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Version 1  
21 January 2011  
Equality Commission

## 1. Introduction

**1.1** A migrant worker is a person who leaves his or her country of origin in order to work, or to seek work, in another country. Migrant workers may also be accompanied by their families, and the workers and their family members will also have needs outside of the field of employment: for example, children will need education, and workers and their families will need adequate housing, water, food, medical care, protection from crime, entertainment and all of the other amenities that local people take for granted.

**1.2** Whilst residing in Northern Ireland, a migrant worker will be subject to the same legal duties that apply to local people and will be entitled to benefit, with perhaps some exceptions authorised by law, from the same public and private goods and services and legal rights that local people enjoy. Thus, a wide body of legal duties and rights will apply to migrant workers and a full study of this subject would have to take account of such matters like housing, social security and welfare law, immigration law, contract law, employment law, equality law, criminal law, human rights law. Unfortunately, it is not possible to cover such a wide field of study in this short Guide.

**1.3** Consequently, the focus here is on the relatively narrow, but vitally important, topic of equality law, with particular reference to how it applies to the field of employment.

## 2. The Equality Laws

### Equality laws which prohibit discrimination

**2.1** The main purpose of the equality laws is to prohibit discrimination in certain specified activities, such as employment, education and housing. The laws prohibit discrimination when it is based on certain specified grounds or criteria, such as religious belief, disability, sex or race. They also prohibit indirect forms of discrimination which occur through the unjustified use of neutral criteria that cause disproportionate disadvantage for groups of people who share a particular characteristic; e.g. women, Irish Travellers, migrant workers.

**2.2** The main municipal equality laws which prohibit discrimination and a description of the prohibited grounds and the activities which they regulate are set out in the following table:

**The word municipal refers to the local Northern Irish equality laws as opposed to the European Union equality laws, which also apply in Northern Ireland and which are very important. However, to a very large extent the municipal laws have the same effect as the EU laws and for most practical purposes only municipal laws need to be considered. Therefore, there will be no detailed discussion of EU law in the Guide, although some additional information is set out in Annex 1.**

| <b>Law</b>  | <b>Prohibited grounds</b>   | <b>Regulated activities</b>  |
|---|---|--|
| <b>Race Relations (NI) Order 1997</b>                                 | Discrimination on “racial grounds” – meaning the grounds of race, colour, ethnic or national origins / nationality (inc. citizenship) | Employment / Vocational training / Employment agencies / Provision of goods, facilities and services to the public / All levels of education / Housing                                     |
| <b>Equal Pay Act (NI) 1970</b>  | Sex discrimination  | Employment – but applies only to contractual pay, benefits, terms and conditions   |
| <b>Sex Discrimination (NI) Order 1976</b>                             | Discrimination on the grounds of sex, pregnancy & maternity, marital status, gender reassignment                                      | Employment (except where Equal Pay Act applies) / Vocational training / Employment agencies / Provision of goods, facilities and services to the public / Education (all levels) / Housing |
| <b>Disability Discrimination Act 1995</b>                             | Discrimination against disabled people  | Employment / Vocational training / Employment agencies / Provision of goods, facilities and services to the public / Housing   |
| <b>Special Educational Needs and Disability (NI) Order 2005</b>       | Discrimination against disabled people  | Education (all levels)   |
| <b>Employment Equality (Sexual Orientation) Regulations (NI) 2003</b> | Discrimination on the grounds of sexual orientation   | Employment / Vocational training / Employment agencies / 3rd level education only  |
| <b>Employment Equality (Age) Regulations (NI) 2006</b>                | Discrimination on the grounds of age  | Employment / Vocational training / Employment agencies / 3rd level education only  |

**2.3** The laws use terms such as **direct discrimination, indirect discrimination, disability discrimination, harassment** and **victimisation** to describe the various types of discriminatory conduct which are prohibited. Further information about these terms is given in Section 3.

**2.4** Of all of the equality laws outlined above, the **Race Relations (NI) Order 1997** (“RRO”) is perhaps the one that is most relevant to the relationship between migrant workers and employers and service providers. The RRO prohibits unlawful racial discrimination and harassment against migrant workers and their families. But it should not be forgotten that the RRO also prohibits unlawful racial discrimination and harassment against local people too. So, although the greater danger is perhaps racial discrimination against migrant workers, it is important that employers and service providers realise that they cannot treat migrant workers more favourably on racial grounds than they treat local people.

**2.5** It should also be remembered that no person is defined solely by reference to their race, colour, ethnicity or nationality. Everyone is either a man or a woman; married or unmarried; with or without dependants; religious or not; disabled or not; gay, bisexual or straight; aging. Also, some of these attributes will, or may, change over time. This means that one ought not to focus only on the RRO when considering the rights of migrant workers under equality law. The other statutes may be more relevant in certain situations. If a migrant worker is the victim of discrimination, it is not necessarily because he or she is a migrant worker. Other factors may be involved, as the next set of examples show-

## CASE STUDY

### M –v- CC [2006]

In this case the Claimant is a local man who had been employed as a Labourer but who had been made redundant by his employer. He alleged that the redundancy was not genuine as the employer had replaced him with a migrant worker from Slovakia. He further alleged that the employer informed him that it was cheaper to employ migrant workers compared to local people. The employer allegedly said that “you can get two for the price of one” and that migrant workers were “more economical and flexible”.

The Claimant was assisted in bringing the complaint by the Equality Commission. The claim was settled for £5,000 compensation. The employer apologised to the Claimant but did not admit liability.

*[see the Equality Commission’s Decisions and Settlements Review 2006-2007 at page 68]*

## CASE STUDY

### L –v- CC [2006]

In this case the Claimant is a Lithuanian woman employed as a Process Operative. She alleged that she was subjected to racial and sexual harassment by a male co-worker. The claim was brought under both the RRO and the Sex Discrimination (NI) Order 1976.

The Claimant was assisted in bringing the complaint by the Equality Commission. The claim was settled for £14,000 compensation. The employer did not admit liability.

*[see the Equality Commission’s Decisions and Settlements Review 2006-2007 at page 105]*

## CASE STUDY

### B –v- FR [2008]

In this case the Claimant is a Polish woman employed as a Pastry Chef in a restaurant. She was dismissed two weeks after informing her

employer that she was pregnant. She alleged that she was dismissed because of her pregnancy. Therefore, the claim was brought under the Sex Discrimination (NI) Order 1976. The Claimant was assisted in bringing the complaint by the Equality Commission.

The claim was settled for £7,750 compensation. The employer did not admit liability.

*[see the Equality Commission's Decisions and Settlements Review 2008-2009 at page 105]*

## CASE STUDY

### Johansson –v- Fountain Street Community DA [2007]

In this case a Swedish woman applied for a post on a , outh Drugs Team but she was not appointed. She alleged that one of the reasons why she was rejected was because she had a disability. Therefore, the claim was brought under both the RRO and the Disability Discrimination Act 1995.

Subsequently the claim was dismissed by the industrial tribunal and so was her appeal to the Court of Appeal. But, despite the failure of the claim, it still illustrates the need to consider a migrant worker's rights under other equality laws, such as the DDA.

*[see the Equality Commission's Decisions and Settlements Review 2006-2007 at page 58]*

## CASE STUDY

### Anon –v- JMD Ltd [2007]

In this case the Claimant is a Turkish man and also a Muslim. He was employed as a Warehouse Operative. He alleged that his co-workers subjected him to a mixture of racial and religious harassment. The latter took the form of taunts about his religion, such as taunting him about eating pork. Therefore, the claim was brought under both the RRO and the Fair Employment & Treatment (NI) Order 1998.

The Claimant was assisted in bringing the complaint by the Equality Commission. The claim was settled for £7,500 compensation. The employer did not admit liability.

*[see the Equality Commission's Decisions and Settlements Review 2007-2008 at page 156-7]*

# Equality laws which promote equality of opportunity

2.6 Some of the equality laws also require employers and service providers to do more than merely avoid committing acts of discrimination. In some cases, an employer or service provider may be obliged to take action, or to consider taking action, to promote equality of opportunity for disadvantaged groups. Not all of these are directly relevant to migrant workers and only a brief description of them can be included in this Guide for reasons of space.

| Law  | Nature of duty   | Relevance to Migrant workers  |
|--|--|---|
| <p><b>The reasonable adjustment duty under the Disability Discrimination Act 1995 and the Special Educational Needs and Disability (NI) Order 2005</b></p> | <p>Although it is a positive duty, a failure to comply is also an act of disability discrimination.</p>  | <p>The duty applies to employers and service providers in both the public and private sectors (inc. the voluntary and community sectors). It is only relevant to migrant workers if they are also disabled persons.</p>   |
| <p><b>Part VII of the Fair Employment &amp; Treatment (NI) Order 1998</b></p>  | <p>Duty on certain employers to monitor the community background of their workforces and, where appropriate, to take lawful action to promote fair participation.</p> <p>The duty applies to employers in both the public and private sectors (inc. the voluntary and community sectors), although it does not apply to small employers (i.e. less than 10 full-time employees) The purpose of the duty is to promote fair participation in employment between members of the two main communities (i.e. Protestants and Roman Catholics).</p>   | <p>It is not directly relevant to migrant workers as such.</p>  |
| <p><b>Section 75 of the Northern Ireland Act 1998 and Section 49A of the Disability Discrimination Act 1995</b></p>  | <p>Together these two duties require designated public authorities, when carrying out their functions, to have-</p> <p>(a) Due regard to the need to promote equality of opportunity between persons of different sex, marital and family status, religious belief, political opinion, race, age, sexual orientation;</p> <p>(b) Regard to the desirability of promoting good relations between people of different religious belief, political opinion and race;</p> <p>(c) Due regard to the need to promote equality opportunity for, positive attitudes towards and encourage participation in public life by disabled people.</p> | <p>The racial elements of the duties are directly relevant to migrant workers as “migrant workers”, while the other elements may have relevance to migrant workers in respect of their other characteristics (e.g. as men or women; disabled or not; with dependants or not).</p> |

**2.8** Better sources of information about these duties can be found in other Equality Commission publications. Refer to Annex 2 for a reading list.

### **3. How to recognise racial discrimination in employment situations**

**3.1** Racial discrimination may take four different forms; namely-

- **direct racial discrimination**
- **indirect racial discrimination**
- **racial harassment**
- **victimisation**

**3.2** Each of these will be discussed in further detail below.

#### **Direct racial discrimination**

**3.3** This occurs where, in the same or similar circumstances, a migrant worker is being treated less favourably than a local person on racial grounds. It would even occur where a migrant worker is being treated less favourably on racial grounds than another migrant worker (e.g. one who comes from a different country or who is of a different colour).

**3.4** There is no exhaustive list of circumstances in which direct discrimination might occur, but signs that one might look for could be where a migrant worker or migrant workers-

- **had a job application rejected and where a local person, who appears to be less qualified for the job, was appointed instead, or**
- **are receiving less salary and benefits than local workers, where both are doing the same or very similar work, or**
- **are not given the opportunity to work overtime, but where local workers doing the same kind of work are; or**
- **are denied opportunities to apply for promotion or career development training, but where local workers doing the same kind of work have such opportunities; or**
- **is dismissed for committing a disciplinary offence, where a local worker who committed the same or a similar disciplinary offence was not dismissed; or**
- **are segregated from local workers on racial grounds.**

**3.5** For there to be direct discrimination the less favourable treatment must be based on racial grounds. This means that it must be based on considerations of race, colour, ethnic or national origins or nationality. It would not amount to direct racial discrimination where the treatment is genuinely based on non-racial grounds. For example, if a migrant worker's job application is rejected for the genuine reason that he/she does not satisfy the objective job selection criteria, or where a local person is genuinely better qualified and is the more meritorious candidate for the job in question.

**3.6** Employers very rarely admit to committing acts of direct discrimination and it is usually necessary for a Claimant to persuade an industrial tribunal to draw inferences from other circumstantial evidence. The "signs" outlined above are unlikely by themselves and without other evidence to be enough to support claims of direct racial discrimination. Other "signs" of the kind that are usually necessary are things like-

- the decision-makers are all local people too (e.g. there is no diversity on interview panels); and
  - have not received equal opportunities training;
  - have not properly or consistently applied an employer's employment and equal opportunities policies and procedures (if such exist);
  - have not followed the recommendations of the equality codes of practice;
  - have not kept adequate written records of their decision-making;
- or
- any written records which are kept show that the decision-makers did not apply criteria fairly and consistently to migrant workers;
  - the employer does not have any formal employment and equal opportunities policies and procedures;
  - the employer has such policies but has never adequately informed staff members about them, nor provided adequate training;
  - the employer habitually ignores complaints from aggrieved individuals and fails to take remedial action to deal with equal opportunities grievances;
  - migrant workers or members of ethnic communities are minority groups in the workplace, or are under-represented there;
  - migrant workers have lower success rates in recruitment and selection exercises compared to local workers;
  - migrant workers have higher disciplinary, dismissal or grievance rates compared to local workers;
  - the workplace is not a harmonious working environment for minority groups (for example, workers habitually engage in racist, sexist or sectarian "banter" without penalty; racist, sexist or sectarian pictures and emblems and graffiti are on display).

**3.7** So, establishing a claim of direct racial discrimination can be quite a complex process but it can be done by looking for the "signs" outlined above:

## CASE STUDY

### AR –v- NI Council for Postgraduate Medical and Dental Education [2007]

The Claimant is a doctor from India who applied for the training post of Specialist Registrar Type 1. The candidates were interviewed by a selection panel that consisted of 9 voting members, all of whom were white, male and local. The Claimant's application was rejected. The 3 successful candidates were also white and local.

The Claimant had applied for similar posts with the Council on two previous years, again without success. The selection panels on those other occasions mostly consisted of the same persons who interviewed him on the third occasion. The Claimant alleged that only NI citizens who were graduates from Queen's University had ever been successful in these selection exercises.

The Claimant was assisted in bringing the complaint by the Equality Commission. He received £10,000 compensation in settlement of the claim. The Council did not admit liability.

*[see the Equality Commission's Decisions and Settlements Review 2007-2008 at page 145]*

# CASE STUDY

## AO & PO –v- FFC [2006]

The Claimants were two brothers from Poland who were employed in a food processing plant. They alleged that they and other Polish workers were subjected to racist harassment by some local workers. After many months of this an internal investigation was conducted by the employer and it resulted with one of the perpetrators being dismissed. However, the investigation also revealed that some managers and supervisors had been aware from an early date that the harassment was occurring but had failed to take any action to prevent it.

The Claimants also alleged that the migrant workers were generally treated less favourably than local workers who were carrying out the same or similar work on the same shift. The different treatment related to the amount of work that was required, the number of breaks that were allowed and the level of scrutiny that was applied by supervisors. It was alleged that the differences were all the more noticeable because the migrant workers worked separately from the local workers.

The Claimants were assisted in bringing the complaints by the Equality Commission. Each claimant received £5,000 compensation in settlement of the claims. The employer did not admit liability.

*[see the Equality Commission's Decisions and Settlements Review 2006-2007 at page 66]*

## ML –v- GSS & PH [2007]

The Claimant was from Morocco and worked for a security firm as a Security Guard and CCTV Operator. The firm provided services for a local district council.

After being in the job for 3 months the Claimant was dismissed, allegedly on the ground that the Council was not satisfied with the standard and quality of the work that he and another employee (a local man) were doing as CCTV Operators. It seems, however, that the local man was not, like the Claimant, dismissed, but was instead given a warning.

The Claimant was assisted in bringing the complaint by the Equality Commission. He received £4,000 compensation in settlement of the claim. The employer did not admit liability.

*[see the Equality Commission's Decisions and Settlements Review 2007-2008 at page 144]*

## Indirect racial discrimination

**3.10** This can occur in situations in which all job applicants and employees, from all racial groups, are treated in the same way, so that there is no direct discrimination, but where, nevertheless, migrant workers (or, a sub-group of migrant workers) are placed at a disadvantage compared to local people.

**3.11** For example, indirect racial discrimination might arise in a recruitment situation in the following way: the employer applies a particular job criterion to all job applicants; however, it has the effect of

disproportionately excluding or disadvantaging people who are migrant workers. For example: requirements to have academic or other qualifications (e.g. a driving licence) that can only be gained locally (i.e. through UK-based qualification bodies) may effectively exclude many migrant workers who are otherwise eligible and qualified to do the work in question and, thus, could give rise to indirect racial discrimination.

**3.12** A decision that is indirectly discriminatory will normally be unlawful unless the decision (e.g. the job criterion or practice in question) can be objectively justified. This means that the employer must be able to show that he has a legitimate reason for acting so (for example, that he has compelling business or other reasons for doing so) and, secondly, that he has little or no option but to act that way in order to achieve his aims.

**3.14** For example, it is legitimate for employers to seek to recruit employees who are adequately qualified and skilled to carry out the duties of the jobs in question and it is legitimate to set standards that will measure qualifications and skills. For example, in a job that involves speaking to members of the public in Northern Ireland (who mostly speak English as a first, or only, language) then it would be justifiable to require the job holder to be reasonably proficient at speaking English (a matter that can be tested at a job interview). But, the employer should not set standards that are too high: for example, by also requiring applicants to write proficiently in English (e.g. which might be measured by requiring applicants to have English language qualifications, like a GCSE or an A-level). If the job only requires an English language speaking ability, then to also require an English language writing ability may exclude a large proportion of migrant workers (i.e. particularly those from countries where English is not the first language) and may be unjustifiable because it is not needed in order to carry-out the duties of the job.

## CASE STUDY

### MP –v- HHG [2006]

**The Claimant is from the Czech Republic. He was employed in a hotel in which many other migrant workers were employed, including others from his home country.**

**Initially, employees were only required to speak English when in the presence of the hotel's guests. This meant that the Claimant could speak Czech or Slovakian to his co-workers when guests were not present, such as on his rest breaks. Later, a rule was imposed which prohibited staff from speaking any language except English in the workplace.**

**Thus, this rule appears to be too inflexible. Clearly it is legitimate and justifiable to require workers to be able to communicate with guests in a common language (i.e. English), but it went too far when it tried to regulate how workers communicated with each other in private moments. Thus the rule was probably unjustifiable. Following the lodgement of his complaint, the rule was relaxed so that it only applied when guests were present.**

**The Claimant was assisted in bringing the complaint by the Equality Commission. He received £2,250 compensation in settlement of the claim. The employer did not admit liability.**

*[see the Equality Commission's Decisions and Settlements Review 2006-2007 at page 62]*

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For reasons that will not be explained here, there are actually two definitions of indirect discrimination under the RRO. The differences are quite technical and lack of space prevents detailed discussion. For most practical purposes, it is sufficient to apply the definition that is set out here.

# CASE STUDY

## CF –v- SHSSB [2006]

The Claimant is from the Irish Republic. He is a qualified accountant and is registered with the relevant professional accountancy body in the Republic. The employer advertised a vacancy for an accountant's post. One of the selection criteria was that applicants had to be registered or certified by one of the UK-based professional accountancy bodies. The employer had not considered the need to recognise the equivalent value of professional accountancy qualifications gained outside the UK. Therefore, the Claimant's job application was rejected.

Clearly it was legitimate to require applicants to have a professional accountancy qualification. But, this selection criterion was too narrow as it unjustifiably excluded people who were otherwise suitably qualified but who had gained equivalent qualifications outside the UK.

The Claimant was assisted in bringing the complaint by the Equality Commission. He received £3,000 compensation in settlement of the claim. The employer also acknowledged that the Claimant's Irish professional qualification was equivalent to the UK ones.

*[see the Equality Commission's Decisions and Settlements Review 2006-2007 at page 104]*

## Racial harassment

**3.14** Racial harassment is a form of discrimination that occurs where a job applicant or employee is subjected to unwanted conduct that is related to race, colour, ethnic or national origins or nationality and which has the purpose, or which has the effect, of violating their dignity or of creating for them an intimidating, hostile, degrading, humiliating or offensive environment.

**3.15** Harassing conduct can take many forms, such as-

- verbal insults, threats and comments and so-called "jokes" or "banter"
- written or graphic insults, threats and comments in graffiti, e-mails, texts, pictures, posters, drawings
- physical conduct, such as assault and so-called "practical jokes"
- isolation, "cold-shouldering"

**3.16** Harassment cannot be lawfully justified and is always unlawful if it is carried out by an employer or by co-employees.

**3.17** In some instances, an employer may be able to avoid legal liability (e.g. paying compensation) for any acts of harassment carried out by his employees against another employee (e.g. a migrant worker). The employer will only be able to do this where he can show that he did not himself harass the worker, but that it was carried out solely by his employees, and where he is able to successfully raise a "reasonably practicable steps defence" (see below). Where the employer can raise this defence, it does not mean that the harassment is lawful. It simply means that the employer is not responsible for it. In such a case, the employees who carried out the harassment may find that they will have to bear full responsibility for it, including being made to pay all of the compensation awarded to the victim.

**3.18** Employers may also be held liable, unless they can establish a "reasonably practicable steps defence", if the migrant workers who they employ are being subjected to racial harassment by third parties (such as customers, clients, patients, visitors, contract workers). We stress the words "may also be liable" because although there are very strong arguments that employers are liable for such harassment by third parties, there is also some legal uncertainty about

the issue too. It is likely that when law is eventually clarified, it will specify that employees will be liable for such harassment in certain circumstances, especially where they know that their workers are being regularly harassed. In interim, an employer would be best advised to take reasonably practicable steps to prevent such harassment occurring.

**3.19** To take action that will enable an employer to establish a “reasonably practicable steps defence” will not merely provide an employer with a possible defence in event of a legal complaint, but it will also reduce the risk that workers will be harassed in the first place. A fuller discussion of the steps that an employer should take is set out in great detail in some of the Equality Commission’s publications listed in Annex 2 (e.g. refer especially to the “Unified Guide for Promoting Equality of Opportunity in Employment” and to “Harassment and Bullying in the Workplace”). However, there follows a brief summary of the main reasonable steps that employer should take:

- **they should develop written equal opportunities and harassment policies and procedures**
- **senior management should show their commitment to promoting equality of opportunity and to eliminating discrimination and harassment**
- **managers and supervisors should receive training in how to apply the policies and procedures properly, fairly and consistently**
- **managers and supervisors should be instructed not wait until formal complaints are made to them, but should instead be proactive and intervene to prevent incidents occurring or from escalating**
- **they should inform staff and customers about how they are expected to behave (e.g. through staff handbooks, training, terms and conditions, posters, notice boards, etc)**
- **they should remind staff and customers about these standards regularly**
- **complaints should be dealt with seriously and promptly and in line with the agreed procedures.**

## CASE STUDY

### ST –v- BMIT Ltd [2006]

**The Claimant is a black man from the Ivory Coast. He was employed as a Welder.**

**His allegations of racial harassment included the following: (a) he was asked if he knew any terrorists or if he knew “Osama bin Laden”; (b) he was asked whether he came to Northern Ireland for “terrorist training”; (c) drawings of Osama bin Laden and Saddam Hussein were pinned up in the workplace; (d) bananas were waved at him and “Fyffe” banana stickers were placed on his car window; (e) other derogatory, racist and obscene comments and graffiti were made.**

**The Claimant was assisted in bringing the complaint by the Equality Commission. The claim was settled for £16,000 compensation. The employer did not admit liability.**

*[see the Equality Commission’s Decisions and Settlements Review 2006-2007 at page 63]*

## LC –v- CP Ltd [2008]

The Claimant is from Portugal and he worked as an Assembler in a plastics factory. He alleged that during the course of his employment, his co-workers subjected him to a prolonged series of racial harassment. He gave the following examples of their behaviour: (a) he was ignored by some workers; (b) he received a note which said “go home”; (c) he was sent toothpaste and mouthwash; (d) he was subjected to foul language. He further alleged that he reported the matter to a manager, but that no remedial action was taken to prevent the harassment or to help and support him.

The Claimant was assisted in bringing the complaint by the Equality Commission. He received £7,500 compensation in settlement of the claim. The employer did not admit liability.

*[see the Equality Commission's Decisions and Settlements Review 2008-2009 at page 98]*

## Victimisation

**3.20** This occurs where an employer treats an employee or job applicant less favourably than he treats (or, would treat) another person, in the same or similar circumstances, because the person has previously exercised their rights under the anti-discrimination laws, or has assisted another person to do so.

**3.21** Victimisation is essentially a form of retaliation (e.g. the employer retaliates against a person who previously made a discrimination allegation against him by refusing on that account to offer them a job or a promotion). Victimisation cannot be justified and is always unlawful.

## CM –v- DARD [2009]

The Claimant is a black man from Zimbabwe who has worked for many years in Northern Ireland as an Official Veterinary Surgeon. He previously brought race discrimination proceedings against his employer and these were settled in 2003. He lodged a further race discrimination claim in 2006 (and this was upheld by an industrial tribunal in 2008).

After the lodgement of his second claim in 2006, but before the tribunal finding in 2008, the employer decided to commence an independent investigation of the Claimant's allegations that he was the victim of racial discrimination.

Eventually the Investigation Officer reported that he found no evidence to support the Claimant's allegations, but he upheld the complaint against the Claimant. On foot of this finding, the employer commenced disciplinary proceedings against the Claimant. This Claimant responded by lodging a further racial discrimination complaint against the employer. The basis of this complaint was that he was subjected to a detriment (i.e. disciplinary proceedings) in retaliation for his having commenced the 2006 discrimination legal action. The irony, of course, is that the industrial tribunal upheld the 2006 legal action in the Claimant's favour. So, the Claimant was disciplined for an action that he was lawfully justified in taking.

The Claimant was assisted in bringing the complaint by the Equality Commission. He received £50,000 compensation in settlement of the claim. The employer did not admit liability, but acknowledged that the Claimant did not harass the other employee and that he should not have been disciplined.

*[see the Equality Commission's Decisions and Settlements Review 2008-2009 at pages 94-96]*

## 4. Racial discrimination outside the field of employment

4.1 The equality laws, and in particular, the Race Relations (NI) Order 1997 (“RRO”) also prohibit discrimination in other areas of activity, such as-

- the provision of goods, facilities and services to the public
- education
- housing / selling and letting of land and premises
- performance of (some) public functions

4.2 There are some differences between the equality laws in relation to the areas that they cover. Some laws cover a wider range of activities than others. The table attached to section 2.2. (see above) gives some indication of the differences but there is not enough space here to discuss these differences further.

4.3 The forms that racial discrimination may take in relation to these other activities are essentially the same four forms which may apply in employment situations and which were discussed in detail above. They are namely-

- direct racial discrimination
- indirect racial discrimination
- racial harassment
- victimisation

4.4 Therefore, without repeating the discussions that went before, it will be sufficient to show some examples of recent cases:

## CASE STUDY

### DB –v- NBS [2007]

The Claimant is Lithuanian woman. She opened a current account with the NBS, a building society. On several occasions she asked for a debit card facility, but her requests were refused. She alleges that an employee of the building society informed her that the reason for the refusal was “probably...because you are not from here”.

The Claimant followed this up by writing to the branch manager. He responded by apologising for his employee’s remark, but still refused to provide a debit card on the ground that the Claimant’s credit rating was insufficient. The credit rating was apparently based on a mixture of criteria such as employment status, income, duration of UK employment history, age, marital status, duration of UK banking history.

This claim potentially had a mix of direct and indirect discrimination. To refuse a migrant worker a bank or building society account merely because “you are not from here” would certainly give rise to an inference of direct racial discrimination. But, if the reason for the refusal was genuinely due to the credit rating then it is more likely to be a potential case of indirect racial discrimination, as a result of the impact of the criteria relating to duration of UK banking and employment history. Ultimately, it comes down to a question of whether the bank or building society can objectively justify using those criteria.

The Claimant was assisted in bringing the complaint by the Equality Commission. She received £2,000 compensation in settlement of the claim. The building society did not admit liability. Therefore, it is not known whether the building society could have successfully justified using the credit rating criteria.

[see the Equality Commission’s Decisions and Settlements Review 2007-2008 at pages 140]

## CASE STUDY

### VS –v- TG [2006]

The Claimant is an Afro-Caribbean woman. She complained of racial discrimination after she was refused admittance to the TG nightclub. She alleges that the doorman refused to admit her

on the grounds that she was not a member of the club. However, at no time did he ask to see proof of membership. Furthermore, she alleges that she saw him admit several groups of white patrons without asking to see proof of their membership. The Claimant was assisted in bringing the com-

plaint by the Equality Commission. She received £2,500 compensation in settlement of the claim. The club did not admit liability.

*[see the Equality Commission's Decisions and Settlements Review 2005-2006 at pages 35]*

### Homefinders Estate Agency [2004]

In 2004 the Irish News reported that it had seen internal documents belonging to this (now defunct) Belfast estate agency. The documents seemed to indicate that the agency had instructed its staff to refuse or to discourage migrant workers and persons from the black and ethnic minority communities from renting properties on the agency's books. The Equality Commission threatened to take legal action against the agency. The allegations were never proven, but the agency settled the dispute by giving the Commission an undertaking to refrain from racial discrimination and to review its commercial practices.

### Advert in the Tyrone Courier & News [2007]

In April 2007, the Tyrone Courier & News ran an advert for the lease of a 3 bedroom house in Dungannon which included the following words: "Tenants must be able to speak Fluent English".

The Equality Commission complained to the newspaper, which gave an undertaking not to accept any similar adverts in the future.

## CASE STUDY

### House window advert – Belfast [2008]

In August 2008, a house-owner placed a "To Let" sign in the window of a house in Belfast. Sadly, the sign also contained the following words: "THIS PROPERT, IS NOT AVAILABLE TO AN, FOREIGNERS".

The incident was widely reported in the local media, including on BBC News and Radio Ulster's Talkback. The owner very quickly removed the sign after he was widely vilified in the media and by local community groups.

**4.5** One final point to note is one that was also made in relation to employment disputes; namely, that when migrant workers experience incidents of discrimination it may not necessarily be due to their race, colour, ethnicity or nationality. It could be due instead to some other factor, such as sex, religion, age, sexual orientation or disability, or a combination of factors:

## CASE STUDY

### LK –v- a College of Further & Higher Education [2009]

The Claimant is a Lithuanian woman. She has a disability due to profound deafness and she needs the help of a British Sign Language interpreter in order to communicate. She enrolled at the College to study for a 2 year full-time BTEC National Diploma course in Performing Arts. The case is primarily concerned with the allegation that the College failed to comply with its duty to make reasonable adjustments for the Claimant to enable her to participate in classes and to enable her to receive other necessary educational support. The duty is imposed on educational bodies by the Special Educational Needs & Disability (NI) Order 2005.

The allegation included a charge that during the first year of the course the College failed to provide her with adequate services from a sign language interpreter. Quite often there was no interpreter provided at all. Furthermore, in the absence of an interpreter to help her understand the lectures, she alleged that the College failed to make alternative arrangements to assist her: for example, by failing to provide written copies of the lecture notes. Nevertheless, despite these problems, the Claimant successfully graduated from the course. The Claimant was assisted in bringing the complaint by the Equality Commission. She received £7,500 compensation in settlement of the claim. The College did not admit liability.

[see the Equality Commission's Decisions and Settlements Review 2008-2009 at pages 107]

## Making complaints

### Employment-related complaints

**5.1** In most cases employment-related discrimination complaints should be made to the industrial tribunals. This goes for racial discrimination complaints and those that are brought under the other equality laws.<sup>3</sup>

**5.2** There is a deadline for bringing complaints to the tribunals. The complaints must usually be brought within 3 months of the date of the act of discrimination. In very exceptional cases, a tribunal might extend the deadline where it is just and equitable to do so.<sup>4</sup>

**5.3** At the time of writing (January 2011), the statutory dispute resolution procedures still apply to many employment-related complaints. The procedures must usually be followed before Claimants lodge complaints in the tribunals.

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<sup>3</sup> However, religious discrimination and political discrimination complaints should be brought to the Fair Employment Tribunal.

<sup>4</sup> There are slightly longer deadlines for religious/political discrimination complaints (i.e. 3 months from the date of knowledge or 6 months from the date of the act, whichever is soonest) and different ones again in cases under the Equal Pay Act (NI) 1970. Nevertheless, it is best to consider 3 months from the date of the act as a "rule-of-thumb" in all cases and to bring all complaints as quickly as possible.

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**5.4** The equality laws established a statutory questions procedure which provides a very easy and useful method for obtaining information from employers which can help employees to settle disputes or, in the last resort, to obtain evidence to build a case against an employer. It is highly recommended that anyone who is considering bringing a complaint should make use of the questions procedure. Help and assistance in using the procedure may be

obtained from the Equality Commission (see also the reading list in Annex 2). The questionnaire that is used in the questions procedure must usually be sent to the employer within 3 months of the date of the act of discrimination, so it is best to send it as soon as possible.

## Other complaints (outside of the field of employment)

**5.5** Complaints about discrimination in relation to the provision of goods, facilities, services, housing/land and education should be made to the County Courts. This goes for racial discrimination complaints and those that are brought under the other equality laws.<sup>5</sup>

**5.6** There is a deadline for bringing complaints to the County Courts. The complaints must usually be brought within 6 months of the date of the act of discrimination. In very exceptional cases, a court might extend the deadline where it is just and equitable to do so.

## Advice and assistance

**5.7** The Equality Commission can provide free and confidential advice and assistance to people who believe that they have been discriminated against. The type of assistance available may range from giving advice or helping a person to complete a questionnaire or an application to an industrial tribunal or to arranging for legal representation in some cases. Some of the Commission's written guides on the subject of how to make a complaint are listed in the further reading list in Annex 2.

**5.8** It is not for the Equality Commission to decide whether a person has been discriminated against or not. That task is a matter for appropriate industrial tribunal or court.

<sup>5</sup> Although, complaints relating to primary and secondary level education under the Special Educational Needs and Disability (NI) Order 2005 should be lodged in the Special Educational Needs and Disability Tribunal (SENDIST).

## ANNEX 1 European Union Equality Laws

1. The main EU equality laws which apply in Northern Ireland and the activities that they regulate are as follows:

### Race equality

- Articles 21 and 45 of the TFEU [freedom of movement for workers]
- Directive 2004/38/EC [freedom of movement for workers]
- Directive 2000/43/EC [employment and goods & services]

### Sex equality

- Article 157 of the TFEU [employment – equal pay for equal work]
- Directive 2006/54/EC [employment – equal treatment & equal pay]
- Directive 2004/113/EC [goods & services]

### Religion / Disability / Age / Sexual orientation

- Directive 2000/78/EC [employment]

2. In summary, EU law is deemed to be superior to municipal law and any unjustified “gaps” that exist between them usually have to be resolved in favour of EU law. Thus, where EU law sets certain standards of protection against discrimination to operate in Member States, then municipal law must satisfy those standards as a minimum. Northern Irish equality law generally satisfies these minimum standards and, therefore, it is reasonable to focus on local law for most purposes.

4. But, it would be prudent to keep EU law in mind, especially where a scenario arises which is not regulated by, or which is inadequately regulated by, Northern Irish equality law. For example, sometimes

municipal laws might require migrant workers from other EU States to be treated less favourably than local people. In such cases it would be reasonable to consider whether the municipal laws are themselves lawful under EU law (and, additionally, under human rights law). It may be possible that EU equality law regulates the scenario and this might be relied upon to force a change in local law. Notable past examples of this have been in the fields of sex equality (e.g. important developments in equal pay law and in pregnancy and maternity leave discrimination law were driven by EU law) and disability equality (e.g. recognition of associative disability discrimination).

5. This is a complex subject and it would be best to seek advice from the Equality Commission (or, the Human Rights Commission) if such questions arise.

## **ANNEX 2**

### **Further reading**

The following guides are available from the Equality Commission

#### **1. Employment publications-**

- Unified Guide to Promoting Equality of Opportunity in Employment
- Disability Code of Practice – Employment and Occupation
- Harassment & Bullying in the Workplace
- Employing Migrant Workers - A Good Practice Guide for Employers
- Pregnancy and Maternity Rights: Law and Good Practice
- Flexible Working: Law and Good Practice
- Positive action – A Guide for Employers

#### **2. Goods-facilities and services publications-**

- Guidelines for providers of goods, facilities and services on developing an equality policy for service provision
- Racial Equality in Health and Social Care - Good Practice Guide
- Racial Equality in Education – Good Practice Guide
- Disability Code of Practice – Goods, Facilities, Services & Premises
- Disability Code of Practice for Schools
- Disability Code of Practice for Further & Higher Education

#### **3. Public sector equality duties publications (Sections 75 and 49A)-**

- Section 75 of the Northern Ireland Act 1998 – A Guide for Public Authorities
- Monitoring Guidance for Use by Public Authorities
- Promoting Good Relations - A Guide for Public Authorities
- Equality of Opportunity and Sustainable Development in Public Sector Procurement
- Section 49A of the Disability Discrimination Act 1995 – A Guide for Public Authorities

#### **4. How to make a discrimination complaint**

- Lodging a claim at the industrial tribunal or Fair Employment Tribunal
- The Questions Procedure – FAQ
- Applying to the Equality Commission for Assistance