Question 2

How effective is the law in protecting workers from discrimination?

The legal framework to protect workers from discrimination will always involve tension between the basic principle of freedom of contract, and that of equality. Discrimination, in the strict sense of the word, is an essential part of employment and the recruitment process, as it is simply to perceive the difference between individuals and act based upon these differences. On the one hand, employers should be free to select their workforce in any way they choose without external interference, but on the other workers should be protected against discrimination based on irrelevant or unfair grounds. Thus the principle of equality must outweigh that of freedom of contract, in order to protect certain groups from being unequally treated due to shared attributes which are not relevant to their ability to carry out the work. The law in this country currently provides protection for workers against discrimination based on gender, race or nationality, sexual orientation, religion or belief, age, and disability.

The limitation in attempting to gauge the successfulness of this law is that it is impossible to know how many people have suffered unfair treatment but have been unable to take any legal proceedings. In order to satisfactorily evaluate the effectiveness of the law, it would be necessary to conduct a survey of such anonymous victims and a study of national employment demographics. Therefore, in order to adequately assess its effectiveness here, the current state of the law will be discussed as well as some of the key decisions and improvements in its development, looking at its use and interpretation, and highlighting various omissions.

The law in this area has developed almost entirely within the last 60 years, following the adoption by the United Nations of the Universal Declaration of Human Rights in 1948[1] and building on the principle of equality declared therein. In 1975 the Sex Discrimination Act[2] was enacted, which built on the Equal Pay Act[3] and pre-empting the EEC directive[4] that required it, to outlaw discrimination against women (and by symmetry men) in the employment field on the grounds of their sex. Both direct discrimination, whereby someone is treated less favourably on the grounds of their sex, and indirect, whereby a requirement is applied with which a "considerably smaller"[5] proportion of the disadvantaged gender can comply, were made unlawful in both recruitment and the employment relationship. The act also applies to discrimination based upon marital status, although no explicit protection for single people is given, though this would be actionable under EU Law[6]. Since then the act has been extended to provide protection for those in civil partnerships[7], and those undergoing gender reassignment[8]. Unlawful discrimination will not apply where it can be shown that there are genuine occupational requirements necessitating a specific gender. The list of genuine grounds include areas like modelling or acting where authenticity requires the given gender, working in a single sex institution, or for reasons of decency and privacy.

Initially the courts seemed to consider whether the relevant decision was motivated by discriminatory attitude, for example in Peake v Automotive Products[9] it was held by that Court of Appeal that women being allowed to leave a factory 5 minutes before their male co-workers for safety reasons, was not discrimination under the act. However this decision was

[1] Universal Declaration of Human Rights 1948
[2] Sex Discrimination Act 1975
[3] Equal Pay Act 1970
[4] Equal Treatment Directive (76/207/EEC)
[5] SDA 1975 s.1.1bi
[6] Equal Treatment Directive (76/207/EEC) Art.2(1)
[7] Civil Partnership Act 2004 c.33
[8] Sex Discrimination (Gender Reassignment) Regulations 1999
[9] Peake v Automotive Products [1978] Q.B. 233

highly criticised and was not followed in Grieg v Community Industry[10] where a female applicant for a painting job was rejected in the interests of administration because the rest of the team was male, demonstrating that motive and good intentions are irrelevant. Discrimination against a woman is found when a man "on the grounds of her sex treats her less favourably than he treats or would treat a man"[11], and so requires an objective test using a comparator of the other sex to identify a discrepancy in treatment, rather than a subjective one of motive or intent. This comparator may be actual or hypothetical but must be used to show an objective difference in treatment, and must be equivalent. For example in Shamoon v Chief Constable of the Royal Ulster Constabulary[12], Chief Inspector Shamoon claimed sexual discrimination after she had the responsibility of writing appraisals for junior officers withdrawn from her as a result of complaints lodged against her. The tribunal took the two other male Chief Inspectors in the traffic division, which still had appraisal responsibilities, as comparators, but the House of Lords criticised this as these inspectors had no complaints lodged against them and so were materially different. Similarly in B v A[13] an Employment Appeal Tribunal criticised the previous finding that a female ex-lover dismissed due to jealousy was sexual discrimination; the hypothetical comparator should not be a male employee, but must be a male employee who had been in a homosexual relationship with the employer, who would also have been dismissed due to jealousy[14].

The Race Relations Act was passed in 1965[15], but did not prohibit discrimination in the employment field until the 1968 act[16]. Even then it was not very effective, as it recommended a process of education and persuasion rather than legal action, and so it was not until the Race

[10] Grieg v Community Industry [1979] EAT, [1979] I.C.R. 356
[11] SDA 1975 s.1a
[12] Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] I.C.R. 337
[13] B v A (Unreported, January 9, 2007) (EAT)
[14] Middlemiss, S, 'A licence to discard? Failed sexual relationships in the workplace and sex discrimination' (2007) 78 Emp. L. B. 2-4.
[15] RRA 1965
[16] RRA 1968

Relations Act of 1976[17] was passed that real protection for workers against racial discrimination emerged. This act mirrors the Sex Discrimination Act[18] with relevant modifications, and covers discrimination based on "colour, race, nationality or ethnic or national origins"[19]. These terms are not defined in the act, and have thus been interpreted by the judiciary. In BBC v Souster[20] being English or Scot was held to constitute nationality or national origin, and in Mandla v Dowell Lee[21] following Lord Fraser's definition Sikhs were held to represent an ethnic group. Jews are similarly protected[22] however Muslims are not covered under the act[23], as no single common ethnic origin can be identified. There are fewer listed genuine occupational requirements for racial discrimination, however the Race Directive[24] and our implementation of it includes the wider category of any genuine requirement which is proportionate in the circumstances. Thus in Tottenham Green Under Fives' Centre v Marshall[25] the requirement that a new applicant be of Afro-Caribbean origin was legitimate as over 80% of the children at the nursery were of this origin and thus speaking in the same dialect would be helpful when caring for the children.

Both the SDA and the RRA make provision for indirect discrimination, but originally this indirect discrimination required the claimants to identify a "requirement or condition"[26] with which they could not comply. This proved effective in some situations such as in Price v Civil Service Commission[27] where the Employment Appeal Tribunal held that the unnecessary requirement that an applicant's age be in the range 17 ½ to 28 did in practice discriminate

[17] RRA 1976
[18] SDA 1975
[19] RRA 1976 s.3.1
[20] BBC v Souster [2000], [2001] S.C. 458
[21] Mandla (Sewa Singh) v Dowell Lee [1983] 2 A.C. 548
[22] See Seide v Gillette Industries [1980] I.R.L.R. 427
[23] JH Walker Ltd v Hussain [1996] I.C.R. 291
[24] Race Directive (2000/43/EC) s.4a
[25] Tottenham Green Under Fives' Centre v Marshall [1990], [1991] I.C.R. 320
[26] SDA s.1.1b; RRA s.1.1b
[27] Price v Civil Service Commission [1978] I.R.L.R. 3

against women as many would be involved in rearing children at that stage of life. However the need for a specific condition severely limited the protection given, as it was interpreted as requiring a complete prevention of appointment, thus excluding the court's consideration of second-order preferences upon which recruitment was made. These acts have since been amended so that any "provision, criterion or practice"[28] may be identified rather than an explicit requirement. This is indicative of the way that legal protection for workers has shifted from a minimal prevention of discriminatory decisions, to enforcing substantive equality in the result. Thus workers now benefit from protection designed to ensure equality in practice, rather than just preventing discriminatory policy.

Until 1995 only discrimination based on sex and race were legally enforceable, but in recent years other groups have been given protection through legislation. In 1995 the Disability Discrimination Act[29] was enacted, which provides protection for those who have a physical or mental impairment which has an adverse effect on normal day to day activities. Discrimination is found when such a person suffers less favourable treatment than someone in the same relevant circumstances, without the disability. Then in 2000 the Framework Employment Directive[30] required legislation to provide protection against discrimination based on sexual orientation, religion or belief, age and required some amendments to the DDA. Legislation protecting workers from discrimination based on sexual orientation, and religion or belief was enacted in 2003[31], but it wasn't until 2006 that provision was made for age-based discrimination in this country[32]. These regulations made equivalent provisions for

[28] The Race Relations Act 1976 (Amendment) Regulations 2003 (S.I. 2003/1626), reg. 3; The Sex Discrimination (Indirect Discrimination and Burden of Proof) Regulations 2001 reg. 3
[29] Disability Discrimination Act 1995
[30] Framework Employment Directive (2000/78/EC)
[31] The Employment Equality (Sexual Orientation) Regulations 2003 (No. 1661); The Employment Equality (Religion or Belief) Regulations 2003 (No. 1660)
[32] The Employment Equality (Age) Regulations 2006 (No. 1031)

direct and indirect discrimination as the RRA specifies, and have enabled many victims who would have fallen between the gaps in prior legislation to receive justice.

A common difficulty in achieving justice for workers suffering from discrimination is the availability of evidence needed, as it is often only accessible to the employer. Claims when an applicant has been rejected for example often require knowledge of the qualifications of successful comparator candidates. This difficulty has led to a shift in the burden of proof from the appellant to the defendant, in cases of discrimination. All the equality enactments now require that the claimant must prove facts from which "a tribunal *could* prove"[33] that the perpetrator "has committed an act of discrimination"[34], and if this is found then the burden of proof shifts to the respondent who must prove that the act was he did not commit it, or that it was "in no way whatsoever on the prohibited grounds"[35]. This was demonstrated and refined in Igen Ltd v Wong at the Court of Appeal, where a 13 step legal test was defined. This measure addresses the imbalance of power in the employment relationship and so has greatly improved the practical effectiveness of the legislation.

A further protection that now exists in statute is the explicit protection of workers against harassment. British law defines harassment as unwanted conduct relevant to the provision which has the effect of violating the person's dignity *or* creates an "intimidating, hostile degrading, humiliating or offensive environment"[36], going further than the EU directive that only recognises the conjunctive case[37]. Previously, any case of harassment would require reasoning as to how the perpetrator might have treated a comparator. In making harassment a freestanding area of discrimination, this speculative process is no longer required, and so it is

[33] The Sex Discrimination (Indirect Discrimination and Burden of Proof) Regulations 2001 (No. 2660), reg. 5
[34] Igen v Wong [2005] EWCA Civ 142 [2005] I.C.R. 931 at Annex [1]
[35] Igen v Wong [2005] at Annex [11]
[36] The Race Relations Act 1976 (Amendment) Regulations 2003 (S.I. 2003/1626), reg. 5;
[37] Race Directive (2000/43/EC); Equal Treatment Amendment Directive (2000/78/EC)

judged from the victim's point of view, subject to an objective test of reasonableness. Part of the benefit of this lies in the ability to award damages for "injury to feelings", giving protection to those who have suffered prolonged campaigns of abuse where it might be difficult to identify a financial loss associated with some individual act, but where the cumulative effect of many instances of mistreatment may be compensated. For example in Vento v Chief Constable of West Yorkshire Police[38] the appellant joined the police force as a mother of 3, two years before her marriage began to break down. While her private life deteriorated she was subjected to an aggressive campaign of criticism which led to clinical depression and further discrimination led to suicidal impulses. She was dismissed and subsequently successfully claimed for sexual discrimination. Without the specific provision for harassment in the legislation, her claim may have failed.

Much of the antidiscrimination law would be ineffective if only acts directly undertaken by the employer were actionable. Under UK law the employer is not only be liable for discriminative treatment done themselves, but also that done by employees and some third parties during employment. In Burton v De Vere Hotels Ltd[39] the hotel was found liable for the racist abuse directed at two Afro-Caribbean waitresses, from the comedian performing: Bernard Manning. Action could only be brought against the employer, and they would have had a defence if they took reasonable steps to prevent such discrimination, however if found liable, they may in turn bring action against the perpetrators. Thus employers are required to ensure suitable protection for workers during employment, rather than merely refrain from discriminatory behaviour themselves. This more adequately protects workers from some of the most common forms of discrimination and provides a means of combating intuitional

[38] Vento v Chief Constable of West Yorkshire Police Court of Appeal [2002] EWCA Civ 1871 [2003] I.C.R. 318
[39] Burton v De Vere Hotels Ltd [1996] EAT [1997] I.C.R. 1;

discrimination, forcing employers to be proactive in ensuring day to day equality for its workers.

One of the most important ways in which the law has led to improved protection for workers is by the effect that it is having on employment practice. The availability of compensation for such discrimination, as opposed to previous attempts at reform through education, serves to proactively promote equality, reforming discriminatory employment practice by acting as an effective deterrent. Furthermore though positive discrimination is outlawed under the legislation (except for some limited cases) positive action, whereby steps can be made to make roles more suitable and more available to unrepresented groups, is encouraged[40]. The RRAA 2000[41] gives certain public authorities like the police force, duties to review the makeup of their workforces and consider such action if a group is found to be under-represented. The CRE also has powers to enforce these duties, issuing notices to authorities that it deems to be falling short.

All this has greatly improved the effectiveness of the law in this area as reliable precedent has developed, however it is still not without its omissions. Firstly due to the unfortunate way in which the amendments to the RRA in 2000[42] were implemented, they do not apply to discrimination based on colour or nationality, and so action brought on these grounds will not benefit from the improvements relating to harassment and indirect discrimination. Then in a recent decision relating to victimisation (protecting employees who are pursuing legal action from receiving less favourable treatment as a result) the House of Lords held that victimisation required more than factual causation. The unfortunate precedent set in Chief

[40] CRE Code of Practice on the Duty to Promote Racial Equality (2002)
[41] Race Relations (Amendment) Act 2000 (c. 34)
[42] RRAA 2000

Constable of West Yorkshire Police v Khan 2001[43], requires once again that there be some measure of motive on the part of the employer, and so future cases of victimisation where such a motive cannot be satisfactorily proved may fail.

Further to these specific anomalies, the legal approach to discrimination in this country has a serious but necessary limitation. There have been numerous cases, such as Dawkins v Crown Suppliers[44] and Walker v Hussain[45], where there has clearly been unfair discrimination, but where an attempt was made to bring action on the wrong grounds because there was no specific legislative provision. Legal protection always applies to specific foreseeable groups, when unfair discrimination itself is based on a multitude of often unforeseeable irrational grounds, not all of which can be adequately mentioned in statute. Thus there is little protection short of serious cases in tort or breaches of trust, for employees discriminated against on unusual grounds. Should an employer be permitted to reject a vastly superior secretarial candidate simply because he prefers blondes? For historical reasons and past prejudice skin colour is protected, but hair colour is not. What about if a worker is obese[46]? Legislation against discrimination based on appearance might solve these examples, but requiring a separate act for every possible ground of irrational discrimination seems impractical. A solution might be to constitutionalize equality[47], or to bring in some generic discrimination act, but this has the danger of opening the floodgates and would leave the courts to decide which requirements are genuine, and which are unfair. Though this could grant more victims justice, it would also produce an even more convoluted precedent and could severely restrict the employer's freedom of contract.

[43] Chief Constable of West Yorkshire v Khan [2000] EWCA Civ 543 [2000] I.C.R. 1169
[44] Dawkins v Crown Suppliers (PSA) [1993] I.C.R. 517
[45] JH Walker Ltd v Hussain [1996] I.C.R. 291
[46] Chamberlain, J, 'Obesity in the workplace: overweight and over here' (2005) 62 Emp. L.J. 13-15.
[47] Monaghan, K, 'Constitutionalising equality: new horizons' (2008) 1, E.H.R.L.R. 20-43.

There is no simple solution to the problem of protecting workers from discrimination in employment. The law has certainly improved vastly in recent years, and looks set to continue as the EU introduces new provisions[48] regarding appearance and social class, but the problem is a difficult one, and is certainly far from solved.

[48] Rubenstein, M, 'What is the next frontier for discrimination law?' (2007) 166 E.O.R.