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EMPLOYMENT RELATIONS RESEARCH SERIES NO. 64

Review of judgments in race discrimination Employment Tribunal cases

ALISON BROWN, ANGUS ERSKINE
AND DORIS LITTLEJOHN
UNIVERSITY OF STIRLING & LAW AT WORK

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About EMAR

Employment Market Analysis and Research (EMAR) is as a multidisciplinary team of economists, social researchers and statisticians based in the Employment Relations Directorate of DTI.

Our role is to provide the evidence base for good policy making in employment relations, labour market and equality and discrimination at work. We do this through:

- Conducting periodic socio-economic benchmark surveys
- Commissioning external research projects and reports
- Conducting in-house research and analysis
- Assessing the regulatory impact of new employment laws and programmes
- Monitoring and evaluating of the impact of government policies

We publicly disseminate results of this research through the DTI Employment Relations Research Series and other publications. For further details of EMAR's work please see our web pages at:

http://www.dti.gov.uk/employment/research-evaluation

About this publication

The project manager for this report was Wayne Diamond, Senior Research Officer in the Employment Market Analysis and Research branch.

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Foreword

The Department of Trade and Industry's aim is to realise prosperity for all. We want a dynamic labour market that provides full employment, flexibility and choice. We want to create workplaces of high productivity, value and skills, where people can flourish and maintain a healthy work-life balance.

The Department has an ongoing research programme on employment relations and labour market issues. DTI researchers, economists and policy advisors devise research projects to be conducted in-house or on our behalf by external researchers, chosen through competitive tender.

This report is one of three commissioned by DTI to examine racial discrimination cases in the Employment Tribunal system. In early 2005, we commissioned a joint University of Stirling and Law at Work research team to conduct a review of judgments in race discrimination Employment Tribunal cases. This consisted of a review of the texts of judgements, and where possible the claim and response forms, in 100 cases those included race discrimination claims and were decided at an Employment Tribunal. Cases were selected at random from a sample of judgments of Employment Tribunals that included race discrimination as an element of the case, decided between January and December 2004.

The two other reports commissioned by DTI consisted of a quantitative survey and qualitative interviews of claimants in race discrimination Employment Tribunal cases.

- *Findings from the Survey of Claimants in Race Discrimination Employment Tribunal Cases (SETA RRA),* by. Mark Peters, Ken Seeds and Carrie Harding.
- *The experience of claimants in race discrimination Employment Tribunal cases*, by Jane Aston, Darcy Hill and Nil Djan Tackey.

All three reports are published in the DTI Employment Relations Research Series, and are available both online or in hard copy.

Together, these three reports add substantially to the evidence base on Employment Tribunal race discrimination cases. They may also have wider implications for other discrimination strands in the Tribunal system.

The views expressed in these publications do not necessarily reflect those of the Department or the Government. We publish them as a contribution towards open debate about how best we can achieve our objectives.

Grant Fitzner
Director, Employment Market Analysis and Research

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Executive summary

A review of Employment Tribunal judgments in race discrimination cases decided at tribunal suggests that the main factors influencing judgments in race cases are the perceived credibility of the parties, and whether the claimant has enough evidence to pass the 'burden of truth' over to the respondent. There is also evidence to suggest that Employment Tribunal statistics over-estimate both the number of Race Relations Act cases and those classified as "unsuccessful" at Tribunal, though the extent cannot be quantified in this research.

Introduction

This research involved a detailed analysis of one hundred judgments of Employment Tribunals that included race discrimination as an element of the case. The main purpose was to investigate whether such an analysis of the judgments would help an understanding of why such cases are much less likely to succeed at Tribunal than other sorts of cases.

Key findings

Three main findings came from this analysis. First that the key factor in deciding on case outcomes appears, from a reading of the judgments, to be the perceived credibility of witnesses, claimants and respondents in the case. How the Tribunal constructs this credibility, which cannot be perceived from the judgment, is clearly central.

Second, the classification of judgments by the Employment Tribunal Service (ETS) involves some inconsistencies that mean the statistical breakdown of cases by jurisdiction may not give an entirely accurate picture of the success or failure of claims. In addition because cases may involve more than one judgment and frequently more than one jurisdiction, what is a successful or unsuccessful case is more complicated than it may first appear.

Third, unlike the findings from other research, type of representation did not appear to be a key factor in the success of claimant's cases.

Quality of information

In general, judgments were full and detailed. Claim and response forms did not add a great deal to the information available. A number of judgments did not fully explain the reasoning for the decision, and were very brief. Typographical errors, ungrammatical sentences or obscure phrasing were common. There is little evidence in the judgments of the use of s.65 questionnaires. It is not apparent from judgments whether decisions were unanimous, but the assumption is that they were unless stated otherwise. There were majority decisions on some points in a small number of cases. From October 2004 onwards the vast majority of judgments will be without reasons, unless requested by the parties.

This research has a subsidiary aim of exploring whether the methodology being adopted will be replicable in the analysis of other types of ET cases. On the basis of the analysis, the judgments generally do provide sufficient data to be able to explore the key elements in cases. However some judgments are procedural and do not provide the final outcome of the case, and many do not include the outcome of later remedy Hearings (though it is possible that the parties agreed the remedy between them without recourse to a further Remedy Hearing).

Classification of outcomes

Not all 'successful' cases were fully successful: many were only partially successful and some were successful only on claims other than race discrimination. Several 'unsuccessful' cases were not 'valid' unsuccessful cases in that no race discrimination case was heard; that is the claimant did not appear, the complaint was struck out or dismissed on procedural grounds, or no discrimination complaint was made. To be clear, ETS does not classify cases as 'successful' or 'unsuccessful' since outcomes are allocated to individual jurisdictions raised by a claimant. However the sample of cases drawn for this study from ETS administrative records was meant to reflect cases where the race discrimination jurisdiction was indicated as being 'successful' or 'unsuccessful' at a full-rights hearing.

How accurately the ETS is classifying judgments needs to be examined. Several cases were either not cases under the Race Relations Act (RRA) or were wrongly classed as being 'successful' or 'unsuccessful' on the race discrimination jurisdiction element of the case. The cumulative effect of these errors in classification will be to over-represent RRA cases in Tribunal proceedings (although there may be race discrimination cases which have not been classified as such by the ETS). This may be of relevance to the reporting of Employment Tribunal statistics and the findings from DTI's periodic Survey of Employment Tribunal Applications (SETA).

According to ETS where a jurisdiction code is input in error, the outcome should be so denoted. Where a claim for race discrimination is raised but is not then pursued or is struck out on procedural grounds this does not invalidate the original coding, i.e. the complaint is made when a claim is accepted and the outcome of the jurisdictional complaints are subsequently recorded, whether that be determined at a Hearing or otherwise.

Nature of complaints

Dismissal was the most frequent complaint and discrimination complaints other than dismissal related mainly to disciplinary procedures and investigations. There was a clear association between unsuccessful race discrimination cases and claims of unfair dismissal that are either ineligible due to insufficient length or service, or are unsuccessful at tribunal. There was also an association between successful claims for unfair dismissal and race discrimination.

The 'adding-on' of a race complaint by claimants in cases of unfair dismissal may explain why some of the cases are relatively unlikely to succeed at tribunal. Whether this is or is not the case could be explored through a statistical analysis of all cases but would require a robust recording system by the ETS.

In the majority of cases the claimant was black and any individual discriminators or comparators white. In some cases though the claimant and respondent were from same non-white ethnic group; or the claimant was white.

Basis for decisions

The main bases for decisions were that the Tribunal preferred the claimant's/respondent's evidence, the claimant established/failed to establish a prima facie case; or the respondent gave/failed to give adequate explanation for the less favourable treatment.

In most unsuccessful cases, the claimant presented an actual comparator on at least one point, which the Tribunal deemed either not appropriate or not indicative of less favourable treatment. In around half of successful cases actual comparators were presented by the claimant, suggesting that this is not necessary for a successful case.

Credibility (or, to a lesser extent, reliability), particularly of the claimant and the respondent's representatives, was central to the outcome of many cases. Credibility was deduced mainly by contradictions and inconsistency in oral evidence, or between oral evidence and documentation.

Motivation was mentioned in a small number of cases (generally the Tribunal reiterating that it is not relevant). In a small number of cases, however, the discussion was less than straightforward, with references to the conscious motivation of the alleged discriminator.

In relation to representation, there was no obvious pattern: unsuccessful claimants were as likely as not to be represented. Many successful claimants were not represented by a professional. The Tribunal's approach to assisting unrepresented claimants was generally not apparent from judgments; and where it was, instances of giving unrepresented claimants some flexibility (allowing adjournments and so on) were found in unsuccessful cases and examples of inflexibility were found in successful cases.

Reference to law

The majority of judgments reiterate the most relevant sections of the Act, and summarise or make brief reference to the most relevant discrimination cases on the questions of establishing detriment, reasonableness, use of comparators and so on. In the majority of cases, the current situation as regards burden of proof was articulated and applied, with varying degrees of detail. In unsuccessful cases, there was in general less detailed reference to the relevant case law and statute.

Remedies

Although several commented unfavourably on the respondents' procedures, Tribunals rarely made recommendations. There were no examples in which reinstatement was discussed: probably because the relationships had deteriorated beyond repair. From the cases where it was known from the judgment, the financial compensation in successful cases varied widely, from tens of thousands of pounds to a few hundred pounds, depending on length of service and the nature of the discrimination (injury to feelings, dismissal, etc.)

About this research

In early 2005, the Department of Trade and Industry (DTI) issued a tender for a research project on a review of judgments in race discrimination Employment Tribunal cases. DTI commissioned a joint University of Stirling and Law at Work research team to carry out the research. This consisted of a review of the texts of judgements, and where possible the claim and response forms, in 100 cases those included race discrimination claims and were decided at an Employment Tribunal. Cases were selected at random from a sample of judgments of Employment Tribunals that included race discrimination as an element of the case, decided between January and December 2004.

1
Introduction

Background to the study

In February 2005, the Department of Trade and Industry (DTI) issued a tender for a research project on a review of judgments in race discrimination Employment Tribunal cases. Early in 2005, the DTI commissioned the joint University of Stirling & Law at Work research team to carry out the research. This consisted of a review of the texts of judgments, and where possible the claim and response forms, in 100 cases that included race discrimination claims and were decided at an Employment Tribunal. This report presents the findings from the documentary analysis. A literature review is included in this report.

Aims and objectives of the research

The primary aim of this research was to identify any persistent patterns in the written judgments of Race Relations Act (RRA) cases that might explain why these claims are relatively unlikely to succeed at tribunal. In order to do this, the research had as its more specific objectives to:

- Describe the nature of race discrimination (RRA) cases and create typologies based on factors such as the characteristics of the parties and circumstances of the case;

- Investigate associations between typologies and case outcome;

- Design an explanatory framework that may include, for example, the expectations of parties, form and content of arguments led, nature of supporting evidence;

- Document how RRA judgments operationalise the provision of s.56(1)(a) of the Act under which the Tribunal recommends that the respondent take action to obviate or reduce the adverse effect on the complainant of the discrimination; such as reinstatement or payment of compensation.

The structure of this report is as follows: a background to the Employment Tribunals; a review of the relevant literature; methodology of the documentary analysis; findings of the analysis; and conclusions.

Caveats

The purpose of this report is to provide a qualitative interpretation. The reader may be tempted to inquire – how many?; what proportion? The researchers have taken the decision not to provide a precise quantification. Terms like many, a few, etc are

used. This is for two reasons. First the sample of cases is small and not truly random and therefore caution has to be applied to statistical generalisation. Second, the objective of a qualitative analysis is to generate and explore themes and issues.

Background to the study

Under the Race Relations Act 1976 a person who believes that he or she has been discriminated against at work on racial grounds can make a complaint to an Employment Tribunal. This protection from discrimination applies to employees, job applicants, and people who have been dismissed. Racial grounds are interpreted widely, and include a person's race, or national or ethnic grounds. The definition of race in the Act can be found in **Appendix C**.

When they were first established in the 1960s the Employment Tribunals (ETs) were called Industrial Tribunals. That name survived until 1998. They initially had a very specialised and limited remit, but since the mid-1970s their role as a specialist industrial court has broadened considerably, and they now deal with more than 70 different kinds of complaint, ranging from unfair dismissal to various kinds of discrimination, non-payment of wages, working time, statutory holiday entitlement, and contractual matters, among others.

In creating Employment Tribunals, Parliament intended that they should be easily and cheaply accessed by the public, and should deal with employment disputes quickly and with less formality than mainstream civil courts. Unlike much of the rest of the civil justice systems that apply in Britain, there are no costs in making an application to an employment tribunal for a matter to be decided, nor does the losing party normally meet the winning party's costs

ETs are chaired by a qualified lawyer referred to independent of gender as 'Chairman', and often have two non-legal members in addition, one appointed from an employer background, and the other from an employee background. However, at the time of this study Chairmen sat alone to deal with a limited number of straightforward cases, though more recently Chairmen will sit alone to hear relatively complex Pre-Hearing Reviews.

Complaints to a tribunal are invariably made by employees, known until recently as applicants but since 2004 referred to as claimants. In the great majority of cases, the complaint is against the claimant's current, recent, or prospective employer. In discrimination cases, however, complaints can also be made against individuals where it is alleged that they have personally discriminated against the claimant. The employers and, where applicable, the individuals which the complaints are about are referred to as respondents.

Should a losing party wish to appeal against an Employment Tribunal judgment, they can do so, but only on grounds that the ET made a legal, as opposed to factual, mistake. Appeals are heard by the Employment Appeal Tribunal (EAT). Appeals against an EAT decision can be made to the Court of Appeal in England and Wales, and the Court of Session in Scotland.

A claimant can apply for a matter to be decided by an ET by completing an initial form called an ET1 (the 'claim' form) in which details of the complaint must be set out. The ET1 must usually be submitted to the Employment Tribunals Service

(ETS) within three months of the date of the event that has triggered the complaint. On receiving the form the ETS sends it on to the respondent along with an ET2, which is official notification of the complaint, and an ET3 (the 'response' form), which the respondent is obliged to complete and return within a further 28 days. The ET3 is where the respondent sets out details of the defence, if there is one. These forms were previously called IT1s, IT2s, and IT3s, and were formally renamed in 2004 (this follows on from the re-naming of Industrial Tribunals to Employment Tribunals from the end of the 1996 onwards). During the period that the cases examined in this research were submitted to the Employment Tribunals Service, these forms were referred to as ITs and this term is used in this report.

The Employment Tribunals Service also sends copies of the papers to the Advisory, Conciliation and Arbitration Service (Acas) who have a duty to attempt to resolve disputes without recourse to formal ET Hearings. Acas intervention results in the settlement of a large number of ET cases, but those that cannot be settled by Acas are listed for hearing by the ET.

ET Hearings very rarely last for less than half a day, and most last for a full day or longer. The Hearings take place at a range of permanent and temporary locations around Britain. There are wide variations in the way in which Hearings are conducted. Some ETs, particularly in England and Wales, rely heavily on pre-prepared witness statements which are treated as the evidence given by the witnesses. In some cases the statements are "taken as read" while in others the ET requires the witness to read his or her statement out. The other party is then given an opportunity to cross-examine the witness, the ET members can then ask questions of the witness, and finally the witness can be questioned again by the representative of the party who called him or her as a witness. Witness statements are rarely used in Scotland.

In most cases there is also documentary evidence in front of the ET. This typically includes company handbooks, correspondence, a contract of employment, and other relevant documentation. This evidence is known as "the bundle" in England and Wales, and as "the productions" in Scotland.

In discrimination cases, unlike other areas of employment law, the claimant has an opportunity to send the respondent a pre-tribunal application questionnaire known as a s.65 questionnaire, alleging discrimination and seeking an explanation for the treatment. Such questionnaires can be sent either before or after submitting a claim form (IT1/ET1). A failure to reply, or a disingenuous reply will often count against the respondent in any subsequent ET proceedings. The questionnaire will usually be included as part of the documentary evidence in front of the ET. **Appendix C** contains the relevant extract from the Race Relations Act referring to these questionnaires.

When both parties have finished dealing with the witnesses and evidence they are given the opportunity to make a closing submission to the ET. This is sometimes done in written form at a later date. The ET members then make their judgment in private, and communicate it to the parties. In England and Wales tribunal judgments are sometimes announced in full on the day of the hearing, and then confirmed in writing (though in discrimination cases or other complex cases a judgment on the day is less likely). In Scotland tribunal judgments are almost invariably issued in written form several days, often several weeks, and sometimes several months after the hearing. However, in Scotland, prior to the 2004

legislative changes, an advance notice of the judgment was often given, this taking the form of a card or letter informing the parties whether or not the claim had been successful.

If an ET upholds a complaint of race discrimination it can make a declaration to this effect, order the employer to pay compensation to the claimant, and order an employer to make changes to ensure that the discriminatory act does not recur. The level of compensation, as also is the case with sex discrimination claims, is not as limited as for cases such as unfair dismissal since compensation may be awarded for damage to feeling or for aggravation.

If an ET upholds a complaint of race discrimination it can make a declaration to this effect, order the employer to pay compensation to the claimant, and recommend that an employer takes action to remove or reduce the adverse effect on the claimant of the discrimination to which the complaint relates. The level of compensation in discrimination claims is not limited by a statutory cap as is the case in unfair dismissal claims. It can also include an award for injury to feelings (which is also not possible in unfair dismissal awards). In England and Wales aggravated damages can be awarded separately, whereas in Scotland, damage of this type may be encompassed within the general injury to feelings award, there being no separate category in Scots law of aggravated damages.

Allegations of race discrimination can be difficult to substantiate. Discrimination can take a variety of different forms; it can be direct discrimination, indirect discrimination, harassment, or victimisation. Direct race discrimination encapsulates circumstances in which the employer treats someone badly (subjects them to a detriment in legal language) because of their race. Indirect race discrimination occurs when an employer acts in accordance with an apparently neutral rule, policy or practice of some kind, which puts people of the same racial group as the claimant at a particular disadvantage when compared to others not of that group. Harassment is a form of direct discrimination. Victimisation occurs when someone of any race is treated badly because they have made a complaint of race discrimination or because they have supported someone else in a complaint of race discrimination.

In 2003 the law was changed to make it slightly easier for someone complaining of racial discrimination (on the ground of race, ethnic or national origin but not colour or nationality) to succeed in his or her complaint. The change was technical, and means that if a race discrimination claimant is able to prove facts such that the tribunal *could* conclude that racial discrimination has occurred then the onus shifts to the employer to prove that the reason for this treatment was not based on racial grounds. If the employer cannot provide an adequate explanation for the treatment in question then the tribunal *must* decide that racial discrimination has occurred. Prior to the change, in such circumstances, while the tribunal was entitled to conclude that racial discrimination had occurred it was not obliged to do so, even if there was no adequate non-racial explanation put forward by the employer to explain the treatment in question. The change was subtle but important and is referred to as the shifting of the *burden of proof*. The relevant legislation is referred to in **Appendix C.**

As pointed out above there have been changes in terminology over the period of this research. For example 'claimant' replacing 'applicant' or 'ET1' replacing 'IT1' etc. In this report the terms used are the ones used at the time as expressed in the

judgment. In the case of the review of the literature, the terms used are those used by the authors referred to, without comment on the accuracy of the use of term.

Outcomes in tribunal cases

Once an application has entered the system, there are effectively six possible outcomes:

- The applicant may withdraw the application (this may follow contact with Acas or advice from their representative);

- The Chairman may dismiss the application because it is not in the scope of the legislation or because a Pre-Hearing Assessment found that there was insufficient evidence to progress the case;

- The parties may reach an Acas conciliated settlement, where Acas is involved in ratifying final settlement. This is recorded as an Acas settlement;

- The parties may reach a private settlement outside Acas either on the basis of a legally binding Compromise Agreement or an 'informal agreement'. These are known as 'private settlements';

- The application may result in a full merits Tribunal Hearing, which may be upheld (claimant wins) or dismissed by the Employment Tribunal (claimant loses).

This study only considers cases decided at Tribunal Hearings.

Compromise agreements were introduced under Section 39 of the Trade Union Reform and Employment Rights Act 1993. They provide for the parties involved in employment rights disputes to settle on the basis of a legally binding agreement in which the applicant waived his or her right to take the claim to an Employment Tribunal. They require the applicant to have received independent advice from a relevant independent adviser. This might be a trade union officer or advice centre worker accredited for this purpose, or a qualified lawyer. Any "private agreements" which have been reached without a compromise agreement or the help of an Acas conciliator will not put a bar on tribunal proceedings. In the case of private settlements there is no requirement on either of the parties to inform the ETS of the outcome beyond the applicant withdrawing the case. ETS statistics, therefore, record these cases as having been withdrawn. This is a weakness in the ETS statistics that the periodic Survey of Employment Tribunal Applications (SETA) attempts to remedy by collecting information from the parties about the private settlements; including the use of Compromise Agreements.

2
Literature review

This literature review focuses on enforcement of the Race Relations Act through employment tribunals. Given that there is relatively little literature on this specific topic, however, the review draws upon related areas, such as the dynamics of race in court proceedings; and employment tribunals' processes and judgments in other forms of discrimination (e.g. sex). The findings are presented to suggest potential themes for analysis of the written judgments. The review is presented under three headings: the application of race discrimination law in employment; the application of sex discrimination law in employment tribunals; and race and criminal court processes.

Racial discrimination in employment

Unexpected dismissal

Lustgarten and Edwards (1992) argue that legal processes were ineffective because of the inability of an individualised legal culture to deal with other forms of information and investigation. They attribute the limitations to 'the assumptions, values and doctrinal constraints of common law'. Lustgarten and Edwards argue that although discrimination cases, like other cases, inevitably require the drawing of inferences, tribunals have been unwilling to draw inferences supporting complainants' claims, but instead have tended to credit respondents' explanations. Furthermore, judges are uncomfortable with the examination of social and labour market conditions that is required in indirect discrimination cases.

Legal adjudication has several features which limit the law's effectiveness in tackling discrimination: law demands specificity and may exclude marginal cases and subtle discrimination. It involves rules and judicial notions of appropriate procedure that defendants can exploit. Use of the law involves skills which large-scale employers may be expected to command far more readily than complainants. Legal reasoning attempts to apply abstract principles rather than adapt to new situations. Law imposes minimum standards only; and only uses threats rather than incentives.

Furthermore, the collective dimension to each discrimination case is difficult to fit within the traditional processes of law that are marked by individuation. Thus unlike in the US, there are no class actions and no tribunal powers to order employment of the claimant in a claim brought under the RRA. (There are provisions allowing the tribunal to make a reinstatement or re-engagement order in an unfair dismissal claim, although these, in fact, are rarely used.)

Qualitative studies of discrimination in employment

There are few qualitative studies of how discrimination operates in employment. One exception, from the US, is that of Thomas (2003) which found that indirect discrimination stemmed from employers' primary concern 'to find workers who would work for low wages and not question management authority'. Attitudes varied by the skill level of employment concerned, 'as the level of occupational skill…increases, employers are less likely to express racial stereotypes' (2003: 228). In firms subject to affirmative action regulations, however, employers were less likely to rely on racial stereotypes in hiring.

The alleged conceptual weaknesses of UK (commonly equated with English) anti-discrimination law have been the major theme of commentaries in this area. A recent paper (Barnard, Deakin and Kilpatrick 2002) reiterates this, contending that this body of law stresses formal rather than substantive equality, and defines discrimination in terms of the asymmetrical treatment of individuals rather than by reference to the structural sources of group disadvantage. These weaknesses may partly explain the relatively limited impact of the legislation on the UK labour market, which continues to be characterised by occupational segregation and persistent pay inequality.

Unconscious racism

Considering the US constitutional principle of equal protection, Lawrence (1987) summarises the criticisms of the doctrine of discriminatory purpose that requires plaintiffs challenging a 'neutral' law to provide a racially discriminatory purpose on the part of those responsible for its enactment or administration. Based on both Freudian and cognitive psychology, Lawrence challenges the supposed dichotomy between intentional and unintentional, given that most racial motivation is unconscious. Lawrence explains why law must acknowledge unconscious motivation; he explores the impact of unconscious racism in everyday life; such as selection of a white candidate over a black one influenced by learned stereotypes of blacks as naturally inclined towards certain behaviour or roles.

Support for the workings of unconscious racism in hiring comes from experimental psychological research from the US (Frazer and Wiersma 2001). From a study of judgments in the US courts, Selmi (2001) argues that courts tend to be sceptical of claims of race plaintiffs, and are hesitant to draw inferences of racial discrimination based on circumstantial evidence, even though courts have long recognized that race discrimination is generally subtle in form.

From a materialist perspective, however, the shortcomings of Lawrence's approach have been pointed out by Delgado (2001), who argues for greater attention in the maintenance of racism in employment to material factors such as changes in the employment market, in socio-economic conditions, and immigration.

Another approach that moves beyond consideration of individual actions and motivations is consideration of how workplace cultures can be a source of discrimination (Green 2005). This approach is said to bridge the conceptual divide between individual actors and organizational choices that dominates traditional anti-discrimination discourse, to include more subtle, ongoing forms of discrimination.

The operation of UK anti-racism legislation

In the early 1990s, the main commentaries on the limitations of law in combating racial discrimination drew similar conclusions about the conflict between individual and group models of justice.

Bindman (1992) focused more specifically on how the law is interpreted and how precedent has developed in the courts, including the complex questions of causation and intention, burden of proof, justifiability of discriminatory requirements, and the obtaining of information from respondents.

Bindman considered how direct and indirect discrimination are each defined in law, arguing that this legalistic distinction is unhelpful in tackling discrimination that may not easily fit under either heading. In relation to burden of proof, Bindman argues that the weakness of the test - that given an inadequate or unsatisfactory explanation by the employer for the discrimination, racial discrimination can be inferred (this was at the time found in case law, now in statute) - does not require the employer to prove that the alternative explanation was the true one, merely that it is plausible.

The major empirical study of race discrimination law in employment is that of McCrudden, Smith and Brown (1991), who studied the effectiveness of enforcement of the RRA in the period 1987-88. The authors also argue that the RRA is based on two conflicting principles, individual justice and group justice. Their interpretation is that the Act adopts modified versions of both models: for example, the individual model in the restriction of remedies in tribunals to individuals; and the group model in the prohibition of indirect discrimination.

Past studies of tribunals include that of Kumar (1986), which interviewed 377 complainants and in its conclusions broadly supports McCrudden, Smith and Brown. McCrudden et al studied 574 case files from tribunals, including file information where available from the CRE and ACAS, and observed Hearings and interviewed parties and professionals. They over-sampled successful cases, as likely to be the most interesting. Their starting point was official statistics that showed a contrast between the outcomes of race discrimination and other industrial tribunal cases: a lower proportion settled through ACAS, a lower proportion successful, a higher proportion dismissed at hearing.

From examination of case files, McCrudden, Smith and Brown concluded that there existed a twin-track system: applicants assisted by the CRE are more likely to have their complaint upheld; and that legal representation gives a better chance of success. Furthermore McCrudden et al conclude that complaints of discrimination tend to be against public sector employers who are introducing equal opportunities policies and therefore raising awareness and making decision-making more transparent, rather than the private sector (a point also made by Lustgarten & Edwards 1992). Although less formal than court, the system is not necessarily inquisitorial, and 'success is heavily dependent on making some formal moves (which most applicants will not know about) and presenting specific kinds of evidence in a form that the tribunal will recognise' (1991: 155). There is little scope for tribunals to influence the practice of employers, with very few recommendations for action.

From observation of tribunal processes, McCrudden et al found that the problems of proof were foremost, with lack of corroborating evidence for the complainant leading to a direct contest of credibility of complainant and respondent. Applicants were reluctant to say they had been discriminated against. Applicants were unlikely to provide statistical evidence. Standards of representation varied. Unrepresented applicants faced serious problems with evidence and presentation (for example, to distinguish the relevant evidence and demonstrate a causal relationship between the act complained of and the racial element) in cross-examination and in preparation of a case. In accordance with the findings of Leonard (1987), the role of the chairman varied widely in terms of how investigatory they were, how encouraging or discouraging, the extent to which formal rules of evidence were modified and their use of powers to regulate the tribunal procedure; the extent to which they indicated what evidence was necessary or unnecessary, encouraged settlement, or involved panel members.

McCrudden et al suggest, however, that this is a complex area in which to draw definitive conclusions. It is difficult to say how many complaints there should be or what the success rate ought to be, as there is no measure of how well-founded a complaint is. 'We may be able to show, for example, that complaints tend to be successful where witnesses are called, where advice and support is provided by the CRE, or where the applicant is represented by a professional lawyer, but we cannot tell whether this is because strong cases attract support and representation, or because advisers and representatives construct strong cases and call witnesses' (1991: 124).

Adjudication of sex discrimination in employment

It is instructive to draw on studies of how other forms of discrimination are dealt with by tribunals. One of the main empirical studies of the application of anti-discrimination law in tribunals is Leonard's (1987) study of sex discrimination in 1983-84, which included interviews and observation of tribunals, along with analysis of 265 judgments. Leonard argues that the relative informality and the lack of strict rules of evidence have both advantages and disadvantages for complainants.

Leonard analysed the judgments in terms of the extent to which the tribunal:

- understood and correctly applied the law;
- applied the correct legal standard (less favourable treatment);
- secured precise explanations from respondents;
- took into account irrelevant matters such as employers' or complainants' intentions, or placed excessive reliance on judgments of credibility, and;
- was consistent in decisions in relation to e.g. past discrimination, general non-discrimination, justifiable indirect discrimination and calculation of compensation.

Leonard explains the apparent shortcomings in terms of:

- the lack of expertise of tribunals;

- confusion with unfair dismissal cases;

- the nature of evidence – over half of cases had only testimony and one or two documents – and many used inappropriate or insufficient evidence;

- lack of expertise in the legislation – tribunals looked to representatives for this but the success rate varied markedly with the type of representation;

- variable interpretations by tribunals of their role in intervening, asking questions and investigating possible discrimination.

Leonard's conclusions were that making a claim of discrimination, providing sufficient evidence, and following procedures such as time limits and cross examination, are difficult for complainants - even those with representation. Complainants were often ill advised, particularly by job centres or trades unions, and suffered delays at the hands of the Equal Opportunities Commission (EOC). A complainant was most likely to succeed if the following were the case: the nature of the complaint was recruitment rather than victimisation; witnesses and/or specially prepared documents were used; skilled representation was used; and the tribunal included a woman, and a full time chairman.

Of particular interest are Leonard's comments on the variable quality of information in judgments. Leonard found that s.74 questionnaires (these are the equivalent of s.65 questionnaires in Race Relations Act cases) were rarely mentioned in judgments, and where they were, contradictions in respondents' statements were rarely accorded significance. Many judgments did not include type of complainant and respondent, use of witnesses and representation, summary of evidence and points contested or conceded, or how conflicting evidence was weighed; and around one tenth did not explain the reasons for the decision reached.

Race and criminal court processes

The aim in reviewing literature on race and criminal court processes is to determine what impact ethnicity may have on the dynamics of a judicial process, which may be of relevance for other judicial processes such as an employment tribunal.

Although most of the literature on criminal justice focuses on the over-representation of people of African-Caribbean background in the prison population, their higher crime rates, higher rates of stop and search and police charges, this section of the review focuses on the limited evidence about court processes. Most of the evidence comes from England, and examines court of trial, bail, remand, reports, sentencing, and representation.

African-Caribbean people are more likely than whites to be tried at Crown Court, due to a combination of two main factors: they are more likely to plead not guilty, and magistrates are more likely to commit them (Brown and Hullin 1992, Phillips and Brown 1998). If found guilty, they generally incur heavier penalties. African-Caribbeans are more likely to be remanded than released on bail (Hood 1992).

African-Caribbean offenders are less likely to have pre-sentence reports (Moxon 1988, Voakes and Fowler 1989) because they are less likely to plead guilty. When

reports are made, they may be biased due to discriminatory assumptions (Whitehouse 1983) or to differential processes of production (allocation of cases, home visits, checking – Gelsthorpe 1992). Hood (1992) however found that black defendants with reports were disadvantaged not by the content of reports but by the courts being less likely to follow the recommendations therein.

African-Carribeans are less likely to receive a sentence of probation (Brown and Hullin 1992, Moxon 1988, Mair 1986, Walker 1989); however there are differing views on broader discrimination in disposals (Reiner 1993, Smith 1997). Hood's study (Hood 1992) of Crown Courts considered the interaction of factors including race. It found that black males were more likely to be given a custodial sentence, and this could be attributed in part to the greater chance of remand in custody. Hood's study points to both direct and indirect discrimination in bail and sentencing decisions. Indirect discrimination arose in that black defendants are more likely to plead not guilty, therefore not to have background reports; and in use of criteria such as employment status in bail decisions.

On the other hand, a recent study by Hood and colleagues (Hood, Shute and Seemungal 2003) of perceptions of discrimination, that involved interviews with defendants, witnesses, professionals, and observation of proceedings, found that a very low proportion of ethnic minority defendants or witnesses believed that they had been discriminated against in criminal proceedings on grounds of ethnic origin.

Research from the United States on black clients in criminal proceedings (Guevara, Spohn and Herz 2004) suggests that representation is not related to outcome as one might expect. This study examined the interaction of race and type of counsel on disposition outcome in juvenile courts. Youth without an attorney were the most likely to have the charges dismissed, and this effect was more pronounced for non-White youth. In addition, non-White youth represented by a private attorney were significantly more likely than similar White youth to receive a secure confinement disposition.

In summary, as Gelsthorpe (2001) notes, the question of race discrimination in criminal justice is not straightforward because:

- not all disadvantages can be attributed to racial discrimination due to the interaction of race, gender and class and other factors;

- what is 'worse' treatment is debatable e.g. which is a 'worse' disposal our outcome;

- considerations of procedural vs substantive justice (equating to individual vs group justice in race discrimination law - McCrudden et al 1991);

- statistical analysis generally cannot easily include less tangible factors such as demeanour, interaction, or prejudice.

Emergent themes from the literature review

Research into criminal court processes suggests that race discrimination exists, but it is not straightforward to determine why this occurs. This is due to the interaction of race with other factors, the limitations of single research methods, and the potential tension between individual and group justice models and outcomes. This last point comes across strongly in the commentaries on race discrimination law's interpretation in the English courts. How discrimination is presented and adjudicated upon by tribunals is an area where there is very little empirical research, although two substantial studies of tribunals, one of sex and one of race discrimination, are directly relevant to the present study.

It will be possible to compare the quality of information in judgments with that found by Leonard's 1987 study, although it is not the aim of this research to follow Leonard in assessing the tribunal's application of the law. From Leonard and McCrudden et al we can draw out the following potential factors that might explain the reasons for success or failure of complaints:

- the nature of the evidence presented;
- the location of the burden of proof;
- the relationship between criteria of direct and indirect discrimination;
- the relationship between racial and any other forms of discrimination;
- the weight given by tribunals to judgments of credibility;
- how the tribunal interprets justifiability of indirect discrimination;
- references by the tribunal to intention and motivation of alleged discriminators;
- the relationship between discrimination and unfair dismissal claims;
- the type of representation and the tribunal's interaction with unrepresented complainants;
- the ability of complainants to obtain relevant information from respondents.

These potential factors will be explored during the following documentary analysis.

3

Methodology

The selection of cases for the study

The Employment Tribunals Service, with technical assistance from the Employment Market Analysis and Research (EMAR) directorate of the DTI, drew a stratified random sample of 150 cases that included a race discrimination claim and were decided at an Employment Tribunal between January and December 2004. Judgments were randomly assigned as either 'main' cases or 'reserve' cases by EMAR. One hundred and fifty cases were sampled by EMAR; one hundred and forty two judgments were actually supplied by ETS. Seven of the cases were missing and one was a duplicate case (see Appendix A for a detailed breakdown of the one hundred and forty two cases). As is shown in the Appendix, the classification of race discrimination cases as 'unsuccessful' or 'successful' by ETS (on the basis of the administrative outcome recorded for the race discrimination component of the claim) was not always accurate. In addition this classification conceals a more complex picture. In this report the terms 'successful' and 'unsuccessful' are used in accordance with the ETS's classification of the judgments.

From the judgments supplied the researchers selected fifty successful and fifty unsuccessful claims for analysis. Of the fifty 'main' unsuccessful cases nine were replaced by 'reserve' claims. This was because four of the judgments on the list had not been supplied to us; one had no reference to race relations but was solely an unfair dismissal case with no race element; one case was not complete; two cases listed were contained within one judgment and two cases were excluded because there was uncertainty over consent to the use of the claim or response form (IT1/IT3). (see below).

Of the successful claims, twelve of the 'main' cases were replaced by reserve cases. This was because three had not been supplied to us; one had no race element; two were not judgments on the claim; one was only a review decision; one was a decision on adjournment only; one case had not succeeded; and for three, there was uncertainty over consent to the use of the claim or response form.

The replacement of the cases was achieved by working back down the list of reserve unsuccessful cases, in order, until a total of fifty cases had been selected. Replacement successful cases were selected by working back up the list in order until fifty were selected.

The cases provided to the researchers were classified under 'main jurisdiction' and also 'additional jurisdiction'. The jurisdiction refers to whether the case is one of unfair dismissal, race discrimination, sex discrimination etc. It appears that cases, where the claim form from the claimant mentioned race, these were likely to have race discrimination recorded as the 'main jurisdiction'. Of the 150 cases listed, twenty-one were not listed under the main jurisdiction as race relation cases.

According to the ETS, the clerk to the Tribunal does the classification of cases and at the time of the research, the classification practice of clerks may have varied in different ET offices. According to ETS there was often no guidance as such as to which jurisdiction was 'main' or otherwise. Indeed more often than not the 'main' jurisdiction would either be the first one that an administrator input, regardless of whether this was the 'central' complaint. The ETS changed the practice of reporting the main and additional jurisdictions after the cases this research examined. Cases are now recorded according to 'all jurisdictions', in other words a case may appear in the statistics more than once because it may involve a claim under a number of jurisdictions.

There is often more than one jurisdiction within any case that is being made to an ET. So one case may involve more than one jurisdiction. For example, it may be a case for unfair dismissal and race discrimination. Therefore one judgment may cover a number of claims under different jurisdictions. In addition, any claim may involve more than one judgment on the claim – for example there may be a judgment as to whether the claim is within the time limits, followed by a judgment on the substance of the case and then followed by another judgment on the remedy. In other cases these separate decisions may be contained within one judgment.

In this research sample, one case contained two claimants within one judgment. In this case two claimants from the same work place both claimed unfair dismissal and race discrimination. Only one claimant succeeded on unfair dismissal, neither succeeded on race discrimination.

The reading of the judgments raises two questions. How consistently are jurisdictions recorded and reported across the ETS? Does the statistical reporting of cases in the ETS Annual Reports accurately portray the complexity of race discrimination cases?

The first question could be answered by examining the recording practice across ETS offices. The second would require a more sophisticated reporting that would involve reporting claims, judgments and jurisdictions separately.

Access to claim and response forms

In addition to the judgments, the ETS provided the researchers with claim and response forms associated with cases. These forms were provided for forty-four unsuccessful cases and sixty successful cases. All claimants and respondents who could be identified from the forms were written to and given the option of having their forms removed from the research by sending a reply paid envelope with an-opt out letter back to the researchers. In the cases where addresses could not be identified, the judgments were removed from the sample for further analysis.

On receipt of the opt-out letter, the relevant form was detached from the judgment and shredded. However, it was decided to keep in the main sample cases where there was either no claim or response form included or where the claim or response form had been destroyed. One of the objectives of the analysis of the claim and response forms is to assess how far analysing these forms alongside the judgments will add more information to allow for identification of the key factors in the case. As such it is useful to be looking at the mixture of positions, from where

there is a judgment and both claim and response form, to where there is solely a judgment.

Of the fifty successful cases selected, the claim and response form was available for analysis in thirty-three cases. In five cases neither form was available, in nine cases there was only the claimant's form and in three only the respondent's form. Of the fifty unsuccessful cases selected, the claim and response form was available for analysis in twenty-six cases. In seventeen cases neither form was available, in four cases only the claimant's form and in three only the respondent's form. The absence of the claim and response form was caused either by the person concerned opting out, or the claim and response forms not having been sent to the researchers by the ETS. In total eighteen response forms and thirteen claimant forms were removed following receipt of an opt-out. Two forms were removed after the letter to the claimant was returned by the postal service.

In the following analysis, each case has been allocated a unique identification number, prefixed by 'u' for cases where the race discrimination element of the claim has been classified by the ETS as 'unsuccessful' and 's' for cases classified by the ETS as 'successful'. However, it is important to note that this classification may not be entirely accurate. Where an individual case is referred to and the classification is inaccurate this is pointed out in the analysis. *Italics* are used where there is a direct quote from a judgment.

Framework for analysis of judgments

From the literature, ten factors were identified that may influence the outcome of race discrimination cases. These fall into two main categories:

The first is the characteristics of the claim and proceedings:

- the nature of the evidence presented
- the relationship between direct and indirect discrimination
- the relationship between discrimination and unfair dismissal claims
- the relationship between racial and any other forms of discrimination
- the type of representation and the tribunal's interaction with unrepresented complainants
- the ability of complainants to obtain relevant information from respondents.

The second is the reasoning of the tribunal:

- the location of burden of proof
- the weight given by tribunals to judgments of credibility
- how the tribunal interprets justifiability of indirect discrimination
- references by the tribunal to intention and motivation of alleged discriminators.

Preliminary analysis

Ten cases were subjected to a preliminary analysis to allow us both to refine and develop typologies and themes, and also assess how far the quality of the data itself could be relied upon to produce a robust analysis. These cases were read independently by two members of the research team, who took detailed notes on each case and prepared a list of themes which they derived from their analysis. The ten cases were then read by the third member of the team, who compared her perception of the themes with those identified in the draft analysis. A summary of the first ten cases is given in Appendix B. The summary gives some indication of the nature of data; that is, the length of judgment (or that devoted to discrimination if that was not the only issue), the proportion of the judgment devoted to reiteration of the law, and whether detailed claim and response forms were available.

In addition to reviewing the literature, looking at the ten judgments in more detail, however, revealed a far greater number of characteristics and factors that may potentially influence success. These formed the wider framework for analysis of the full sample of judgments, in order to meet the three main aims of the research:

- to provide an overview of the characteristics of cases;
- to suggest the main factors influencing the outcome of cases;
- to determine the quality and utility of written judgments as data.

From the analysis of ten judgments, the key factors that appeared to influence the success of otherwise of a complaint were as follows:

- presence or absence of sufficient evidence of discrimination (particularly in dismissal)
- whether a non-discriminatory explanation for less favourable treatment was presented and /or accepted (where burden of proof rests on respondent)
- the credibility or reliability of claimant, respondent and witnesses in the eyes of the tribunal
- the claimant's use of comparators.

Analytical themes

On the basis of the literature and an analysis of the first ten cases, themes were identified for the further analysis of the one hundred chosen cases. The framework is arranged under the following eight headings.

1. *Characteristics of the parties*

    1.1. Claimants: gender, length of service, occupation

    1.2. Respondents: nature of business, size of business, industrial sector, number of respondents cited.

2. *Nature of the complaint*

2.1. An isolated incident or a process. Is the claim based on an alleged history of discrimination or is this a one off incident? And which events preceded which e.g. unfair dismissal leading to a claim also of discrimination or discrimination followed by dismissal (discrimination as a precursor or discrimination as 'add-on')

2.2. The way in which the complaint was dealt with internally – procedures for dealing with complaints in the period before the claim

2.3. Whether the claim was that there was direct and/or indirect discrimination

2.4. Dismissal or other event (failure to recruit, promote, etc.)

3. *The claimant's case*

3.1. Is the claim linked to other complaints as well as racial discrimination?

3.2. The nature of 'race' as articulated in the complaint e.g. ethnicity, colour, or religion

3.3. How comparators were used - named individuals or 'hypothetical' or 'statistical'

3.4. The use of information obtained from respondent.

4. *The respondent's case*

4.1. The use of comparators

4.2. The procedures to resolve the complaint prior to tribunal

5. *The tribunal*

5.1. The nature of representation of both sides (legal, union, friends, etc.)

5.2. The number of Hearings and the numbers of days of each hearing

5.3. The use of witnesses

5.4. Tribunal's apparent approach to assisting unrepresented claimants.

6. *Basis of the judgment*

6.1. The articulation of the burden of proof and its use

6.2. What constitutes sufficient evidence to support a claim?

6.3. What constitutes a non-discriminatory explanation for less favourable treatment?

6.4. Reference to motivation or intention

6.5. Judgment on credibility or reliability of parties or witnesses.

7. *The outcomes*

  7.1. Where unfair dismissal found and race discrimination not or vice versa

  7.2. Where more than one incident how tribunal identifies the key incident

  7.3. Discrimination found in only one, some, or all counts

  7.4. Unanimous or majority decision

  7.5. Remedy: whether known, and nature of.

8. *The written text*

  8.1. Length of judgment

  8.2. Additional data in claim and response forms

  8.3. Reference to or reiteration of the Act

  8.4. Reference made to case law – degree to which the reference to the case is explained or just the case merely named

  8.5. Variation in terms of accuracy and quality (ranging from basic factual and typographical errors, such as wrong names for people or inaccurate dates to application of the law such as attribution of intention to discriminate)

  8.6. The degree to which the reasoning for the judgment is explained.

Following the above themes, a template for analysis was drawn up for the main analysis. The cases were divided between the two researchers, who then completed a template for each case. Each researcher then completed an overall summary of themes and key factors; these were then compared and combined into an overall analysis. The third researcher then reviewed this analysis, reviewing selected cases as appropriate.

4

Main findings

Basic description of cases

Of the one hundred cases selected for analysis in thirty-four of the cases the claimant was a woman and in sixty-six, a man. The respondent employers were from the private sector in sixty two; the public sector in twenty six cases (many of these the NHS) and twelve in the voluntary sector (higher education and GPs practices have been included in this category). In one case the nature of the employer was not clear from the judgment. The nature of jobs that claimants had or were engaged in was very diverse, from cleaners and bus drivers to university lecturers and doctors

Quality of information in judgments

The majority of judgments provided sufficient detail of the claimant and respondent's cases, the tribunal's interpretation of the law and their finding of fact to understand how the reached the decisions that they did. A small number of judgments did not fully explain their reasoning and these judgments tended to be very brief, confined to one or two pages. The 2001 Rules, which applied at the time when these Judgments were made stated that a determination of an issue arising out of the 1976 Act should be not be recorded in a judgment in summary form but with full written reasons *(Rule 12(4)(a))*.

How the judgments were structured, however, was very variable. In some cases they were laid out in a logical order; for example in an unsuccessful case (u1), the tribunal laid out its findings of fact in the case of an employee who was claiming discrimination and unfair dismissal following an allegation of abusive language towards a customer. In this case, the claimant also alleged previous discriminatory behaviour by the respondents prior to the dismissal, including not getting a bonus and having been called a '*nigger*'.

Other judgments were much more difficult for the reader to follow; for example, where it was not clear whether what was being presented was findings of fact by the Tribunal or allegations by the claimant or respondent. Furthermore, in some cases the Tribunal's reasoning on race discrimination was not separated out from that on unfair dismissal. For example, in case u58, the claimant had been disciplined and dismissed for failure to follow reasonable instructions. He made allegations about overtime, harassment, long service awards, pay awards, and one discriminatory remark (found to be out of time). The Tribunal concentrated on the disciplinary process, finding that it had been thorough, and that the dismissal was fair; and found no race discrimination.

In a successful case (s23), where the claimant was awarded £5000 for race discrimination and £15,000 for unfair dismissal, the judgment is laid out over 26 pages in a very clear structure with six pages of reference to the law. Both the

claim (IT1/ET1) and response (IT3/ET3) forms provide cogent accounts of the respondent's and claimant's case. The judgment focuses upon the issue at the heart of the disciplinary hearing (whether the claimant was authorized to drive a forklift truck or whether he possessed a license to drive one). Given the clear structure of the judgment, the claim and response forms do not add to the reader's understanding of the reasoning of the Tribunal.

Claim and response forms did not add a great deal to the information available, because most judgments included sufficient reference to the parties' cases. These, particularly the respondents' case, however, often had to be extracted by the reader from the judgments because they were not necessarily set out in a discrete section. In only a very few cases did the claim and/or response forms add to the reading and understanding of the judgment. In particular, claimants' forms provided details of how the claimant articulated 'race' or ethnic origin and in some cases detailed the alleged incidents where the case involved more than a one-off incident. Reflecting the tendency for them to be completed by an agent, respondents' forms were generally prepared in more formal legal terms, denying the allegations and providing little additional detail. This in part may be because the response form is completed at an early stage in the procedure when the respondent may only be aware of the nature of the complaint and the case as it is laid out in the claim form.

The Act defines racial grounds as including race, colour, nationality or ethnic or national origins. The way in which 'race' was articulated in the judgments varied. It was not articulated at all in some cases, but where it was it could include ethnicity, nationality, colour, or a combination of these, and in some cases, religion. The following terms give an indication of the diverse ways in which 'race' is articulated in judgments: '*Pakistani muslim*', '*Jewish*', '*British of Nigerian ethnic origin*', '*black*', '*Afro-Caribbean*', '*Turkish Cypriot*', '*black Kenyan*', '*mixed race*', '*black African*', '*black of Rwandan racial and national origin*', '*Asian Indian*', '*Indian racial or ethnic or national origins*'.

There were a surprising number of typographical errors and use of obscure phrasing or poor grammar which caused confusion in reading the judgment. Perhaps the worst example (s3) was one in which a supervisor employed in a care home '*Park Lodge*' was redeployed to '*Heather Lodge*' because her staff would not take instructions from a black person. At one point in the judgment the Lodge was referred to as '*White Lodge*'. A manager carried out the internal investigation of this for the employer. The claimant alleged that the manager only interviewed white members of staff. At one point this manager is referred to as *Mr White* which was not his name. Errors like these and other typographical mistakes in other cases make reading and understanding the judgments difficult because they alter the meaning significantly and lead to confusion.

Reading of the judgments raised issues of practice about accuracy of detail and the logical ordering of written judgments. and the accuracy of the classification of cases (see section Successful and Unsuccessful cases, below). Since the cases analysed were heard, the Employment Tribunal (Constitution and Rules of Procedure) Regulations 2004 have come into effect. These new regulations lay out the form and content of judgments and how the reasons should be contained in the judgment. The relevant extract of the new Regulations are to be found in **Appendix C.**

Association with other complaints

There is a clear association between unsuccessful race discrimination cases and claims of unfair dismissal that are either ineligible, due to insufficient length of service, or are unsuccessful at tribunal. There is also an association between successful claims for unfair dismissal and for race discrimination.

Among successful cases, there were four main types of case:

- Race discrimination, no unfair dismissal claim
- Unfair dismissal and race discrimination found
- Race discrimination found, but fair dismissal
- Race and sex discrimination found.

While dismissal was the most frequent complaint in successful cases, the cases also included discrimination complaints in relation to the following diverse circumstances: redundancy, investigation/disciplinary procedures, bullying/harassment, professional registration/tests, promotion/internal applications, racist remarks, undermining/demotion/removal from certain duties, probation/performance marking, and being not appointed to a post. There were relatively few additional claims such as unlawful deductions or breach of contract.

Among unsuccessful cases, the four main types of case were:

- Not eligible to claim unfair dismissal, or dismissal found to be fair
- Unfair dismissal claimed, dismissal found to be fair
- Unfair dismissal found but no race discrimination
- Not dismissed, unsuccessful claim of race discrimination.

Most of these dismissal cases involve various non-discrimination complaints (such as unlawful deductions or breach of contract.) Race discrimination complaints other than dismissal related mainly to disciplinary procedures and investigations.

In some cases, there is an implicit suggestion that the race discrimination claim was 'added on' to a main complaint, such as unfair dismissal, and would not have been made without it. Tribunals did not make this explicit, although it generally weakened the claimant's case if, in an ongoing conflict, they had not made any race discrimination complaint until preparing the tribunal application. In one case, the Tribunal explicitly suggests that the race discrimination complaint was 'added on' to a claim of unlawful deductions (u33).

Successful and unsuccessful cases

Cases provided for this study were classified for the researchers as 'successful' or 'unsuccessful' at tribunal by the ETS on the basis of the outcome of the race claim in the case. A central aim of this research is to investigate whether a qualitative analysis of judgments can explain the lower proportion of RRA cases which are successful. In this report, the terms 'successful' or 'unsuccessful' reflect the

categorization by the ETS. This categorization proved to be unreliable, however. This is partly a result of the association with unfair dismissal, by which a case might be categorised as successful or not on this basis rather than any discrimination claim.

Most cases, both successful and unsuccessful, involved a number of allegations of race discrimination or victimization; but few successful cases succeeded on all the allegations of victimization or discrimination under the RRA. An extreme example of this would be s29 where a trainee biomedical scientist presented ten allegations of victimization and eventual unfair dismissal over a period of two years. This began with a successful claim that she was discriminated against upon recruitment.

Some cases involved a number of allegations or claims all of which were successful, and others classified by the ETS as successful claims were largely unsuccessful. Others are included as 'successful' by the ETS for no apparent reason. In s5, for example, a black maintenance engineer claimed that someone else in the company was given a job which he would have applied for if the procedure for recruitment had been open, and that he had been discriminated against because the appointment did not follow the firm's equal opportunity policy. The Tribunal judged that he had not been treated less favourably and dismissed the claim, yet it was classified as successful.

Conversely, many 'unsuccessful' cases were unsuccessful not on substantive grounds relating to discrimination but because the claimant did not appear or the complaint was judged out of time or dismissed on procedural grounds. As noted in our discussion above, technically these should have been classified as "withdrawn" or "dismissed" cases. According to ETS a claim dismissed at a Hearing is classified either as 'unsuccessful at Hearing' or 'dismissed at Hearing out of scope'.

Judgments' use of statute and case law

The majority of judgments reiterate the most relevant sections of the RRA, primarily sections 1 (defines discrimination), 4 (applies this to employment) and 54A (sets out the burden of proof provision, in short, that a tribunal shall uphold a complaint if the claimant proves facts from which the tribunal could conclude in the absence of an adequate explanation that the respondent has discriminated). They also summarise or make brief reference to the most relevant cases for race discrimination and the questions of establishing detriment, reasonableness, use of comparators and so on - primarily

- Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] IRLR 285 (the first issue to be decided is whether there was less favourable treatment and sometimes this cannot be decided without deciding about the reason why);

- Nagarajan v London Regional Transport [1999] IRLR 572 (the discriminatory reasons need not be the principal reason for the discrimination provided they are a significant or effective influence);

- Qureshi v Victoria University of Manchester [2001] ICR 863 (the tribunal must consider the totality of the evidence, approved by the Court of Appeal in Anya v University of Oxford);

- Glasgow City Council v Zafar [1998] ICR 120 and The Law Society v Bahl [2003] IRLR 640 (unreasonable treatment is not necessarily discrimination);

- King v Great Britain China Centre [1991] IRLR 513 and Anya v University of Oxford [2001] IRLR 377 (the Tribunal must draw inferences it considers proper from the primary facts, the principle now embodied in s.54A);

- Barton v Investec Henderson Crosthwaite Securities Limited [2003] IRLR 332 (guidelines on applying the burden of proof), approved in Chamberlin Solicitors v Emokpae [2004] IRLR 592.

In two cases (s1, s2), the Tribunal drew up a set of principles based on its thorough consideration of case law and statute. Neither of these cases were decided on complex matters of legal principle: they both concerned bullying and harassment, and in both cases the claimant's evidence was preferred. Perhaps coincidentally, these were the two cases in which sex discrimination was also proved; and one involved a respondent of the same ethnic group as the claimant. In case s67, the Tribunal undertook a thorough discussion of the legal principles involved, perhaps because a family member represented the claimant, of whom the Tribunal was highly critical in terms of the way the case was conducted. Sex discrimination was also alleged.

Aside from the burden of proof, case law, not necessarily from race discrimination cases, is considered in relation to various procedural issues such as time limits, what constitutes a course of action, hearing of evidence, use of comparators, and determining the amount of compensation.

In most cases, however, the reference to case law is very brief, and even in a few cases there was no reference at all to the law. In this latter group are cases where either the entire judgment is very brief and/or where there is no significant argument reported from the respondent.

The reference to law is slightly different in unsuccessful cases, in that there is in general less detailed reference to the relevant case law and statute. This is partly because of the higher number of cases where there is no judgment related to race discrimination (no full reasons, no race claim, no case was presented or it was found to be out of time or struck out). Of the race discrimination-focused judgments, on the whole, there is little reference to law or merely a reiteration of key sections of the Act. In some cases, however, the Tribunal sets out the relevant sections and cases in some detail: usually in relation to specific issues such as comparators (u9), unreasonableness (u5), courses of action (u62), or burden of proof (u2, u17).

In a few unsuccessful cases the Tribunal details the judgment and reference to law extensively. On reading these judgments, it seems that they tend to occur where the claimant may be seen as litigious. For example, in u45 the claimant had already appealed to the Privy Council a decision by the General Medical Council, which was the starting point for the events which led to the Tribunal. This was followed by a history of litigation and the judgment seems to suggest that there was also

other current litigation taking place. The Tribunal provides a very full and clear account of their judgment and its basis in law. This is similar to the litigious tone to s67 referred to above.

Basis for judgments

The main basies for judgments in successful cases were that the Tribunal preferred the claimant's evidence, the respondent did not appear, or the claimant established a prima facie case and the respondent failed to give adequate explanation for the detriment.

Conversely, in unsuccessful cases, the main basies for judgments were that the Tribunal preferred the respondent's evidence, the claimant failed to establish a prima facie case, or the respondent gave an adequate explanation for the detriment. On one level this is not a surprising since the judgment embodies the rationale for the Tribunal reaching the decision which it did.

Significance of shifting burden of proof

Burden of proof - successful cases

In a number of cases the shifting of the burden of proof alone results in a successful claim. For example, in s14, although most of the counts of discrimination were not found, the one claim that succeeded was that the respondents had suspended the claimant without explanation, and gave no non-discriminatory reason for this lack of explanation. This constituted *prima facie* discrimination. Another example would be s21 where the claimant was sacked for bullying and harassment. The claimant suggested that the dismissal was based upon race discrimination and victimization following whistle blowing allegations about the safety of the company's products. The judgment states:

> *'It was for the respondents to demonstrate, on a balance of probabilities that difference in treatment identified in para 110 of this decision was not on the grounds of race. The respondent has failed to discharge that burden.'*

In another successful case, which did not hinge on the burden of proof, and which was successful on one of two counts, the Tribunal did not shift the burden in relation to the unsuccessful claim. At issue was the number of hours being worked on shifts and even though the judgment finds that

> *'we have been hampered in this task because the schedule compiled by the respondent for this purpose turned out to be useless'* (s11)

The Tribunal did not shift the burden to the respondent, implying (although this is not explicit), that it did not accept that the claimant had a *prima facie* case.

In the majority of successful cases, the current situation as regards burden of proof is articulated and applied, with varying degrees of detail. In some cases, it is not referred to, either where the judgment as a whole is very brief, or where the respondent either does not appear or fails to present a meaningful case. In some cases the case law considered focuses on burden of proof specifically, that is, the

Barton case, and the principles set out therein, as clarified by the Emokpae case in relation to race being a significant influence. Few of these cases, however, discuss the law in detail, and most simply reiterate the guidelines in Barton.

Specific issues considered in relation to burden of proof include its application to victimisation. One case (s44) finds that s 54A and the Barton principles do not apply to victimisation. Instead, principles from the Khan, Nagarajan, King, Zafar, and Shamoon cases are applied (see above). This case concerned less favourable treatment alleged as a result of three protected acts: an unfavourable appraisal, a hostile remark, and removal from certain duties. The tribunal found discrimination on the second point.

Another explains that s.54A in no way alters the basic position that the claimant is required to prove their case; that is, s.54A means that Tribunal can draw inferences from the facts, but it is for the complainant to prove her or his case. In this case (s55), there was evidence that someone involved in interviewing the claimant for a post had racist views. The records of how the interviewers had scored the candidates as compared with their written comments corroborated the claimant's hearsay evidence for this.

Only one case (s62) explicitly discusses the significance of s.54A, in that the outcome of the case might have been different had it not been in force. In this case, the claimant was made redundant; and alleged that the dismissal was race discrimination, using a white colleague as a comparator and a comparison of bonus scores against the redundancy selection criteria. The Tribunal found unfair dismissal and race discrimination because the respondent provided no adequate explanation for less favourable treatment than a white comparator.

Burden of proof - unsuccessful cases

In very few unsuccessful cases there is detailed discussion of the law. Case u21, for example, was termed as a '*difficult*' case involving a non-white respondent and recruitment procedures that were poor, aside from any consideration of discrimination.

In this case, the respondent's explanation was accepted:

> *'The explanation for the difference in treatment is partly that…the 2nd respondent genuinely thought that the H grade posts might not be advertised at the same time…and partly the poor relationship and communication between the two, which we conclude was a result of their respective personalities, and not related to the applicant's race'* (para 42).

The Tribunal discussed (para 39) that the law requires

> *'not merely whether the respondent has proved an explanation for such facts, but further that it is adequate to discharge the burden of proof on the balance of probabilities that the proscribed ground was not any part of the reasons for the treatment in question'.*

The Tribunal's interpretation of s. 54A is that

> *'burden of proof shifts only if the facts proved are such that the tribunal could properly draw from them an inference'* (para 39).

Together, the guidance from case law is that it is for the claimant to prove facts from which tribunal can conclude discrimination; that it is unusual to find direct evidence of discrimination; that unreasonableness on the part of the respondent is not sufficient to infer discrimination; and that once the burden of proof shifts, it is for the respondent to prove that treatment was 'in no sense whatsover' discriminatory.

Even where the Tribunal summarises the burden of proof provisions, this is often a formality, in that the burden of proof is not central to the basis for its judgment (for example, u50). In many cases, there is no reference at all to the burden of proof. In one case, the burden of proof regarding victimisation is considered as a preliminary point, the Tribunal finding that s.54A does not apply, but that the 'old' burden of proof that does apply is the same but for a slight difference of emphasis: if there is different treatment and the respondent's explanation is inadequate

> *'a Tribunal may, but not must, draw an inference that the treatment was because they had done a protected act. The difference between this and section 54A, if any, is a small difference of emphasis only'* (u17).

Comparators

In most unsuccessful cases, the claimant presented an actual comparator on at least one point, which the Tribunal deemed either not appropriate or not indicative of less favourable treatment. In around half of successful cases, actual comparators were presented by the claimant, and around half of successful claimants did not present actual comparators, suggesting that this is not necessary for a successful case. In many cases both successful and unsuccessful, the Tribunal itself considered a hypothetical comparator in order to determine a point.

In some cases, the points on which the claimant did not succeed were those on which they had suggested an actual comparator.

In case s39, for example, on one element of the complaint, the claimant used actual comparators, co-workers of Arab origin, who were paid more. The Tribunal, however, found that a non-transparent pay policy is not in itself discriminatory, and that the respondent was entitled to pay the claimant less in the circumstances. It considered it unlikely that the manager would have favoured the Arab workers in terms of pay in light of the claimant's contention that the manager insulted Arabs. The complaint succeeded in relation to allegations of racist remarks by the manager.

In case s50, the complaints of discrimination, in relation to which the claimant used white co-workers as comparators, failed. The Tribunal found non discriminatory reasons for the claimant's work being checked more carefully, and his being asked to make more corrections than colleagues, for example. The complaints of victimisation in relation to the dismissal process, however, succeeded.

Credibility

It is revealing, but not surprising that what seems to primarily influence the Tribunal's decision is whether the Tribunal prefers the evidence of either the claimant or the respondent. It is apparent that credibility is important, but how Tribunals define credibility is not. If it is assumed that credibility is culturally constructed as much as legally defined, then how credibility is constructed is important. Whether or not there was a Tribunal member from a similar ethnic group as the claimant cannot be read from the judgments.

Credibility - Successful cases

In some cases, however, the Tribunal, despite criticism of the claimant, found in their favour on at least one aspect of the case. For example, s29 is a long and complicated case with a judgment of 29 pages. The claimant presented ten separate incidents which are laid out in the judgment. The Tribunal dismisses almost all of the incidents but does conclude that she was victimized, although making a number of critical comments about the claimant such as '*The applicant is …entirely self-centred*'. In context this comment appears to be gratuitous.

Credibility (or, to a lesser extent, reliability) was central to the outcome of many cases and was therefore discussed frequently. Credibility was deduced mainly by contradictions and inconsistency in oral evidence, or between oral evidence and documentation (including originating application). Other factors included respondents' evasive responses to s.65 questionnaires (s28); respondent's key witnesses subsequently dismissed for misconduct (s39); claimants prone to exaggeration in their evidence or on a c.v. (s46, s65), and vagueness (s57).

Reading the judgments does not allow the reader to assess the basis upon which the Tribunal judges the credibility of claimants, respondents or other witnesses, yet it is clear that this is central to many of the Tribunals' judgments. Credibility may be derived from hard factors such as inconsistencies in evidence or more intangible culturally bound judgments such as self-presentation or demeanour. These assessments may be both negative and positive. For example in one successful case the Tribunal comments

> *'the concept of work is important to [the claimant]; he would rather work than receive state benefits.'*

As pointed out above, negative comments about the claimant did not necessarily lead to a lack of success. In other cases, however, negative assessments of credibility do appear to be central; for example,

> *'we find [the claimant] evasive.'*

In several successful cases, indeed, the claimant was found to be less credible on some if not all points. The relationship between this and the outcome can be explained as follows: the claimant's case did not succeed in relation to discrimination (s46, s65), succeeded only in part (s14, s50 – see above, s73), or the respondent did not present a case (s71).

In case s14, the Tribunal found that the claimant was a less credible witness because his evidence was inconsistent. Discrimination was not found on two

counts - in the application of a drug testing policy, nor in the respondent's decision to summarily dismiss the claimant. In relation to the claimant being subjected to suspension without explanation, the respondent gave no explanation for the lack of explanation so discrimination was found.

Case s73 concerned two claims of victimisation by an employee who had been investigated for misconduct after having alleged racial discrimination. The Tribunal preferred the account of the respondent's witnesses over the claimant on what he was told the purpose of an investigation meeting was, because of a discrepancy between the claimant's application and his evidence. The Tribunal found on one of two points that victimisation had occurred. By a majority, it found that an employee who had not brought proceedings would not have been formally investigated, and that the respondent provided no non-discriminatory explanation for this detriment.

In case s46, a complaint of bullying and harassment and unfair dismissal, the Tribunal found that the claimant had exaggerated his skills on his c.v.; and that his evidence also contradicted documentary evidence about training opportunities, instructions given, and so on. It commented (para 15):

> *'He is clearly a very sensitive person and it may be that in some instances his perception of harassment and what he calls bullying may be his oversensitive perception to an appropriate management instruction or, on occasion, criticism'.*

> *'The Tribunal reminded itself of the need to construct an appropriate hypothetical comparator but could not conclude that [Respondents] would have treated such comparator more favourably'* (para 21).

It found that the dismissal, for misconduct and unacceptable levels of absence, was fair, and found no discrimination.

In case s65, the Tribunal believed the claimant's credibility had been undermined by her exaggerating evidence. The claim was that the claimant had been shouted at by a manager and her contract had not been renewed. The Tribunal accepted the evidence of the respondent's witness that the shouting did not amount to discrimination nor victimisation. The Tribunal found that the evidence of the previously favourable treatment by this manager, was

> *'inconsistent with a situation in which the head teacher had suddenly adopted …a racially motivated approach'* (para 42).

Credibility - Unsuccessful cases

Credibility was implicit as an issue in many unsuccessful cases, but less often explicitly referred to, and then only in general terms; that is, that the respondent's witnesses are more credible (often termed '*honest*') than the claimant. Credibility was reduced for either party by inconsistency in evidence (u33, u37, u62),

evasiveness or defensiveness (u21, u62), and, for claimants, exaggeration of one's abilities (u21), a belief that one is victim of conspiracy (u21), and a willingness to distort the truth (u37). External factors adding or subtracting from credibility were the racial diversity of a respondent organisation (u3) and previous conduct of a witness who admitted falsely signing off sick (u62). In each case, credibility was greater on the part of the respondent, although in two cases, neither respondent nor claimant were found to be wholly reliable (u21, u50).

For example, in case u21 (see above in relation to discussion of law), the Tribunal found neither the claimant nor the second respondent, the claimant's manager, to be wholly reliable. The judgment stated that the claimant has '*a somewhat exaggerated view of her own abilities*' and '*tends to see herself as the victim of a conspiracy*'; while the manager has a '*somewhat supercilious manner*' and becomes '*very defensive*' and '*less than frank*'. Nevertheless, the first respondent's explanations were accepted to be non-discriminatory.

Case u37 concerned conflict between co-workers and the claimant alleged discrimination when given a '*suspended dismissal*' (a term which whilst having no legal standing was not questioned in the judgment) for threatening a co-worker. The Tribunal found the claimant and his witness to be inconsistent, and neither honest nor reliable. The two main witnesses for the respondent, however, were honest and reliable. It stated:

> '*the applicant is so convinced about the rightness of his cause that at times he is willing to distort the truth*';

and

> '*the applicant has a highly selective memory*'.

Credibility was central to the outcome of this case.

In case u3, the claimant had been dismissed for poor timekeeping and other misconduct. She claimed that her assertive behaviour was interpreted as challenging due to cultural differences not being accommodated. She contended that people of her ethnic background did not have the same understanding of time, therefore a requirement to be punctual was discriminatory. The Tribunal found that the disciplinary action was reasonable in the circumstances; and that the claimant had been able to comply with timekeeping following a warning. It explicitly took into account the racial diversity of the respondent's management committee, staff and appeal panel.

Case u62 concerned a driver dismissed for falsely reporting an assault by a member of the public, who claimed the respondent had interfered with evidence, and claimed a background of less favourable treatment on a range of issues. There was no claim of discrimination until the tribunal proceedings. The respondent's witness was judged more credible than the claimant or his witness. The Tribunal stated (para 20.4):

> *'we reject the evidence of the applicant, who for the large part, gave his evidence in an inconsistent and evasive manner. He admitted…that he did not, at times, tell the truth if the truth did not help him';*

and (para 20.22)

> *'[The claimant's witness] was not a credible witness: he accepted openly that he had falsely signed off work sick'.*

In case u50, the claimant had been off long-term sick and redeployed. The issues were whether the following were discrimination:

- she was moved from her normal place of work on medical grounds,
- was in the redeployment pool for too long,
- was removed from an alternative post,
- was belittled by a requirement to attend weekly meetings,
- and was ultimately dismissed.

The Tribunal found unfair dismissal but not discrimination. It found that the claimant was 'essentially credible', but not reliable in certain matters of evidence. It had mixed view of the respondent's witnesses:

- it preferred the HR person's evidence over that of the claimant;
- it found the dismissing officer was not very reliable;
- it found the senior manager misguided about dismissal procedures;
- and the redeployment manager was reasonably credible.

Discrimination: conscious and unconscious

Motivation was mentioned in a small number of cases, generally the judgment reiterating that it is not relevant. In a small number of cases, however, there was some discussion of the question of conscious versus unconscious discrimination. In one (s16), a critical remark, not overtly discriminatory, was found to have been made out of thoughtlessness rather than an intention to humiliate; however, the Tribunal explained that it was not the lack of intent that was the basis for a finding of no discrimination, but the fact that such remarks tended to be made to other people also. In the second case (s57), the discrimination was found to be at least subconscious if not conscious, with the respondent adopting an 'at the very least subconsciously racially exclusive' approach to running its organisation. However, this discussion was not relevant to the outcome. In the third (s67), the tribunal in its discussion of case law on how to weigh discrimination when it is not the sole ground for a decision (Nagarajan – see above), stated that the mental processes of the alleged discriminator have to be taken into account. However, this is not applied in any obvious way in the judgment.

One case is an example of the lack of clarity on the issue of motivation:

> *'even unconscious discrimination requires a consideration of what is in the mind of the discriminator' (u17).*

In other cases, however, the discussion of motivation was even less straightforward. In one case, the judgment found that the alleged discriminator had no discriminatory motive, although it did state that motivation could be conscious or subconscious:

> *'there is no significance in any of the admissions [the manager] made which would enable us to find any racially discriminatory motive in her decision to believe the case against the applicant' (u5).*

In another, it found that the question of (conscious) motivation on the part of alleged discriminators was important:

> *'the lack of any obvious motive is an important factor…Neither of them had any apparent reason to treat the Applicant in this seriously discriminatory manner.' (u33)*

In a third case, the Tribunal, considering one incident, found it relevant to whether there was discrimination that the conduct was unintentional: a '*mishap*', '*as opposed to any intention to mete out detrimental treatment*' (u58).

Use of information from respondents in s.65 questionnaires

From the information found in judgments and claim forms, s.65 questionnaires appear to be little used, or at least are rarely referred to.

In a small number of successful cases, it is apparent from the judgment that the claimant has used a s.65 questionnaire. There is no discussion of the information obtained or its use, except to note that in one case (s71) there was no response and that in another (s16) the information went against the claimant (although there is no detailed discussion). From the reading of the judgments there appeared to be no claims of indirect discrimination that required use of statistics. Very few unsuccessful cases demonstrated use of questionnaires. The use by the claimant of information about colleagues' performance ratings and about the racial composition of the workforce suggests questionnaires were used in cases u48 and u50, while in case u9 there is reference to use of a questionnaire, with no further detail.

Representation

If there is a representative for the claimant or respondent, the judgments name them. However their designation is not then done in a consistent manner which would allow for comparison. Representatives are given descriptions such as '*family member*' '*husband*' '*counsel*', '*consultant*', '*solicitor*' etc. These are not mutually exclusive categories.

There was no obvious relationship between success and representation. Nor was there any obvious relationship between use of witnesses and representation, although it was apparent that respondents generally had more witnesses than claimants. Claimants generally had one, or none, other than themselves.

Representation by a family member was referred to in a small number of cases, and could be detrimental to the claimant. For example, one claimant succeeded

despite the Tribunal's scathing attack on the '*dishonest*' family-member representative (s67). The judgment found that there had been improper actions by the claimant's representative in relation to exchange of documents, letters, and other procedural and preparatory matters. It found that the delay in exchange of witnesses statements was caused by the representative. This representative was found to be '*dishonest*', '*devious*' and '*obstructive*' (para 3); and was said to have been no help to the Tribunal, which had '*to work out the claimant's case itself*' (para 5).

The Tribunal's approach to assisting unrepresented claimants was generally not apparent from judgments. In some cases, however, the Tribunal did not allow postponement or adjournment to allow the claimant to obtain representation, on the grounds that, in one case, the respondent was not professionally represented and the proceedings had already been significantly delayed (s57), and, in the other, that the respondent did not appear (s41). In a successful case, where the claimant was represented by her husband, the judgment appears to reflect a lack of assistance to the claimant:

> *'It is not for us to prove the applicant's case on remedy or gather evidence for her.'*

This was a case where the Tribunal made a number of negative comments about the claimant whilst finding for her. There were some instances of giving unrepresented claimants some flexibility, but this did not ensure success. In one case, the Tribunal adjourned on the first day when the claimant's representative did not turn up (u61). In another, the tribunal assisted the claimant by deciding that it considered it just and equitable to consider the complaints in their entirety despite a break in service (u62). In one case, after an equality organisation ceased to represent and a friend took over, the Tribunal stated that it gave the representative '*rather more latitude than it would have given to a legally qualified representative*' (u37). On the other hand, the complaint of an unrepresented claimant was struck out after the claimant had refused repeatedly to comply with directions to prepare witness statement (u68). In one case (which was unsuccessful on the race claim but successful on a disability claim), the claimant, who suffered from schizophrenia, was assisted by the Tribunal in arranging a lawyer to represent him. In other unsuccessful cases (for example u10), the claimant was assisted by the Tribunal in devising a hypothetical comparator.

Remedies and recommendations

Although several judgments commented unfavourably on the respondents' procedures, judgments rarely made recommendations: in one case to implement an equal opportunities policy and to train staff in it (s57); and in another to provide references for the claimant and to review its equal opportunities procedures (s25). There were no instances of reinstatement.

Comments made by Tribunals included unfavourable views of irregular recruitment procedures. For example, in case u21, the normal recruitment process was not applied. The Tribunal remarked that such an employer '*opens the way to the suspicion of irregularity and discrimination*' (para 40). It commented that the respondent organisation…

> *'…invited this complaint by its cavalier decision to disapply its Recruitment and Selection Procedure, and has only itself to blame for the ensuing costs and inconvenience'* (para 44).

In u14 and u24, two white receptionists in a doctors' surgery claimed unfair dismissal and race discrimination against a predominantly minority ethnic GP practice. One claimant was successful in her unfair dismissal claim. Both claimants were unsuccessful on their race claim. The Tribunal awarded expenses to the respondents from the claimants (including the claimant who succeeded in her unfair dismissal claim). At the same time, however, the judgment criticized the management's approach to equal opportunities.

From the cases where it was known from the judgment, the financial compensation in successful cases varied widely, from tens of thousands of pounds to a few hundred pounds, depending on length of service and the nature of the discrimination (injury to feelings, dismissal, etc.) Although there were higher awards in combination with a successful claim of unfair dismissal, the top award on discrimination grounds alone was £63,000, which included past and future loss of wages, psychiatric damages, injury to feelings, and aggravated damages awarded on the basis that the respondent organisation was supposed to promote equality, and did not investigate the actions of the individual at the centre of the case.

Unusual cases

It is not apparent from judgments whether they were unanimous, but the assumption is that they were unless stated otherwise. There were majority decisions on some points in a small number of cases.

Although in the majority of cases the claimant was black and any individual discriminators or comparators white, in some cases the claimant and respondent were from same non-white ethnic group (s1, u21); or the claimant was white (s26, u17, and u14/u24 - see above).

5
Conclusions

There were no clear patterns in the written judgments of RRA cases that might explain why these claims are relatively unlikely to succeed at tribunal. The main factors at work appeared to be credibility of the parties, and whether the claimant had enough evidence to pass the burden of proof to the respondent. Section 54A appears to be very significant: it is likely that far fewer cases would succeed if the burden of proof did not transfer to the respondent once a detriment is established that calls for explanation.

Factors identified in literature supported and not supported by this study

To return to the key factors identified in the literature, those that are supported by this study are:

- the nature of the evidence presented
- the location of the burden of proof
- the weight given by tribunals to judgments of credibility
- the relationship between discrimination and unfair dismissal claims

and those that are not found to be as significant are:

- the relationship between criteria of direct and indirect discrimination
- the relationship between racial and any other forms of discrimination
- how the tribunal interprets justifiability of indirect discrimination
- references by the tribunal to intention and motivation of alleged discriminators
- the type of representation and the tribunal's interaction with unrepresented complainants
- the ability of complainants to obtain relevant information from respondents.

This study used solely documentary analysis and cannot be as comprehensive as using a combination of methods. However, these findings agree with those of McCrudden, Smith and Brown that RRA cases are characterised by a direct contest of credibility, and claimants are unlikely to be able to present documentary evidence.

Areas for further investigation

Given that the Tribunal's judgment on credibility of the witnesses was highly significant, this is an area that could be the subject of further research using observation and semi-structured interviews. Inconsistencies in evidence affected credibility, but it is also probable that less tangible qualities and the demeanour of witnesses, which cannot be deduced from documents, influenced the Tribunal's judgment in this respect. Credibility may be culturally grounded and the credibility of claimants and respondents may be interpreted differently according to the experience and background of members of the Tribunal. Further investigation of this important area would involve both observation and interviewing witnesses, claimants, respondents and Tribunal members. Because documentary evidence appears to be a significant aspect in the Tribunals judging credibility, an investigation of credibility should also involve examining how claimants can acquire documentary evidence.

It was striking that a significant proportion of cases involved claimants who appeared to be suffering from mental health problems or were in some way traumatised by their experiences – resulting, for example, in long periods off work due to stress. This aspect was rarely discussed explicitly in judgments. It is therefore possible that future research could examine this, perhaps to explore the causal links between work-related stress and ill health.

Many cases seem to involve people who have recently moved to the UK. This could be an area for more detailed investigation. What is the relationship between racial discrimination and national origin and immigration status?

The volume of cases which involve both more than one incident and more than one jurisdiction needs to be explored more fully to examine how the various incidents interact with one another in a case. It may be that some claims for race discrimination in the workplace are the product of wider experiences of discrimination for which the claimant finds difficulty in finding redress elsewhere. It may be that the claimant has the employment relationship as the only locus where a legal challenge to this wider racism can be asserted.

A comparative study of sex and disability discrimination cases would be valuable, given the importance of the statutory burden of proof, and the relative absence of indirect discrimination claims in race cases. A comparison of some of the factors to which this report has pointed in both sex and race cases would further an understanding of how the cases come to a Tribunal and the eventual outcome.

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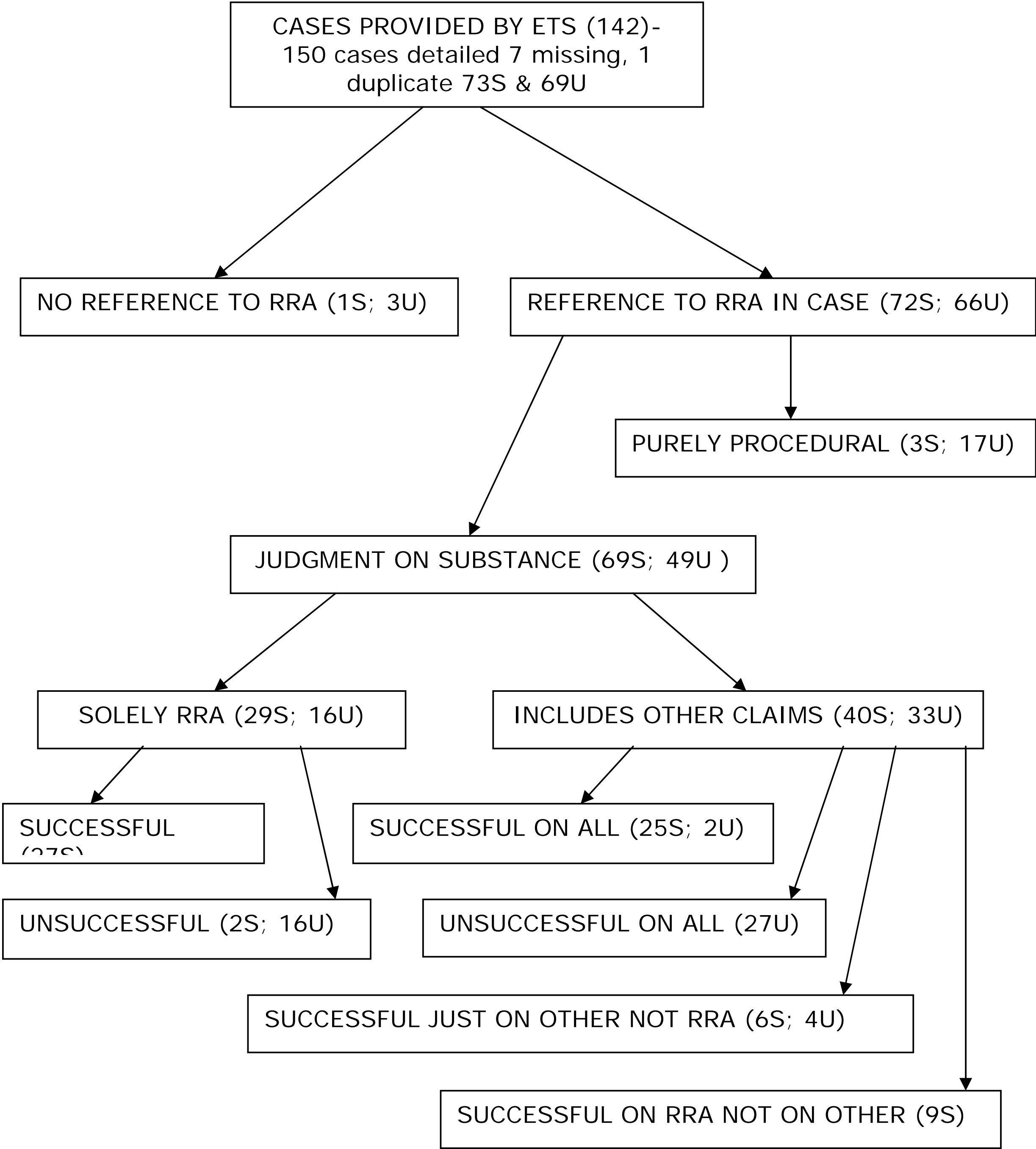
Appendix A: Description of Sample



Appendix B:
Key features of first ten cases

Abbreviations: C claimant R respondent D discrimination UD unfair dismissal

	complaint & representation	summary	key factors	notes on judgement
ID	**successful**			
55	did not recruit C C unrepresented	C had evidence of racist views of someone involved in recruitment; C found to be credible; R could not prove otherwise remedy not shown	no non-D explanation credibility	8 pp, 1 pp on law IT 1 not detailed no data on C-tribunal interaction
3	dismissed after failing probation C represented by husband because solicitor ill R did not appear	various allegations e.g. white staff refused to be managed by C, transfer, demotion, white only interviews during investigation, victimisation, no appeal procedure white comparator not dismissed remedy: compensation	factors: use of comparator; non D explanations only for transfer and demotion	12 pp, 1 pp on law; detailed IT1 and IT3
14	dismissed after drugs test represented	C found to be less credible; D in testing and in dismissal not found; D found in lack of explanation of suspension; only successful on 1/3 counts; remedy: compensation other claims: UD not found	factors: credibility; no non D justification for lack of explanation	13 pp, 10 on D; 1 pp on law

	complaint & representation	summary	key factors	notes on judgement
17	dismissed for misconduct represented	no non D explanation for less harsh treatment of white comparator remedy: compensation	factors: use of comparator	7 pp, 6 pp on D 1 In on law brief IT1 & detailed IT 3
53	various allegations against manager inc racist remarks represented	little evidence of D but no non-D explanation R lacked credibility remedy not shown	factors: no non D explanation; credibility	10 pp, 1pp on law IT1 & IT3 not detailed
74	trainee not appointed to job but white person appointed without formal process C represented but did not appear	could infer unconscious discrimination in promotion process that used no objective criteria issue of time bar remedy: compensation	factors: inference of unconscious D	19 pp 5 pp on law detailed IT1 & IT3
44	unfavourable appraisal, victimisation represented	D not found in relation to appraisal or removal from duties but found in relation to victimising remark C's witness reliable remedy not shown	factors: reliability	12 pp, 1 pp on law detailed IT1 & IT3
	Unsuccessful			
40	dismissed for misconduct manager allegedly failed to support, promote, etc. C unrepresented	clear evidence of misconduct, non discriminatory explanations found for all allegations other claims: UD and breach of contract not found	factors: no evidence of D	19 pp, 17 on D 2.5 pp on law no data on C-tribunal interaction
58	dismissed for failure to follow instructions various allegations against manager re pay, overtime, etc. C no professional representation	no evidence of D found; potentially racist remark made years previously seen as out of time and merely distasteful UD seen as main issue before tribunal other claims: UD not found	factors: no evidence of D	11 pp, 9 on D 8 lines on law no data on C-tribunal interaction

	complaint & representation	summary	key factors	notes on judgement
50	redeployed then dismissed on medical grounds represented	use of comparator statistics showed no indirect D non D explanations found for treatment of white comparators C not reliable, R's witnesses reliable other claims: UD found	factors: non D explanations found; use of comparators; reliability	23 pp, 19 on D, 3 pp on law

Appendix C: Extracts from legislation and regulations

Race Relations Act 1976 , Section 74

Definition of race

Meaning of "racial grounds", "racial group" etc,

3.--

(1) In this Act, unless the context otherwise requires--

"racial grounds" means any of the following grounds, namely colour, race, nationality or ethnic or national origins;

"racial group" means a group of persons defined by reference to colour, race, nationality or ethnic or national origins, and references to a person's racial group refer to any racial group into which he falls.

(2) The fact that a racial group comprises two or more distinct racial groups does not prevent it from constituting a particular racial group for the purposes of this Act.

Race Relations Act 1976 , Section 65

(1) With a view to helping a person ('the person aggrieved') who considers he may have been discriminated against in contravention of this Act to decide whether to institute proceedings and, if he does so, to formulate and present his case in the most effective manner, the Secretary of State shall by order prescribe--

(a) forms by which the person aggrieved may question the respondent on his reasons for doing any relevant act, or on any other matter which is or may be relevant; and

(b) forms by which the respondent may if he so wishes reply to any questions.

(2) Where the person aggrieved questions the respondent (whether in accordance with an order under subsection (1) or not)--

(a) the question, and any reply by the respondent (whether in accordance with such an order or not) shall, subject to the following provisions of this section be admissible as evidence in the proceedings

(b) if it appears to the court or tribunal that the respondent deliberately and without reasonable excuse, omitted to reply within a reasonable period or that his reply is evasive or equivocal, the court or tribunal may draw any inference from that fact that it considers it just and equitable to draw, including an inference that he committed an unlawful act.

The Race Relations Act 1976 (Amendment) Regulations 2003

(Extract)

41. After section 54 of the 1976 Act insert -

" Burden of proof: employment tribunals
54A. - (1) This section applies where a complaint is presented under section 54 and the complaint is that the respondent -

(a) has committed an act of discrimination, on grounds of race or ethnic or national origins, which is unlawful by virtue of any provision referred to in section 1(1B)(a), (e) or (f), or Part IV in its application to those provisions, or

(b) has committed an act of harassment.

(2) Where, on the hearing of the complaint, the complainant proves facts from which the tribunal could, apart from this section, conclude in the absence of an adequate explanation that the respondent -

(a) has committed such an act of discrimination or harassment against the complainant, or

(b) is by virtue of section 32 or 33 to be treated as having committed such an act of discrimination or harassment against the complainant,

the tribunal shall uphold the complaint unless the respondent proves that he did not commit or, as the case may be, is not to be treated as having committed, that act.".

42. - (1) In the heading to section 57 of the 1976 Act (claims under Part III), after the words "Part III", insert "etc.".

(2) In subsection (1) of that section -

(a) omit the words "of discrimination", in both places where they occur, and

(b) after the words "Part III" insert "other than, in relation to discrimination on grounds of race or ethnic or national origins, or harassment, section 26A or 26B".

43. After section 57 of the 1976 Act insert -

" Burden of proof : County and Sheriff Courts
57ZA. - (1) This section applies where a claim is brought under section 57 and the claim is that the respondent -

(a) has committed an act of discrimination, on grounds of race or ethnic or national origins, which is unlawful by virtue of any provision referred to in section 1(1B)(b) to (d), or Part IV in its application to those provisions, or

(b) has committed an act of harassment.

(2) Where, on the hearing of the claim, the claimant proves facts from which the court could, apart from this section, conclude in the absence of an adequate explanation that the respondent -

(a) has committed such an act of discrimination or harassment against the claimant, or

(b) is by virtue of section 32 or 33 to be treated as having committed such an act of discrimination or harassment against the claimant,

the court shall uphold the claim unless the respondent proves that he did not commit or, as the case may be, is not to be treated as having committed, that act.".

The Employment Tribunals (Constitution and Rules of Procedure) Regulations 2004

Rules 29 - 30

Form and content of judgments
29. - (1) When judgment is reserved a written judgment shall be sent to the parties as soon as practicable. All judgments (whether issued orally or in writing) shall be recorded in writing and signed by the chairman.

(2) The Secretary shall provide a copy of the judgment to each of the parties and, where the proceedings were referred to the tribunal by a court, to that court. The Secretary shall include guidance to the parties on how the judgment may be reviewed or appealed.

(3) Where the judgment includes an award of compensation or a determination that one party is required to pay a sum to another (excluding an order for costs, expenses, allowances, preparation time or wasted costs), the document shall also contain a statement of the amount of compensation

awarded, or of the sum required to be paid.

Reasons

30. - (1) A tribunal or chairman must give reasons (either oral or written) for any -

(a) judgment; or

(b) order, if a request for reasons is made before or at the hearing at which the order is made.

(2) Reasons may be given orally at the time of issuing the judgment or order or they may be reserved to be given in writing at a later date. If reasons are reserved, they shall be signed by the chairman and sent to the parties by the Secretary.

(3) Written reasons shall only be provided: -

(a) in relation to judgments if requested by one of the parties within the time limit set out in paragraph (5); or

(b) in relation to any judgment or order if requested by the Employment Appeal Tribunal at any time.

(4) When written reasons are provided, the Secretary shall send a copy of the reasons to all parties to the proceedings and record the date on which the reasons were sent. Written reasons shall be signed by the chairman.

(5) A request for written reasons for a judgment must be made by a party either orally at the hearing (if the judgment is issued at a hearing), or in writing within 14 days of the date on which the judgment was sent to the parties. This time limit may be extended by a chairman where he considers it just and equitable to do so.

(6) Written reasons for a judgment shall include the following information -

(a) the issues which the tribunal or chairman has identified as being relevant to the claim;

(b) if some identified issues were not determined, what those issues were and why they were not determined;

(c) findings of fact relevant to the issues which have been determined;

(d) a concise statement of the applicable law;

(e) how the relevant findings of fact and applicable law have been applied in order to determine the issues; and

(f) where the judgment includes an award of compensation or a determination that one party make a payment to the other, a table showing how the amount or sum has been calculated or a description of the manner in which it has been calculated.

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