Discrimination Law Association

THE DISCRIMINATION LAW ASSOCIATION

RESPONSE TO:

Statutory Code of Practice on Racial Equality in Employment

Introduction

1. The Discrimination Law Association ('DLA') is a membership organisation established to promote good community relations by the advancement of education in the field of anti-discrimination law and practice. It achieves this by, among other things, the promotion and dissemination of advice and information; the development and co-ordination of contacts with discrimination law practitioners and similar people and organisations in the UK and internationally. The DLA is concerned with achieving an understanding of the needs of victims of discrimination amongst lawyers, law makers and others and of the necessity for a complainant-centred approach to anti-discrimination law and practice. With this in mind the DLA seeks to secure improvements in discrimination law and practice in the United Kingdom, Europe and at an international level.

2. The DLA is a national association with a wide and diverse membership. The membership is growing and currently consists of over 400 members. Membership is open to any lawyer, legal or advice worker or other person substantially engaged or interested in discrimination law and any organisation, firm, company or other body engaged or interested in discrimination law. The membership comprises, in the main, persons concerned with discrimination law from a complainant perspective.

3. We are a company limited by guarantee.

4. The membership of the DLA has considerable experience in working in the field of discrimination law and in working with the statutory Commissions. It also comprises solicitors, barristers, and other paralegals and non-lawyers engaged in advising and representing those facing discrimination.

5. DLA welcomes the opportunity to respond to the draft Code.

6. We have also completed a hard copy of the questionnaire which we will forward to you by post.

PART 1 STATUS OF THE CODE/INTRODUCTION

7. The Code is not clear as to whether or not it applies to Scotland. If so, then there needs to be references made to the duty on public authorities, especially references to specific duties, may need some modification.

8. In the introduction section, Paragraph 1.4 outlines the purpose of the Code and states “Qualified individuals are still being turned down for jobs on racial grounds, or being overlooked for promotion, or earning less than colleagues from other racial groups, or not being encouraged to take up training opportunities, or being treated adversely on the basis of stereotypes, or experiencing unpleasantness or even harassment as a result of their colleagues’ actions”. This paragraph deals with not being encouraged to take up training but omits that employers fail to consider individuals for training and therefore this strand needs to be included to reflect the reality of the issues associated with discrimination within the workplace.

PART 2 THE LEGAL CONTEXT

9. Paragraph 2.2 fails to mention that religious discrimination is now unlawful by virtue of the Employment Equality (Religion or Belief) Regulations 2003, in exactly the same ways as are described for race discrimination.

10. Paragraph 2.6 states that there are four main types of discrimination but paragraph 2.14 then adds a fifth type, namely, segregation.

11. Paragraph 2.10 provides a useful point but it is unlikely to be understood in its present form and could possibly be re-written from the employer's perspective. It would also appear that the term "detriment" is avoided in usage even though it is specific to the Race Relations Act (as amended) 1976, yet it is treated as a basic concept. "Detriment" needs to be clearer and less favourable treatment could be shown by way of an example.

12. Paragraph 2.12 deals with the definition of indirect discrimination. As most cases will now come within the new definition in subsection 1 (1) (a), it is not clear why this is not put first (this also applies to later references to these differences within the Code). Additionally, as 1 (1) (a) applies to all of Part 2 of the RRA 1976, then in a code that only concerns Part 2 of the RRA, it makes it unduly complicated and confusing to include 2.12 (a) (iii).

13. Example 4 is unhelpful as it currently stands because it refers to "a Black African" where "African" is clearly not a nationality. If this is mean to be an example of indirect discrimination under 1 (1) (b), ie: colour or nationality, then it would be better to use a nationality example. This is even if it needs to be a hypothetical example, or an example based solely on colour.

14. Paragraph 2.10 states "The detriment or disadvantage caused by discrimination, evidence of which is used to prove less favourable treatment, exists if it is reasonable for any person to conclude that the circumstances in which the victim has to continue to work are to his or her disadvantage". The use of the word "victim" may not be deemed

appropriate by Applicants and this ought to be substituted with "Complainant", "Applicant" or "Employee". The word victim may be perceived as associated with someone who is weak and unable to pursue their claim. This would also be consistent with the rest of the Code whereby the word "complainant" is used in, for example, paragraph 4.65 (j)

15. Paragraph 2.10 also provides an "Example 2" which provides an example of detriment suffered should focus on an example involving racial discrimination and detriment rather than in a sex discrimination claim. By doing so, it would provide employers with a clearer and relevant example.

16. Similarly, Paragraph 2.14 states, "Segregating a person from others on racial grounds automatically means treating him or her less favourably, and constitutes unlawful direct discrimination. Segregation of workers by racial group will be unlawful even if they have the same access to promotion and training, and the same pay and conditions, as other workers". Example 5 demonstrates an exception to the rule rather than showing why or how segregation is wrong. This may send out the message to employers that it is acceptable to segregate employees providing it is done lawfully and within such guidelines. Examples should show how treatment is unacceptable and or unlawful. They should not seek to assist the employer to create a perception that a "loophole" exists.

17. It is also important to clarify that the "reasonableness" test applies only if the complaint is that the conduct "has the effect of…" but not if the complaint is that this was the purpose of the conduct. The test is not applicable if the harassment has the purpose of violating the other person's dignity **or** creating an environment that was intimidating, hostile, degrading, humiliating or offensive. This paragraph does not distinguish between the test being "either", "or".

18. The recent case of *Pearce v Governing Body of Mayfield Secondary School* [2003] IRLR 512, which over ruled *Burton & Rhule v De Vere Hotels* [1996] IRLR 596, made it clear that under the unamended RRA, in

order to prove harassment as less favourable treatment , the complainant would need to have a comparator. The example could be re-phrased to make the point clearer.

19. The example in 2.23 does not illustrate the point concisely or accurately, since the example is not about discriminatory instructions within s 30. It would be of assistance to give an example of a case where the CRE has used its enforcement powers in relation to discriminatory instructions.

20. In paragraph 2.25 and in other parts of the draft Code, the new statutory shift of the burden of proof is not accurately described, although it is more accurate here than elsewhere. It may be better to substitute "could conclude" for "can infer" in the first line in paragraph (a). To demonstrate this sufficiently, it would be better to use an example showing the shift of the burden of proof, rather than using an older example using King.

21. Paragraph 2.26 deals with positive action. This could be taken in a number of ways and not merely selection. It is probably more important to explain what positive action is, rather than to try to explain other terms that have a different meaning. To also state categorically that selection "must be based on merit", may overstate the case; it may not be accurate and may not be helpful to employers whose workforce is mostly unskilled. For most unskilled jobs it would be difficult to distinguish applicants on grounds of merit (for example the recruitment of casual building labourers from a queue of men standing on a particular street corner' the critical point is that they should not be selected for reasons unrelated to the job, for example on racial grounds). We would refer to the judgment of Baroness Hale of Richmond in *Archibald v Fife* [2004] IRLR 651, paragraph 70 in which when referring to low grade sedentary work, she comments,

> *"We are not talking here of high grade positions where it is not only possible but important to make fine judgments about who will be best for the job. We are talking of positions which a great many people could fill and for which no one candidate may be obviously 'the best'".*

Thus in this code, it may be more appropriate to refer to “relevant factors” as well as “merit” as the appropriate basis for selection.

22. Paragraph 2.33 deals with genuine occupational requirements/qualifications (GOR/GOQ). This part of the Code is too long and there are problems concerning accuracy and clarity. The last sentence should probably be rephrased to read “….an employer can lawfully discriminate if they can show they truly need to employ a person from a particular racial group”. The emphasis should be on the employer’s need.

23. The examples given in this section are over complicated. The example in 2.34 refers to a public sector project, which is a situation that is unlikely to arise for any private sector employer who may use or try to use GOR for business purposes. The same message could be contained in a much simpler example such as a restaurant proprietor who decides to change from a Chinese restaurant to an Indian restaurant and wants to dismiss all of the Chinese waiters. Unless the code is offering advice on employment law generally, it may not be helpful to include the last sentence in this example where there could also be issues of unfair dismissal.

24. Paragraph 2.41 provides a table of “type of discrimination” and “definition”. DLA welcomes this as a positive step to help employers to understand the different types of discrimination and how they are applicable in an employment law context.

CHAPTER 3 - RESPONSIBILITIES OF EMPLOYERS: A FRAMEWORK FOR ACTION

25. The section is useful to employers to provide guidance as to what should be done and their obligations.

26. Paragraph 3.3 - Add “or subject a person to harassment” at 3.3 and before the second (a).

27. Paragraph 3.6 is inaccurate as it is not accurate to define “in the course of employment” as “done while at work”. This gives a misleading impression that an employer’s liability is limited to acts carried out at work. It does not take into account cases such as *Sidhu v Aerospace Composite Technology Ltd* [2000] IRLR 602.

28. Paragraph 3.12 states, “Employers who are already working toward equality standards or targets, or who have drawn up race quality schemes (if they are public authorities bound by the duty to promote race equality), should not feel they have to duplicate their efforts and introduce a separate policy on racial equality in employment, unless this helps to consolidate work they are already doing. They may find it more useful to evaluate their policies and processes against the recommendations of this code, and strengthen them where necessary”. It may be helpful to employers to make a distinction between racial equality in employment which differs to equality standards. The former is about providing equal opportunities and promoting equality in employment whereas the latter may involve a more statistical and target based approach. Employers may assume that if they are involved in equality standards, they are automatically involved in racial equality. Further clarification of what each means would be helpful.

29. Paragraph 3.13 refers to the appendix which provides a sample racial equality policy for employers and specifically states that “smaller business may however need to adapt their policy to their size and circumstances”. Whilst the Code is informative as to what a small employer is as opposed to a large employer, it does not state how much the policy can be varied. This will have a negative effect on Applicants as employers are able to vary the code as they like, without guidance, and because the Code can be used as evidence in the Employment Tribunal, it will be difficult for Applicants to demonstrate a failure to follow or comply with the Code. Perhaps guidance on how the Code can be varied and to what extent, i.e.: minimum criteria would be of assistance. This would make the Code user-friendly for the smaller employer and compliance is more likely.

30. DLA welcomes the guidelines set out at Paragraph 3.25 in developing and assessing racial equality training programmes. However, (a) - (m) may only apply to medium to large employers and the section does not mention what small employers can do. It may be useful to set out an additional policy for the smaller employer, taking into account that they may not have a senior personnel manager or internal trainers.

31. The Code imposes monitoring categories and benchmarks on employers. However, paragraph 3.42 does not give any guidance as to what is an acceptable benchmark or how to establish the benchmark. This may be difficult for small employers who then may be less inclined to attempt compliance. There will be obvious costs involved in engaging the services of outside agencies to assist with establishing the benchmark. This will be at a cost to the small employer and therefore, it would be helpful to suggest examples of benchmarking. This will impact negatively on the Applicant, as when this information may be requested, incorrect data is held which will not be of assistance for discrimination cases.

32. A table is shown at 3.58 but it is incomprehensible and needs further explanation of what the table demonstrates, if it does at all. Similarly, paragraph 3.58 (b) is confusing and does not clearly state what is required. The wording “Consider each racial group separately and avoid referring to “ethnic minorities” or “ethnic minority under-representation”, unless there is clear evidence that all the groups so defined are under-represented in the particular work for which positive action is being considered”. This should be less confusing and simply state that each racial group should be broken down and then considered as to whether or not it forms a minority group or not.

33. Paragraph 3.59 suggests types of training and encouragement for particular racial groups. The list in (a) - (j) specifies many different types of courses but fails to address that such courses may not be relevant to all industrial and professional businesses. For instance, a person working as a mechanic may not require computer courses. There should be a

substitution to the wording or an addition to state “any relevant training appropriate to the position”. This would ensure that employers do not simply refer to (a) - (j) and say that they have complied with their obligations, but would allow broader use of the Code.

PART 4 -RESPONSIBILITIES OF EMPLOYERS: RACIAL EQUALITY AND GOOD EMPLOYMENT PRACTICE

34. Paragraph 4.10 should be integrated with or possibly follow after paragraph 4.11 as the latter paragraph makes clear what information should be used for selection purposes and what information needs to be received either to identify the person or for monitoring purposes. Paragraph 4.11 does not make sufficiently clear that all personal details, including name, should be detached from the document used for purposes of shortlisting/selection. See CRE guidance.

35. 4.15 states that “Employers should make sure that accents play no part in assessing applicants’ ability to do the job, unless it can be shown that a strong accent should impede satisfactory performance of the duties of the job”. It will be extremely difficult to assess and monitor how decisions are made for telephone interviewing.

36. Paragraph 4.4 discusses person specifications and provides an example in the box - Example 15. This particular example is a negative decision for the Applicant and does not sufficiently demonstrate that language skills should not discriminate against anyone. Instead, the example shows how an employee’s poor English writing skills which led to the employer issuing a warning did not constitute discrimination. The example should be changed to show how language requirements can lead to discrimination.

37. Paragraph 4.18 (i) states that “Enough time should be allowed for the tests, particularly for difficult tests. Candidates who have been educated in a different educational system may be particularly disadvantaged,

especially if younger British-educated applicants' abilities are used as the benchmark for constructing and administering the test". This is an encouraging way forward in terms of allowing enough time, but does this mean additional time should be allowed or that extra time should be incorporated into the test without specifying why there is extra time. If additional time were allowed, this may indirectly discriminate against British-educated applicants and careful thought is needed as to how this should be monitored and implemented.

38. Paragraph 4.54 deals with disciplinary and grievance procedures. It is important to emphasize that the policy should be communicated to the employee in an effective manner. All employees should have a contract of employment but some racial groups may not fully understand what the grievance and disciplinary procedure is or what to do with it. Some suggestion of translating the procedure or verbally reading it out in the Applicant's language. This would ensure that employees are not just asked to sign receipt of the procedure, but would enable people to understand the procedure and overcome poor reading skills as well as language barriers.

39. Paragraph 4.57 states "Employers who make sure their policies on grievance and disciplinary action take account of the following guidelines to build a stronger defence if they have to face a complaint of unlawful racial discrimination in an employment tribunal". This paragraph could be interpreted as assisting the employer to prepare a good defence if they follow the guidelines. The Code has to be put into practice with goodwill and not with the intention of building a good defence if there is a case against the employer. We would suggest that this paragraph is either re-worded or deleted completely.

40. DLA welcomes the guidelines in 4.72 (h) and (g) as actively encouraging employers to monitor workforce statistics. The statistics collated in the exit interview would also be useful to form an accurate view of how well the Code is working and to what extent obligations are being complied with.

41. It should also be mentioned that an employer should reply to a race relations questionnaire within 8 weeks of it being served on them and not within the previous “reasonable” time period.

42. An important consideration not mentioned anywhere in the Code is the impact of the Employment Act 2002, namely the Statutory Disciplinary and Grievance Procedures. Employees may not be able to submit written grievances or communicate their difficulties (non-discrimination claims such as wages etc) because their reading and writing skills are limited. Perhaps there should be something to address this as well as this section needing re-drafting to reflect the new rules and the minimum procedures to be followed.

APPENDIX 6 – GLOSSARY

43. **Burden of Proof** - definition (a) does not accurately reflect the law. Definition (b) for purposes of a code on employment, ie: only Part 2 of the RRA should refer only to colour and nationality.

44. **Citizenship** - This may not be an appropriate definition where citizenship appears only as a sub-category of nationality in defining a racial group. Being a “good citizen” must be irrelevant.

45. **Employment Agency** - see decision in the Court of Appeal, *Brook St Bureau (IK) Ltd -v- Dacas* which held that there could be an implied contract of service between a cleaner supplied by an employment agency and the local authority for which she did the work.

46. **Functions** - in a code for public and private sectors a different definition is needed.

47. **Genuine Occupational Qualification and Genuine Occupational Requirement** - delete “on all racial grounds” in 4th line.

48. **Indirect discrimination** - for part 2 of the RRA, which is what this code is concerned with, the second definition applies only to colour and nationality.

49. **Procurement** - should say goods, facilities or services. The last sentence is irrelevant.

50. **Race Equality Scheme** - it is better to use the description from the regulations which neither requires neither a timetable nor that the scheme is realistic.

51. **Race Relations Act** “(Amendment)” should be inserted.

52. **Specific duty** - Does this code cover Scotland, if so, the definition should refer to the Scottish Order as well.

53. **Under- Representation** - this goes beyond definitions when only definitions are needed here.

54. **Workers** - RRA S78 specifically includes people who are self-employed where they contract personally to carry out any work or labour, eg: self-employed carpenters, cleaners etc.

Conclusions

55. In conclusion, the Code is welcomed by the DLA and is encouraging to create better relations between employers and employees. However, the Code is extremely lengthy compared to the existing code and this may deter employers from reading or complying with the Code. Smaller employers will certainly be less likely to read the Code than larger employers.

56. The DLA particularly welcomes the liberal use of examples which we believe will increase the accessibility of the Code. We recognize that we have, at times, been critical of the content of some of these, but this is only intended to ensure that they do work as well as they should.

57. The Code is also, necessarily, complex in content. Perhaps it would be of assistance to provide a flowchart to show the various ways of complying with the Code and which parts are applicable to small employers. When dealing with the unfortunate distinctions between discrimination on grounds of race or ethnic or national origin and discrimination on grounds of colour or nationality it may be helpful to put these expressions in bold so that the relevant section can be quickly picked out by the reader.

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