HOW TO WIN A DIRECT DISCRIMINATION CASE

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1. It is well known that direct discrimination cases are extremely difficult to win if you are acting for the Claimant.[1] However, on occasions, they can also be tricky for Respondents.

2. This guide explores the practical tactical techniques that you can utilise to assist you to win a direct discrimination case, whichever party you are acting for.

3. **A (very) brief outline of the law**

3.1. Whilst the burden is on the Claimant to prove facts from which a tribunal could conclude that there has been unlawful discrimination and the burden of proof then shifts on to the Respondent to prove there was no discrimination, whether conscious or sub-conscious, (see: s.136 of the Equality Act 2010; *Igen v Wong* [2005] ICR 9311 CA; and *Hewage v Grampian Health Board* [2010] ICR 1054 SC), often, the Employment Tribunal will look at whether in the fact the acts alleged occurred, and then look straight at the reason why they occurred. This approach is supported by case law, see for example *Laing v Manchester City Council* [2006] ICR 1519, at paragraph 73 and *Brown v Croydon LBC* [2007] IRLR 259. The rationale, according to Lord Nicholls in *Shamoon v Chief Constable of the Royal Ulster Constabulary [2008] ICR 396*, is that when matters are approached in this way, the strict statutory question of whether the claimant has been treated less favourably than the appropriate comparator will generally answer itself.

3.2. The point is summarised in paragraph 18 of *Cordell v Foreign and Commonwealth Office* by Underhill J:

> "*[The legislation] appears to require the tribunal to consider two questions – (a) whether the claimant has been treated less favourably than an actual or hypothetical comparator with the same characteristics (other than his or her disability) was or would have been treated ("the less favourable treatment question"), and (b) whether that treatment was on the grounds of that disability ("the reason why question"). However, as was pointed out by Lord Nicholls in* Shamoon v Chief Constable of the Royal Ulster Constabulary *[2007] EWCA Civ 1127, [2008] ICR 396, and as has been repeatedly emphasised since, both in this tribunal and in the Court of Appeal (See, for example,* D'Silva v NATFHE [2008] IRLR 412 *at para 30 (p 417);* London Borough of Islington v Ladele *[2009] LGR 305, [2009] IRLR 154, [2009] ICR 387, at paras 35 – 37 (p 395);* Aylott *(above), at paras 43 – 45 (p 1290); and, most recently,* Chweidan *(above), at para 5.) – though still too often too little heeded by tribunals – those two questions are two sides of the same coin, and the answer to the one should in most cases give the answer to the other. To spell it out: if A, who is deaf, has been treated differently from B, who is not, and that is indeed the only difference between their cases, the irresistible inference will be that the reason for the different treatment is A's deafness; and likewise if A is subjected to a detriment on the grounds of his deafness it logically follows (at least if that disability is the principal ground) that a person who was not deaf would not have been so treated.* ***As between the two questions, it is the reason why question that is in truth fundamental****. As to this, see in particular the analysis by Elias P in* Ladele *(above), at para 32 (p 394H) – also para 5 of his judgment in* Chweidan *(above).)* ***Where there is an actual comparator, asking the less favourable treatment question may be the most direct route to the answer to both questions; but where there is none it will usually be better to focus on the reason why question than to get bogged down in the often arid and confusing task of "constructing a hypothetical comparator****."* [emphasis added]

3.3. This is further highlighted at paragraph 32 of *London Borough of Islington v Ladele* [2009] LGR 305, [2009] IRLR 154, [2009] ICR 387**:**

[1] Unfortunately, there are no solid statistics on this point as the current government statistics fail to state the number of direct discrimination cases that are successful.

"*The concept of direct discrimination is fundamentally a simple one. A claimant suffers some form of detriment (using that term very broadly) and the reason for that detrimental treatment is the prohibited ground. There is implicit in that analysis the fact that someone in a similar position to whom that ground did not apply (the comparator) would not have suffered the detriment.* ***By establishing that the reason for the detrimental treatment is the prohibited reason, the claimant necessarily establishes at one and the same time that he or she is less favourably treated than the comparator who did not share the prohibited characteristic.*** *Accordingly, although the directive and the regulations both identify the need for a tribunal to determine how a comparator was or would have been treated, that conclusion is necessarily encompassed in the finding that the claimant suffered the detriment on the prohibited ground.* ***So a finding of discrimination can be made without the tribunal needing specifically to identify the precise characteristics of the comparator at all***."

3.4. If you are acting for the Claimant, all you need to do is plant in the Employment Tribunal's mind that the protected characteristic is *a factor* in the treatment. It does not need to be the main reason, it just needs to have a "significant influence" on the outcome.

3.5. This point is made in *Law Society v Bahl* [2003] IRLR 640, at paragraph 83:

"… the discriminatory reason for the conduct need not be the sole or even the principal reason of the discrimination; ***it is enough that it is a <u>contributing cause</u> in the sense of a 'significant influence****'."*

3.6. Lord Nicholls' observations at 512-3 in *Nagarajan v London Regional Transport* [2000] 1 AC 501 are also helpful:

"Decisions are frequently reached for more than one reason. Discrimination may be on racial grounds even though it is not the sole ground for the decision. A variety of phrases, with different shades of meaning, have been used to explain how the legislation applies in such cases: discrimination requires that racial grounds ***were <u>a cause</u>, the activating cause, a substantial and effective cause, a substantial reason, an important factor****. No one phrase is obviously preferable to all others, although in the application of this legislation legalistic phrases, as well as subtle distinctions, are better avoided so far as possible.* ***If racial grounds or protected acts had a significant influence on the outcome, discrimination is made out****."* [emphasis added] (see also: *Metropolitan Police v Keohane* [2014] UKEAT 0463_12_0403).

3.7. Given that direct discrimination can be conscious or unconscious (see: *Nagarajan*), and most Respondents are unlikely to admit that their behaviour is discriminatory in either of these ways, it is important to maximise any information or evidence that you have to show that the protected characteristic had a significant influence on the act. The tribunal`s finding on this point is likely to go to the very heart of the case.

3.8. If you are acting for a Respondent, it is equally important that you produce credible evidence to defeat the contention that the protected characteristic significantly influenced the doing of the act in question. As will be seen below, there are a number of methods of seeking to achieve this.

4. <u>The pleadings</u>

4.1. This is the first document that a tribunal panel will read. If you get this right, it will greatly assist your case.

5. *Be careful about what you include in your factual background*

5.1. You do not need to plead the entire history, or to be too specific when you are currently unable to substantiate your pleadings with documentary evidence: you only need to plead the pertinent facts. Likewise, you should not be pleading points for which there is no evidence.

5.2. If you do plead the entire background, or if you are too precise in your pleadings (for example, in so far as dates or particular documents are concerned), without having seen sufficient documentary evidence to back it up, you are nailing your colours to the mast at a very early stage. This could result in the other side producing evidence which contradicts your initial position (as outlined in your pleadings), or your own client changing his or her stance having reflected on the matter. To take a simple example, a client may innocently tell you that an incident occurred on a specific date, genuinely believing an event to have occurred on that day. The Respondent denies that the incident happened at all and suggests that the Claimant is making this up. After disclosure, it is clear that the Claimant was not in work on the date of the alleged incident and that it must have happened on a different date. In fact, your client got her dates wrong and now says the incident happened a week earlier than she had originally thought. Whilst this is only a small error as to the date, the Claimant's credibility on this point will inevitably be called into question in cross-examination and the reliability of their "story" challenged.

6. *Should you or shouldn't you include a schedule of less favourable treatment?*

6.1. Schedules are very useful tools for Employment Tribunals, and enable panels to get to grips with a case quickly.

6.2. If you are acting for the Claimant, and you are complaining of numerous counts of less favourable treatment, you should consider providing a schedule of less favourable treatment. In the schedule, summarise each instance of less favourable treatment, in one or two lines. This can assist in crystallising your case to the Employment Tribunal panel and ensuring they focus on the key issues. There is an example of such a schedule in Appendix 1, in respect of a claim for sex discrimination.. It is usually preferable to supply a schedule, outlining each and every allegation of less favourable treatment, than to write a narrative alone, making numerous allegations of less favourable treatment alongside other facts, leading to a lack of clarity about what is an allegation and what is not. Sometimes, the Employment Tribunal panel themselves struggle to decipher what exactly the allegations of less favourable treatment are, and the danger is that they simply get lost in the detail of your pleadings.

6.3. If you are acting for a Respondent, you will need to think carefully about whether you should include a schedule of less favourable treatment. If you can see that there are numerous allegations of less favourable treatment that are lost in the Claimant's lengthy account, it is sometimes better for you to leave the Employment Tribunal to wade through the Claimant's particulars of claim and try and digest all the factual information to identify the less favourable treatment, and hope that the Employment Tribunal finds it confusing. However, there can be risks to this strategy. For example, you may believe you can identify what appears to be an allegation and what appears to be mere background, but the Claimant and the tribunal may subsequently disagree with your analysis. You may therefore wish to give some thought, in an appropriate case, to preparing a schedule and asking the Claimant to agree that this sets out the allegations of less favourable treatment. Ultimately, this will be a question of judgment in each case.

6.4. Another advantage of producing a Respondent`s schedule (whether or not the Claimant has already produced a schedule) is that it will often be looked at favourably by the Employment Tribunal Panel, as it clearly outlines the Respondent's position, and may be used by the panel as an aid memoir when making their determination, which is more likely to secure the Respondent a positive result.

6.5. An example of a Respondent schedule is shown at Appendix 2.

7. *Make sure you outline the reason why a Claimant was treated the way he/she was, briefly*

7.1. At the pleading stage, if you are acting for the Claimant, you only need to cite the assertion that the reason for the treatment was because of the protected characteristic. For the

Respondent, at this stage, you only need to give an outline of the non-discriminatory reason why you treated the Claimant the way you did.

8. *Do not feel obliged to create a hypothetical comparator, but if you do, make sure that they are favourable to your case*

8.1. If you are acting for the Claimant, and you are able to establish that the protected characteristic materially influenced the Respondent's behaviour; or if you are for the Respondent, and you are able to establish that your behaviour was due to the non-discriminatory reason alone, then you will succeed at your claim, and there will be no real need to identify the characteristics of a comparator.

8.2. However, if you choose to use a comparator, it is best to use an actual comparator where possible (though, of course, it is extremely rare to find the perfect actual comparator). If you are going to construct a hypothetical comparator, the best way to do it - as alluded to by Lord Nicholls of Birkenhead at paragraphs 9-11 in *Shamoon v. Chief Constable of the Royal Ulster Constabulary* [2003] UKHL - is to identify two to four "near" comparators, who share some of the same characteristics and are favourable to your case, and to "cherry pick" the characteristics of the near comparators you would like to rely upon to create the hypothetical comparator. That way, throughout the hearing, the advocate presenting the case will be able to pick and choose the "best bits" on which to cross-examine and make submissions to the Employment Tribunal.

8.3. It is possible to outline that you will be relying on a hypothetical comparator, without naming anyone specifically as a "near" comparator. However, the earlier you are able to identify names of "near" comparators, the better it is for your case, as it makes your argument regarding the hypothetical comparator to be more convincing. You should not, at that early stage, identify which characteristics you will rely on with each of the near comparators to create your hypothetical comparator. Indeed, to do so may "tip off" your opponent about the line of argument that you seek to pursue at trial.

Alternative arguments

9. *Time limits*

9.1. Of course, all claims of direct discrimination should be brought within three months of the acts complained of. If you are acting for the Claimant, and there are a series of discriminatory acts (some outside the statutory time limit), you are well advised to express that all acts were linked (see, for example: *Hendricks v Commissioner of Police for the Metropolis* [2003] IRLR 96 CA). It is sometimes better not to go further, and say that they amount to continuing acts, as this may put the Respondent on notice of potential time limitation arguments.

9.2. However, if you are acting for the Respondent, arguing that a claim or part of a claim is out of time can be a good way to strike out part or all of a Claimant's case at a preliminary hearing. While strike-outs in discrimination claims are fairly rare, this can be done in an appropriate case. Respondents should examine all acts that occurred before the three month time limit, and then try and establish why the acts are not in any way linked to those that are within time (if any) or something that could properly be described as a continuing act.

9.3. Consideration of time limits from a Respondent`s perspective can tie in with efforts to pin down the Claimant to a schedule of alleged acts of less favourable treatment or further particulars of those acts (see below). If the Claimant`s own case makes it clear that the claim, or elements of it, are clearly out of time, the tribunal is more likely to give consideration to the time limit arguments at a preliminary hearing rather than at the substantive hearing.

9.4. For either party, where time limit arguments are to be addressed at the full hearing, it is essential that the witness and documentary evidence (if available) is provided to support your client`s contentions, going to both the issue of whether the claim was brought in time and to the question of the just and equitable extension of time. It is surprising how often these points, which can of themselves lead to success or failure, are overlooked.

10. *The Statutory Defence*

10.1. The statutory defence is a line of argument which is underutilised by Respondents, but one which can be very effective.

10.2. The statutory defence is at section 109(4), which states:

> "*(4) In proceedings against A's employer (B) in respect of anything alleged to have been done by A in the course of A's employment it is a defence for B to show that B* ***took all reasonable steps*** *to prevent A—*
> *(a) from doing that thing, or*
> *(b) from doing anything of that description*".

10.3. *Canniffe v East Riding of Yorkshire Council [2000] IRLR 555 EAT* demonstrates that to successfully establish the statutory defence, the Respondent must firstly show what, if any steps, they took, to prevent their employee from doing the act or acts complained of in the course of their employment; and secondly, show that there were no other reasonably practicable actions they could have taken. It is irrelevant whether those steps the Respondent took were actually effective. Rather, Respondents merely need to show that they were the only reasonable steps they could have taken, and they took them. But, the Respondent should show that they anticipated that the actions would be effective (see: *Croft v Royal Mail Group plc* [2003] EWCA Civ 1045, [2003] IRLR 592, [2003] ICR 1425).

10.4. Consequently, Respondent's representatives are well advised to examine all the pre-existing policies that relate to discrimination, harassment, equal opportunities and so on, and explore with the Respondent how those policies were communicated to the employees. Other considerations would include whether training was provided to staff and if so to what extent and at what level, whether they were regularly reviewed and updated, whether there has been any monitoring of the effectiveness of these policies and whether they have been utilised in an appropriate way when issues have occurred within the workplace. Further, if the Respondent was put on notice that alleged discriminatory acts were occurring, you would wish to explore what, above their normal policies and training, your client did to avoid any further discrimination from occurring.

10.5. The statutory defence is a complete defence for employers. It would be very helpful if they were advised to keep good, contemporaneous records of all steps taken to seek to prevent workplace discrimination so that in the event a claim is made, they are in the best possible position to successfully argue the defence at the tribunal.

10.6. From a Claimant`s perspective, the main ways to defeat a statutory defence argument, are to show that the actions taken did not amount to taking "all reasonable steps," that there was more that could reasonably have been done and/or that the Respondent could never have contemplated that the steps they did take would be effective (see: Croft). For example, if the Claimant suffers from anonymous discrimination (an anonymous note is sent to the Claimant, referring in derogatory terms to their protected characteristic), and the Respondent does nothing, and it happens again, the Claimant could legitimately argue that the Respondent ought to have sent an email or other communication to all employees to the effect that acts of discrimination are not tolerated, and that should anyone be found guilty of discriminatory acts, they will be disciplined. The Claimant could successfully argue that the Respondent was on notice that the danger that discrimination would occur was heightened, and that they should reasonably have done something to prevent it over and above what had already been done on a more general basis.

10.7. Moreover, in case a statutory defence is ultimately successful, the Claimant should name the perpetrator(s) of the discriminatory behaviour as (an) additional respondent(s), alongside the Respondent company, so that they are able to succeed against them even if the Respondent employer is successful in its statutory defence. As such, as soon as it becomes clear that the Respondent is relying on the statutory defence, consideration should be given to adding the individual discriminators as further Respondents, assuming they are not already a party to the proceedings.

10.8. *If you are acting for the Respondent company, and you are not running the statutory defence, you should request that the Claimant withdraws any claim against the individual(s), as they could act as a bar in successful negotiations, or unnecessarily complicate matters. The Claimant may be unwilling to do this unless it is clear that the Respondent employer has sufficient funds to meet any award.*

10.9. *As the statutory defence is such an effective defence, it should always be pleaded by a Respondent if there are grounds to support it, in conjunction with alternative arguments. Depending on the facts, it can present a strong "back-stop" position for Respondents if they fail on all other points.*

11. *The Bastard Defence*

11.1. *The Bastard Defence (I did not treat you less favourably because of a protected characteristic, rather, I am a bastard employer, and treat everyone equally badly), which can act as a bar in establishing less favourable treatment, is an extremely unattractive argument to run, not least because the Respondent will usually be portrayed in a negative light. However, it can be extremely effective in preventing the Claimant from succeeding in their claim.*

11.2. *This defence should only be raised by a Respondent if it really can be substantiated, and only in circumstances where derogatory language or actions are not specific to the protected characteristic. It can be an extremely useful defence, which may facilitate settlement, if there is any truth to it. Further, if the case involves an industry where "banter" is not so frowned upon (for example, a garage or a pub), it may be that the Respondent will not be afraid to run such a case.*

11.3. *Likewise, if acting for the Claimant, you would be well advised to first try to show that the conduct in question is specifically related to the protected characteristic (see data below), second to lead evidence that the behaviour is targeted rather than general and also, to appreciate that you may have more power than a Respondent, in that you are able to point to negative publicity as an incentive to achieve a higher settlement figure.*

12. ***<u>Gathering information</u>***

12.1. *As noted above, the burden of proof provisions are not as important as they may initially appear: a mechanistic approach is not generally required. Inevitably however, both parties will need to collate information to back up their version of events and ensure that all the relevant documents are in the agreed bundle.*

12.2. *If acting for the Claimant, it is clearly simpler to obtain evidence in cases where there has been flagrant discrimination, than in cases where the discrimination is subtle and less obvious. For example, only oral evidence is likely to be required in circumstances where the oldest employee in a company is suddenly demoted for poor performance just a few days after his manager makes comments such as: "the old fogies in the office are stuck in the 18th century" and "the wrinklies are so boring, it`s time to bring in the new blood". It will be agreed by both sides that the Claimant was demoted. The Respondent in those circumstances will need to either assert that those comments were not made, or if they were made, that the reason for the demotion was not in any way influenced by the Claimant`s age, and producing evidence to demonstrate this*

12.3. *You should always endeavour, at the first preliminary hearing, to ensure that a disclosure order is made, unless the information you have sought has already been provided voluntarily. If acting for the Claimant, try to identify exactly what type of documentation will actually be useful for your client, above and beyond normal disclosure, and attend the hearing armed with reasons why the documents should be disclosed. Further, remember that on both sides, there is a continuing obligation to disclose information and documents (see: Scott v Inland Revenue [2004] IRLR 713 CA), and so you must disclose any relevant documents up to and including the date of hearing.*

13. **Subject Access Request and Freedom of Information Act 2000 request**

13.1. If acting for the Claimant, it may be a good idea to advise the Claimant to make a subject access request under the Data Protection Act 1998. The Respondent has a duty to disclose personal data within 40 days of the subject access request. This can be extremely useful in getting information at an early stage about the Claimant.

13.2. Alternatively, when representing a Claimant (particularly one who was/is an employee of a public body/authority), you can also make a Freedom of Information Act 2000 request. This also could uncover information that is useful for the purposes of litigation.

13.3. However, if you are acting for the Respondent, and receive a subject access request, as Durant v FSA [2003] EWCA Civ 1746 shows, the fact that an individual is named in a document does not mean that the whole document is necessarily disclosable. This means that you do not need to disclose a whole document that might be useful to the Claimant at an early stage: for information to be personal data it has to be "biographical in a significant sense" and the individual making the request has to be the focus of the information. Therefore, you can avoid showing how other people in the organisation were treated, by explaining that they do not feature as part of the Claimant's personal data.

13.4. Further, if the Respondent receives a Freedom of Information Act 2000 request, following the recent case of Edem v Information Commissioner and anor [2014] EWCA Civ 92, Respondents can become exempt from disclosing data, if they are able to show that other people's "personal data" feature in the documents (as per the Data Protection Act 1998). It is likely that this argument could also be used for partial disclosure when receiving subject access requests.

13.5. However, both these points are often not appreciated by Respondents, meaning that the Claimant will frequently find that all and sundry is sent when making a subject access request or a Freedom of Information Act 2000 request, sometimes giving the Claimant to have a head start in the conduct of the case.

13.6. If you are acting for a Claimant, and a Respondent refuses point blank to send you data, you may be advised to ask them for redacted information; partial data is better than none! Moreover, you are able to side-step the Respondent's reluctance to reveal data, by approaching specific individuals who you would like consent to access their personal data. If they say yes, in written form, the Respondent is then in a position to process the data lawfully within the Data Protection Act (schedule 2-3).

14. **Questionnaires**

14.1. Whilst section 138 of the Equality Act 2010 is now repealed, meaning that the statutory discrimination questionnaires procedure is now abolished, the Claimant is still able to ask the Respondent questions. This can be an extremely useful tool for Claimants, as adverse inferences can still be drawn in circumstances where the Respondent fails to answer the questions, or is in any way evasive in their answers.

14.2. This can be shown by the ACAS guidance in conjunction with reading the case law on non-statutory discrimination questionnaires.

14.3. ACAS' guidance, "Asking and responding to questions of discrimination in the workplace"2, states:

14.4. "A responder is not under a legal obligation to answer questions. However a tribunal or county/sheriff court may look at whether a responder has answered questions and how they have answered them as a contributory factor in making their overall decision on the questioner's discrimination claim. A Tribunal or court may also order a responder to

[2] <http://www.acas.org.uk/media/pdf/m/p/Asking-and-responding-to-questions-of-discrimination-in-the-workplace.pdf> accessed 31 August 2014

provide such information as part of legal proceedings in any event. These are issues a responder would need to weigh up when considering if to reply and what to say"3

14.5. The ACAS guidance accords with McMullen J QC's comments at paragraph 43 of Dattani v Chief Constable of West Mercia [2005] IRLR 327, that negative inferences can be drawn when a Respondent replies to a Claimant's questions outside the prescribed form. In particular he states:

14.6. "…a tribunal may, but is not required to, draw an inference from a nil return or from an evasive reply if it considers it just and equitable so to do..."

14.7. Dattani was of course decided at a time when s 65 of the Race Relations Act 1976 (which was transposed into s.138 of the Equality Act 2010) was still in force. That section provided specifically that asking questions outside the statutory questionnaire format could still give rise to adverse inferences in the same way as answers to the full questionnaire. There is now technically an issue about whether a tribunal can in fact properly draw an adverse inference from answers to simple written questions, because the statutory basis has now gone. It is conceivable that appellate authority will eventually arise on this point. However, given that the Employment Tribunal can draw adverse inferences from other documents, teamed with the ACAS guidance, it seems likely that the Tribunal still has this ability. Therefore, if you are acting for the Respondent, and you fail to reply, with no sound cause, or if your answers appear oblique without a good reason, then you run the risk that adverse inferences will be drawn.

14.8. When you are acting for a Claimant, you need to think carefully about whether you should ask questions: you should only do so if there is a tactical objective to do so.

14.9. For example, you are acting for a Claimant in a race discrimination claim, where the Claimant has been passed up for a promotion, and you know that no black people in the organisation have been promoted in the last five years despite it having a racially mixed workforce. You may want to ask the Respondent how many black employees have been promoted in the last five years. Even though you already know the answer before you have asked the question, asking for that type of information can achieve a number of objectives. First, it can push the Respondent to answer that question and admit at an early stage that they have not promoted anyone in the last five years who was black; secondly, it can make the Respondent feel uncomfortable, as it exploits an obvious weakness in their case, and third, it may push the Respondent to make an early reasonable offer of settlement.

14.10. Another example is to tactically ask for sensitive financial or other information, which you know the Respondent may be reluctant to give. So, for example, if a 55 year old man was dismissed, and the reason cited by the Respondent was that he was not billing enough, but he alleges age discrimination, the Claimant's solicitor could ask for anonymised billings for each employee, save that the age of the person is disclosed. The Respondent company may be extremely reluctant to provide this information. If the Respondent cites that the information is financially sensitive in their refusal to give information, the refusal may nonetheless lead the Employment Tribunal to make adverse inferences. Alternatively, it may push the Respondent to settle out of court, above the odds, to avoid the Respondent Company's information becoming public.

14.11. If you are acting for the Respondent and you do not want to hand over all the information asked, consider giving a partial answer, and giving a carefully worded, but full reason for failing to provide a full picture. Adverse inferences are less likely to be drawn where there is a reasonable explanation for the failure which is shared with the Claimant at the time in question.

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15. **Requests for additional information – the two step process**

15.1. When their opponent's pleadings are deficient, representatives often find it tempting to seek further and better particulars, to enable them to ask the obvious questions that are crying out to be asked, to get answers that ought to have been in the pleadings in the first place. Drafting requests for further information or better particulars can be tactically dangerous, as it often allows the other party to expand upon, and improve their case. In many cases it may very well be more advantageous in the long run, to let the poorly drafted particulars stand and to use them against the other party at the hearing itself.

15.2. However, carefully drafted requests for additional information can enable you to trap the other side or limit the remit of their case. It is essential that you give the other side limited options and restrict them as to how they can answer a question. You must ensure that you do not give them the opportunity to effectively re-plead their case but instead force them to nail their colours to the mast in respect of the matters already pleaded. It is useful to adopt a two stage test before serving any request for additional information.

15.3. First, do I need to serve one at all? It maybe you already can work out how to defend your case or proceed with the claim. Therefore, it may be better to leave their pleadings in a mess.

15.4. Secondly, if you do need to file a request for additional information, how should it be framed? Whilst you have identified a benefit, you equally need to limit the scope for your opponent to improve their case. The answer to both questions depends on the objective you are trying to achieve. The most likely reasons for seeking further information include:

15.4.1. Seeking essential clarity to allow you bring/defend the claim;
15.4.2. To expose weaknesses and encourage settlement;
15.4.3. To hit a pressure point and encourage settlement;
15.4.4. To limit the extent of the claim;
15.4.5. To highlight weaknesses for the Judge/Panel at Trial.

15.5. For example, if you are acting for a Respondent, if a claim is poorly pleaded, you can identify the acts of less favourable treatment, and ask them to confirm that these are the acts they are complaining of, and if not, asking which paragraph numbers in the particulars of claim amount to allegations of less favourable treatment (see Appendix 3 for a more detailed example).

15.6. If the Claimant agrees with what you have written, then it means that they have effectively nailed their colours to the mast, and are unlikely to be able to rely on any other acts of less favourable treatment at the hearing.

15.7. However, if the Claimant seeks to deviate from the questions you ask, and point to less favourable treatment that was not in the original particulars of claim, you force them to make an application to amend their particulars of claim. By this time, it is likely that they will be out of time, and so you will be in a good position to resist any application to amend.

15.8. This method is effective, whether you are acting for the Claimant or the Respondent. Whilst this all seems like obvious advice, identifying when to make a request (and how to draft it) is by no means an easy task and the decision will always be fact-sensitive. This is an area where specialist advice can sometimes be helpful.

16. **Top tips for gathering evidence and witness statements**

16.1. These tips only apply when you are taking a proof from a witness yourself, or are advising the witness how best to construct their witness statement.

16.2. The witness statements are the place for your witnesses to expand upon your more concise pleadings, in detail. Because it is likely that the Employment Tribunal will first decide on whether the acts relied on by the Claimant actually happened, and only then

examine the reason why certain acts occurred (see: Laing), rather than following the burden of proof provisions as outlined in Igen mechanistically, the following approach is recommended.

17. *The behaviour in question*

    17.1. If acting for the Claimant, it is of course important that you ensure they give positive evidence that all of the pleaded acts complained of actually occurred. Factual evidence that is relied on as being suggestive of the reason why the alleged acts complained of occurred, must also be set out fully, including the bundle references. The latter are particularly important (whether acting for Claimant or Respondent): nothing is more likely to set the tribunal against you from the outset of a case, than a failure to provide it with the pointers it needs towards the key documentary evidence. If the other side have done it, they are already ahead of you before you walk through the door.

    17.2. If acting for the Respondent, whilst formally the burden is not on you to disprove what is alleged, you would of course be well advised to do what you can to positively to disprove that the acts occurred. By way of an example, using Appendix 2, it was alleged that "Ms Mite was shouted at by Mr Oss, in front of all her colleagues" in July 2010. If, for example, Mr Oss was able to show using Outlook or another calendar application that Ms Mite and Mr Oss were not in the same location for most of July 2010, or that there was never a time where all colleagues were in the same place in the whole of July, it makes it much more difficult for Ms Mite to prove her case.

18. *The reason why: If acting for the Claimant, plant seeds in the Employment Tribunal's mind that the Claimant's protected characteristic had* ***some*** *impact on the Respondent's actions*

    18.1. As noted above, in reality, Employment Tribunals will often look at the reason why the Claimant was treated in a particular way, effectively side stepping for practical purposes the need formally to examine whether the Claimant has been treated less favourably than a comparator, and whether the treatment was on the grounds of their protected characteristic (although strictly speaking the "reason why approach" turns the required statutory question into a question that answers itself).

    18.2. If acting for the Claimant, you need to show that their protected characteristic was at least a contributing cause to the Respondent's actions. It does not need to be the principal or main reason.

    18.3. Given that most discrimination is subconscious, from the Claimant's perspective, a useful route to showing that the protected characteristic had a significant influence on the outcome will be to try to establish that the Respondent may have treated the Claimant in a way that is stereotypical of a certain characteristic, or showing that the Respondent has in some way made assumptions based on the Claimant's characteristic and treated the Claimant according to those stereotypical assumptions.

    18.4. When taking the witness statement, it is important that you ask questions that elicit any information from which any inferences could be drawn, and then exploit that material.

    18.5. In *R v Immigration Officer at Prague Airport* [2004] IRLR 115 (HL), at paragraph 82, Baroness Hale aptly states that the "person may be acting on belief or assumptions about members of the sex or racial group involved which are often true and which if true would provide a good reason for the less favourable treatment in question. But ... [t]he object of the legislation is to ensure that each person is treated as an individual and not assumed to be like other members of the group". In that case, the Immigration Officer at Prague Airport subjected Roma to more stringent checks and interviews than other groups, because it was assumed that Roma were more likely to assert a weak claim for asylum or to overstay the limits of the right to remain in the UK. If acting for the Claimant, it will often be useful to point to the Claimant not being viewed as an individual, but instead treated in a way that makes assumptions about their protected characteristic.

18.6. An example which shows how stereotypical behaviour can be taken advantage of is where the Claimant is of Italian decent, and works at the Respondent's company as a cleaner. The managing director of the Respondent perceives her and the other cleaners of Italian origin, as generally louder than the cleaners of English, Polish and African origin. He made a comment to that effect (along the lines of "those Italians don't half shout a lot"). If the Claimant is dismissed for aggression, even months after the comment was made, it is possible to capitalise on the stereotypical comment made by the Respondent's managing director. This comment plants a seed in the Tribunal's mind that the Respondent's managing director perceived the Italians as generally loud, that he would have continued to hold this stereotypical view when dismissing and that this influenced his decision-making.

18.7. Similarly in *Aylott v Stockton on Tees Borough Council* [2010] IRLR 994 (CA), the Claimant was dismissed because of the "stereotypical view taken of mental illness taken by the council in its reactions to the claimant's disability: the ET referred to panic, to descriptions of intimidating and scary behaviour, to fear of his return to work and to the wish to manage him out of work." (para.43, per Mummery LJ). Applying R v Immigration Officer at Prague Airport, Mummery LJ was "unable to accept that, in the circumstances of this case, the ET's reference to the council's 'stereotypical view of mental illness' was too vague to support the finding of direct discrimination." (para.46).

18.8. If you are acting for the Respondent, and you are able to point to an incident which led to the treatment of the Claimant (using the above example in an extreme way, proving for instance that the Claimant aggressively threatened to kill another employee), it is possible to dispel the panel's illusions that the act had anything to do with the protected characteristic. Respondents would be well advised to capitalise on any non-discriminatory reasons for their behaviour, which could distract the panel from any arguments brought by the Claimant.

19. *General tips for witness statements*

19.1. Whilst your pleadings allude to the reason for the Claimant's treatment, you should use the evidence in the bundle (with reference to your pleadings) to expand upon your case in detail. Now is the time for you to provide the detail and to be specific (for example, providing dates, names and other detailed information where you are able to, given that you should have all the documentary evidence).

19.2. If your witness statement departs from your original pleading in any way, explain why. This will allow your witness to provide a well thought out answer, on their own terms, rather than allowing your witness to be cross-examined on the inconsistency during their evidence, and their credibility or reliability being called into question.

20. **<u>Conclusion</u>**

20.1. Whilst direct discrimination cases are rarely wholly straightforward, it is more likely that your client will be successful if, from the outset, you examine what evidence it is that you need to do to bring or defend your case. Think about how best to present your case, from getting the pleadings right, to your efforts at obtaining further information and clarification, as well as information to assist your case. Focusing on the key issues enables you to build a more effective case, dispensing of superfluous information which could distract from an otherwise strong case. If you doing this effectively, you should be in a position to anticipate your opponent's efforts and to counter them appropriately. Always try to bear the following tips in mind:

20.1.1. Only plead the pertinent facts;
20.1.2. Consider using a schedule of less favourable treatment to supplement your particulars of claim or response;
20.1.3. If for the Claimant, only send a Respondent questions if you have a tactical rationale for doing so;

20.1.4. If you are for the Respondent, be sure to respond to questions where appropriate, as adverse inferences can be drawn from a failure to respond, or by an evasive answer. If you do not want to provide a full answer, try and provide a partial answer, with an adequate and diplomatically worded reason as to why only a partial answer is being provided;

20.1.5. Consider time limit arguments, “bastard defence” arguments, and the statutory defence under section 109(4) of the Equality Act 2010;

20.1.6. If you ask for further information, make sure the questions you ask are closed in order to nail the other side’s colours to the mast;

20.1.7. If for the Claimant, consider making subject access requests under the Data Protection Act, or requests under the Freedom of Information Act, where appropriate. If for the Respondent, think about ways to avoid sending full documents (for example, the data is not personal data, or the document includes another person’s personal data);

20.1.8. Collate information to prove or disprove that the alleged acts actually occurred in the first place;

20.1.9. Focus on the reason why the Claimant was treated as they were. Irrespective of whether you are for the Claimant or the Respondent, maximise the evidence you have on this point, and capitalise on it when drafting witness statements.

Suzanne Staunton
Guildhall Chambers
September 2014

Appendix 1

IN THE BRISTOL EMPLOYMENT TRIBUNAL **Claim No:2014/12345**

B E T W E E N:

MS. DINAH MITE

Claimant

-and-

MR KAY OSS (1)
K. OSS & PARTNERS LTD (2)

Respondents

SCHEDULE OF LESS FAVOURABLE TREATMENT

APPROXIMATE DATE	**LESS FAVOURABLE TREATMENT**
June 2014	Mr Oss refused to let Ms Mite sign up to the Guildhall Employment law seminar, which was attended by all her male colleagues.
22 June 2014	During Ms Mite's appraisal, Mr Oss gave Ms Mite a 3 out of 5 for billable hours, when she had exceeded her billable hours target.
July 2014	Ms Mite was refused holiday leave.
July 2014	Ms Mite was shouted out by Mr Oss, in front of all her colleagues.
July – August 2014	Mr Oss made derogatory comments about the standard of Ms Mite's work.
August 2014	Mr Oss told Ms Mite that she should wear a skirt to the office, rather than trousers.
August 2014	Ms Mite was the only member of her team present at work excluded from the team photograph for K.Oss and Partners' website.

Suzanne Staunton
11 September 2014

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Appendix 2

IN THE BRISTOL EMPLOYMENT TRIBUNAL **Claim No:2014/12345**

B E T W E E N:

MS. DINAH MITE

Claimant

-and-

MR KAY OSS (1)
K. OSS & PARTNERS LTD (2)

Respondents

RESPONSE TO THE CLAIMANT'S SCHEDULE OF LESS FAVOURABLE TREATMENT

Approximate Date	**Alleged Less Favourable Treatment**	**Did The Act Occur**	**What Was The Reason For The Treatment**
June 2014	Mr Oss refused to let Ms Mite sign up to the Guildhall Employment law seminar, which was attended by all her male colleagues.	Yes	Mr Oss sent an email explaining that there were only 5 spots available on the Guildhall Employment Seminar, on a first come, first served basis. This was to ensure there was enough cover in the office. Ms Mite was last to sign up, by which time, all spaces were filled.
22 June 2014	During Ms Mite's appraisal, Mr Oss gave Ms Mite a 3 out of 5 for billable hours, when she had exceeded her billable hours target	Yes	Ms Mite's billable hours did not justify a mark of a 4 or a 5.
July 2014	Ms Mite was refused holiday leave.	No	Ms Mite asked for holiday leave in July, when 3 out of 6 team members had already had holiday approved. It is a term of Ms Mite's contract that holiday can only be taken if less than half the team are on holiday. Ms Mite was offered to take holiday any other week the rest of the year. She took holiday in August.
July 2014	Ms Mite was shouted out by Mr Oss, in front of all her colleagues.	No	
July – August 2014	Mr Oss made derogatory comments about the standard of Ms Mite's work.	Yes	Ms Mite missed the limitation date for three cases in a row. Mr Oss made derogatory comments about Ms Mite missing three limitation dates, and did so due to her obvious negligence.
August 2014	Mr Oss told Ms Mite that she should wear a skirt to the office, rather than trousers.	No	
August 2014	Ms Mite was the only member of her team present at work excluded from the team photograph for K.Oss and Partners' website.	No	Ms Mite was not at work when the team photograph was taken.

Appendix 3

IN THE BRISTOL EMPLOYMENT TRIBUNAL **Claim No:2014/54321**

B E T W E E N:

MS. SUE YOO

Claimant

-and-

SURE LOCK HOMES

Respondent

REQUEST FOR ADDITIONAL INFORMATION

In respect of paragraph 1(ii)

"*The Claimant brings the following claims:*

…

(ii) Direct discrimination because of sex;

Question

1. In relation to the allegation of less favourable treatment arising because of the Claimant's sex, the Respondent has identified the acts outlined at paragraphs 8 and 11 as relating to this claim (in particular, the Respondent did not show the Claimant the new product line of locks).

2. Please confirm that the Claimant's claim for discrimination arising from sex is as identified here.

3. Alternatively, by reference to paragraph numbers of the Particulars of Claim, please identify where the Claimant has identified any other allegations of less favourable treatment because of her sex. In particular, please identify where else it is pleaded:
   3.1 That the Claimant was subjected to any acts of less favourable treatment; and
   3.2 How that treatment arose in consequence of her sex?