

DISCRIMINATION

What is discrimination?

This is the unjust prejudicial treatment of one because of factors relating to their social class, ethnicity, gender, age etc.

Equality and discrimination

Creating fair workplaces

Fairness in the workplace is a vital part of a successful business or public body. It is supported by the law - the Equality Act 2010 - and also makes good business sense in running and developing an organisation.

The aim of the Equality Act is to improve equal job opportunities and fairness for employees and job applicants. Organisations should have policies in place so these outcomes happen and, just as importantly, to prevent discrimination.

Under the Act, it is unlawful to discriminate against people at work because of nine areas termed in the legislation as protected characteristics:

- age
- disability
- gender reassignment
- marriage and civil partnership
- pregnancy and maternity
- race
- religion or belief
- sex
- sexual orientation.

Types of discrimination

Under the Equality Act, there are four main types of discrimination:

- Direct discrimination
- Indirect discrimination

- Harassment
- Victimisation

***Discrimination claims can be made because of a single characteristic e.g. because one is a female, or because of the intersectionality of characteristics e.g. because one is a female Muslim.*

Direct discrimination: when someone is treated less favourably than another person because of a protected characteristic they have or are thought to have (perceptive discrimination) or because they associate with someone who has that characteristic (associative discrimination).

Indirect discrimination: a rule, policy or practice which is applied more widely but has a disproportionately adverse effect on particular groups of people and furthermore this rule policy or practice cannot be objectively justified.

Harassment: unwanted conduct related to a relevant protected characteristic, which has the purpose or effect of violating an individual's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for that individual, relevant protected characteristics are limited to race, sex, disability, religion or belief, sexual orientation, age, and gender reassignment.

Discrimination arising from disability: This means unfavourable treatment because of something arising in consequence of a person's disability

Victimisation: treating a person badly because they have made, or people think they have made, a complaint about discrimination or have given evidence in a discrimination case.

Very broadly, the prohibition against victimisation protects workers from being punished or treated prejudicially because they have raised, or have assisted someone else in raising, a complaint of discrimination, or because the employer suspects they have done or may do so.

The primary purpose of the victimisation protections is to ensure that workers asserting, or intending to assert, their rights to equality under the Act can do so without fear of retribution. However, in practice victimisation can be difficult to prove and the protections are not always effective.

FAQs:

How do I know I have been discriminated against?

What are the first steps I shall take to get fair treatment at work?

Can the law protect me even though I am an immigrant?

What are my rights under equality?

Can my boss terminate my contract because I got an accident?

Steps to undertake if one has been discriminated against.

- an employee raises the matter quietly with a manager
- an employee raises the matter through other contacts - for example, the HR department, trade union representatives or 'fair treatment'
- contacts such as a manager or employee representative with the role of helping to champion equality
- an employee raises a complaint as part of the organisation's grievance process
- a member of staff or line manager observes behaviour that concerns them
- the organisation's equality monitoring process highlights a concern
- such as a company policy unintentionally discriminating against staff with a particular protected characteristic
- an individual from outside the organisation raises the matter with the employer or a manager.

Know Your Rights

If you're experiencing workplace discrimination or retaliation for opposing it, you don't have to suffer in silence. There laws that protect your rights.

What is Workplace Discrimination and Harassment?

Various common law and Human Rights laws protect employees who have been discriminated against on the basis of a number of characteristics. These include sex/gender, age, race, colour, national origin, disability, pregnancy, care giving

responsibilities, sexual orientation, and political affiliation. Not every workplace hardship rises to the legal definition of discrimination, but these laws do cover a wide variety of actions that an employer might take for unlawful reasons, including failure to hire, failure to promote, failure to protect from ongoing and known harassment by co-workers or supervisors, and termination. The following are some forms of discrimination that are unlawful under UK law and Human Rights law:

Age Discrimination

Age discrimination, also commonly called ageism, is one of the most common forms of unfair treatment at work. The age gap between staff can now be 50 years or more. Features of the protected characteristic of age under the Equality Act include:

- protection against unfair treatment because of someone's actual age, or the age they are thought to be, or the age of someone they are associated with
- protection against harassment because of age, and
- different treatment because of age being allowed in very limited circumstances.
- Common examples of age discrimination at work include:
- Stereotyping people of a certain age
- Making someone redundant because of his or her age
- Harassing or victimising someone at work because of his or her age
- Compulsorily retiring someone because of their age, unless it can be objectively justified
- Requiring a minimum number of years' experience for a job, where this is not necessary

Employers should avoid discrimination on the grounds of age in relation to recruitment, selection for promotion and training, and in pay settlements. An example is a case where ⁱMiriam O'Reilly successfully won an age discrimination claim against the BBC. If you have been replaced by younger colleagues, were paid less because they were younger than their colleagues, you are being discriminated against because of your age.

ⁱ *O'Reilly v BBC* [2011]

Another example,ⁱⁱC, aged 61, responded to VR Ltd's advertisement for electric meter installers. He had over 30 years' relevant experience. Although his application initially received very positive feedback, after he was asked his age, the agency told him that the job was no longer available. It later transpired that jobs were offered to two other applicants who were younger and far less experienced than C. He lodged an employment tribunal claim alleging direct age discrimination. The tribunal held that C had suffered direct discrimination.

Disability Discrimination

It is unlawful for an employer or service provider, such as a shop, transport company or healthcare provider, to treat someone less favourably because of a disability or because of something arising as a result of his or her disability. Employers and service providers also have a duty to make reasonable adjustments to make sure that a disabled person has the same access to everything that is involved in doing and keeping a job or using a service as a non-disabled person.

Under the Act, a person is disabled if they have a physical or mental impairment which has a long-term (usually lasting more than a year) and substantial adverse effect on their ability to carry out normal day-to-day activities. A number of impairments, such as cancer, HIV and multiple sclerosis are automatically considered disabilities and other progressive conditions will be considered a disability as soon as the symptoms of that condition have an effect. What constitutes a disability can be variable and difficult to define.

Employers should remember that:

- a reasonable adjustment is a change or adaptation to the physical or working environment that has the effect of removing or minimising the impact of the individual's impairment in the workplace so they are able to undertake their job duties, and;
- employers are accountable for deciding what (if any) reasonable adjustments will be made. It is good practice for employers to seek advice in coming to this decision.

ⁱⁱ *Chappell v Vital Resources Ltd* ET Case No.1301251/07

The focus is very much on the employee's ability to function on a day-to-day basis rather than on medical diagnosis.

ⁱⁱⁱHouse of Lords, departed from established employment case law to interpret disability-related discrimination restrictively, so as to cover much the same ground as direct disability discrimination. This development was of such magnitude that it required a complete reformulation of the law governing disability-related discrimination when the Equality Act was enacted.

Gender reassignment discrimination

'Gender reassignment' is defined in the Equality Act 2010 as 'reassigning a person's sex by changing physiological or other attributes of sex.' The Equality Act protects employees from discrimination, harassment and victimisation relating to gender reassignment. In the Act, someone who proposes to, starts, or has completed a process to change his or her gender is referred to as a 'transsexual'.

Previously, people reassigning their gender had to be under medical supervision to be covered, but this is no longer the case. For example, a male employee who decides to live as a woman, but does not undergo any medical procedures, must not be harassed if the employee begins to use female toilet facilities. It is discriminatory to treat a transsexual employee less favourably for being absent from work because they propose to undergo, are undergoing or have undergone gender reassignment. An employer must not treat them any differently than it would if they were absent because they were ill or injured. In law, cross-dressers are not regarded as transsexual people as they do not intend to live permanently in the gender opposite to their sex at birth.

While they are not specifically protected under the Act as cross-dressers, if they are harassed because they are perceived to be transsexual or to have a particular sexual orientation, they may be in a position to claim discrimination under the

ⁱⁱⁱ The House of Lords in *Mayor and Burgesses of the London Borough of Lewisham v Malcolm* 2008 IRLR 700

relevant protected characteristics. As a matter of good practice, employers and employees should not try to make a distinction whether a colleague is a cross-dresser or transsexual. An employer should make it clear to all staff that it agrees that a transsexual employee, once living and working in their new gender, can then use the toilet facilities for that gender.

Statutory protection from discrimination against transsexuals was first introduced in the UK in response to the decision of the European Court of Justice decision^{iv}. There, the claimant — a male-to-female transsexual — was dismissed by her employer shortly before undergoing the final stages of gender reassignment surgery that would have given her the physical attributes of a woman. She complained of sex discrimination but an employment tribunal held that she had no redress under domestic law. It found that the reason P lost her job was the fact that she proposed to undergo gender reassignment but that the Sex Discrimination Act 1975 (SDA) at that point protected only those who were treated differently because they belonged to one or other of the sexes: it did not extend to those who changed from one sex to the other, or wished to do so.

It is discriminatory to treat an employee, who is absent from work to undergo gender reassignment, worse than someone who is absent from work for another reason - for example, because they are ill, injured, recuperating, or having counselling or medical appointments.

Marriage and civil partnership discrimination

The Equality Act protects employees from direct discrimination (although not the forms by association or by perception), indirect discrimination and victimisation because of marriage or civil partnership. For example, an employee must not be ignored for promotion because they are in a civil partnership. However, single people and couples in relationships which are not legally recognised are not protected. Civil partnerships have the same legal protection against discrimination as marriage.

^{iv} P v S and anor 1996 ICR 795, ECJ

Same-sex marriages became legally recognised in England and Wales on 29/03/2014 and in Scotland on 16/12/2014. Employers should also ensure that employees in same-sex marriages or civil partnerships are not subjected to behaviour that could amount to harassment because of sexual orientation.

For example, ^vP had resigned as a priest when he realised he was gay but had since returned to the ministry and worked as a community chaplain. He had lived with his male partner since 2008; their relationship was well known within the Church and had caused P no difficulties. In April 2014, P and his partner got married. When the bishop subsequently refused to grant him an extra-parochial ministry licence, which he needed in order to be able to take up a new post of chaplaincy and bereavement manager at Sherwood Forest Hospitals NHS Trust, P claimed that he had been subjected to direct sexual orientation discrimination contrary to Ss.12, 13 and 53 Equality Act. The Court of Appeal upheld an employment tribunal's decision that the reason for the bishop's refusal to grant the licence was that P had recently entered into a same-sex marriage, which was considered to be contrary to the teachings and law of the Church of England. However, P's claim ultimately failed, as the Court also agreed with the tribunal's finding that the licence was a qualification for employment for the purposes of an organised religion within para 2 of Schedule 9 Equality Act, and that the bishop's refusal to grant the licence was in order to comply with the present doctrine of the Church on the issue of same-sex marriage.

In ^{vi}another example, a married woman with four young children was dismissed on the first day of her employment as a waitress when the owner of the restaurant discovered that she had children. The reason for this treatment was that the employer believed that women who had care of young children were unreliable when it came to evening work. The claimant claimed both direct sex discrimination and indirect marital discrimination. In respect of direct sex discrimination, it ruled that, contrary to the tribunal's finding, there was absolutely no reliable evidence that the employer's policy was not to employ men with small children. This meant that the policy in effect discriminated only against women with small children, thus

^v Pemberton v Inwood 2018 ICR 1291

^{vi} Hurley v Mustoe 1981 ICR 490, EAT

demonstrating that the claimant had been treated less favourably than a man would have been on the ground of sex.

Pregnancy and maternity discrimination

It is against the law for an employer to treat a woman unfavourably because she is pregnant, has pregnancy-related sickness, or is on maternity leave, or has taken maternity leave.

Common examples of discrimination include:

- Not offering the same training or promotion opportunities to a woman because she is pregnant or on maternity leave
- Treating a woman unfavourably because she has pregnancy-related sickness
- Dismissing a woman on maternity leave shortly before she is due to return to work (or after she returns) and keeping the person covering her maternity leave on instead
- Making a woman redundant because she is pregnant, or for reasons related to her maternity leave

These laws protect you in the workplace from: less favourable treatment, fewer workplace opportunities, termination and refusal to hire. Similarly, these laws protect you if your employer denies your maternity leave or refuses to hire you because of your pregnancy.

The key difference between the special protection from pregnancy and maternity discrimination afforded by S.18 and the general protection from direct discrimination under S.13 Equality Act is that S.18 does not require a complainant to compare the way she has been treated with the way a male comparator has been or would have been treated. In contrast, S.13 simply requires the complainant to show she has been treated 'unfavourably' — no question of comparison arises. This recognises the fact — as confirmed by the case law emanating from the European Court of Justice — that pregnancy is a condition unique to women and it therefore makes no sense for a claimant to be required to compare her treatment with the treatment that would have been accorded to a man in similar circumstances.

Race Discrimination

The Equality Act protects employees from discrimination, harassment and victimisation because of the protected characteristic of Race, which may include different elements that often merge:

- race – an umbrella term for the other four aspects.
- colour – like ‘race’ it tends to overlap, particularly with the concepts of
- ‘ethnic origin’ and ‘national origin’. Examples include black and white.
- ethnic origin – may include racial, religious and cultural factors which give a group of people a distinct social identity with a long and shared history. Examples include Sikhs, Jews, Romany Gypsies and Irish Travellers.
- national origin – birthplace, the geographical area and its history can be key factors. Examples include Welsh and English.
- nationality – usually the recognised state of which the employee is a citizen. In other words, what it says in their passport if they have one. For example, British citizen.

For example, it would be unlawful for an employee to make racial slurs against Eastern European colleagues. Additionally, a racial group can be made up of two or more of these aspects, such as black Britons. Welsh, Scottish, Northern Irish/Irish and English are all recognised under this protected characteristic, as is British. The laws prohibit an employer from discriminating against an employee based on race. These laws protect employees from being treated less favourably, receiving fewer job or promotional opportunities, termination and more—including allowing an employee to be subjected to severe or pervasive harassment—based on race.

The decision of the employment tribunal in one case^{vii} appears to accord with the approach to defining a ‘racial group’ adopted in *Rogers and Orphanos*. There, the tribunal found that M, who was black and of African origin, had been subjected to racial harassment by a colleague, B. During a dispute about shift rotas, B had told M not to ‘get a face on’, a common regional colloquialism. When M questioned this, B responded in a belittling tone that it was ‘a Yorkshire thing’. In the tribunal’s view, it was M’s ‘foreignness or otherness’ that gave rise to her possible lack of

^{vii} *Mandindo v Sheffield Health and Social Care NHS Foundation Trust ET Case No.1800467/15*

understanding. Accordingly, B's treatment of her amounted to harassment related to her race.

Religion or belief Discrimination

The Equality Act protects employees from discrimination, harassment and victimisation because of religion or belief. For example, a manager should ensure that religiously offensive graffiti in a staff toilet is removed, and that the matter is thoroughly investigated and handled. The law also protects employees or job applicants if they do not follow a certain religion or belief, or have no religion or belief at all. In the Act, religion means any religion with a clear structure and belief system. Belief means any religious or philosophical belief. Denominations or sects within a religion can be considered a protected religion or religious belief. A belief must satisfy various criteria, including that it is a weighty and substantial aspect of human life and behaviour, worthy of respect in a democratic society and does not conflict with the fundamental rights of others.

The Equality Act prohibits employers from discriminating against employees on the basis of their religion. This discrimination may come in the form of adverse employment actions, but may also include harassment based on an employee's religion. Employers are also required to provide reasonable accommodations for their employees' religious practices and beliefs unless the employer can demonstrate that such an accommodation would cause them an "undue hardship."

Features of the protected characteristic of religion or belief include:

- employees are protected against discrimination because they have a religious faith or a philosophical belief, as well as because they don't
- no one religion or branch of a religion overrides another - so, for example, an employee is protected against discrimination by someone of another religion, or of the same religion or of a different branch or practice of their religion

- a philosophical belief must meet certain conditions including being a weighty and substantial aspect of human life, worthy of respect in a democratic society and not conflicting with the fundamental rights of others
- all protected beliefs are equal - whether religious or philosophical.

Examples of religion and belief discrimination at work include:

- a company favouring an employee of a particular religion
- a worker not being allowed to pray without justification
- an individual being forced to work in an environment where jokes about a belief are made

It is also illegal for service providers such as healthcare providers, social services and retailers including banks, travel agents and travel companies to discriminate on the grounds of religion or belief.

Three sources of official guidance are available that serve to assist understanding of the scope of the protection against discrimination on the ground of religion or belief in an employment context.

These are:

- the Equality and Human Rights Commission's (EHRC) Code of Practice on Employment ('the EHRC Employment Code')
- EHRC Guide, 'Religion or belief: a guide to the law' ('the EHRC Guide'), and
- Acas Guide, 'Religion or belief and the workplace' ('the Acas Guide').

Sex Discrimination

Sex discrimination can also occur where a woman is disadvantaged because of an unjustified or unreasonable provision, criterion or practice, which applies to men and women, but particularly disadvantages women, compared to men.

The Equality Act protects and applies equally to people who are discriminated against because they are:

- male or female

- an employee associated with someone who is male or female – for example, a colleague, friend or family member
- an employee who is perceived – correctly or incorrectly – to be male or female
- subjected to comments and behaviour regarding sex which they find offensive.

For example, requiring full-time or long hours will disadvantage more women than men, as it is still mainly women who take primary responsibility for childcare so cannot work full-time or long hours. The key question then is whether the job can be done on the requested hours and this is for the employer to show. These laws prohibit discrimination based on sex with respect to all terms and conditions of their employment, including but not limited to: hiring, compensation, promotion, treatment on the job, termination. They also prevent employers from making employment decisions based on stereotypes or assumptions about the abilities, traits, or performance capability of individual employees based on gender.

Employers should ensure they have policies in place to prevent discrimination in:

- recruitment and selection
- determining pay, terms and conditions
- training and development
- selection for promotion
- dismissal
- selection for redundancy.

In very limited circumstances, there are some jobs which can require that the job-holder is a man or a woman. This is known as an 'occupational requirement'. One example is where the job holder is likely to work in circumstances where members of one sex are in a state of undress and might reasonably object to the presence of a member of the opposite sex, such as in a bra-fitting service.

Following the UK 'Brexit' referendum in June 2016, there is much uncertainty around the UK's future relationship with the EU and, in particular, the future of UK legislation that is based on EU law. However, the prohibition on sex discrimination and harassment is one of the areas that is unlikely to be significantly impacted by the UK's withdrawal, given the long-standing protection provided under domestic law.

Sexual Orientation Discrimination

The Equality Act protects employees from discrimination, harassment and victimisation because of sexual orientation. It applies equally to bisexual, gay, heterosexual and lesbian orientations. For example, an employer must ensure that an employee who is perceived to be bisexual (whether they are or are not is irrelevant) is not bullied by colleagues.

The Act defines Sexual orientation as:

- orientation towards people of the same sex (lesbians and gay men)
- orientation towards people of the opposite sex (heterosexual)
- orientation towards people of the same sex and the opposite sex (bisexual).

Examples of sexual orientation discrimination include:

- Stereotyping, i.e. making assumptions about how gay people behave, for example not employing a gay man at a child care centre because of an assumption that the safety of children will be compromised;
- Appointing or promoting a person because of their sexual orientation whether it be because of a conscious or unconscious preference or prejudice.

Under domestic UK law^{viii}, where the House of Lords ruled that the Sex Discrimination Act 1976 (now subsumed into the Equality Act) did not protect individuals against discrimination on the ground of their sexual orientation alone. A homosexual man was forced to resign from the army and a female school teacher was subjected to verbal abuse by pupils because she was a lesbian. In both cases, the House of Lords determined that, the discrimination the pair faced was not because of their gender, but that if another homosexual person of the opposite sex was in their position, they would have been treated the same way.

^{viii} (1) Macdonald v Ministry of Defence (2) Pearce v Governing Body of Mayfield School 2003 ICR 937, HL

SOURCES OF INFORMATION

Legislation

Equality Act 2010

Sex Discrimination Act 1975

Sex Discrimination Act 1976

Other sources

ACAS website

Employment Case Law

Employment Law Handbook

Employment Tribunal

Equality and Human Rights Commission

UK Government website