

Technical factsheet

Unlawful discrimination

This factsheet is part of a suite of employment factsheets and a pro forma contract and statement of terms and conditions that are updated regularly. These are:

- The contract of employment
- The standard statement of terms and conditions
- Working time
- Age discrimination
- Dealing with sickness
- Managing performance
- Disciplinary and dismissal procedures
- Unlawful discrimination
- Redundancy
- Settlement offers
- Family-friendly rights
- Employment status: workers

Please note: this factsheet does not cover age discrimination, which is the subject of a separate factsheet.

The law recognises the right of an individual worker to be treated equally with others regardless of certain personal characteristics that should be irrelevant in decision-making. These are known as 'protected characteristics', and include such matters as sex and race; they are detailed further below.

The word 'discrimination' simply means to decide between one thing and another. As a matter of course, we will often have to 'discriminate' or make choices at work. This area of law is about trying to prevent employers making choices that are detrimental to someone at work for reasons that are unlawful. The fact that an employer decides to employ one candidate rather than another, or decides to promote one member of staff rather than

another, is a form of discrimination, and here the employer makes a decision that is favourable to one person and unfavourable to another. Such decisions are legitimate unless made on an **unlawful** basis, and it will be important for employers to be able to justify them in order to defend an action for unlawful discrimination.

Unlawful discrimination was a feature of our law before it was affected by our membership of the European Union and it is thought unlikely that there will be a great deal of change as a result of Brexit. There are some small reforms that many people believe may be introduced and this is indicated below at the relevant point.

Why do we have a law about equality of opportunity?

- It has an important role in protecting the dignity of the individual worker.
- It tries to correct the disadvantages suffered by certain groups.
- It tries to overcome the failure of the market by bringing down barriers against certain excluded groups.

General principles

Anti-discrimination legislation has a number of features that makes it more stringent and wider than standard employment protection:

- There is no qualifying period of employment required before the worker can take advantage of the protection; it operates from recruitment onwards.
- All forms of discrimination allow for unlimited damages and, in addition, the legal costs involved in defending these complicated claims tend to be high.
- There is a reversed burden of proof; this means that, once the applicant shows that there is a genuine question mark over the decision, and prima facie evidence of unlawful discrimination is established, the employer has to show that, in taking the decision or action in question, there was **not** unlawful discrimination. Proving a negative is always a challenge and will require decisions to be carefully documented and justified.
- A discrimination action is often interesting enough to the general public to generate unwelcome publicity.
- The law applies to all persons who work for the organisation, whether employees, workers or contractors who provide their work personally and to ex-employees (for example, where a failure to give a reference is claimed to be victimisation), and also

to job applicants.

The Equality Act 2010 places all anti-discrimination provisions under a single consolidated statute. The Act also reformed the law in a number of areas and reference is made to this in the relevant sections. The Act can be viewed at bit.ly/ea-2010. Further details on understanding the matters laid out below can be found at bit.ly/ehrc-def.

‘Protected characteristics’

Just because a decision seems unfair does not necessarily mean that it is unlawful. In order to be so, any unfavourable treatment needs to be ‘because of’ certain protected characteristics. Unfavourable treatment will be unlawful if it is because of the following characteristics:

- sex or married status (including pregnancy and childbirth)
- race, colour, nationality or ethnic or national origin
- disability
- gender reassignment
- sexual orientation
- religion
- age.

There is also a separate provision that prevents discrimination against part-time workers and those on fixed-term contracts. Part-timers’ treatment and terms and conditions should be equalised with full-timers, and the same applies to fixed-term employees (other than the fact that their contract is set to run for a specific period, rather than being permanent). Employers cannot continue to renew fixed-term contracts indefinitely. Once a fixed-term employee has been on contract(s) that have run continuously for four years, the employer must make that employee permanent.

‘Caste’ had been included as a protected characteristic in recent legislation, but the UK government recently announced that it would not be enacting this and would instead rely on case law, which has already found that discrimination because of caste is a form of race discrimination.

The caste system is practised by some people of South Asian origin and is a hereditary class system based on the granting of fixed rights depending on birth.

What acts are discriminatory?

In all cases, the legislation provides for four main kinds of discrimination and a fifth more restricted type.

1. **Direct discrimination:** adverse treatment specifically 'because of', ie causally related to, one of the protected characteristics – for example, the person's sex (including pregnancy), race, colour, nationality or ethnic or national origin, disability, gender reassignment or sexual orientation.
2. **Indirect discrimination:** where the employer uses a provision, criterion or practice that has an adverse impact on one or more of these protected groups and which cannot be objectively justified. For example, a required level of English to qualify for a job might discriminate against people for whom English is a second language; they may have learned the language late and not have such a high degree of proficiency. A minimum height requirement will tend to discriminate against women, a stringent health check will discriminate against those with a disability, and some dress codes may discriminate against certain religions. The question in all cases will be: can that requirement or criterion be justified in the context of the genuine requirements of the job?
3. **Discrimination based on association or perception:** only direct discrimination and harassment claims can be brought on this basis, which was included in the Equality Act 2010.
 - Where unfavourable treatment of the worker is not based on their particular protected characteristic – for example, disability or age or race – but is because of their **association** with another person who does have those particular characteristics, that treatment will be unlawful. An example might be a worker who is harassed by the employer because of the time they are spending away from work caring for an elderly relative or a disabled child. This will be a form of direct discrimination because of the worker's association with someone who is disabled.
 - The perception discrimination provisions make it unlawful to treat someone unfavourably because it **is perceived** that they are, for example, gay or

Muslim, even though, in fact, they are not; the unfavourable treatment takes place 'as if' they were within that protected group. An example might be that a worker is subjected to homophobic abuse on the basis that they are gay when in fact they are straight, or an application from a prospective employee is rejected because their name makes them 'sound' like a person of African or Asian descent, when they are not.

- Do bear in mind that, where a worker is 'associated' with someone who is disabled – for example, is caring for a disabled child or spouse – there is no requirement for the employer to make reasonable adjustments in relation to that worker, in order to accommodate the fact that they are caring for a disabled person, although many organisations would choose to make such adjustments. Such a person must never be subject to either harassment or direct discrimination, which means that any action taken against such a person in relation to absence from work must be consistent with the treatment of any other employee with the same level of absence.

4. **Victimisation:** less favourable treatment meted out to any person related in some way to the use of this legislation, or to supporting someone who sought to use it – for example, because a person has brought unlawful discrimination proceedings, or assisted another person to do so.
5. **Harassment:** unwanted conduct violating dignity of men and women in the workplace and causing a hostile and intimidating atmosphere for them, and which takes place because of a protected characteristic. The key is that the actions or comments are viewed as demeaning and unacceptable to the recipient, and it is reasonable to expect them to have that effect.

It will be essential to show a **good paper trail** for all decisions that have a potential unlawful discrimination element, and employers will have to be ready to provide a good explanation for such decisions.

How does this apply in employment?

An employer must not unlawfully discriminate against someone:

- in the arrangements they make for the purpose of determining who should be offered that employment

- in the terms on which they offer the person that employment
- by refusing or deliberately omitting to offer that employment
- in the way they afford access to that person to opportunities for promotion, transfer or training, or to any other benefits, facilities or services, or by refusing or deliberately omitting to afford access to them
- by dismissing them, or subjecting them to any other detriment.

Positive action

For many years it has been lawful for employers to take 'positive action' to reduce the effect of discrimination on the make up of the workforce, where an employer has a particularly low proportion of a particular group. In practice this is most likely to be in relation to one sex, age group or a racial group, either:

- in one department or part of the business compared with the rest of the organisation, or
- in the business, compared with the proportion of that group in the wider community.

The employer is entitled to attempt to redress that balance by:

- placing job advertisements in particular parts of the press/online
- using employment agencies where such groups may be concentrated
- aiming recruitment or training schemes at school leavers from particular groups
- encouraging these employees to apply for promotion or training opportunities
- providing special training for promotion or skills to this group.

These provisions are aimed at encouraging participation and upskilling members of unrepresented groups. Ultimately, however, decision-making around recruitment, promotion or training must be fair and not discriminate unlawfully.

Positive discrimination

The Equality Act introduced a limited ability for employers to discriminate positively. This is specifically in the area of recruitment and promotion. The employer is entitled to take a protected characteristic into account when deciding whom to recruit or promote where people with this characteristic are at a disadvantage or are underrepresented in its workforce. This is quite limited, as it applies only where the candidates are otherwise

equally qualified, and it is not lawful to have some kind of blanket rule of treating candidates with a particular characteristic more favourably than others. It tends only to be useful where particular types of standardised posts are being offered, eg police constables, and all candidates are broadly equally qualified for the role. It is suggested by commentators that this provision may be removed from our law following Brexit.

There are some older provisions, however, which have always constituted a type of lawful positive discrimination. The protection of pregnant women gives them particular status within the workplace; they have a right to paid leave, to return to their original job following maternity leave and a right to first choice of any suitable alternative on redundancy. Disabled people also have additional protection in that the employer is required to make reasonable adjustments to the job or to the equipment or premises to 'level the playing field' with their able-bodied colleagues, and disabled workers also have a right to be considered for redeployment ahead of others in redundancy situations, although behind women on maternity leave.

Harassment

It is unlawful to harass a worker at work because of any of the protected characteristics. This means that the employer has an obligation to take all reasonable steps to ensure that such harassment does not take place and to support the worker if it does. If this is not done, the employer may be vicariously liable for the harassment.

The potential damages can be high; even in an isolated example of severe harassment, the employer will have to demonstrate that it has a well-enforced and well-understood harassment policy and that it takes such matters very seriously. This potential vicarious liability of an employer for acts of harassment by an employee towards a fellow employee usually extends to work-related social activities but not purely private social engagements.

The approach to the definition of sexual harassment has changed, which has the effect of simplifying and widening it. The general harassment provisions apply to age, disability, gender reassignment, race, religion or belief, sex and sexual orientation. Obviously, it is unlawful for A to harass B by engaging in conduct 'related to' one of these protected characteristics where the conduct has the purpose or effect of violating B's dignity, or creating an intimidating, hostile, degrading, humiliating or offensive environment for B.

This would cover a situation where B was being harassed because **he** was gay, but it also covers any situation where the conduct is 'related' to that characteristic. This means that the law also covers a situation where offensive remarks were made to C about, for example, B's disability or sexual orientation and C is upset by them. Indeed, it could also cover general racist or sexist comments made by A to B in the hearing of C. C could make a claim of harassment based on upset they are suffering, even though the conduct or remarks are not aimed at them.

Third-party harassment

A worker may suffer harassment at the hands of a third party who is not a fellow employee, such as a visitor, customer or contractor. Case law has always suggested that there was a clear duty to try to protect workers from such harassment, and it is widely accepted that there is a general duty of care to do so. Where a worker complains to an employer about their treatment by a third party, the employer should respond accordingly, taking whatever reasonable steps they deem necessary to reduce or eliminate the impact of this harassment. This is always done best in collaboration with the worker. Of course, there can be no liability if the employer was not alerted to the behaviour and was not aware of it.

Genuine occupational requirements

The Equality Act applies a general occupational requirement defence to all protected characteristics. This means that if a person is able to show that, having regard to the nature or context of the work, it is an occupational requirement to have a particular characteristic and that applying that requirement is a proportionate means of achieving a legitimate aim of the employer, then it will be lawful. For example, only female staff may be recruited where the job involves close personal contact with women, and vice versa for men; or the authenticity of a dramatic performance may require an actor of colour. In both cases the recruiter will argue that this characteristic is a genuine occupational requirement and will reject candidates who do not have that characteristic.

There is also provision to deal with organised religions and organisations that have a religious ethos. This is a strict provision and does not allow generalised discrimination by those bodies. They will have to show that the post in question is either for a minister of religion or is one of the small number of lay posts that exist to promote and represent

religion. It certainly would not apply to support posts such as administrators etc, but only to those positions where the religious ethos was fundamental to the work.

THE PROTECTED CHARACTERISTICS IN DETAIL

Sex discrimination

This is the oldest form of unlawful discrimination and it was introduced in the mid-1970s. It renders unlawful any unfavourable treatment because of the person's sex, ie because the person is male or female.

Pregnancy

Pregnancy-related discrimination amounts to direct unlawful sex discrimination. It is also unfair dismissal to dismiss any woman by reason of pregnancy, no matter how long she has worked. It is unlawful to treat a woman less favourably in any other way on the grounds that she is pregnant or that she is exercising or seeking to exercise, or has exercised or sought to exercise, her statutory right to maternity leave. Dismissal of a woman on the grounds of pregnancy or maternity is automatic unfair dismissal from day one of employment; there is no requirement for any continuous service. Therefore, a woman in this position will have both unfair dismissal rights and a claim for sex discrimination.

Returning part time

Any refusal to allow a woman to return part time following maternity leave will have to be justified by the employer. It will be more difficult for larger organisations to justify a refusal than for small ones, as larger employers usually have more scope to reorganise hours or to find an alternative position that can be worked part time. An unjustified refusal will be sex discrimination. The employer has to be able to show that the job simply cannot be done part time and that it has no other similar roles that could be performed in that way that it could offer. It is usually advisable for the employer to be able to produce examples to explain why a job cannot be done part time and this will often revolve around the demands of customers, tight deadlines, unpredictable spikes in work, burden of work in small teams etc, showing how difficult it is to accommodate such a change in that particular role.

Race discrimination

It is unlawful to treat someone unfavourably because of their race, colour, nationality or ethnic or national origin.

Disability discrimination

It is unlawful to discriminate against a person who qualifies as disabled. Every employer has an additional obligation to make reasonable adjustments to 'level the playing field' for disabled workers or job applicants. Where a disability leads to sickness absence, the impact of this is examined in *Technical factsheet: Dealing with sickness*. The definition of disability is restated here:

Who qualifies as disabled?

This definition goes far beyond the traditional perception of disability.

- A disabled person is someone who has 'a physical or mental impairment which has a substantial and long-term adverse effect on his/her ability to carry out normal day-to-day activities'.
- In order for the disability to be seen to be substantial, it must have lasted, or be predicted to last, **at least one year** or the rest of the person's life.
- It covers any normal physically related illness or impairment that has a substantial effect on the person – for example, heart conditions, angina, epilepsy and diabetes type 1 and possibly type 2 in certain circumstances.
- It also covers mental conditions ranging from schizophrenia and bipolar disorder to anxiety disorders; reactive and clinical depression is also regarded as a disability. The employee will be required to produce clear medical evidence of their condition and the impact it has on their day-to-day life, rather than just on their work.
- It can cover disorders that recur, although the person may not suffer any symptoms in between attacks, such as serious asthma and epilepsy.
- Learning difficulties such as dyslexia are now recognised as a disability.
- There are some conditions that are automatically regarded as disabilities, even though the worker may not currently be suffering any or many symptoms; these are HIV/Aids, multiple sclerosis and cancer.

Some conditions are expressly excluded, including alcoholism, voyeurism and kleptomania.

What activities must be affected?

It is not only activities at work that must be affected. In order to satisfy the definition, it is essential that the worker should have substantial difficulties in their everyday life, which may include work but will normally affect their home life also.

When does this legislation apply?

- **Recruitment:** at this stage, an applicant may reveal that they have a disability. There are restrictions on what questions an employer can ask at the recruitment stage. Any further enquiries about the disability, either before or during the interview, should be restricted to those medical conditions that directly affect either the assessment process or the ability to do the job itself. For example, if an employee has a sight problem that is likely to affect any assessment tests they might have to sit during selection, and also their ability to do the job itself, it will be acceptable to further discuss the extent of the problem and the implications for the work prior to or at the interview. If a candidate has a mobility problem but the job is sedentary and there is a straightforward interview for the role, it may not be appropriate to discuss the disability unless and until the candidate is selected for the job. At that point the employer may consider seeking further medical information in order to be able to fulfil its health and safety duties to the employee and deal with other practical issues. The idea is that a disability that is irrelevant to job suitability or to assessment for the job should not be considered as part of the recruitment process.

If, as a result of the interview and further investigations, the employer concludes that, for disability-related reasons, it is not possible for that applicant to perform the role, even if reasonable adjustments have been considered, then it is lawful not to recruit. However, the decision needs to be clearly justified and taken with proper medical information, and it is critical to carefully document each stage of the decision-making process.

There is no positive duty on a job applicant to reveal a disability. Therefore, if they start work for the employer and then the employer becomes aware of it, the employer must consider the situation on its merits. Except in circumstances where safety is clearly compromised (for example, epilepsy in a machine shop), if the employment has been continuing for some time without any problems it will be difficult for the

employer to argue that the disability is a justification for dismissal. The employer will just have to put in any reasonable adjustments that might be necessary and the employment will continue.

- **During employment:** a worker may develop a disability during employment. Once this happens, as above, the employer will need to determine the extent of the disability, with medical reports if necessary, and decide whether reasonable adjustments are required, and otherwise whether the employment can continue.
- **Redundancy:** employers need to be careful in conducting redundancy selection procedures, to ensure that they do not include factors that have an adverse effect on disabled workers in comparison with other staff. For example, absences related to disabilities should not be included in the marking process, and allowance should be made in marking for performance where a disability does have an impact on speed of work. Where a disabled person is made redundant, they should be at the front of the queue for redeployment if alternative work is available.

Gender reassignment

Discrimination on the grounds that someone has been, or will be, in the process of gender reassignment/undergoing a sex change is unlawful. Most of these cases tend to be either about harassment or washroom facilities. The employer must be careful to ensure that a hostile working environment does not grow up around a transsexual and that it permits use of the assigned sex facilities once any operative procedures are complete. On sick leave, treatment of a gender reassignment case will be compared with those who are absent because of sickness or injury, in order to determine whether there has been less favourable treatment.

The **Gender Recognition Act 2004** was passed to give transsexual people legal recognition in their acquired gender. Legal recognition follows the issue of a full gender recognition certificate by a gender recognition panel. The panel has to be satisfied that the applicant:

- has, or has had, gender dysphoria
- has lived in the acquired gender throughout the preceding two years

- intends to continue to live in the acquired gender until death.

On the issue of one of these certificates, the person is entitled to a new birth certificate reflecting the acquired gender, and is able to legally marry someone of the opposite sex. For all purposes they will be legally regarded as being of their acquired gender. Consultation is currently under way to reform this Act and bring it more into line with current thinking on gender, and this closed in mid-October 2018.

Sexual orientation

Discrimination on the grounds of sexual orientation, ie unfavourable treatment on the grounds of homosexuality, lesbianism and bisexuality, is unlawful.

The cases have largely been on the subject of homophobic abuse and the extent to which employers have been responsible for encouraging it or permitting it, or failing to have a policy dealing with it. The main issue for employers to be aware of here is 'banter' of a homophobic nature, which therefore clearly classes as harassment. It is critical that employers take action to tackle any such issue within their workforce and show that they have understood and clearly enforced policies on harassment; otherwise, there may be potential liability to the affected worker.

Religion

It is unlawful to discriminate against workers because of religion or similar belief. The law applies, as do all the discrimination rules, to recruitment, terms and conditions, promotion, transfers, dismissals and training, and therefore both to current, prospective and former workers.

The employer must not discriminate directly by, for example, refusing to recruit or dismissing a person on the grounds of their religion or belief, or applying some rule or procedure to them, such as a dress code, which is indirectly discriminatory unless it can be justified. Workers must not be harassed or victimised because of their religion.

The law covers any religion, religious belief or philosophical belief; it probably does not cover philosophical belief unless it is **similar** to religious belief. (The Acas guidance

suggests that paganism and humanism are covered.) The law has been amended to encompass atheists, and recent cases have indicated that spiritualism, environmentalism and beliefs about animal rights are also potentially covered.

Where a worker makes a request based on some religious observance – for example, prayer room, particular dress, time off to go to mosque, Friday afternoons off, particular holidays or extended holidays – the employer should listen carefully, consider the consequences for the business and grant them if practicable. If it is not possible, then they should explain carefully to the employee why, on good business grounds, their request cannot be granted, and this should always be documented.

The Rehabilitation of Offenders Act 2014

This Act applies to England, Scotland and Wales, and is aimed at helping people who have been convicted of a criminal offence and who have not reoffended since. It has made changes to the law as from 10 March 2014.

Under the new system, rehabilitation periods for community orders and custodial sentences comprise the period of the sentence plus an additional specified period, rather than all rehabilitation periods starting from the date of conviction as before. So, for example, an adult offender sentenced to two-and-a-half years' custody, who would previously have had to declare their criminal conviction for 10 years from the date of conviction, will now have to disclose their conviction for the period of the sentence plus a further four years (giving a total rehabilitation period of 6.5 years). The details of the various time periods can be viewed at bit.ly/ref-reoff.

Once a conviction is 'spent', the convicted person does not have to reveal it or admit its existence in most circumstances. However, there are some exceptions relating to employment and these are listed in the exceptions order to the Act. The two main exceptions relate to working with children or with the elderly or sick people, but admissions to certain professions are also covered, including accountancy. If a person wants to apply for such a position they are required to reveal all convictions, both spent and unspent, and they may be taken into account for the purposes of recruitment. The firm should state clearly on any application for or at recruitment that the position is exempted and full disclosure is required.

CLAIMS OF UNLAWFUL DISCRIMINATION

Tribunal fees

Tribunal fees, which stood at a total of £1,200 per claim for unlawful discrimination, were abolished in July 2017, and there is currently **no charge** for making a claim before a UK employment tribunal.

Pre-claim conciliation

However, pre-claim conciliation is still a requirement. There is **no charge** for this but it requires every potential claimant to be approached by Acas, which will offer to try to settle their claim prior to it being lodged. Only when Acas has contacted both parties, and is satisfied that either or both are not prepared to consider a settlement, will it issue a claim number to allow the claim to proceed. Otherwise, Acas will do its best to reach a settlement before any claim can be lodged; current figures indicate that Acas is dealing with around 1,700 matters per week.

Damages

Where a claim for unlawful discrimination is successful, there is no limit on the potential damages that can be awarded. That said, the figures produced annually by the Ministry of Justice indicate that, unless the figure is skewed by a particularly large claim, the average discrimination award tends to be between £10,000 and £25,000, depending on the type of claim, with age discrimination tending to result in lower awards; the others are quite similar, although disability discrimination awards can be slightly higher. The component parts are as follows:

- financial loss incurred because of the unlawful discrimination
- injury to feelings; this is hurt or distress suffered because of the discrimination
- a personal injury, such as stress or depression, that the employee can demonstrate was caused by the discrimination
- aggravated damages; this is compensation the tribunal can order the employer to pay if it concludes they have behaved in a particularly malicious or insulting way towards the worker. This could be either during the period when the discrimination took place or during the defence of the tribunal claim. Aggravated damages are not available in Scotland but the injury to feelings award can include compensation for

these types of behaviour; this equates to one-half of the award, with a minimum award of £100 and a maximum of £5,000.

- interest on all the above payments.

More details on tribunal procedure and rules can be found at bit.ly/et-rules.

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