Compensation for Discrimination

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On 18 February 1994, Keith Vaz's Private Members' Race Relations (Remedies) Bill [Bill 20 1993/4] is due to have its Second Reading. The Bill will remove the current limit of £11,000 on compensation payments for race discrimination. It follows a European Court of Justice ruling [Marshall v Southampton and South West Hampshire Area Health Authority (No. 2)] that limits on compensation payments in sex discrimination cases are in breach of EC law. The Government has already removed the limit in sex discrimination cases and has made it clear that it will support Keith Vaz's Bill to remove the limit in race discrimination cases and introduce legislation to remove the existing £30,000 limit on compensation payments for religious discrimination in Northern Ireland. This paper describes the background to these changes.

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I Introduction : The Law and Impending Changes

There are three major pieces of legislation outlawing discrimination in the UK:

- the *Sex Discrimination Act 1975* which makes discrimination on grounds of sex or marital status unlawful. The Act applies to England, Wales and Scotland. Similar legislation, the *Sex Discrimination (Northern Ireland) Order 1976*, covers Northern Ireland.

- the *Race Relations Act 1976* which makes discrimination on grounds of colour, race, nationality or ethnic or national origins unlawful. This Act also applies to England, Wales and Scotland, but there is no equivalent legislation in Northern Ireland.

- the *Fair Employment (Northern Ireland) Act 1976*, as amended by the *Fair Employment (Northern Ireland) Act 1989*, which makes discrimination on grounds of religious belief or political opinion unlawful. This Act applies only to Northern Ireland and there is no equivalent legislation in the rest of the UK.

These Acts all provide for compensation to be awarded to people who have suffered unlawful discrimination in the employment field. In the case of sex or race discrimination, the compensation is awarded by industrial tribunals. In the case of religious discrimination in Northern Ireland, it is awarded by the Fair Employment Tribunal. However, the Acts all placed a limit on the amount of compensation which could be awarded in these cases. The Sex Discrimination and Race Relations Acts both set the limit at that "for the time being imposed by section 75 of the Employment Protection (Consolidation) Act 1978"[1]. This is the limit which applies in unfair dismissal cases and it is currently set at £11,000[2]. The Fair Employment (Northern Ireland) legislation sets the limit at £30,000[3]. There is a power to increase this limit by order[4].

On 2 August 1993, the European Court of Justice ruled in the case of *Marshall v Southampton and South West Hampshire Area Health Authority (No. 2)* that a statutory limit on the amount of compensation for sex discrimination was a breach of the *European Community Equal Treatment Directive 76/207/EEC*. The Government responded by announcing on 1 November 1993 that it would abolish the limit not only in sex discrimination cases but also in cases of racial or religious discrimination:

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1 *Sex Discrimination Act 1975*, s.65(2)
Race Relations Act 1976, s.56(2)

2 *Unfair Dismissal (Increase of Compensation Limit) Order 1993*, SI No. 1348

3 *Fair Employment (Northern Ireland) Act 1976*, s.26(4), inserted by s.50 of the 1989 Act

4 Ibid, s.26(9)

European Court

"**Mr. Duncan Smith:** To ask the Secretary of State for Employrnent how the Government intend to respond to the recent decision of the European Court of Justice in the case of Marshall v. Southarnpton and South West Harnpshire heath authority (No. 2).

Miss Widdecombe: We are urgently seeking powers under section 2(2) of the European Communities Act 1972 to make regulations to amend the law in the light of this judgment. These regulations will, in particular, remove the upper limit on compensation in the Sex Discrimination Act 1975 and give industrial tribunals a power to award interest in sex discrimination and equal pay cases. I expect these regulations to come into force during November. Similar regulations are intended for Northern Ireland.

The Marshall judgment was concerned only with sex discrimination. However, the Government believe that other types of discrimination which are similarly prohibited should carry the same penalties as sex discrimination.

The Government will therefore seek a suitable opportunity to amend the penalties available for racial discrimination under the Race Relations Act 1975, to keep them consistent with those soon to be available under the Sex Discrimination Act.

Similarly, my right hon. and learned Friend the Secretary of State for Northern Ireland will seek an opportunity to amend the penalties available for religious discrimination in Northern Ireland under the Fair Employment (Northern Ireland) Act 1976, as amended."

[HC Deb 1 Nov. 1993 cc69-70W]

The limit on compensation in sex discrimination cases has already been removed in Great Britain by the *Sex Discrimination and Equal Pay (Remedies) Regulations 1993* SI No. 2798, which came into force on 22 November 1993. A similar order, the *Sex Discrimination and Equal Pay (Remedies) Regulations (Northern Ireland) 1993*, No. 478, has removed the limit in Northern Ireland with effect from 17 December 1993. As EC law covers neither racial nor religious discrimination, Regulations under s.2(2) of the *European Communities Act 1972* (which allows legislation by Ministerial Regulation where it is necessary to comply with the requirements of EC law) cannot be used to lift the limits in these cases. Keith Vaz, MP, who came 11th in the ballot for Private Members Bills on 25 November 1993 has introduced a *Race Relations (Remedies) Bill* [Bill 20 of 1993/4] whose purpose is

> "to remove the limit imposed by subsection (2) of section 56 of the Race Relations Act 1976 on the amount of compensation which may be awarded under the section and to make provision for interest in connection with sums so awarded."

This has given the Government a "suitable opportunity" to make the necessary amendments to the race relations legislation and it is supporting Mr Vaz's Bill. The Bill is down for Second Reading on 18 February 1994. To make the changes to the religious discrimination legislation in Northern Ireland, it will be necessary to pass an Order in Council (the equivalent of primary legislation) through the Westminster Parliament. This could take a year or so. However, as a sign of their good intentions, the Government will shortly be introducing a Statutory Rule (subordinate legislation) to increase the current limit on compensation in these cases from £30,000 to £35,000[5].

II The Marshall Case

Helen Marshall was employed as a dietician by the Southampton and South West Hampshire Area Health Authority until she was dismissed at the age of 62 in 1980, on the sole ground that she was a woman who had passed the retirement age of 60 applied by the Authority to women. Had she been a man she would have been able to go on working until the age of 65. Ms Marshall appealed against her dismissal to an Industrial Tribunal claiming unlawful discrimination contrary to the *Sex Discrimination Act 1975* and the *European Community Equal Treatment Directive 76/207/EEC*. At that time, section 6(4) of the 1975 Act specifically excluded "provision in relation to death or retirement" from the requirement to treat men and women equally. Despite this, Ms Marshall eventually won her case when it was referred to the European Court of Justice [ECJ]. On 26 February 1986, the Court ruled that a general policy allowing dismissal of a woman solely because she had passed a retirement age which was different for men and women was contrary to the EC Directive. It also ruled that an employee of a state authority could rely directly on the EC Directive to claim discrimination regardless of the provisions of national legislation. As a result of this ruling, the Government amended the 1975 Act. Provisions in the *Sex Discrimination Act 1986* required both private companies and the public sector to set equal compulsory retirement ages for men and women and equalised the age limit on unfair dismissal claims.

After the February 1986 ruling, Helen Marshall's case was referred back to an Industrial Tribunal for an assessment of the compensation to be awarded in respect of her discriminatory dismissal. At that time section 65(2) of the *Sex Discrimination Act 1975* imposed a limit on the amount of compensation which could be paid in sex discrimination cases. In 1980, the

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5 Northern Ireland Office, Department of Economic Development

limit was £6,250. Despite this, the Industrial Tribunal awarded £19,405 in compensation, arguing that the 1975 Act limit did not apply as Ms Marshall had been an employee of the state and could rely directly on EC law. Article 6 of the Equal Treatment Directive provides that:

> "Member States shall introduce into their national legal systems such measures as are necessary to enable all persons who consider themselves wronged by failure to apply to them the principle of equal treatment within the meaning of Articles 3, 4 and 5 to pursue their claims by judicial process after possible recourse to other competent authorities."

Another ECJ case (Von Colson v Land Nordrhein-Westfalen) had found that "if a Member State chooses to penalise breaches of that prohibition [on discrimination] by the award of compensation, then in order to ensure that it is effective and has a deterrent effect, that compensation must in any event be adequate in relation to the damage sustained". The tribunal considered that placing a limit on awards prevented "adequate" compensation from being paid. The tribunal also included £7,710 interest from the date of dismissal in the award. When Helen Marshall brought her case, there was no power in UK law for industrial tribunals to award interest at all. This has since been changed by the *Industrial Tribunals (Interest) Order 1990 SI No. 479* which provides for interest (at a current rate of 8%) from 42 days after the date of the decision. It does not allow interest from the date of the discriminatory act.

The Southampton and South West Area Health Authority appealed against the award of interest and, ultimately, the Court of Appeal ruled that Ms Marshall could not rely on the EC Directive either to override the statutory limit on compensation or the time limit on interest payments. Helen Marshall appealed to the House of Lords which referred the following questions to the ECJ for a preliminary ruling:

> "1. Where the national legislation of a Member State provides for the payment of compensation as one remedy available by judicial process to a person who has been subjected to unlawful discrimination of a kind prohibited by Council Directive 76/207/EEC of 9 February 1976 ('the Directive'), is the Member State guilty of a failure to implement Article 6 of the Directive by reason of the imposition by the national legislation of an upper limit of £6,250 on the amount of compensation recoverable by such a person?
> 2. Where the national legislation provides for the payment of compensation as aforesaid, is it essential to the due implementation of Article 6 of the Directive that the compensation to be awarded—
>
> (a) should not be less than the amount of the loss found to have been sustained by reason of the unlawful discrimination, and

> (b) should include an award of interest on the principal amount of the loss so found from the date of the unlawful discrimination to the date when the compensation is paid?
>
> 3. lf the national legislation of a Member State has failed to implement Article 6 of the Directive in any of the respects referred to in questions 1 and 2, is a person who has been subjected to unlawful discrimination as aforesaid entitled as against an authority which is an emanation of the Member State to rely on the provisions of Article 6 as overriding the limits imposed by the national legislation on the amount of compensation recoverable?"

On 2 August 1993, the ECJ ruled that a statutory limit on the amount of compensation **was** a breach of the EC Directive, as was a restriction on the amount of interest payable, and that Ms Marshall **was** entitled to rely on the EC legislation directly as an employee of the State. A key paragraph from the judgement read:

> "Where financial compensation is the measure adopted in order to achieve the objective indicated above, it must be adequate, in that it must enable the loss and damage actually sustained as a result of the discriminatory dismissal to be made good in full in accordance with the applicable national rules."

Not long after this ruling, the Government announced that, once again, Helen Marshall and the ECJ were compelling them to amend the UK law on sex discrimination.

III The Sex Discrimination and Equal Pay (Remedies) Regulations 1993

These Regulations, which came into force on 22 November 1993, repealed section 65(2) of the Sex Discrimination Act 1975, thereby abolishing the upper limit on compensation in sex discrimination cases. They also give industrial tribunals a discretionary power to include interest on the sums awarded. This covers both sex discrimination compensation and awards of arrears of remuneration or damages under the Equal Pay Act 1970. In any case, tribunals must consider the award of interest [Reg. 3]. The rate of interest to be applied in England and Wales is that prescribed for the Special Investment Account under rule 27(1) of the Court Fund Rules 1987 (currently 8%). The same percentage rate is applied in Scotland under the Act of Sederunt (Interest in Sheriff Court Decrees or Extracts) 1975 [Reg. 4]. The interest is calculated as "simple interest which accrues from day to day".

In discrimination cases, compensation awards are normally made up of two parts:

- a sum for injury to feelings; and
- a sum for pecuniary loss.

The Regulations provide that in the case of sums awarded for injury to feelings, interest will cover the whole period beginning with the date of the act of discrimination and ending with the day on which interest is calculated by the Tribunal [Reg. 7(1)(a)]. In the case of pecuniary loss, interest will start from the "mid-point" between the act of discrimination and the day of calculation and run up to the date of calculation [Reg. 7(1)(b)]. In exceptional circumstances, where a "serious injustice" might otherwise occur, tribunals can calculate interest over a different period.

The Regulations also provide that, if an award is not paid within 14 days, interest should run from day one [rather than from day 42 as provided by the Industrial Tribunals (Interest) Order 1990].

IV The Race Relations (Remedies) Bill 1993/4

Keith Vaz's Private Members Bill, which has Government and all party support, and is due to have its Second Reading on 18 February 1994, provides that section 56(2) of the Race Relations Act 1976, which puts a limit on compensation payments in race discrimination cases, shall "cease to have effect". It also gives the Secretary of State the power to make Regulations enabling a tribunal to include interest on any such compensation awards. Presumably, the Regulations will follow the model of the Sex Discrimination and Equal Pay (Remedies) Regulations described above.

V Levels of Awards

The *Employment Gazette*, Nov. 1993, contains statistics showing the level of compensation awarded by industrial tribunals in both sex and race discrimination cases between 1990 and 1993. There are fewer race discriminations than sex discrimination cases but, in 1992-93 at least, awards are generally higher in race discrimination cases. The median award in 1992-93 was £3,333 in race discrimination cases and £1,416 in sex discrimination cases:

Table 4 Compensation awarded by tribunals — race discrimination cases

	1990-91		1991-92		1992-93	
	Num-bers	Per-cent	Num-bers	Per-cent	Num bers	Per-cent
Less than £100	1	3.7	0	0.0	0	0.0
£100- £149	0	0.0	0	0.0	0	0.0
£150- £199	0	0.0	0	0.0	0	0.0
£200- £299	0	0.0	2	9.1	0	0.0
£300- £399	1	3.7	1	4.5	0	0.0
£400- £499	1	3.7	1	4.5	0	0.0
£500- £749	5	18.5	2	9.1	1	4.6
£750- £999	1	3.7	2	9.1	0	0.0
£1,000-£1,499	4	14.8	4	18.2	3	13.6
£1,500-£1,999	1	3.7	3	13.6	1	4.6
£2,000-£2.999	8	29.7	3	13.6	5	22.7
£3,000 and over	5	18.5	4	18.3	12	54.5
All	**27**	**100.0**	**22**	**100.00**	**22**	**100.0**
Median award	**£1,749**		**£1,374**		**£3,333**	

Table 5 Compensation awarded by tribunals — sex discrimination cases

	1990-91		1991-92		1992-93	
	Num-bers	Per cent	Num-bers	Per cent	Num-bers	Per cent
Less than £100	0	0.0	2	4.7	0	0.0
£100-£149	1	2.0	0	0.0	2	3.1
£150-£199	1	2.0	0	0.0	0	0.0
£200-£299	3	6.0	3	7.0	3	4.6
£300-£399	2	4.0	1	2.3	3	4.6
£400-£499	0	0.0	0	0.0	1	1.5
£500-£749	9	18.0	4	9.3	10	15.4
£750-£999	7	14.0	2	4.7	1	1.5
£1,000-£1,499	7	14.0	5	11.6	15	23.1
£1,500-£1,999	3	6.0	10	23.2	9	13.9
£2,000-£2,999	5	10.0	8	18.6	5	7.7
£3,000-£3,999	2	4.0	5	11.6	6	9.2
£4,000-£4,999	3	6.0	2	4.7	3	4.6
£5,000-£5,999	1	2.0	1	2.3	2	3.1
£6,000-£6,999	2	4.0	0	0.0	4	6.2
£7,000- £7,999	1	2.0	0	0.0	0	0.0
£8,000 and over	3	6.0	0	0.0	1	1.5
All	**50**	**100.0**	**43**	**100.0**	**65**	**100.0**
Median award		**£1,142**		**£1,725**		**£1,416**

Surveys for the *Equal Opportunities Review* (EOR) produce similar results[6]. In 1991, they found the average compensation award in sex discrimination cases was £1,896 and in race discrimination cases, £2,289. By 1992, the figures had risen to £2,526 and £3,088 respectively.

Awards in religious discrimination cases in Northern Ireland are considerably higher, but this is, no doubt because the statutory limit on compensation is so much higher. The EOR survey found that the average compensation award up to 1 March 1993 (nine cases 1992/3) was £10,042, four times the figure for sex and race cases in Great Britain.

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6 *Equal Opportunities Review* No. 49, May/June 1993 : "Compensation Awards : Employers pay more for race and sex bias"

The EOR survey also separates out the amount of the award which relates to injury to feeling. In 1991, the average injury to feelings award in sex discrimination cases was £838 and in race discrimination cases, £1,226. In 1992, these figures rose to £1,239 and £1,659 respectively. The Northern Ireland figure in religious discrimination cases was £7,611, more than 5 times the figure for sex and race cases in Britain. In *Alexander v The Home Office* (EOR 20), the Court of Appeal set out the basic principles for assessing damages for injury to feelings:

> "For injury to feelings.... for the humiliation, for the insult, it is impossible to say what is restitution and the answer must depend on the experience and the good sense of the judge and his assessors. Awards should not be minimal, because this would tend to trivialise or diminish respect for the public policy to which the Act gives effect. On the other hand, just because it is impossible to assess the monetary value of injured feelings, awards should be restrained".

In *Sharifi v Strathclyde Regional Council* (EOR 44), the Employment Appeal Tribunal suggested that £500 for injury to feelings should be at or near the minimum appropriate level of award. In *Noone v North West Thames Regional Council* (EOR 20), the Court of Appeal suggested that an award of £3,000 for injury to feelings was at the top end of the appropriate range when the statutory limit on compensation was £7,500.

Compensation for pecuniary loss includes compensation for loss of earnings, benefits and other compensatable items. As a general rule, overall compensation awards are assessed "in like manner as any other claim in tort"[7], subject, until now, to the statutory limits.

The levels of awards are expected to rise once the statutory limits have been removed, not just because it will be possible to make higher awards but because the existence of an upper limit has exercised a downward pressure on all awards which are seen in relation to a maximum. There is striking evidence of this already in the case of ex-employees of the Ministry of Defence dismissed on pregnancy grounds between 1978 and 1990 where awards have been as high as £200,000 (See Part VI below). But there have been other examples. For example, Kim Holden was awarded £17,127 by an industrial tribunal in Liverpool because Wirral Hospital discriminated against her in July 1992. The Tribunal used the fact that, as an employee of a public sector body, Mrs Holden could rely directly on the EC Directive, to disapply the statutory limit[8]

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7 *Sex Discrimination Act 1975*, s.66(1)
Race Relations Act 1976 s.57(1)
Fair Employment Act (Northern Ireland) 1976, s.26(1)

8 EOR Discrimination Case Law Digest No. 18, Winter 1993 : "Limit disapplied. Holden v Wirral Hospital"

VI Pregnancy Dismissals in the Armed Forces

Until August 1990, the Armed Forces had a policy of automatically dismissing any servicewoman who became pregnant. With the backing of the Equal Opportunities Commission two former members of the forces' nursing service (Mrs Leale and Mrs Lane) who had been dismissed on pregnancy grounds in early 1990, initiated legal proceedings against the Ministry of Defence. Although the *Sex Discrimination Act 1975* [s.85(4)] excludes the armed forces, the Equal Opportunities Commission argued that the European Community's Equal Treatment Directive overrides this exclusion and that the MOD policy was a direct breach of the Directive[9].

After Mrs Leale and Mrs Lane started their action, the armed forces changed their policy and since August 1990 pregnant servicewomen have no longer been automatically dismissed. However, elements of discrimination remained. For example, women with less than 2 years service in the RAF were still dismissed on pregnancy and those wishing to return after maternity leave were required to sign a declaration that they were willing to undertake the full range of service, including service abroad.

On the 16 December 1991, the day the proceedings were due to start in the High Court, the MOD conceded the case and agreed to pay the two women compensation of £15,000 and £10,000[10]. It also revised the arrangements for maternity leave, introducing paid maternity leave and reducing the qualifying period to one year[11]. There are an estimated 5,000 women dismissed because of pregnancy between August 1978 (when the EC Directive came into force) and August 1990 (when the first amendments were made to MOD policy) who may have a claim against the MOD[12]. The MOD offered these women compensation of up to £10,000 depending on length of service, loss of earnings and pension benefits, plus £500 for injury to feelings. To qualify, the women had to show that they would have returned to work after maternity leave had they not been automatically dismissed. It is estimated that about 1,500 women have settled under this scheme[13]. However, many more - perhaps 3,500 - have still to settle and were waiting for the outcome of the Marshall (No. 2) case before taking their claims to industrial tribunals.

The awards in the post-Marshall cases have been much higher than expected. They include:

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9 Equal Opportunities Commission Press Release, 16 Dec. 1991 : "EOC takes MOD to Court over sex discrimination"

10 *Financial Times*, 18 Dec. 1991 : "Dismissal of Pregnant Nurses Unlawful"

11 Ministry of Defence Press Notice, 16 Dec. 1991 : "New Maternity Leave Policy for Servicewomen"

12 *Times*, 16 Oct. 1992 : "MOD faces £50m claim from women fired while pregnant"

13 *Daily Telegraph*, 31 Jan. 1994 : "Pregnancy Payouts : Forces plan appeals as servicewomen unfairly dismissed for becoming mothers queue for compensation"

Fiona Hadley	-	£200,000[14]
Nichola Cannock	-	£172,000
Patricia Prior	-	£133,000 (plus pension entitlement)
Deborah Miller	-	£54,000
Jacqueline Peel	-	£62,000[15]
Esther Dill	-	£46,550
Angela Howell	-	£24,000
Kim Castledine	-	£17,000
Jacqui Thornber	-	£22,000

In some cases awards are high because the women had signed up to long contracts so many years' loss of earnings and pension entitlements had to be taken into account. But interest payments also contribute to the size of the awards. In Nichola Cannock's case, £52,000 of the award is composed of interest[16].

The MOD is reportedly going to appeal against the size of some of these awards to the Employment Appeal Tribunal. The total bill could turn out to be £100 million rather than the £30 million estimated. Apart from the cost, the awards are said to be causing resentment in the services, particulary from women who decided not to have children so that they could remain in the services, and others who say that the women knew what they were signing up to. On the other hand, Norman Lamb, chairman of the Armed Forces Pregnancy Dismissal Group, says that the women have every right to pursue large claims as they were unlawfully dismissed in the first place. He argues that the MOD was negligent in ignoring the EC Directive and leaving an unlawful policy in place for 12 years[17].

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14 ibid

15 *Equal Opportunities Review No. 53*, January/February 1994 : "£173,000 sex bias award"

16 Ibid

17 *Daily Telegraph*, op cit

VII Further Reading

1. Equal Opportunities Review No. 49, May/June 1993 : "Compensation awards : employers pay more for race and sex bias"

2. Equal Opportunities Review, No. 49, May/June 1993 : "Fair employment case law"

3. Fair Employment Commission Fourth Annual Report 1992/3

4. Equal Opportunities Review No. 51, Sept/Oct. 1993 : "Compensation limit unlawful"

5. Anthony Korn : "Compensation for Dismissal", Blackstone Press, 1993

Recent papers on related subjects have been:

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93/28	The Maastricht debate: Social charter, chapter or protocol?	09.03.93