have been dismissed.
- Evidence which helps to prove direct discrimination, although no factor is conclusive in itself:
  - your client's performance was not so bad that it warranted dismissal. (This is unlikely to be sufficient evidence of discrimination in itself.)
  - the employer handled matters extremely unfairly. (This will not prove discrimination in itself, unless the employer is entirely unable to explain its actions.)
  - comparators: other employees of a different race, sex, age etc have similar levels of performance, but have not been dismissed. If the employer has no innocent explanation, this is the best evidence.
  - overt racist, sexist, ageist remarks (as relevant).
  - statistics: generally in the workplace, those of a different race, sex, age etc (as relevant) to the client are favoured, eg in terms of status, disciplinary action, dismissal, recruitment.
  - the employer cannot give a credible explanation as to why your client was dismissed. (Note: it is not evidence of discrimination that the employer gives an unfair reason, if that reason is nevertheless credible.)
- There is no defence if the employer has directly discriminated against your client, unless it is direct age discrimination.
- For more on the definition of direct discrimination, see p48.
- It is victimisation if your client was dismissed as a result of complaining about discrimination in the past.
- Evidence which helps to prove victimisation (although no single factor will be enough in itself):
  - the previous complaint of discrimination was not too long ago.
  - the decision-maker was aware of the previous complaint.
  - the organisation – and particularly the decision-maker – were upset about the previous complaint.
  - your client's poor performance was not so bad that it warranted dismissal.
  - comparators: other employees, who have never complained of discrimination, have shown equally poor performance and not been dismissed.
- For more on the definition of victimisation, see p48.
- If your client was pregnant, consider whether her performance fell below standard for pregnancy-related reasons. If so, it would be automatic unfair dismissal and sex discrimination to dismiss her for such reasons. (See pregnancy and maternity checklist, p76.)

- If your client has a disability which is affecting his/her performance, has the employer made appropriate reasonable adjustments? (See disability discrimination checklist, p53.)
- Consider what compensation a tribunal may award if your client wins his/her discrimination case.

C. Possible other legal claims

- Notice pay.
- Outstanding wages and holiday pay.
- Failure to provide written reasons for dismissal in response to a request. (If your client is pregnant, no prior request is necessary.)
- Section 1 statement if worthwhile (see comments, p18).

2. Interviewing your client

A. Find out background facts

- Find out your client's start and finish date. (This is relevant to length of service to claim unfair dismissal and to the time-limit to start a claim.)
- If uncertain, ask questions to establish whether your client was an employee so that s/he is eligible to claim unfair dismissal.
- Find out about the workplace: departments; management hierarchies; jobs.
- How long has your client held his/her current post? If s/he was new in the job, was s/he given sufficient induction and training?
- Establish the reason for dismissal. Obtain dismissal letter and any prior letters calling the client to a disciplinary.
- Find out the disciplinary process which was followed. Check it conforms with the employer's disciplinary procedure and any required statutory steps.
- Ask your client's comments on the reasons given for dismissal.

- Ascertain your client's prior disciplinary record. Are any previous warnings live or have they expired? Were previous warnings for the same form of poor performance? If so, was your client given constructive help and a reasonable time to improve?
- Have the criticisms made at the time of dismissal been raised before, even informally?
- Is there evidence that your client was doing a good job, eg thank you letters from customers; exceeding targets; good appraisals; witnesses.
- Would your client have benefited from training which s/he was not offered?
- Did mismanagement contribute in any way to your client's poor performance, eg excess workload; unrealistic targets; failure to be supportive?

B. Check whether direct discrimination is possible

- Why does your client think s/he was dismissed? (This is a useful question to establish whether your client thinks it is due to discrimination or for some other reason, which may or may not be unlawful.)
- Does your client think s/he would have been dismissed if s/he was of a different race, age, sex etc? If so, what leads your client to that conclusion? (Make sure you express this in a constructive way and not in a way which sounds like you are disputing your client's opinion.)
- Has the employer made any discriminatory comments?
- How does your client get on generally with his/her manager and, if different, the manager who decided to dismiss him/her? Is there any other evidence of racism, sexism, ageism etc (as relevant) in the workplace generally or specifically by the decision-maker? Who appointed your client?
- Comparators: are there other workers who have made the same performance mistakes, but who have not been dismissed? Are they of a different race, age, sex etc (as relevant) to your client? How similar is their situation? What explanation would the employer give for treating them more leniently?
- What are the general workplace statistics, loosely speaking, in relation to race, sex, age etc (as relevant)? What are the patterns of employment, disciplinary action, dismissal?
- Consider whether your client's work performance fell short for a reason related to pregnancy or a disability or because s/he has been harassed? If so, see relevant checklists.
- If this is an age discrimination case, what is your client's age? Is the employer aware of his/her age? If your client is at retirement age, research special rules on retirement dismissals.

- Does your client feel s/he has been discriminated against in any previous incidents? If so, when? (This is relevant to time-limits.)

C. Check for victimisation

- Has your client previously alleged discrimination based on race, sex, age etc?
- If so, what was the allegation and against whom?
- How long ago? Was it in writing or can it otherwise be proved?
- What was the outcome? Is there any indication that management were unhappy, at the time or since, that the allegation had been made?
- Would those involved in dismissing your client have been aware of the previous allegation?

Relevant documents in your client's hands

- Dismissal letter.
- All documents related to the disciplinary action.
- Contract of employment.
- Previous warnings.
- Previous appraisals.
- Any thank-you letters from customers.

Relevant law

- Unfair dismissal: Employment Rights Act 1996, s98.
- Discrimination: Race Relations Act 1976, Sex Discrimination Act 1975 or other discrimination legislation as relevant

Time-limits

- Unfair dismissal: within 3 months from the effective date of termination.
- Discrimination: within 3 months of the act of discrimination. In a dismissal claim, this is usually, 3 months from the termination date. If there were prior acts of discrimination eg discriminatory warnings, count the 3 months from the earliest of those (unless already out of time).
- Extension of time is possible if the statutory dispute resolution procedures apply.
- See p90 for overview of time-limits.

Other relevant checklists

- Dismissal: p15.
- Unfair dismissal overview: p20.
- Discrimination overview: p47.
- Disability discrimination: p53.
- Pregnancy and maternity: p76.

For more detail, see

- Chapter 7 (for unfair capability dismissals) and Chapter 16 (for evidence in discrimination cases) in 'Employment Law: An Adviser's Handbook' (bibliography, p97).

Dismissal for ill-health: unfair dismissal or discrimination

1. Law and evidence

A. Unfair dismissal

- Check whether your client is eligible to claim unfair dismissal (see p20).
- One or more of the following factors may make the dismissal unfair:
  - the employer has failed to obtain its own medical report.
  - the employer has failed to discuss the medical report with your client.
  - the employer has not offered your client the opportunity to get his/her own medical report.
  - the employer made an unreasonable decision based on the medical evidence.
  - no reasonable employer would have dismissed your client at that time, eg because:
    (a) it is not too difficult for the employer to cope while your client is away.
    (b) your client would have been able to return to work within a reasonable time.
  - (until abolished) failure to follow the statutory dispute resolution procedures (glossary, p100).
- Consider the amount of compensation your client will receive if s/he wins (see p24). Note: if your client was dismissed on long-term ill-health and his/her contractual sick pay had run out, if s/he is unlikely to have been fit to return for some while, his/her compensation for loss of earnings may be minimal.

B. Disability discrimination

- Consider whether your client is eligible to claim disability discrimination (see p53).
- If your client's absences are for disability-related reasons, it will be discrimination to dismiss him/her for those absences unless it is justifiable to do so.
- It is good practice for the employer to have a separate disability absence policy rather than applying the usual sickness absence policy to your client without considering his/her specific circumstances and the fact that s/he is disabled.

- It is likely to be discrimination not to make any extra allowance for disability-related absences. How much extra time off an employer must permit is uncertain. It depends on what a tribunal would think reasonable.
- The employer must make any necessary reasonable adjustments, both in its treatment of the absences, and in working conditions generally.
- An employer would not usually be expected to pay your client fully for disability-related absences once the usual sick pay runs out.
- However, if your client's absence is because s/he is unable to work due to the employer's failure to make reasonable adjustments to his/her working conditions, s/he should receive full pay for that absence and should not be dismissed.
- Consider what compensation a tribunal may award if your client wins his/her discrimination case. For an overview on disability discrimination, see p53.

C. Pregnancy discrimination

- It is automatic unfair dismissal and sex discrimination to dismiss a woman for pregnancy or pregnancy-related reasons, eg because she is absent or unable to carry out certain duties due to her pregnancy. For more detail, see p76.

D. Possible other legal claims

- Notice pay.
- Outstanding wages and holiday pay.
- Failure to provide written reasons for dismissal in response to a request.
- Other forms of discrimination.
- Section 1 statement if worthwhile (see comments, p18).
- Personal injury claim if the employer caused the ill-health.

2. Interviewing your client

A. Find out background facts

- Find out your client's start and finish date. (This is relevant to length of service to claim unfair dismissal and to the time-limit to start a claim.)
- If uncertain, ask questions to establish whether your client was an employee so that s/he is eligible to claim unfair dismissal.
- Establish the reason for dismissal. Obtain the dismissal letter and any prior letters related to your client's ill-health absences.
- Find out the procedure which was followed. Check it conforms with the employer's sickness procedure and any required statutory steps.
- Find out about the workplace: departments; management hierarchies; jobs
- Was your client dismissed for long-term ill-health or for too many days of intermittent ill-health?
- Does the employer accept the ill-health was genuine?
- Has the employer obtained its own medical report and discussed it with your client?
- Has the employer given your client the chance to obtain his/her own medical report? If the employer wrote to your client's GP, did the employer follow the provisions of the Access to Medical Reports Act 1988?
- Has the employer considered the individual circumstances of your client's case or is it automatically dismissing your client because s/he has reached a specified number of days sickness?
- What was your client's sick record in previous years?
- Has your client been warned that s/he may be dismissed, on this or previous occasions?
- If your client is on long-term sick, when is s/he likely to return? Has s/he kept the employer fully informed?

- What sick pay entitlement is your client entitled to? Has it run out?
- How difficult is it for the employer to make arrangements to cover your client when s/he is absent?
- What is the general level of sickness in the workplace / your client's department?
- Did mismanagement contribute in any way to your client's ill-health, eg excess workload; pressure from users; harassment?

B. Check for disability discrimination

- Was your client's sickness absence due to a disability as defined by the Disability Discrimination Act 1995?
- Were there any reasonable adjustments which the employer should have made which would have prevented the sickness absence?
- Is there a separate sickness policy for disability-related sickness? If not, does the standard sickness policy recognise that disability-related sickness should be considered separately and on a case-by-case basis?
- See disability discrimination checklist, p53.

C. Check for pregnancy discrimination

- Was your client's absence due to pregnancy-related sickness? Can this be proved?
- If it was unrelated, has the employer nevertheless dismissed your client because she is pregnant, when a non-pregnant worker would not have been dismissed?
- Is there evidence to prove this, eg a non-pregnant worker with an equivalent level of sickness who has not been dismissed? Note: this comparison is not necessary if your client's sickness was pregnancy-related.
- See pregnancy discrimination checklist, p76.

D. Relevant documents in your client's hands

- Dismissal letter and all related documents.
- Medical reports.

- Contract of employment.
- Correspondence related to any ill-health in the past.

Relevant law

- Unfair dismissal: Employment Rights Act 1996, s98.
- Disability discrimination: Disability Discrimination Act 1995.
- Pregnancy discrimination: Sex Discrimination Act 1975. Employment Rights Act 1996, s99.

Time-limits

- Unfair dismissal: within 3 months from the effective date of termination.
- Discrimination: within 3 months of the act of discrimination. In a dismissal claim, this is usually, 3 months from the termination date. If there were prior acts of discrimination, eg failure to make reasonable adjustments, count the 3 months from the earliest of those acts or omissions(unless already out of time).
- Extension of time is possible if the statutory dispute resolution procedures apply.
- See p90 for overview of time-limits.

Other relevant checklists

- Dismissal: p15.
- Unfair dismissal overview: p20.
- Discrimination overview: p47.
- Disability discrimination: p53.
- Pregnancy and maternity, p76.

For more detail, see

Chapter 7 (for unfair sickness dismissals); Chapter 11 (for pregnancy discrimination); Chapter 15 (for disability discrimination) in 'Employment Law: An Adviser's Handbook' (bibliography, p97).

Redundancy dismissal: unfair dismissal or discrimination

1. Law and evidence

A. Unfair dismissal

- Check whether your client is eligible to claim unfair dismissal (see p20).

  Note: If your client accepted voluntary redundancy, s/he may be unable to claim that s/he was dismissed.

- One or more of the following factors may make the dismissal unfair:
  - an unfair selection pool was chosen.
  - subjective or inherently unfair selection criteria were used.
  - the selection criteria were not objectively measured and applied.
  - on a fair application of the criteria, your client should not have been selected for redundancy.
  - your client has substantially longer service than those who were retained. (This is unlikely to be enough on its own, but may help, unless 'Last in, First out' would have been discriminatory.)
  - the employer did not look for alternative employment opportunities. (This may be an empty point if no suitable vacancies in fact exist.)
  - your client was not consulted regarding the application of the selection criteria or possible alternative employment.
  - (until abolished) the employer failed to follow the DDP under the statutory dispute resolution procedures. Note these do not apply where your client's redundancy is one of 20 or more.
- Alternatively, the dismissal may have been for an automatically unfair reason, eg due to your client's pregnancy (see p23).
- Consider the amount of compensation your client will receive if s/he wins (see p24). Note also:
  - any redundancy pay your client has received will be set off against the basic award and if it exceeds that, against the compensatory award.
  - the tribunal is unlikely to order reinstatement if your client's job no longer exists.

B. Discrimination

- Consider whether your client is eligible to claim discrimination (see p47).
- Consider which type of discrimination may be involved, eg race, sex, age etc (see p47). In this checklist, 'race, sex, age etc' is shorthand for all forms of unlawful discrimination.
- Direct discrimination means your client was selected for redundancy on grounds of his/her race, sex, age etc. If your client was of a different race, sex, age etc, s/he would not have been selected.
- Evidence which helps to prove direct discrimination, although no factor is conclusive in itself:
  - it was not logical to have selected your client. (It is not enough that it was unfair.)
  - comparators: those retained are of a different race, sex, age etc and should have scored less on the selection criteria. Unless the employer has an innocent explanation, this is the best evidence.
  - overt racist, sexist, ageist remarks.
  - statistics: generally in the workplace, those of a different race, sex, age etc (as relevant) to the client are favoured, eg in terms of status, recruitment, dismissal.
  - the employer cannot give a credible explanation as to why your client was selected. (Note: it is not evidence of discrimination that the employer gives an unfair reason, if that reason is nevertheless credible.)
- There is no defence if the employer has directly discriminated against your client, unless it is direct age discrimination.
- For more on the definition of direct discrimination, see p48.
- It is victimisation if your client was selected for redundancy as a result of complaining about discrimination in the past.
- Evidence which helps to prove victimisation (although no single factor will be enough in itself):
  - the previous complaint of discrimination was not too long ago.
  - the decision-maker was aware of the previous complaint.
  - the organisation – and particularly the decision-maker – were upset about the previous complaint.
  - it wasn't logical to have selected your client for redundancy.
  - comparators: those retained have never complained of discrimination and should have scored less on the selection criteria.
- For more on the definition of victimisation, see p48.

- It may be indirect discrimination, if any of the selection criteria or methods disadvantaged your client and would generally disadvantage those of your client's racial group, sex, age group etc.
- Examples of indirectly discriminatory selection criteria are:
  - last in, first out (LIFO) – tends to disadvantage younger workers and workers who tend to get discriminated against in finding and holding jobs, as well as women who have career breaks.
  - part-time workers first – tends to disadvantage women and is unlikely to be justifiable.
  - inability to carry out work in terms of flexible hours or location – may disadvantage women or older workers with caring commitments.
- For more examples, see Appendix B of 'Employment Law: An Adviser's Handbook' (bibliography, p97).
- It is not unlawful indirect discrimination if the employer can prove that applying the criterion is a proportionate means of meeting a legitimate aim.
- See p53 regarding disability discrimination. There may be disability discrimination if, for example, your client is unjustifiably selected:
  - because of inability to do certain tasks or work across a variety of tasks in the past or in the future, where s/he is unable to do so for disability-related reasons.
  - due to a disability-related absence record.
- If your client is made redundant while on maternity leave and not offered an existing suitable vacancy, this is automatic unfair dismissal and sex discrimination.
- Consider what compensation a tribunal may award if your client wins his/her discrimination case, see p17.

C. Redundancy pay

- Is your client eligible for statutory redundancy pay?
  - s/he must be an employee.
  - s/he must have two years' minimum service.
  - s/he must be dismissed for redundancy. Note: there are special rules if your client leaves early.
- Has your client lost his/her entitlement to statutory redundancy pay because s/he has unreasonably refused an offer of suitable alternative employment?
- Is your client entitled to enhanced contractual redundancy pay?

D. Possible other legal claims

- Time off to look for alternative employment.
- Protective award for lack of collective consultation.
- Notice pay.
- Outstanding wages and holiday pay.
- Section 1 statement if worthwhile (see comments, p18).

2. Interviewing your client

A. Find out background facts

- Find out your client's start and finish date. (This is relevant to whether s/he has one year's minimum service for claiming unfair dismissal and also to the time-limit for starting a claim.)
- If uncertain, ask questions to establish whether your client was an employee so that s/he is eligible to claim unfair dismissal.
- Find out about the workplace: departments; management hierarchies; jobs
- What redundancy process was followed? When was your client first informed? When was s/he consulted? Obtain any letters.
- How many redundancies were made? What jobs / which department?
- Who was in the potential selection pool for redundancy? Was this a fair and logical pool for the employer to have chosen?
- What were the redundancy selection criteria? How was your client measured against the criteria? What are your client's comments on how s/he was measured against the criteria?
- What reason was your client given as to why s/he was selected for redundancy? Is this in writing?
- What comments does your client have on the reason?
- Was your client offered any alternative employment? Was there any alternative employment available which s/he would have liked?

- Who made the decision to select your client for redundancy? Did they know your client's work?
- Did the employer call for volunteers first? If so, did anyone volunteer? Were they accepted as volunteers?
- Where 20 or more redundancies were made: is your client a trade union member? If so, was the union consulted? If not, were workplace representatives consulted?

B. Check whether direct discrimination is possible

- Why does your client think s/he was selected for redundancy? (This is a useful question to establish whether the client thinks it is due to discrimination or for some other reason, which may or may not be unlawful.)
- Does your client think s/he would have been made redundant if s/he was of a different race, age, sex etc? If not, what leads the client to that conclusion? (Make sure you express this in a constructive way and not in a way which sounds like you are disputing the client's opinion.)
- Has the employer made any discriminatory comments, eg racist comments, or comments indicating the employer believes the client has too many childcare commitments, or should be first to be made redundant due to his/her age?
- How does your client get on generally with the decision-maker? Is there any other evidence of racism, sexism, ageism etc (as relevant) in the workplace generally or specifically by the decision-maker?
- Comparators: what is the race, age, sex etc of those who have not been made redundant? How should they score on the selection criteria compared with the client?
- What is the race, age, sex etc of those who have been made redundant?
- What are the general workplace statistics, loosely speaking, in relation to race, sex, age etc (as relevant)? What are the patterns of employment, promotion, dismissal?
- If this is an age discrimination case, what is your client's age? Is the employer aware of his/her age? If the client is at retirement age, research special rules on retirement dismissals.

C. Check for victimisation

- Has your client previously alleged discrimination based on race, sex, age etc?
- If so, what was the allegation and against whom?
- How long ago? Was it in writing or can it otherwise be proved?
- What was the outcome? Is there any indication that management were unhappy, at the time or since, that the allegation had been made?
- Would those involved in making the redundancy selection decision have been aware of the previous allegation?

D. Check for indirect discrimination

- Did any of the redundancy selection criteria have indirectly discriminatory effect?
- If so, discuss how the employer would try to justify using such a criterion.

E. Relevant documents in your client's hands

- Dismissal letter.
- All documents related to any prior consultation.
- Contract of employment.
- Vacancy lists.

Relevant law

- Unfair dismissal: Employment Rights Act 1996, s98.
- Statutory redundancy pay: Employment Rights Act 1996, Part XI
- Discrimination: Race Relations Act 1976, Sex Discrimination Act 1975 or other discrimination legislation as relevant.

Time-limits

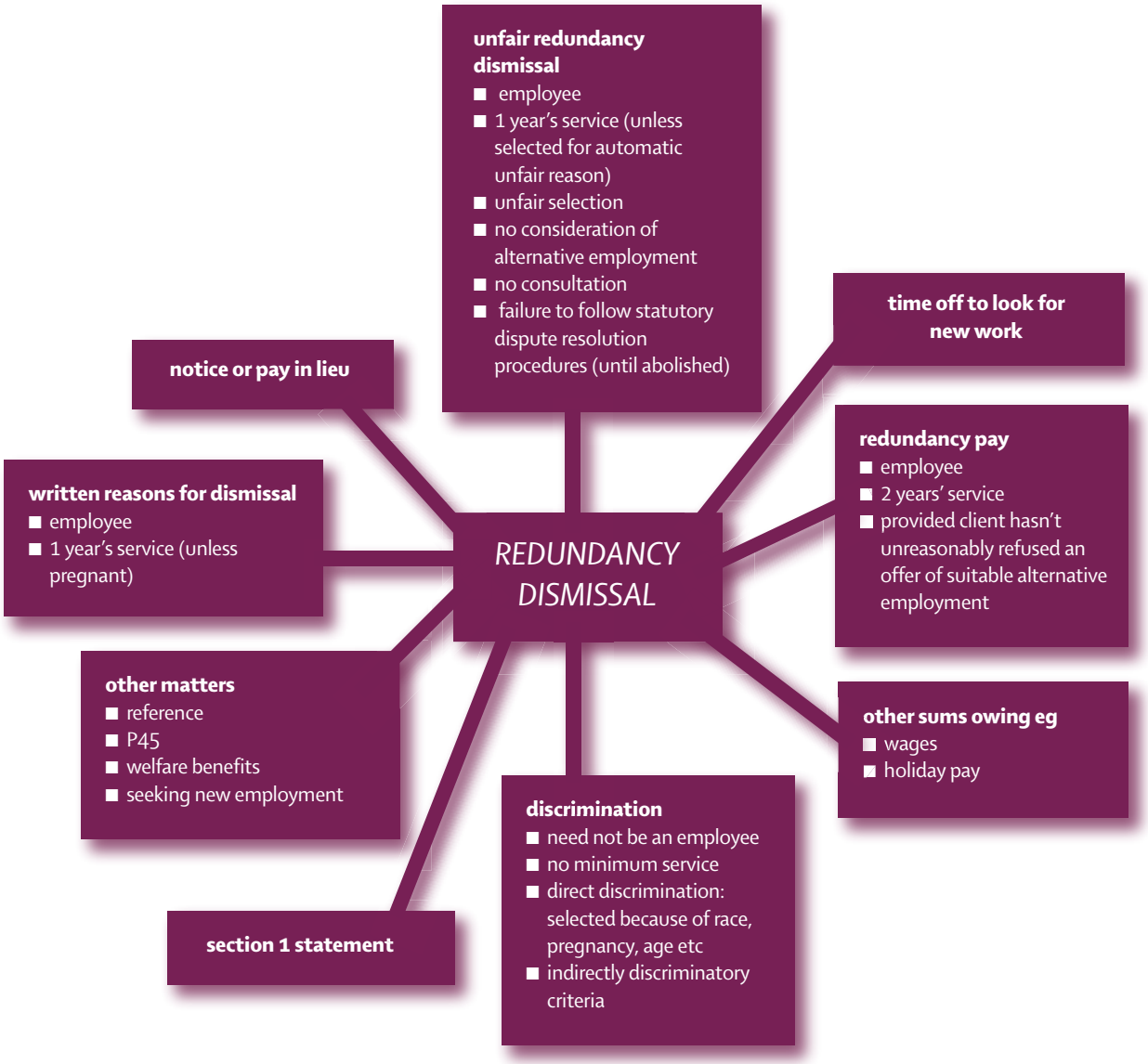
- Unfair dismissal: within 3 months from the effective date of termination.
- Discrimination: within 3 months of the act of discrimination. In a dismissal claim, this is usually within 3 months of the termination date. If there were prior acts of discrimination, count the 3 months from the earliest of those (unless already out of time).
- Redundancy pay: 6 months. However, remember unfair dismissal and discrimination have shorter time-limits.
- Extension of time is possible if the statutory dispute resolution procedures apply.
- See p90 for overview of time-limits.

Other relevant checklists

- Dismissal: p15.
- Unfair dismissal overview: p20.
- Discrimination overview: p47.
- Disability discrimination: p53.

For more detail, see

- Chapter 8 (for redundancy) in 'Employment Law: An Adviser's Handbook' (bibliography, p97).


REDUNDANCY DISMISSAL
unfair redundancy dismissal
employee
1 year's service (unless selected for automatic unfair reason)
unfair selection
no consideration of alternative employment
no consultation
failure to follow statutory dispute resolution procedures (until abolished)
notice or pay in lieu
written reasons for dismissal
employee
1 year's service (unless pregnant)
other matters
reference
P45
welfare benefits
seeking new employment
section 1 statement
discrimination
need not be an employee
no minimum service
direct discrimination: selected because of race, pregnancy, age etc
indirectly discriminatory criteria
time off to look for new work
redundancy pay
employee
2 years' service
provided client hasn't unreasonably refused an offer of suitable alternative employment
other sums owing eg
wages
holiday pay

Discrimination overview

1. What does discrimination law cover?

- Sex Discrimination Act 1975: gender; gender reassignment; being married or a civil partner; being pregnant.
- Equal Pay Act 1970: sex discrimination in pay and contract terms. It is not covered on this checklist (see p73).
- Employment Equality (Sexual Orientation) Regulations 2003: sexual orientation.
- Race Relations Act 1976: race; colour (black / white); nationality; national origin; ethnic origin.
- Employment Equality (Religion and Belief) Regulations 2003: religion; belief.
- Employment Equality (Age) Regulations 2006: age (any).
- Disability Discrimination Act 1995: disability.

2. Check whether your client is eligible to claim

- Your client must be a job applicant, apprentice, employee, former employee, contract worker, or working on a contract personally to execute any work. (Research the position if s/he does not fall within these categories.)
- There is no minimum length of service requirement.
- Your client's claim may be against
  - his/her employer or former employer
  - the principal (if s/he is a contract worker)
  - an employment agency
  - an individual employee (only as an additional respondent to the employer).

3. The definitions of discrimination

- With minor differences of wording, the concepts of direct discrimination, victimisation and harassment apply to discrimination related to gender, being married or a civil partner, race, religion or belief, sexual orientation, age and disability. Indirect discrimination applies to all these grounds except disability.
- The following definitions provide broad guidelines but don't deal with the finer distinctions.

A. Direct discrimination

- Direct discrimination is less favourable treatment on one of the prohibited grounds, eg race or age. For example: a woman applies for a job, but a less qualified and experienced man is promoted.
- Direct discrimination is different treatment not simply unfair treatment.
- Imagine your client was of a different race, sex, age etc, but all other circumstances were the same. Would the employer have treated him/her differently/better?
- It is useful but not essential to find a real-life comparator. Other evidence can also prove direct discrimination.
- Except for direct age discrimination, there is no defence to direct discrimination.
- There are some very limited exceptions.

B. Victimisation

- Victimisation is less favourable treatment because your client has complained about discrimination in some way, eg in an internal grievance, in a letter or by bringing a tribunal case.
  For example: an employee is made redundant on dubious grounds after s/he brings a grievance complaining of religious discrimination.
- There is no protection if your client makes a false allegation in bad faith.
- Witnesses and potential witnesses also must not be victimised.
- In practice, it may be hard to prove the reason for your client's treatment is his/her previous complaint of discrimination.

C. Indirect discrimination

- Indirect discrimination is where the employer applies a provision, criterion or practice which disadvantages your client and which would tend to disadvantage others of your client's race, age, sex etc
  For example, a woman wants to work part-time for childcare reasons. Her employer refuses even though it would be relatively easy to arrange. The discriminatory practice is requiring the woman to work full-time.
- It is not unlawful if the employer can justify the provision, criterion or practice by showing it is a proportionate means of achieving a legitimate aim.

D. Harassment

- Harassment is unwanted conduct related to race, age, sex etc which has the purpose or effect of violating your client's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for him/her.
  For example, an employer constantly subjects your client to racist remarks and so-called jokes.

E. Additional definitions under Disability Discrimination Act

- There are additional concepts of disability-related discrimination and failure to make reasonable adjustment (see p55).

4. How to approach a discrimination case

- Allow more time than for average employment law cases.
- Interview with sensitivity. Be alert to indications of discrimination. Ask whether discrimination could be a factor. (See interview tips checklist, p87.)
- Identify the act or acts of discrimination, eg lack of promotion; disciplinary warning.
- Note the date(s) of each act(s).

- Note who carried out each act of discrimination (individual and organisation.)
- Consider the type of discrimination in each case, eg direct, indirect, victimisation, harassment.
- Explore all the evidence.
- Note the time-limits for each potential act of discrimination.
- Consider your client's chances of proving his/her case and advise.
  - it is not enough that your client believes s/he was discriminated against – there needs to be enough evidence to prove a case.
  - it is irrelevant whether you personally believe discrimination took place. Again it depends on whether there is objective evidence.
  - do not consider a discrimination case only when your client is not eligible for any other kind of case. There needs to be enough evidence to prove discrimination on its own merits.
  - do not overlook discrimination simply because another case, eg unfair dismissal, is easier. Discrimination is likely to be important to your client as a matter of principle.
- Advise your client on tribunals' powers of remedy / compensation and the limitations.
- Is your client ready to take on a case of discrimination?
  - do not pressurise a reluctant client to take on a case just because you believe the evidence is strong.
  - your client needs to believe him/herself that discrimination took place. Otherwise s/he will break down under cross-examination.
  - if your client is still in employment, s/he needs to think carefully about the repercussions.
- For more detail, see specific checklists.

5. First steps for a tribunal case

- To start a case, lodge the standard Claim form within the correct time-limit.
- (If the statutory dispute resolution procedures apply), ensure a grievance is brought first for each act of discrimination other than dismissal which might be the subject of the tribunal claim.
- Send a questionnaire, ideally before the case is started, but at the latest within 21 days afterwards (28 days under the Disability Discrimination Act). (See p91 for time-limits.)

A. What is a questionnaire?

- The questionnaire procedure is only available in discrimination cases.
- Only the Claimant can send a questionnaire, not the employer.
- The Claimant sends the employer a series of written questions. Usually a standard form is used.
- The questions are to gather evidence to help prove discrimination. For example, the Claimant can ask for details about who was promoted; about other people who have committed similar offences and not been dismissed; why the employer made certain decisions; general statistics.
- If the employer doesn't answer fully, the tribunal can draw an adverse inference at the eventual hearing.
- For more details of the procedure and sample precedents, see Central London Law Centre's specialist guides (bibliography, p97).

Relevant law

- Race Relations Act 1976, Sex Discrimination Act 1975 or other discrimination legislation as relevant.

Time-limits

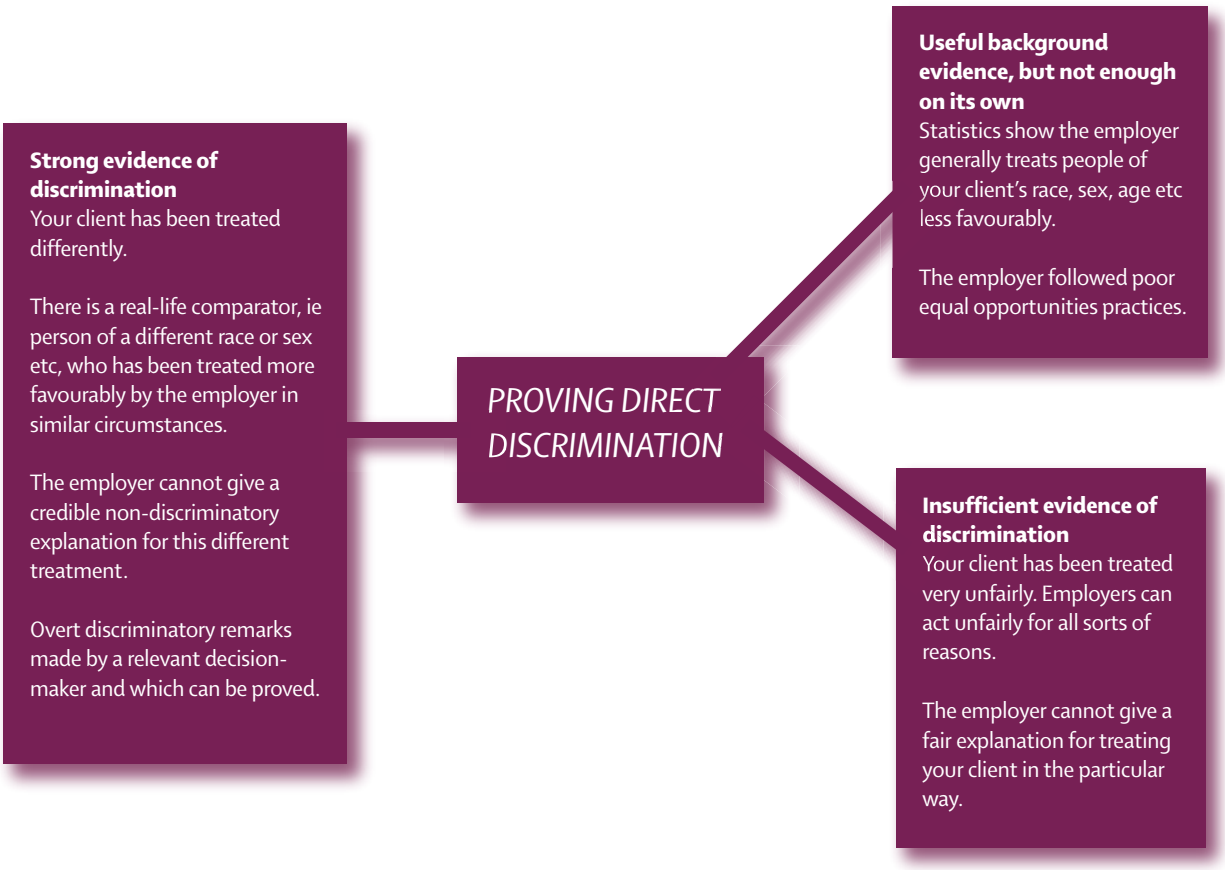
- Within 3 months of the act of discrimination. In a dismissal claim, this is usually, counted from the termination date. If there were prior acts of discrimination, count the 3 months from the earliest of those (unless already out of time).
- Extension of time is possible if the statutory dispute resolution procedures apply.
- See p90 for overview of time-limits.

Other relevant checklists

- Disability discrimination: p53.
- Discrimination: recruitment: p58.
- Discrimination: promotion: p63.
- Redundancy dismissal: p40.
- Dismissal for poor performance: p30.
- Dismissal for ill-health: p35.
- Dismissal for misconduct: p25.
- Pregnancy and maternity: p76.
- Interview tips: p87.

For more detail, see

- Chapters 12 – 17 (for discrimination law and evidence), 19 (for discrimination remedies), 21 (for running a discrimination case) in 'Employment Law: An Adviser's Handbook' (bibliography, p97).


PROVING DIRECT DISCRIMINATION
Strong evidence of discrimination
Your client has been treated differently.
There is a real-life comparator, ie person of a different race or sex etc, who has been treated more favourably by the employer in similar circumstances.
The employer cannot give a credible non-discriminatory explanation for this different treatment.
Overt discriminatory remarks made by a relevant decision-maker and which can be proved.
Useful background evidence, but not enough on its own
Statistics show the employer generally treats people of your client's race, sex, age etc less favourably.
The employer followed poor equal opportunities practices.
Insufficient evidence of discrimination
Your client has been treated very unfairly. Employers can act unfairly for all sorts of reasons.
The employer cannot give a fair explanation for treating your client in the particular way.

Disability discrimination overview

Your client may be comfortable with the fact that s/he is disabled and raise the matter with you directly. However, the law protects discrimination in respect of impairments which are not always recognised as disabilities. You should be alert to the possibility of the Disability Discrimination Act applying whenever a health issue arises. See p87 regarding sensitive interviewing.

1. The legislation

- The law is primarily set out in the Disability Discrimination Act 1995 ('DDA').
- The Disability Discrimination (Meaning of Disability) Regulations 1996 (SI No 1455) and Guidance on matters to be taken into account ('the Guidance') give more detail on the legal meaning of 'disability'.
- The DDA Employment Code of Practice ('the Code') gives detailed guidelines and illustrations on the employer's duty to make reasonable adjustments.
- The Guidance and the Code, both of which have been revised, do not constitute the law in themselves, but the tribunal must take what they say into account.

2. Eligibility

- As with other discrimination legislation, your client need not be an employee in the unfair dismissal sense. (See Discrimination overview on p47.)
- There is no minimum service requirement.
- Your client must have a 'disability' as defined by the DDA.
- Your client must have a physical or mental impairment.

- The impairment must affect your client's ability to carry out day-to-day activities in respect of at least one of the following capacities:
  - mobility
  - manual dexterity
  - physical co-ordination
  - continence
  - ability to lift, carry or move everyday objects
  - speech, hearing or eyesight
  - memory or ability to concentrate, learn or understand
  - perception of the risk of physical danger.

Note: It is the effect on the day-to-day activity which counts, not on hobbies. A person who can move easily but cannot play football is probably not 'disabled'. It is uncertain whether it is enough that only work activities are affected (watch for case law developments).

- The impairment must have a substantial and not just a minor effect on your client's ability to carry out any of these activities.
- The test is the effect of the impairment without any controlling medication or treatment. (The exception is wearing glasses to correct a visual impairment.)
- A worker with a progressive condition, eg muscular dystrophy, is protected as soon as the condition has any effect on a day-to-day activity, even if the effect is not yet substantial.
- The impairment must have long-term effect on your client's ability to carry out these activities, ie has lasted or is likely to last at least 12 months or for the rest of your client's life.
- An impairment which stops having effect but is likely to recur, counts as continuing, eg rheumatoid arthritis.
- The Guidance (see above) should be referred to when applying each stage of the definition.
- Medical evidence may be necessary to prove any of these stages.
- The following conditions are deemed a 'disability': HIV, multiple sclerosis, cancer or your client is certified blind or partially-sighted.
- The following conditions are specifically excluded:
  - a tendency to set fires or to steal.
  - a tendency to physical or sexual abuse, exhibitionism or voyeurism.

- seasonal allergic rhinitis.
- disfigurement by tattoo or non-medical body piercing.
- addictions to alcohol, nicotine or other substances unless the addiction was originally the result of medical treatment.

- For assistance applying the definition to a range of different impairments, see 'Proving disability and reasonable adjustments: A worker's guide to evidence under the DDA' (bibliography, p97).

3. The definitions of disability discrimination

- Direct discrimination. The definition parallels those in the other discrimination strands. The employer has treated your client less favourably than it would treat a non-disabled person in similar circumstances. There is no defence, once it is proved.
- Disability-related discrimination. Less favourable treatment for a reason related to your client's disability. For example, your client is not offered a job because s/he cannot type sufficiently fast. The reason s/he cannot do this is because of his/her arthritis.

Note: There is a defence to disability-related discrimination if the employer can justify its actions.

- Victimisation. The definition is the same as in all the discrimination strands (see p48).
- Harassment. The definition is basically the same as in all the discrimination strands (except sex discrimination).
- The employer has failed to comply with its duty of reasonable adjustment.

A. The duty of reasonable adjustment

- This duty arises if your client is at a disadvantage due to his/her disability.
- The employer must make any reasonable adjustments which will remove that disadvantage.
- The DDA suggests the following reasonable adjustments, although these are just examples:
  - adjusting premises.
  - acquiring or modifying equipment.

- modifying instructions or reference manuals.
- modifying testing or assessment procedures.
- providing a reader or interpreter.
- providing supervision.
- adjusting hours.
- allowing time-off for care.
- Training.
- reallocating some duties.
- assigning the person to a different workplace.
- transferring to any suitable available alternative posts.

- Discuss with your client and any relevant specialist organisation what adjustments could be helpful. For a compendium of ideas, see 'Proving disability and reasonable adjustments: A worker's guide to evidence under the DDA' (bibliography, p97).
- The DDA says that whether the employer should have made adjustments will be judged by the following criteria:
  - the extent to which the adjustment would prevent the disadvantage.
  - the practicability of the employers making the adjustment.
  - the financial and other (staff and resources) costs of the adjustment and the extent of any disruption caused.
  - the extent of the employer's financial or other resources eg size of workforce.
  - the availability of financial or other assistance to make the adjustment.
  - the extent to which your client is willing to cooperate.
- The Code (see above) gives examples of adjustments which may be expected.
- Grants are often available to employers through the Access to Work Scheme (contact JobCentre Plus).
- If the employer refuses to make adjustments, your client should contact the Access to Work Scheme for an assessment of what is needed.

4. Compensation and remedies

The employment tribunal has the same powers as for all discrimination cases (see p17).

5. Some points to remember if running a tribunal case

- The statutory dispute resolution procedures may need to be followed if your client is an employee, including lodging a grievance first regarding action prior to dismissal. These procedures are due to be abolished.
- A discrimination questionnaire should usually be sent first (see p51).
- Employers frequently deny the worker is 'disabled'. You often require medical evidence.

Relevant law

- Disability Discrimination Act 1995

Time-limits

- Within 3 months of the act of discrimination (subject to any extension under the statutory dispute resolution procedures).
- For failure to make reasonable adjustments, time runs from when the adjustment should first have been made had there been no discrimination.
- Extension of time is possible if the statutory dispute resolution procedures apply.
- See p90 for overview of time-limits.

Other relevant checklists

- Discrimination overview: p47.
- Interview tips, p87.

For more detail, see

- Chapters 15-16 (disability discrimination law and evidence) in 'Employment Law: An Adviser's Handbook' (bibliography, p97).

Discrimination: recruitment

This checklist is suitable for failure to get short-listed or failure to get offered the job after interview.

1. Law and evidence

- Consider whether your client is eligible to claim discrimination (see p47).
- Consider which type of discrimination may be involved, eg race, sex, age etc (see p47). In this checklist, 'race, sex, age etc' is shorthand for all forms of unlawful discrimination.
- Direct discrimination means your client was not recruited on grounds of his/her race, sex, age etc. If your client was of a different race, sex, age etc, s/he would have been recruited.
- Evidence which helps to prove direct discrimination, although no factor is conclusive in itself:
  - looking at the job requirements and your client's application form, you would have expected him/her to be short-listed / recruited.
  - comparators: those short-listed / recruited were of a different race, sex, age etc to your client and were less qualified, experienced, suited for the job. This is the best evidence.
  - overt racist, sexist, ageist remarks during the interview by the decision-makers.
  - statistics: generally in the workplace, those of a different race, sex, age to your client are favoured, especially in relation to who is appointed, relevant jobs and status.
- There is no defence if the employer has directly discriminated against your client, (except in respect of direct age discrimination).
- For more on the definition of direct discrimination, see p48.
- It is victimisation if your client was not recruited because s/he had complained about discrimination in the past, eg in a previous application to the same employer, or the new employer was aware of a discrimination claim s/he had brought against his/her former employer..

- For evidence to prove victimisation, see the promotion checklist on p00. For more on the definition of victimisation, see p48.
- It may be indirect discrimination, if any of the selection criteria or methods disadvantaged your client and would generally disadvantage those of your client's racial group, sex, age group etc.
- Examples of indirectly discriminatory selection criteria are:
  - previous experience or length of service – tends to disadvantage younger workers and workers who often get discriminated against in finding and holding jobs, as well as women who have career breaks.
  - full-time working – tends to disadvantage women.
  - qualifications – certain qualifications are less likely to be held by women, older workers, certain minority ethnic groups.
- For more examples, see Appendix B of 'Employment Law: An Adviser's Handbook' (bibliography, p97).
- It is not unlawful indirect discrimination if the employer can prove that applying the criterion is a proportionate means of meeting a legitimate aim.
- Consider what compensation a tribunal may award if your client wins his/her discrimination case.

2. Interviewing your client

A. Find out background facts

- Obtain all documents related to the recruitment including the advert, job description, person specification, client's application form, rejection letter.
- Discuss the nature of the job and your client's suitability for it.
- Did your client get short-listed?
- If so, when was the interview and who was on the interview panel?
- How well does your client feel the interview went?

- While your client's memory is still fresh, try to reconstruct the interview questions and answers given by your client.
- On what date does your client think the decision not to short-list / recruit him/her was made? (The time-limit probably runs from this date.)
- What reason was your client given as to why s/he was rejected? Is this in writing?
- What comments does your client have on the reason?
- Has your client ever applied for a job with this employer before? If so, get details.

B. Checking for direct discrimination

- Why does your client think s/he was not short-listed / offered the job? (This is a useful question to establish whether your client thinks it is due to discrimination or for some other reason, which may or may not be unlawful.)
- Does your client think s/he would have been short-listed / offered the job if s/he was of a different race, age, sex etc? If so what leads your client to that conclusion? (Make sure you express this in a constructive way and not in a way which sounds like you are disputing your client's opinion.)
- Did the employer made any discriminatory comments during the interview, eg racist comments, or comments indicating the employer believes your client has too many childcare commitments, or is too old?
- Comparators: what is the race, age, sex etc of those who were short-listed / offered the job? How do their qualifications, experience, suitability compare with those of your client?
- What was the race, age, sex etc of the interview panel?
- Is your client aware of the general workplace pattern of employees in relation to race, sex, age etc?
- If this is an age discrimination case:
    - what is your client's age?
    - was your client asked to state his/her age on the application form or during the interview?
    - would the employer have been able to guess your client's age from the contents of his/her application form?
    - if your client is at retirement age, research special rules on recruitment near retirement age.

- If this is a race discrimination case and your client was not short-listed, would the employer have been able to guess your client's ethnic origin from the application form or in some other way?
- If the case concerns discrimination on grounds of sexual orientation or religion, how would the employer have known your client's sexual orientation or religion?

C. Checking for victimisation

- Has your client previously alleged discrimination against this employer based on race, sex, age etc?
- If so, what was the allegation and against whom?
- How long ago? Was it in writing or can it otherwise be proved?
- What was the outcome? Is there any indication that management were unhappy, at the time or since, that the allegation had been made?
- Would those involved in making the recruitment decision have been aware of the previous allegation?
- Alternatively, did your client ever allege discrimination against a previous employer? Would this employer be aware of that?

D. Checking for indirect discrimination

- Did any of the selection criteria have indirectly discriminatory effect? eg
  - insistence on full-time working would potentially be indirect sex discrimination against women with childcare obligations.
  - setting a minimum or maximum length of experience could be indirect age discrimination against younger or older workers respectively.
  - requiring fluent English or hand-completed application forms could be indirect race discrimination against those from non-English speaking countries.
- If so, discuss how the employer would try to justify using such a criterion.

E. Disability / pregnancy

- If your client failed to get the job for a reason connected with a disability, see checklist on p53. If your client is pregnant, see p76.

F. Relevant documents in your client's hands

- advert and recruitment pack – job description, person specification etc.
- your client's application form.
- the letter rejecting your client.

Relevant law

- Race Relations Act 1976, Sex Discrimination Act 1975, Disability Discrimination Act 1995, or other discrimination legislation as relevant.

Time-limits

- Within 3 months of the act of discrimination. Be careful! In a recruitment claim, this is usually 3 months from the decision not to short-list or recruit your client, even if your client does not find out and is not notified till later.
- See p90 for overview of time-limits.

Other relevant checklists

- Discrimination overview: p47.
- Disability discrimination: p53.
- Pregnancy and maternity: p76.

For more detail, see

- Chapters 13 - 17 (for discrimination law and evidence) in 'Employment Law: An Adviser's Handbook' (bibliography, p97).

Discrimination: promotion

This checklist is suitable for failure to get short-listed or failure to get offered the job after interview.

1. Law and evidence

- Consider whether your client is eligible to claim discrimination (see p47).
- Consider which type of discrimination may be involved, eg race, sex, age etc (see p47). In this checklist, 'race, sex, age etc' is shorthand for all forms of unlawful discrimination.
- Direct discrimination means your client was not promoted on grounds of his/her race, sex, age etc. If your client was of a different race, sex, age etc, s/he would have been promoted.
- Evidence which helps to prove direct discrimination, although no factor is conclusive in itself:
  - looking at the job requirements and your client's application form, you would have expected him/her to be short-listed / promoted.
  - your client has previously acted-up successfully in the promoted post.
  - your client has an excellent work record.
  - comparators: those short-listed / promoted were of a different race, sex, age etc to your client and were less qualified, experienced, suited for the promotion. This is the best evidence.
  - overt racist, sexist, ageist remarks, eg during the interview or on other occasions, by the decision-makers.
  - statistics: generally in the workplace, those of a different race, sex, age to your client are favoured, especially in relation to status and promotions.
- There is no defence if the employer has directly discriminated against your client, (except in respect of direct age discrimination).
- For more on the definition of direct discrimination, see p48.
- It is victimisation if your client was not promoted as a result of complaining about discrimination in the past.

- Evidence which helps to prove victimisation (although no single factor will be enough in itself):
  - your client had made a previous complaint of discrimination against the employer, which was not too long ago.
  - the decision-maker was aware of the previous complaint.
  - the organisation – and particularly the decision-maker – were upset about the previous complaint.
  - your client appeared very suitable for the promotion.
  - comparators: the people who were short-listed / promoted were less suitable (and presumably had never complained of discrimination).
- For more on the definition of victimisation, see p48.
- It may be indirect discrimination, if any of the selection criteria or methods disadvantaged your client and would generally disadvantage those of your client's racial group, sex, age group etc.
- Examples of indirectly discriminatory selection criteria are:
  - previous experience or length of service – tends to disadvantage younger workers and workers who often get discriminated against in finding and holding jobs, as well as women who have career breaks.
  - full-time working – tends to disadvantage women.
  - qualifications – certain qualifications are less likely to be held by women, older workers, certain minority ethnic groups.
- For more examples, see Appendix B of 'Employment Law: An Adviser's Handbook' (bibliography, p97).
- It is not unlawful indirect discrimination if the employer can prove that applying the criterion is a proportionate means of meeting a legitimate aim.
- Consider what compensation a tribunal may award if your client wins his/her discrimination case.

2. Interviewing your client

A. Find out background facts

- Establish whether a formal promotion process was followed in relation to a particular vacancy or whether the employer promotes people at random times, when they are perceived to meet a particular level of performance.

- If there was a formal process, was the job advertised externally?
- Obtain all documents related to the promotion including the advert, job description, person specification, client's application form, rejection letter.
- Discuss the nature of the job and your client's suitability for it.
- Has your client ever acted-up / substituted into the promoted post? If so, when, for how long, and how well did s/he do?
- Did your client get short-listed?
- If so, when was the interview and who was on the interview panel?
- How well does your client feel the interview went?
- While your client's memory is still fresh, try to reconstruct the interview questions and answers given by your client.
- On what date does your client think the decision not to short-list / promote him/her was made?
- What reason was your client given as to why s/he was rejected? Is this in writing?
- What comments does your client have on the reason?
- When did your client start with this employer? How has s/he progressed generally?
- Has your client ever applied for promotion before? If so:
  - when did s/he apply?
  - what happened?
  - did s/he apply for the same job as on this occasion?
  - what reason was s/he given for his/her lack of success? Was it a reason that is consistent with the reason given this time?
  - was the successful candidate on that occasion genuinely more suitable for the job?
  - were the same decision-makers involved as on this occasion?
  - does your client think s/he was discriminated against on that occasion too? If so, did s/he complain at the time?
- What is your client's general work record, eg does s/he have a clean disciplinary record? Has s/he received good appraisals?
- What is the usual pattern of promotions within the employer? How quickly do people tend to get promoted?

B. Checking for direct discrimination

- Why does your client think s/he was not short-listed / promoted? (This is a useful question to establish whether your client thinks it is due to discrimination or for some other reason, which may or may not be unlawful.)
- Does your client think s/he would have been short-listed / promoted if s/he was of a different race, age, sex etc? If so what leads your client to that conclusion? (Make sure you express this in a constructive way and not in a way which sounds like you are disputing your client's opinion.)
- Did the employer made any discriminatory comments during the interview, eg racist comments, or comments indicating the employer believes your client has too many childcare commitments, or is too old?
- Comparators: what is the race, age, sex etc of those who were short-listed / promoted? How do their qualifications, experience, suitability compare with those of your client?
- What was the race, age, sex etc of the interview panel?
- What is the general workplace pattern of employees in relation to status and promotions by reference to race, sex, age etc?
- How is your client treated generally at work, especially by those who denied him/her promotion? Have there been any other incidents which your client thinks were discriminatory?

C. Checking for victimisation

- Has your client previously alleged discrimination against the employer based on race, sex, age etc?
- If so, what was the allegation and against whom?
- How long ago? Was it in writing or can it otherwise be proved?
- What was the outcome? Is there any indication that management were unhappy, at the time or since, that the allegation had been made?
- Would those involved in making the promotion decision have been aware of the previous allegation?

D. Checking for indirect discrimination

- Did any of the selection criteria have indirectly discriminatory effect?
- If so, discuss how the employer would try to justify using such a criterion.

E. Disability / pregnancy

- If your client failed to get promotion for a reason connected with a disability, see checklist on p53. If your client is pregnant, see checklist on p76.

F. Relevant documents in your client's hands

- advert and recruitment pack – job description, person specification etc.
- your client's application form.
- the letter rejecting your client.

Relevant law

- Race Relations Act 1976, Sex Discrimination Act 1975, Disability Discrimination Act 1995, or other discrimination legislation as relevant.

Time-limits

- Within 3 months of the act of discrimination (subject to any extension under the statutory dispute resolution procedures). Be careful! In a promotion claim, this is usually counted from the decision not to short-list or promote your client, even if your client does not find out and is not notified till later.
- Extension of time is possible if the statutory dispute resolution procedures apply.
- See p90 for overview of time-limits.

Other relevant checklists

- Discrimination overview: p47.
- Disability discrimination: p53.
- Pregnancy and maternity: p76.

For more detail, see

- Chapters 13 - 17 (for discrimination law and evidence) in 'Employment Law: An Adviser's Handbook' (bibliography, p97).

Sexual harassment

1. The law

- Sexual harassment is covered by the Sex Discrimination Act 1975 ('SDA'). The definition at the time of writing is due to be amended following a judicial review brought by the former Equal Opportunities Commission.
- It is unlawful to subject your client to sexual harassment. It is also unlawful to punish him/her if s/he complains about it in good faith.
- The employer is vicariously liable for harassment carried out by its employees against your client unless it took all reasonably practicable preventative steps. This is a difficult defence for the employer to prove, as it requires a high level of preventative action.
- The employer is not vicariously liable for harassment which takes place outside the course of employment. However, business trips, joint work outings, drinks after work, are usually covered.
- The employer may now be legally responsible for harassment carried out by members of the public if such harassment was foreseeable and within the employer's control to prevent. Watch for legal developments.
- If there are problems with bringing a tribunal case under the SDA, eg because a time-limit is missed or the harassment happened outside the course of employment or wasn't related to sex, your client may be able to bring a civil claim or claim under the Protection from Harassment Act 1997.

Note: As such claims are in the proper courts, this is only realistic if the evidence is strong, it is a serious case, and your client would obtain legal aid.

2. Evidence

- Harassment can be difficult to prove. The following evidence can be useful:
  - direct witnesses of the harassment.
  - indirect witnesses – those who your client told about the harassment.
  - others who have been harassed by the same person.
  - false allegations of poor work made by the harasser against your client.
- It is crucial that your client is consistent on every occasion that s/he retells the incidents. Ensure you are precise and accurate if drafting letters or tribunal documents for him/her. Do not make assumptions or avoid clarification through embarassment.
- The questionnaire procedure (see p51) is a vital way of finding out more information.
- Be prepared to spend time finding out what happened and running the case. The employer will spend considerable time and resources defending a case.

3. Questions to ask your client

A. Background

- The harasser's job title and working relationship with your client.
- The nature of the working day. How often your client has contact with the harasser.
- The general office situation, lay-out and presence of other workers.
- Your client's start date and disciplinary record. (This is sensitive: explain that you are asking about the record only to see how vulnerable your client might be if management raises the issue.)

B. The harassment

- When the harassment started.
- Details and dates of the harassment (verbal and physical). (This requires a sensitive approach as your client may be embarrassed, particularly if the representative is of the opposite sex.)
- Establish what is normal acceptable office behaviour and where the line is drawn.
- Are there witnesses? Has your client kept a diary? Has s/he been in touch with his/her GP?
- Has the harasser done the same thing to other workers? Have others complained to management?
- Has your client said explicitly to the harasser or made it clear in any other way that the behaviour is unwelcome? Many kinds of behaviour are obviously unwelcome and it is not essential that your client has said as much to the harasser, but it is helpful if s/he has. Note that this is extremely sensitive as your client may feel to blame if s/he has not said anything to the harasser. Therefore do not ask this question until late in the interview when confidence is built. This also gives your client time to raise it first, which is preferable. If you have to raise the issue first, be sure to give prior reassurance that it would be understandable if s/he had not felt able to say anything.
- If your client did tell the harasser, how and when did s/he do so and what was the reaction?
- Has your client raised the matter with anyone in management or told anyone else before? (This question also needs prior reassurance.)

C. The next steps

- A discussion of options including taking a grievance, going to tribunal plus time-limits, resigning and claiming constructive dismissal (see p9), making an informal approach to the harasser, or doing nothing but keeping a diary.

4. Sensitive interviewing

A sensitive approach to interviewing your client is crucial. Remember s/he has been through a traumatic experience. The following would normally be helpful:

- Take the matter seriously and give it the necessary time.
- Be friendly and supportive but formal. Do not be authoritarian or too informal. Both could replicate the harasser's behaviour.
- Be clear about your own role and explain why sensitive questions are asked before asking them.
- In the first interview, allow your client to give you a broad picture before going back (in this interview or a subsequent interview) to ask for more detail.
- Do not try to get all the information in the first interview - focus on building confidence (although you must find out enough to ensure you do not miss a legal time-limit).
- A staged approach is recommended, asking more sensitive questions (eg as to any counter-allegations) in later interviews, so confidence is built first.
- To maintain confidence, arrange swift follow-up interviews at the first interview. This is also essential before memories fade and witnesses lose interest.
- In case your client is embarrassed, offer the opportunity to write down what has happened before discussing it.

  Note: This is not a substitute for spending time talking to your client.
- Provide reassurance that your client is entitled to feel upset and that the harasser has behaved unacceptably.
- Reassure your client that s/he has done nothing wrong.
- Acknowledge your client's feelings as genuine.
- Reassure your client on confidentiality and that you will do nothing without permission. It is important to take notes, but ask your client's permission first as reassurance.

- Discuss various options, taking account of what your client wants and clarifying the level of assistance you can provide. Address any fear of reprisals.
- Raise the matter of your client's feelings and current state of health and direct him/her to appropriate bibliography of support. Do not:
  - act as an amateur counsellor yourself.
  - suggest she needs counselling/psychiatric help in a way which could be understood as meaning you think there is something wrong with her.
  - use this as an alternative to concrete remedial action.
- Do not:
  - make assumptions.
  - suggest your client could be to blame in inviting the harassment.
  - blame your client for not confronting the harasser, telling management or seeking advice earlier.
  - suggest your client may be misinterpreting events or being over-sensitive.
  - say you know the harasser and are surprised s/he has acted in that way.
  - express any view as to the effect on the harasser or the harasser's wife/husband/partner if your client makes an allegation.
  - pressurise your client into taking any form of action.

Relevant law

- Sex Discrimination Act 1975; Protection from Harassment Act 1997; civil and criminal law.

Time-limits under the SDA

- Within 3 months of each act of harassment, though some actions may already be out of time.
- It is possible that the harassment amounts to an ongoing discriminatory state of affairs, in which case 3 months can be counted from the final incident.
- In respect of any victimisation by the employer, within 3 months of that date.
- Extension of time is possible if the statutory dispute resolution procedures apply.
- See p90 for overview of time-limits.

Other relevant checklists

- Discrimination overview: p47.

For more detail, see

- Chapter 17 (For harassment) in 'Employment Law: An Adviser's Handbook' (bibliography, p97).

Equal pay

1. The law

- 'Equal pay' law concerns sex discrimination in pay. It is covered by the Equal Pay Act 1970 ('EqPA').
- The EqPA also covers sex discrimination in other contract terms, eg sick pay entitlement or entitlement to a company car.
- Sex discrimination in all other matters is covered by the Sex Discrimination Act 1975 ('SDA').
- Non-contractual, ie wholly discretionary, bonuses are covered by the SDA. It is often unclear whether or not a bonus derives from the contract. If in doubt, use both statutes.
- It is only the SDA which does not cover discrimination in pay or contract terms. Other discrimination statutes and regulations cover discrimination in pay and contract terms in the same way as all other discriminatory actions. For example, the Race Relations Act 1976 covers race discrimination in pay.
- EU law through Article 141 of the Treat of Rome and the Equal Pay Directive cover sex discrimination in pay.

2. How does the Equal Pay Act work?

- The EqPA covers the self-employed having contracted to execute work personally as well as ordinary employees.
- Both men and women can claim equal pay, but it is usually women who are underpaid. This checklist therefore assumes your client is a woman.
- A woman can claim equal pay with that of a man employed on (i) like work, (ii) work rated as equivalent on a Job Evaluation Scheme (iii) work of equal value.

- Unlike the SDA, your client needs a real life man in the same employment with whom to compare her pay. She cannot make a hypothetical comparison. Note:
  - there are some complicated rules as to what can be regarded as 'in the same employment'.
  - some commentators believe that under EU law, an actual comparator should not be necessary.
- Your client can compare her pay with that of her predecessor or a successor.
- Equal value claims can compare very different jobs. The comparison is based on whether there is an equivalent level of skills and responsibilities etc.
- Equal value claims are particularly lengthy and expensive to run. Usually it is necessary for a tribunal to appoint an independent expert to assess the value of each job.
- Employers can defend an equal pay claim if they prove that the difference in pay is due to a genuine material factor other than sex, eg the man has greater experience or higher qualifications, or market forces at the time of recruitment.
- Before starting any tribunal case, your client can find out more information about how her pay is calculated, the justification for any bonuses, the pay of others etc by sending a questionnaire (see p51).
- It is unlawful victimisation under the SDA to dismiss or otherwise penalise your client because she has complained about sex discrimination in pay. It is also victimisation to punish other employees because they have helped your client, eg a male colleague who tells her what he is getting paid.

3. Indirect sex discrimination in pay

- The employer's reason for paying your client less than a comparable man may amount to indirect sex discrimination.
- Examples of pay criteria causing indirect sex discrimination:
  - bonuses for unsocial hours working.
  - lower hourly rates for part-timers.
  - higher pay for 'flexibility' and 'mobility' (unpredictable working hours, last-minute overtime).

- paying more for certain qualifications or experience, if of a kind which men are more likely to have than women.
- increments for length of service (women tend to build up less service because of childcare breaks).

■ An employer can defend using any indirectly discriminatory criterion if it can be justified. The test of justification is whether it is a proportionate means of achieving a legitimate aim.

Relevant law

■ Equal Pay Act 1970.

Time-limits

■ Six months from the last day the woman was employed in the relevant employment.
■ The rules can be complicated and are set out in EqPA, s2(4) and s2ZA together with test cases.

Other relevant checklists

■ Discrimination overview: p47.

For more detail, see

■ Chapter 5 (equal pay) in 'Employment Law: An Adviser's Handbook' (bibliography, p97).

Pregnancy and maternity

1. What your client needs to know if she is pregnant

- Employees are entitled to reasonable time off on a paid basis for ante-natal care.
- All employees, regardless of their length of service, are entitled to one year's statutory maternity leave. Check whether your client's contract gives her additional rights.
- There is no entitlement to full pay while on maternity leave unless specified in your client's contract. Your client should be eligible for maternity allowance or statutory maternity pay.
- During maternity leave, your client can work up to 10 'keeping-in-touch' days if she and the employer both agree.
- Your client must give notice no later than the end of the fifteenth week before her expected week of childbirth (EWC) of her pregnancy, her EWC and the date she wishes her maternity leave to start.
- See checklist regarding part-time working on p80 if your client wants to return part-time.
- If your client is exposed to a biological, chemical or physical risk (including fatigue), she may be entitled to a modification of her duties, a reduction in hours or a fully paid health and safety suspension.
- If your client is being harassed, discriminated against, or dismissed because she is pregnant, she may be able to claim sex discrimination, unlawful detriment and/or automatic unfair dismissal.
- It's automatic unfair dismissal if your client is made redundant during maternity leave and is not offered any existing suitable alternative vacancy.
- An employee who is dismissed while pregnant is entitled to written reasons for her dismissal regardless of her length of service.

2. Pregnancy discrimination (including dismissal)

A. The law

- A woman who is dismissed (disciplined or harassed) because she is pregnant may be able to claim sex discrimination. See checklist, p47 for eligibility to claim sex discrimination.
- The woman may also be able to claim unlawful detriment or, if she is an employee, automatic unfair dismissal.
- It is direct sex discrimination to treat a woman less favourably for a reason related to her pregnancy, eg she is dismissed:
  - because she cannot perform certain tasks due to her pregnancy.
  - because of pregnancy-related sickness.
  - on a pretext. The employer would not have dismissed a non-pregnant worker who had the same level of performance or conduct.

B. Evidence

- In some cases, the employer has dismissed the woman for a reason which is obviously related to pregnancy, eg a related illness or drop in work performance. If so, it is necessary to prove the illness etc is related to pregnancy.
- In other cases, it is necessary to prove the employer has dismissed the woman on a pretext and the true underlying reason is her pregnancy. The following evidence helps prove pregnancy discrimination. No single factor is conclusive.
- Evidence to prove that at the time your client was dismissed (or discriminated against), the employer knew she was pregnant.
  - when did your client tell her employer that she was pregnant?
  - did she put it in writing? If verbal, who did she tell, what was the response and were there witnesses?
  - other proof that the employer knew? Has she requested time off or been sick?
  - did the particular manager who took the decision to dismiss know she was pregnant?

- Evidence to show that the employer (or relevant manager) was unhappy that your client was pregnant. Check:
  - the employer's reaction/comments when she first told the employer.
  - the employer's attitude towards any time off for ante-natal care or due to sickness.
  - the employer's attitude towards any discussions about returning after maternity leave.
  - lack of sympathy towards any tiredness; unwillingness to modify or reduce any duties if necessary.
  - any adverse comments, eg about your client's appearance or about whether she should be returning to work or stereotyped comments about women's roles.
- Evidence to show that particular managers changed their attitude towards your client after she became pregnant, eg
  - they became less friendly or helpful towards her.
  - they started to make criticisms of her work which they had not made before.
- Evidence to show the employer (or particular manager) was generally unsympathetic towards pregnant workers, eg
  - how are other pregnant workers normally treated?
  - do women often return after having babies?
  - what does the employer's pregnancy and maternity policy say?
- The employer's reason for dismissing your client can be discredited.
  - find out and pin down the employer's reasons for dismissing (disciplining or otherwise mistreating) your client. Obtain any letters.
  - ask your client's comments. Can she answer the case against her? Does she believe the true reason was her pregnancy?
  - can the employer's reason be completely disproved eg that there was nothing at all wrong with your client's work, or she did not commit the offence and the employers must have known that, or it was an extremely trivial offence which would not rationally lead to dismissal.
  - ask yourself and your client, if a non-pregnant worker had behaved in the same way as your client, is it likely the employer would have sacked her?

- Compare the treatment of your client with that of non-pregnant workers who behaved in a similar way. For example:
  - if your client was made redundant: Was it logical to select her rather than other workers who have been retained? How does your client measure on any criteria used as against retained workers?
  - if your client was dismissed for misconduct: have any non-pregnant workers committed the same or equivalent offences and received lesser penalties? Is there any innocent reason for greater leniency to the non-pregnant worker?
  - if your client was dismissed for poor work: was this an issue before she became pregnant? Has she had warnings? How are other comparable workers treated?
- Evidence can be gathered in a sex discrimination questionnaire (see p51).

Relevant law

- Pregnancy discrimination: Sex Discrimination Act 1975.
- Detriment or automatic unfair dismissal: Employment Rights Act 1996, s47C; s99; Maternity and Parental Leave etc Regulations (MPL Regs) 1999, SI No 3312, regs 19 and 20.
- Written reasons for dismissal: ERA 1996, s92(4).
- Health and safety suspension: ERA 1996, s66.
- Ante-natal care: ERA 1996, s55.
- Maternity leave: ERA 1996; Maternity and Parental Leave etc Regulations 1999, SI No 3312.

Time-limits

- Sex discrimination: within 3 months of the act of discrimination.
- Unfair dismissal: within 3 months from the termination date.
- For other claims, you need to research the position.
- Extension of time is possible if statutory dispute resolution procedures apply.
- See p90 for overview of time-limits.

Other relevant checklists

- Part-time and flexible working: p80 & 83.
- Discrimination overview: p47.

For more detail, see

- Chapter 11 (work and family life) in 'Employment Law: An Adviser's Handbook' (bibliography, p97).

Part-time working; hours which clash with childcare

1. Is there a right to work part-time?

- There is no absolute right to work part-time under statute, although check your client's contract to see if s/he has a contractual right.
- In this context, indirect sex discrimination law under the Sex Discrimination Act 1975 ('SDA') will usually only help female or (possibly) married workers. This is because child-care responsibilities disproportionately fall on women.
- Refusing to allow your client to work part-time may be indirect sex discrimination, unless the employer can justify the refusal.
- To prove indirect sex discrimination, your client must show:
  - it is difficult for her to work full-time.
  - in the particular workplace, or in the workforce generally, it is more difficult for women than for men (or for married workers than for unmarried workers) to work full-time.
- There is no indirect sex discrimination if the employer can justify insisting that your client works full-time.
  - find out the employer's aim or need in desiring full-time work.
  - is the aim legitimate?
  - is insisting on full-time work a proportionate means of achieving that aim? Are there other non-discriminatory ways of meeting the same aim? The employer needs a very strong reason for refusing to allow a woman to work part-time.
- The legal definition of indirect sex discrimination is complex and each stage can cause evidential difficulties. However, in practice, the most important consideration in deciding whether the employer's refusal is indirect sex discrimination comes down to whether there is a good justification.
- As well as full-time working, similar issues of indirect sex discrimination due to childcare can arise on any arrangements which clash with childcare, eg:
  - fixed hours which clash with collecting children from school or child-minders.
  - rotating and 24 hour shifts.

2. Less favourable treatment of existing part-timers

- It may be indirect sex discrimination under the SDA (see p47) or Equal Pay Act (see p73) to treat your client less favourably because she is a part-timer.
- Examples of less favourable treatment of part-timers:
  - less favourable terms and conditions, eg lower hourly rates of pay.
  - no access to training opportunities.
  - selection of part-timers first for redundancy.
- As explained above, indirect sex discrimination law in this context probably only protects women and (possibly under the SDA) married people.
- Employers can defend indirect sex discrimination if they can justify giving part-timers less favourable treatment.
- The Part-Time Workers (Prevention of Less Favourable Treatment) Regulations say that part-timers must not be unjustifiably treated less favourably than comparable full-timers because they are working part-time.
- These Regulations protect both male and female part-timers.
- Your client needs to compare his/her treatment with that of a comparable full-timer in the same employment or with how s/he was treated before s/he became part-time.
- A pro-rata principle applies, ie a part-timer must not receive a lesser proportion of a full-timer's pay or other benefit, than the proportion that the number of his/her weekly hours bears to the number of weekly hours of the full-timer.

Note: A part-timer cannot claim equivalent overtime pay until s/he has worked at least the full-timer's hours.

- As with indirect sex discrimination law, it is not unlawful if the employer can justify treating your client less favourably.
- Useful best practice guidelines are available on the DBERR website – 'Part-time workers. The law and best practice – a detailed guide for employers and part-timers' URN No: 02/1710.

- An employment tribunal case can be brought under the SDA or the Part-time Workers Regulations according to which applies. If possible, apply under both as each have different advantages. The questionnaire procedure (see p51) can only be used under the SDA and compensation under the SDA can include injury to feelings.

Relevant law

- Insistence on full-time working or hours clashing with childcare: Sex Discrimination Act 1975 ('SDA').
- Less favourable treatment of part-timers: SDA; EqPA (pay/contract terms); Part-Time Workers (Prevention of Less Favourable Treatment) Regulations 2000, SI No 1551.

Time-limits

- Under the SDA: within 3 months of the act of discrimination.
- Time may run from the date of the first refusal to allow part-time working.
- A second refusal may set time running again if it entailed a fresh consideration of the issue.
- Ongoing failure to allow a post to be worked part-time may amount to continuing discrimination.
- Under the Part-Time Workers Regulations: within 3 months from the less favourable treatment or detriment.

Other relevant checklists

- Flexible working and breaks: p83.
- Equal pay: p73.
- Discrimination overview: p47.
- Time-limits: p90.

For more detail, see

- Chapter 11 (work and family life); Chapters 13 - 17 (for discrimination law and evidence); Appendix B (list of discriminatory requirements) in 'Employment Law: An Adviser's Handbook' (bibliography, p97).

Flexible working and breaks

1. Background facts

- How much time-off does your client need, when, and for what reasons?
- Has your client asked the employer for permission? If so, who did s/he ask, when and what was the response? Is it in writing? Why did the employer refuse?
- Check your client's contract to see whether s/he is entitled to the time-off or change of hours and whether any time-off must be paid.

2. Does the refusal amount to discrimination?

- Has the employer agreed to give a similar break or adjustment in hours to a worker of a different race or sex etc? If so this could be direct race or sex discrimination.
  - how similar are the circumstances of the other worker?
  - would the employer have an 'innocent' reason for differentiating?
- Does your client need flexible hours for childcare? If so, this could be indirect sex discrimination. (See part-time working checklist, p80.)
- Does your client need flexible hours for religious holidays or to go to the mosque? If so, this could be indirect religious discrimination.
- Does your client need flexible hours to care for elderly parents? If so, this could be indirect age or sex discrimination.
- Does your client need time off for a reason related to his/her disability? (See disability discrimination checklist, p53.)
- Does your client need time off due to pregnancy or for maternity, paternity or adoption leave? (See pregnancy and maternity checklist, p76.)

3. Parental leave

- Eligibility:
  - your client must be an employee with at least one year's continuous service.
  - s/he must need the leave to care for his/her child. This includes settling the child into a new nursery.
  - the child must be under 5 (or 18, if disabled).
- How much leave does your client want?
  - the statutory entitlement is a total of 13 weeks unpaid leave for each child.
  - leave can only be taken in 1-week blocks and a maximum of 4 weeks in a year.
  - check if the situation really falls within the entitlement to Dependant Leave (see below).
- Your client must give 21 days' notice to take the leave. The employer can postpone leave by giving the correct written notice.
- It is unlawful to dismiss your client or subject him/her to a detriment because s/he has claimed Parental Leave.

4. Dependant leave

- Your client must be an employee, but there is no minimum service required.
- The entitlement is to reasonable time off, unpaid.
- The leave is so your client can assist when a dependant is ill or injured or gives birth; to make care arrangements; to deal with an unexpected incident at school; or if a dependant has died.
- The leave does not cover actually providing the care.
- It is unlawful to dismiss your client or subject him/her to a detriment because s/he has claimed Dependant Leave.

5. Your client wants to work part-time, flexibly or at home

- The Part-time Workers Regulations protect terms and conditions of part-timers but do not give a right to work part-time. However the Best Practice Guidelines encourage employers to be flexible. (See part-time working checklist, p80.)
- A woman or married worker who needs to alter his/her hours or work location due to child-care may be able to claim indirect sex discrimination if the request is unjustifiably refused. (See part-time working checklist, p80.)
- Eligible parents of children under 6 may request a contractual variation to their hours or place of working under the Flexible Working Regulations. Note:
  - this is only a right for your client to have the request considered.
  - even if not eligible, there is nothing to stop your client making an informal request to work flexibly.
  - either way, if the request is refused, your client can consider whether s/he would win a discrimination claim (see above).
- There are similar rights to request flexible working to care for adult relatives. If the employer refuses the request, consider whether your client may have a discrimination claim (see above).

6. Rest breaks under the Working Time Regulations

- Most workers are entitled to the following minimum breaks:
  - daily rest: 11 consecutive hours in each 24-hour period, unless working shifts.
  - weekly rest: 24 hours. This can be averaged over a fortnight.
  - 20 minute rest break away from the work station if more than 6 hours worked.
  - special rules for night workers.
  - 4 weeks paid annual leave.
  - 48 hours maximum working week unless individual worker opts out.
- There are some exceptions and modifications to the above entitlements in certain circumstances.

Relevant law

■ Hours clashing with religious observance: Employment Equality (Religion and Belief) Regulations 2003.
■ Insistence on full-time working or hours clashing with childcare; refusal to allow flexible hours: Sex Discrimination Act 1975 ('SDA').
■ Right to request flexible working: Employment Rights Act 1996 ss80F–80I; Flexible Working (Eligibility, Complaints and Remedies) Regulations 2002, SI No 3236; the Flexible Working (Procedural Requirements) Regulations 2002, SI No 3207.
■ Parental leave: Maternity and Parental Leave etc Regulations 1999, SI No 3312.
■ Dependant leave: Employment Rights Act 1996 s57A.
■ Rest breaks: Working Time Regulations 1998.

Time-limits

■ discrimination: within 3 months of the act of discrimination, eg the decision to impose the problematic hours or to refuse to allow flexibility. Same principles may apply as to ongoing refusal to allow part-time working (see p82).
■ dependant leave: within 3 months of refusal of time off.
■ parental leave: see Employment Rights Act 1996, s80(1).
■ for other claims, you need to research the time limit.

Other relevant checklists

■ Part-time working; hours which clash with childcare: p80.
■ Pregnancy and maternity: p76.
■ Equal pay: p73.
■ Discrimination overview: p47.

For more detail, see

■ Chapter 4 (for working time regulations); Chapter 11 (work and family life); Chapters 13 - 17 (for discrimination law and evidence); Appendix B (list of discriminatory requirements) in 'Employment Law: An Adviser's Handbook' (bibliography, p97).

Interview tips: discrimination

1. General considerations

- In any case where a client from a disadvantaged group complains of unfair treatment at work, you need to consider whether discrimination has occurred.
- Do not assume your client does not believe his/her treatment was discrimination just because s/he does not mention it first. S/he may be unconfident about your reaction and be waiting for you to raise the possibility.
- It can be useful to start with an open question, eg 'Why do you think you were dismissed / not recruited?' or 'Why do you think your dismissal was unfair?' This provides an opening for your client to raise discrimination if s/he wants to. Alternatively, your client may give a reason which is quite different and would make it hard to prove discrimination.
- If your client still does not raise the issue of discrimination, then you will have to ask explicitly. This need not be at the outset of the interview, but it should not be left to the end either, as this will seem an afterthought.
- If you feel uncomfortable about asking directly, eg 'Do you think you were dismissed because you are black?', you could make a general statement and see if the client responds, eg 'The law says employees must not be unfairly dismissed. It also says they must not be discriminated against for various reasons, eg their race, sex, age etc'.
- Do not force a client to take up the issue of discrimination if s/he does not want to. However, you need to be sure his/her reluctance is not based on a misunderstanding as to whether you, the adviser, are interested.
- Once you have established that discrimination is a possibility which your client would like you to explore, make it clear that you are not making a personal judgement about whether discrimination had occurred. You are aware of the high level of discrimination in society generally. You are only looking at whether there is evidence which would convince a tribunal in this instance.

- People feel very strongly about discrimination. It is important that you do not come across as detached and indifferent to the social reality of discrimination.
- Make sure your language is up-to-date. In all the discrimination fields, there are acceptable and unacceptable terms which change over time. If you use old-fashioned terms, you sound like you have not bothered to listen to the current issues facing the group in question. You may even be unintentionally offensive. If uncertain, listen to your client or ask how s/he would describe him/herself.
- For a general approach to analysing a discrimination case, see discrimination overview checklist, p47.

2. Disability discrimination

- If you think your client may benefit from the protection of the Disability Discrimination Act 1995, but your client has not identified him/herself to you as disabled, you need to raise the possibility with sensitivity. Explain first that although it is called the Disability Discrimination Act, it has far wider scope, and protects people with impairments, whether temporary or permanent, and long-term illnesses.
- When checking whether your client's impairment has a substantial adverse effect, you need to explain that the law unfortunately uses this negative definition, focusing on what people cannot do, even if they can do everything else. Acknowledge that this approach is undesirable.
- Remember that your client will be the best expert on the effects of his/her impairment. It is good to make yourself generally informed in advance, but do not apply generalisations to your client. Always ask.
- See also disability discrimination checklist, p53.

3. Sexual harassment

- This is an extremely sensitive area. Good practice suggestions are in the checklist on p68.

4. Sexual orientation

- This is another sensitive area, especially if your client has not identified him/herself to you as gay, but you suspect that is the case and that it is the basis of the discrimination against him/her.
- Rather than raise the possibility directly yourself, it is probably best to provide your client with a comfortable opening, eg 'Why do you think you were really dismissed?' or 'Why do you think the manager was hostile towards you?'.
- If your client still does not mention sexual orientation, you could raise the matter in a general non-specific way, eg 'The law says there must be no discrimination on grounds of race, sex, sexual orientation, age, disability and so on. Do you feel any of these are relevant to you?'

5. Accessibility of your service

- Consider the accessibility of your service: language; mode of communication; hours; location; access.

Time-Limits

1. Overview

- Each employment law claim has its own time-limit. The Claim form must arrive at the employment tribunal (or court, as applicable) on or before the time-limit.
- Employment tribunal time-limits are very short. Most time-limits are only 3 months. Often the difficulty is knowing when the time-limit should be counted from.
- It is usual to put all claims on the same Claim form. If so, the form must be submitted before the earliest applicable time-limit.
- If the statutory dispute resolution procedures apply, time-limits may be extended. As the procedures are due to be abolished, further details are not contained in this checklist. It is essential that you are aware of the up-to-date rules.
- If they have a potential legal claim, clients should be advised about the correct time-limits as soon as they seek advice, even if they are very doubtful whether they will go ahead.
- The law on time-limits may change. For the position as at its publication date, see Chapter 20 (for unfair dismissal time-limits), Chapter 21 (for discrimination time-limits) and Chapter 22 (for statutory dispute resolution procedures) in 'Employment Law: An Adviser's Handbook' (bibliography, p97).

2. Unfair dismissal

- The time-limit is three months from the effective date of termination ('EDT'), ie 3 calendar months less 1 day. For example, if the EDT was 3rd June, the deadline is 2nd September. If the EDT was 30th November, the deadline is the last day of February.
- The EDT is when the contract of employment ends. The three month time-limit must not be counted from the outcome of an appeal following termination.

- The EDT can be uncertain where your client does not work his/her notice. Sometimes your client's contract terminates with immediate effect, but s/he is paid in lieu of notice. At other times, your client is not allowed to work his/her notice, but the contract does not end until the expiry of the notice period.

Note: The position is often ambiguous. If there is any doubt at all, your client should count the three months from the earliest possible date. Unless s/he was off sick or on holiday, for example, it is usually safest to count the three months from the last day your client worked.

- The time-limit is extremely strict. In theory, tribunals have power to allow in a late claim if it was not reasonably practicable to get the claim in on time. In practice, they rarely accept late claims.
  - it is rarely an acceptable excuse that the claim was delayed or lost in the post.
  - time is not extended just because the appeal is outstanding (unless, to a limited extent, if the statutory dispute resolution procedures apply).
  - always telephone and check the tribunal has received the full Claim form before the deadline expires.
- If there is a discrimination or other claim as well as unfair dismissal, ensure any earlier time-limits are complied with (see below).

3. Discrimination

- The time-limit is three months from the act of discrimination, ie 3 calendar months less 1 day. For example: if the act of discrimination was on 3rd April, then the tribunal Claim form must arrive at the tribunal on or before 2nd July (of the same year).
- Time runs from each act of discrimination, not just the last act. Therefore all significant acts of discrimination should be kept in time.
  - for example: your client is given a disciplinary warning on 5th May is made redundant on 7th July. To keep both the warning and the dismissal in time, the 3 months is counted from the earlier incident, ie the warning.

- Time runs from the act of discrimination not from the outcome of any grievance or appeal. It is easy to miss earlier time-limits because there is often a gap in time between an act of discrimination and the outcome of a grievance.
    - for example: your client is discriminated against by way of a warning on 5th August, but her appeal is not heard and rejected until 5th November. The time-limit for the warning is 4th November.
    - on this example, the rejection of the appeal may or may not constitute another act of discrimination, which will be in time until 4th February the following year. However, the missing of the 4th November time-limit will mean that the tribunal is not required to make a finding on the warning itself.
    - therefore it may be necessary to lodge a tribunal Claim while the appeal is still being pursued in order to protect the option of taking the case to tribunal. If the appeal is rejected and this appears to be a discriminatory act a further tribunal Claim would have to be completed.
- Although your client may refer to earlier incidents as evidence, only acts within the time-limit form the grounds of the claim. Therefore even if discrimination has been going on for some while so that earlier incidents are inevitably out of time, the more serious and provable recent incidents should be kept in time.
- There is a concept known as 'continuing discrimination' which may keep a claim in time, which would otherwise seem out of time. However this is commonly misunderstood and only applies in limited circumstances where there is an ongoing discriminatory policy, practice, rule or state of affairs. It is also harder to prove in practice. Do not rely on this concept unless you have already missed time-limits on individual incidents.
- The tribunal does have power to permit a late claim to be made if it is just and equitable to do so, but it is very risky to rely on a tribunal allowing this.
- If further discrimination or victimisation occurs after a claim has been made, a further Claim should be made within a further 3 month time-limit.
- To avoid missing time-limits it is essential to produce a chronology of key incidents, and at the first meeting to draw up a diary plan of what has to happen by when.
- Until they are abolished, make sure your client (if s/he is an employee) complies with the statutory dispute resolution procedures. If the discrimination concerns action other than dismissal, s/he will need to send a grievance letter within the original time-limit and wait at least 28 days before starting his/her claim. The time-limit will then be extended by 3 months.

4. Discrimination questionnaires

- The questionnaire procedure is extremely important in gathering evidence for a discrimination case (see p51). There are strict time-limits. If a time-limit is missed, the worker must ask the tribunal's permission to send the questionnaire late to the employer. The tribunal may refuse. It is therefore vital not to miss the time-limit.
- The questionnaire must be received by the employer on or before the time-limit. This is when the questionnaire is 'served' on the employer.
- The questionnaire may be served at any time before a tribunal case has been started. However, a tribunal case must be started within three months of the act of discrimination (or any extended time-limit under the statutory dispute resolution procedures, until they are abolished).

  Note: Age discrimination questionnaires need to be served within the original three month time-limit and not within any extended time-limit under the statutory dispute resolution procedures. Watch for amending regulations on this, possibly during 2008.
- Once a tribunal case has been started, if no questionnaire has yet been served, it must be served within 21 days afterwards (28 days for disability discrimination). For example, if the tribunal Claim form arrived at the tribunal on Tuesday 2nd February, the questionnaire must be received by the employer on or before Monday 22nd February. This is so even if the tribunal Claim was lodged well within the time-limit for starting a case. Equally, it is so even if the tribunal Claim was lodged on the last possible day for starting a case.

List of main employment rights

The following is a list of the main statutory employment rights, ie rights given by parliament. Different eligibility requirements apply to different rights. In particular, access to the right may depend on whether or not your client is an employee and how long s/he has been in the job. Your client may also have rights under his/her own contract. The headings in the list are not a precise description of the actual right.

Note: This is not a full list. It may also change with new legislation.

1. Dismissal

- Statutory minimum notice (Employment Rights Act 1996 ('ERA') s86)
- Unfair Dismissal (ERA Part X)
- Automatic Unfair Dismissal (ERA Part X), eg
  - for pregnancy-related reasons (ERA s99)
  - for trade union reasons (Trade Union and Labour Relations (Consolidation) Act 1992 ('TULR(C)A') s152)
  - see unfair dismissal checklist, p00, for further examples.
- Written reasons for dismissal (ERA s92)
- Statutory Redundancy Pay (ERA Part XI)
- Dismissal due to race, religious, sex, sexual orientation, disability or age discrimination (see Discrimination below)

2. Discrimination, maternity and flexible working

- Race discrimination (Race Relations Act 1976)
- Religious discrimination (Employment Equality (Religion or Belief) Regulations 2003)

- Sex discrimination (Sex Discrimination Act 1975 and Equal Pay Act 1970)
- Sexual orientation discrimination (Employment Equality (Sexual Orientation) Regulations 2003)
- Age discrimination (Employment Equality (Age) Regulations 2006).
- Disability discrimination (Disability Discrimination Act 1995)
- Statutory maternity leave (ERA Part VIII; Maternity and Parental Leave etc Regulations 1999)
- Statutory paternity and adoption leaves (Paternity and Adoption Leave Regulations 2002)
- Paid time off for ante-natal care (ERA s55)
- Right to modified duties or paid health and safety suspension while pregnant (ERA s66)
- Right to written reasons for dismissal if dismissed while pregnant (ERA s92(4))
- Right to parental leave (Maternity and Parental Leave etc Regulations 1999)
- Right to dependant leave (ERA s57A)
- Rights of part-timers (Part-Time Workers (Prevention of Less Favourable Treatment) Regulations 2000)
- Protection for fixed-term employees (Fixed-Term Employees (Prevention of Less Favourable Treatment) Regulations 2002)
- Right to request flexible working (Flexible Working Regulations 2002)

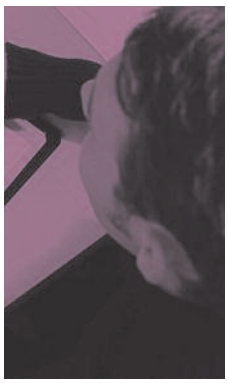
3. Other Rights at Work

- Right to receive itemised pay statements with pay (ie pay slips) (ERA s8)
- Right to receive the main terms and conditions of employment in writing (ERA s1-4)
- Unlawful deductions from pay (ERA Part II)
- Protection for whistleblowers (ERA Part IVA)
- Action short of dismissal for membership of a trade union or trade union activities (TULR(C)A s146-151)

- Right not to suffer a detriment for taking up health and safety issues (ERA s44)
- Preservation of terms and conditions and continuity of service on a transfer (Transfer of Undertakings (Protection of Employment) Regulations 2006 ('TUPE')
- Minimum breaks and holidays and maximum weekly hours (Working Time Regulations 1998)
- Minimum pay (National Minimum Wage Act 1998; National Minimum Wage Regulations 1999)
- Access to information (Data Protection Act 1998, Freedom of Information Act 2000, Freedom of Information (Scotland) Act 2002)

4. Collective

- Consultation with trade union or appropriate representatives over proposed redundancies (TULR(C)A)
- Consultation with trade union or appropriate representatives over a transfer of an undertaking (TUPE)
- Information and consultation (Information and Consultation of Employees Regulations 2004)



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Law, tribunal procedure and practice, compensation, precedents, glossary, all in one place. From a Claimant's view point. Particularly suitable for voluntary sector, trade union and legal aid solicitors.

Butterworths Employment Law Handbook. Edited by Peter Wallington. All relevant statutes, regulations, codes and EU Directives fully reproduced with up-to-date amendments. No commentary.

Harvey on Industrial Relations and Employment Law. Published by Butterworths. Multi- volume loose-leaf, regularly updated. Also available on-line. The most authoritative academic text on employment law.

2. Central London Law Centre Guides

For availability, contact administrator: 020 7839 2998

Enforcing ET Awards and Settlements by Philip Tsamados. Ed 2.

RRA Questionnaires: How to Use the Questionnaire Procedure in Cases of Race Discrimination in Employment. By Tamara Lewis. Guide to procedure and sample questionnaires for many situations.

SDA and EqPA Questionnaires: How to Use the Questionnaire Procedure in Cases of Sex Discrimination in Employment. Ed 2. By Tamara Lewis.

DDA Questionnaires: How to Use the Questionnaire Procedure in Cases of Disability Discrimination in Employment. By Tamara Lewis.

Age Questionnaires: How to Use the Questionnaire Procedure in Cases of Age Discrimination in Employment. By Tamara Lewis.

Discrimination Questionnaires: How to Use the Questionnaire Procedure in Cases of Discrimination in Employment. By Tamara Lewis. Guide to procedure and sample questionnaires for various discrimination

strands, particularly sexual orientation, religion and belief.

Proving disability and reasonable adjustments: A worker's guide to evidence under the DDA. By Tamara Lewis.

How to recognise cases of age discrimination: An Adviser's Toolkit. By Tamara Lewis. Available free on Help the Aged's website, www.helptheaged.org.uk

3. Law reports

Industrial Relations Law Reports (IRLR). Fully reproduced law reports.

IDS Employment Law Brief (until issue 778, Apr 2005, IDS Brief). Published twice month by Incomes Data Services Ltd. Subscriptions include access to its website plus occasional specialist handbooks. Tel: 020 7449 1107.

Legal Action magazine. Published by Legal Action Group. Tel: 020 7833 2931. Employment Law update in May and November issues written by Central London Law Centre's Employment Unit. Useful summary of key statutes and cases in the previous six months, selected from the worker's point of view and put into an understandable context.

Equal Opportunities Review (EOR). Published every month by Michael Rubenstein Publishing. Tel: 0844 800 1863. News, policy features on HR initiatives, legal analysis and law reports in the equal opportunities field.

IDS Diversity at Work. Published monthly by Incomes Data Services Ltd. Tel: 020 7449 1107. Mix of equality good-practice case-studies and occasional case reports. Some overlap with IDS Employment Law Brief.

Glossary

claimant
The person bringing an employment tribunal claim.

constructive dismissal
This is where an employee resigns because the employer has broken his/her contract of employment in a very serious way – usually referred to as a fundamental breach of contract. If s/he has sufficient service, the employee can claim unfair dismissal. constructive unfair dismissal claims are usually hard to prove (see p9).

DDP
The minimum disciplinary and dismissal procedure imposed by statute under the statutory dispute resolution procedures (below). If an employer fails to follow the DDP, an employee with at least one year's service can claim automatic unfair dismissal.

discrimination law
This refers to discrimination on grounds of race, sex, marital status, pregnancy, civil partnership, religion or belief or lack of religion, sexual orientation, disability and age. See overview checklist, p47.

employee
A worker who works under a contract of employment. It is necessary to be an employee to claim unfair dismissal. It can be hard sometimes to judge whether your client is an employee. A key indicator is whether the employer is obliged to provide your client with work and whether your client is legally obliged to perform he work.

fixed-term contract
A contract with a fixed termination date or one which ends on completion of a certain task or when a specific event does or does not happen.

fixed-term employee
An employee employed on a fixed-term contract.

questionnaire
The statutory questionnaire procedure available under discrimination law, see p51.

respondent
The defendant in an employment tribunal claim – usually the employer.

section 1 statement or particulars of employment
The terms and conditions under an employee's contract of employment which must be put in writing and given to the employee within 2 months of the start of his/her employment.

statutory dispute resolution procedures
Statutory minimum dismissal and grievance procedures which employers and employees must follow. If your client has been dismissed, the DDP must be followed. If your client is an employee and wishes to claim discrimination in work or other in-work claims, s/he must usually write a grievance letter and wait at least 28 days before s/he may start a tribunal claim. The rules are complicated. For more detail, see Chapter 22 of 'Employment Law: An Adviser's Handbook'. The Employment Bill proposes to abolish the procedures (possibly in late 2008) and replace them with procedural ACAS Codes enforceable by compensation penalties.

unfair dismissal
Employees with at least one year's service can bring a statutory claim in an employment tribunal claiming their dismissal is unfair.

unilateral variation
Where an employer attempts to change the contract of employment without the employee's agreement. Strictly-speaking, this is not possible. See checklist, p11.

victimisation
This is a specific term used in discrimination law. A person is victimised if s/he is treated less favourably because s/he has complained of discrimination.

worker
This is an imprecise term covering all types of worker, including employees. It also has a precise definition for the purpose of employment rights such as under the Working Time Regulations and not to have unlawful deductions from pay. As well as employees, the definition of 'worker' covers those who have entered into, or work under any other contract whereby the individual undertakes to do or perform personally any work or services for another party to the contract whose status is not, by virtue of the contract, that of a client or customer of any profession or business undertaking carried on by the individual

wrongful dismissal
Where an employee is dismissed in a way which the contract of employment does not permit – usually without giving the contractual notice. It has nothing to do with fairness.

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