

# EQUALITY ACT 2010

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## EXPLANATORY NOTES

### COMMENTARY ON SECTIONS

#### **Part 9: Enforcement**

#### *Chapter 5: Miscellaneous*

#### *Section 136: Burden of proof*

##### **Effect**

443. This section provides that, in any claim where a person alleges discrimination, harassment or victimisation under the Act, the burden of proving his or her case starts with the claimant. Once the claimant has established sufficient facts, which in the absence of any other explanation point to a breach having occurred, the burden shifts to the respondent to show that he or she did not breach the provisions of the Act. The exception to this rule is if the proceedings relate to a criminal offence under this Act.

##### **Background**

444. Under previous legislation, in most cases the burden of proof was reversed once the claimant had established a case to an initial level. However, the burden of proof was not previously reversed in race discrimination claims brought because of colour and nationality; claims of victimisation which related to race discrimination; non-work disability discrimination claims; and sex discrimination claims which related to the exercise of public functions. In these areas the burden of proof is now reversed once the claimant establishes his or her case to an initial level.

##### **Example**

- A man of Chinese ethnic origin applies for a promotion at work but is not given an interview for the job. He finds that a number of white colleagues were given interviews despite having less experience and fewer qualifications. He brings a case for race discrimination before the employment tribunal and provides sufficient evidence to show that he had been treated less favourably because of his ethnic origin. It would then be up to his employer to prove that she had not discriminated against him in the promotion process.

#### *Section 137: Previous findings*

##### **Effect**

445. This section provides that if a person has brought a case under any of the previous legislation listed in this section (which this Act replaces), and a finding by a tribunal or court has been finalised, the issues decided in that case cannot be re-opened and litigated again under the provisions in this Act.

## **Background**

446. This provision is necessary because the Act replaces many of the provisions in the legislation listed at subsection (2). It would not be appropriate for the Act to allow the re-opening of issues which have been decided in proceedings under the previous legislation.

### ***Section 138: Obtaining information, etc.***

#### **Effect**

447. This section provides a mechanism for a person who thinks that he or she may have been unlawfully discriminated against, harassed or victimised to obtain information from the person he or she thinks has acted unlawfully against him or her (that is to say, the potential respondent or defendant). The person may ask questions either on a form prescribed by order by a Minister of the Crown or in some other form.
448. The questions and the answers are admissible as evidence in a case brought under the Act and the court or tribunal may draw inferences from a failure by the respondent to answer the questions posed within eight weeks or from evasive or equivocal answers.
449. However, the court or tribunal cannot draw such inferences in certain specified circumstances. These are if the respondent says that to answer differently would have prejudiced criminal proceedings or revealed the reason for criminal proceedings being withdrawn or not being brought and this is reasonable. The section contains a power for a Minister of the Crown to specify by order additional circumstances where such inferences may not be drawn.

## **Background**

450. This provision is designed to replicate the effect of provisions in previous legislation.

### ***Section 139: Interest***

#### **Effect**

451. This section enables a Minister of the Crown to make regulations enabling an employment tribunal to add interest payments to any award of compensation made to a claimant as a result of a discrimination case brought under this Act. The regulations can set out how the tribunal should calculate how much interest should be paid.
452. The regulations may provide that interest is to be calculated in a different way in discrimination proceedings from how it is in other cases before the employment tribunals, so they can modify the effect of an order made under the Employment Tribunals Act 1996 about interest calculations which applies to employment cases more generally.

## **Background**

453. This replicates powers contained in previous legislation.

## **Example**

- A claimant is awarded compensation for being discriminated against by his employer. Regulations made under this section may provide that if the award is not settled by the respondent within 14 days of the employment tribunal's decision then interest is to accrue on this award. The current regulations specify that the rate of interest applied to unpaid awards is fixed at 8%. A different rate can be applied if this is provided in regulations.

***Section 140: Conduct giving rise to separate proceedings***

**Effect**

454. This section enables an employment tribunal to transfer a case to a county or sheriff court, or a court to transfer a case to an employment tribunal, if it is based on the same conduct as one or more separate cases and one of the claims relates to instructing, causing or inducing a person to discriminate against, harass or victimise another person. It also provides that an employment tribunal or court cannot make a decision about such a case which is inconsistent with an earlier decision about the same conduct.

**Background**

455. This is a new provision which will allow for the transfer of certain types of connected cases between the tribunals and courts.

**Example**

- An employer instructs an employee to discriminate against a customer. The customer brings a case against the employer or an employee in a county court. The employee brings a case against the employer in an employment tribunal. These claims both arise out of the same conduct and so the court and the tribunal can transfer one set of proceedings so that they can be dealt with together as this is a better way of managing the cases.

***Section 141: Interpretation, etc.***

**Effect**

456. This section explains the meaning of various terms used in this Part.