Think Ahead ACCA

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 *Technical factsheet: Age discrimination*.

Employment law recognises the right of an individual worker to be treated equally with others regardless of certain personal attributes 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' here means 'unfavourable treatment'. As a matter of course, we

will often have to ‘discriminate’ or make choices at work, which may be detrimental to an employee or worker. 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’, since the employer is making a decision that is favourable to one person and unfavourable to another. A legitimate commercial judgment made on good grounds is, of course, lawful. The law around unlawful discrimination tries to prevent employers making choices that are detrimental to someone at work for reasons that are deemed to amount to unacceptable and unjustifiable prejudice.

The law on unlawful discrimination has been largely unaffected by our exit from the European Union. There are some reforms gradually being introduced and are indicated below at the relevant points.

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 that have been and are being suffered by certain groups.
- It tries to overcome the failure of the market by bringing down barriers against certain commonly excluded or marginalised groups.

General principles

Anti-discrimination legislation has a number of features that make 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 the start of the recruitment process onwards.
- It is expensive; all forms of discrimination allow for unlimited damages and, in addition, the legal costs for employers involved in defending these complicated claims tend to be high.
- There is a reversed burden of proof; the applicant only needs to demonstrate what is known as a ‘prima facie case’. This means that they have to show sufficient evidence to satisfy the court that the decision is suspicious and appears, on the face of it, to be potentially unlawful. Once the applicant does this, the burden shifts to the employer to show that, in taking the decision or action in question, there was no

unlawful discrimination or, where applicable, there was a legitimate justification. Proving a negative is always a challenge and this means that employers will have to document their decisions carefully in order to be able to justify them, and demonstrate that they were not the result of discrimination.

- A discrimination action is often interesting enough to the general public to generate unwelcome publicity for the employer.
- The law applies to all employees, workers (including casual and agency workers) and to contractors who provide their work personally, as well as 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 on the Equality and Human Rights Commission's (EHRC) website.

'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 (including pregnancy and childbirth)
- married status/civil partnership
- race, colour, nationality or ethnic or national origin; this now includes 'caste' as a result of case law, explained below
- disability
- gender reassignment, including transexual, gender-fluid or non-binary persons
- 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.

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. The courts have concluded that discrimination based on this system is unlawful under the provisions on race discrimination.

What acts are discriminatory?

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

- **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, age or sexual orientation.

- **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 stringent health check is likely to discriminate against those with a disability, and some dress codes may discriminate against certain religions.

  One case involved a successful indirect discrimination claim by a Sikh worker against an agency that recruited hotel workers who would not put him on their books as they had a 'no-beards' policy (*Sethi v Elements Personnel Services Ltd 2020*). The tribunal found that the agency had made no attempt to address the issue with their clients and

to explore with them whether the rules could be modified for faith-based reasons, and it could not justify its stance.

The question in all cases will be: can that requirement or criterion be justified in that it is a 'proportionate means of achieving a legitimate aim'? The employer will need to show that it needs to impose this in the context of the genuine requirements of the job and the needs of the business.

In the important case of *Dobson v North Cumbria Integrated Care NHS Trust 2021*, the trust proposed a change to the hours of nurses to require them to work regular weekend shifts. Dobson successfully argued that the employer was potentially guilty of indirect discrimination. It had failed to consider the effect of this on women, who bore the brunt of childcare, and had refused to be flexible for her, as a single mother of three children including two who were disabled. It was now for the trust to show that it was justified in imposing this on its staff and on her. The case is discussed further below.

Sometimes the justification is cost based, and the case of *Heskett v Secretary of State for Justice 2020* shows that the employer will need to demonstrate a wider purpose than pure cost savings. Here, a reduction in pay increments was indirectly discriminatory on grounds of age, but it was justified in the context of the protection of pay overall for probation officers and the future of the service, given the budget cuts it had sustained.

- **Discrimination based on association or perception**:
  - 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.

- It is still safest to assume that only direct discrimination and harassment claims can be brought under this heading, but there has been some suggestion to the contrary in one or two recent cases – for example, *Follows v Nationwide Building Society*.
- 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. However, such a person must never be subject to either harassment or direct discrimination, so if the employer decides to take management action against such a person, it must be consistent with the treatment of any other employee with the same level of absence.

- **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. A good example of this is a refusal of a job reference, which the applicant suspects is because they have previously raised grievances relating to discrimination in the workplace.

- **Harassment**: this is defined as unwanted conduct that has the purpose or effect of violating the dignity of an individual 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. Please see later for more detail on this important area.

The width, seriousness and complexity of such cases means that it will be essential to show a **thorough 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.

Vicarious liability

This is a key principle in discrimination law, since the actions and decisions that are unlawful will often be taken by fellow employees of the complainant, rather than by the employer itself. The Equality Act provides that anything done by an individual in the course of their employment must be treated as also done by the employer, unless the employer can show that it took all reasonable steps to prevent the employee from doing that thing, or from doing anything of that description.

Where a potentially discriminatory act has taken place, it will be important for an employer to show that it had clear, well-understood policies in place that were not in themselves discriminatory, that it dealt promptly and effectively with any complaints and that the workplace is not one where unlawful discrimination is tolerated or condoned. If the employer is able to show clear policies that are robustly applied and well understood by the workforce, a finding of unlawful discrimination against the business is unlikely. It is a particularly important issue in relation to harassment, which is discussed below.

Positive action

For many years it has been lawful for employers to take ‘positive action’ to reduce the effect of discrimination on the makeup 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, for example:

- 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 to all applicants and not discriminate unlawfully.

Positive Action s159 Equality Act 2010

The Equality Act introduced a limited ability for employers to discriminate 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, which is why it is known as the 'tie-breaker rule'. 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.

However, in February 2019 Cheshire Police was found to have unlawfully discriminated against a white male applicant who was not appointed in favour of candidates with protected characteristics (*Furlong v Chief Constable of Cheshire Police 2019*). The force's argument that all those who had passed the entrance tests were 'equal' was not sufficient to allow them to use this exception.

It is suggested by commentators that this provision may be removed from our law

following Brexit, and in practice it appears difficult for an employer to successfully defend positive action under the current provisions.

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. These rights have been extended to the whole period of pregnancy, throughout maternity leave and for a protected period thereafter, and all details relating to this area are included in *Technical factsheet: Redundancy*.

People with disabilities 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. Workers with disabilities also have a right to reasonable adjustments, which means that the employer will in most cases have to at least consider redeploying them ahead of others in redundancy situations, although they will be behind pregnant employees and others in the protected groups (see above), who are specifically protected for reasons relating to maternity and childbirth and family leave.

Harassment

It is unlawful to harass a worker because they possess, or are perceived to possess, any of the protected characteristics, or because they are associated with someone who does. The principle of vicarious liability (see above) means that the employer has an obligation to take reasonable steps to ensure that such harassment does not take place and to support the worker if it does. If they fail to do this, the employer may be vicariously liable for the harassment.

In the case of *Kaur and Rehman v Capita Retail Finance Services Ltd & Woodhouse 2019*, a manager (W) was found to have made unpleasant and discriminatory remarks directed at two team members of Asian origin. Capita carried out an immediate investigation and suspended W, and the complaint of harassment against it was dismissed. The judge said 'Capita did not just have comprehensive policies in place. It communicated them, trained all employees on them and updated that training annually.' It is interesting to note that this case was unusual in that although their case against

Capita failed, the employees were successful in obtaining damages personally against the manager; W was required to pay more than £2,600 to them for injured feelings and for creating a hostile working environment.

In addition, in the case of *Allay (UK) v Gehen*, the employment appeal tribunal held that the employer had not taken reasonable steps to prevent P's harassment of the claimant of which at least three other employees, including two managers, were aware. The tribunal accepted that while the employer could establish that training was delivered to all employees concerned two years earlier, it had nonetheless become 'stale' and 'ineffective'. The employer had not taken reasonable steps to prevent the harassment from occurring. The tribunal indicated that it would have been a reasonable step to give refresher training. In particular, the way in which P had sought to justify the comments as no more than 'banter', and the behaviour of three other employees in failing to report the harassment to HR, clearly indicated that refresher training was necessary.

The potential damages for employers in this area 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.

It is also worth noting that the definition of sexual harassment has been simplified and widened. Obviously, it is unlawful for A to harass B by engaging in conduct 'related to' one of the 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, however 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 within earshot of C. C could make a claim of harassment based on upset that they are suffering, even though the conduct or remarks are not aimed at them. The recent case of *Coffey v Coople 2023* is a good example; a male employee gained damages because of the upset caused by witnessing the women in his office being sexually harassed.

Developments in the law and third-party harassment

From October 2024, the Worker Protection (Amendment of Equality Act 2010) Act 2023 strengthened existing protection for workers against sexual harassment. The law places a new statutory duty on employers to take 'reasonable steps' to prevent sexual harassment. Tribunals have the power to increase compensation by up to 25% if they find an employer has breached this duty. The government is proposing to adjust this duty in due course to require employers to take 'all reasonable steps' (a more stringent test) to prevent harassment of their employees, including harassment by third parties, which will itself be extended to all forms of harassment.

At the time of writing, and despite the fact that it may not strictly be part of the law at the moment, it has always been understood that it is good practice for employers to try to protect workers from third-party 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. It is always better to do this in collaboration with the worker.

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, it is lawful to recruit solely female staff 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. In one case that attracted some publicity (*Kinlay v Bronte Film and Television 2021*), a production company argued that it could not cast a female actor who had appeared in the first series of the TV drama, *Strike*, but who was pregnant by the time of the second series. It argued that her pregnancy would confuse audiences as it was not part of the story, and it was a qualification for the role not to be visibly pregnant. The tribunal was

unconvinced; it was not persuaded that the production company had properly considered how the matter could have been dealt with, either during or post-production, so as to conceal her pregnancy from the audience.

There is also provision to deal with organised religions and organisations that have a religious ethos. This is strict and does not allow generalised discrimination by those bodies. In requiring a certain religious belief as a condition of recruitment, the employer 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 a religion. It certainly would not apply to support posts such as administrators etc, but only to those positions where the religious ethos is 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. (Other gender statuses are covered below.)

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, and the protection is stronger than that provided under the flexible working provisions (covered in *Technical factsheet: Family-friendly rights*). As we note in the factsheet, actions for unlawful discrimination are becoming a real threat for

employers refusing or failing to consider flexible working requests, and in the case of *Dobson v North Cumbria Integrated Care NHS 2021*, mentioned above, the president of the employment appeal tribunal stated that it should now be a matter of judicial notice that the burden of childcare generally falls on women. Therefore any refusal of flexible working (or requirement to be flexible) needs to take this into account; there have already been a number of cases where women with young children have had their requests denied and the tribunals have held that the employer did not demonstrate that the refusal was reasonable. 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 in this way, and this will often revolve around the demands of customers, tight deadlines, unpredictable spikes in work, burden of work in small teams etc, demonstrating 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. Employers will be well advised to look at the make-up of their organisation and consider what barriers exist for people of colour working for them who seek advancement in their careers.

The government is proposing to introduce a Race Equality Act, which will enshrine a right to equal pay for this protected group and also extend protection to so-called ‘dual discrimination’, where a worker is treated unfavourably because, for example, they are both black and female. There is currently no date for this change, but the government launched a call for evidence in relation to reform in this area in April 2025.

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 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.

- Under the Equality Act 2010, 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 covers mental conditions ranging from schizophrenia and bipolar disorder to anxiety disorders; reactive and clinical depression is also regarded as a potential 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, since it will be necessary to satisfy the definition of long-term adverse effect.
- It can cover disorders that recur, although the person may not suffer any symptoms in between attacks, such as serious asthma and epilepsy.
- Neurodiverse conditions such as dyslexia are now recognised as a disability, and autism has been the subject of a number of recent cases.
- 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. It is sensible to avoid detailed questions about disability 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, and might affect their ability to do the job itself, it will be acceptable to further discuss the implications 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 and deal with other practical issues. The idea is that a disability that is irrelevant to job suitability or to assessment for the post 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. It would always be advisable to seek legal advice before taking a decision not to recruit at this stage.

  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 potentially compromised (for example, poorly controlled epilepsy in a machine shop), if the employment has been continuing for some time without any problems it will be difficult to argue that the disability is a justification for dismissal. It will just have to action any reasonable adjustments that might be necessary, and the employment will continue.

Candidates should not be required to complete health questionnaires or undergo medicals until they have been selected for the role.

- **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 possible, and, if not, whether the employment can continue.

- **Dismissal for misconduct:** where an employer is considering dismissing a disabled employee for misconduct, it is important to take into account what impact the disability might have had on the behaviour. In one case, the appeal tribunal held that the employer was guilty of disability discrimination in failing to make adjustments for an employee with Asperger's syndrome who was persistently late. The tribunal felt that the employer could have considered making reasonable adjustments for him. In another case the employer had dismissed an employee who was neurodiverse because of his confrontational and aggressive conduct towards his colleagues. The tribunal decided as a matter of fact that, although he had some problems at work, the behaviour was not the result of his disability, but of his resentment at being told what to do and his bad temper. Great care will need to be taken by employers in this area, and it is certainly one where professional advice and medical information is key.

- **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 has an impact on matters such as speed of work. Where a disabled person is made redundant, the requirement to make reasonable adjustments means that they should be seriously considered for any redeployment that may be available if alternative work is available, subject to the rights of women and others for family leave-related reasons. This is discussed more fully in the redundancy factsheet.

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. To be protected from gender reassignment discrimination, a person does not need to have undergone any specific treatment or surgery to change from their birth sex to their preferred gender. This is because changing physiological or other gender attributes is a personal process rather than a medical one. Despite the most recent Supreme Court decision, dealt with below, this situation remains the same.

A person is protected at any stage in the transition process – from proposing to reassign their gender, to undergoing a process to reassign their gender, or having completed it.

The Equality Act says that a person must not be discriminated against because:

- of their gender reassignment as a transsexual. Some may prefer the description transgender person or trans male or female. A wide range of people are included in the terms ‘trans’ or ‘transgender’ but a person is not protected as transgender unless they propose to change their gender or have done so.
- someone thinks a person is transgender, for example because they occasionally cross-dress or are gender variant (discrimination by perception)
- a person is connected to a transgender person, or someone wrongly thought to be transgender (discrimination by association).
- A person is gender fluid or non-binary. In the decision of *Taylor v JLR*, an employment tribunal confirmed that the law also provided protection for these groups.

It is very likely that an employer would be expected to deal robustly with a situation where a transgender person has made it clear that they wish to be addressed or referred to as ‘they/them’ rather than ‘he’ or ‘she’ but one or more of their colleagues choose to misgender or tease them about this. Also, employers should also be careful to ensure that a transitioning person is not ‘deadnamed’, ie their new name appears in all relevant places either in the physical environment eg where staff names and photos appear, or online eg on websites, payroll etc. For an example of this, see *AB v Royal Borough of Kingston upon Thames*.

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.

When a certificate is issued, the person is entitled to a new birth certificate reflecting the acquired gender. It was previously understood that for all purposes they would be regarded legally as being of the acquired gender; however, the recent decision of the Supreme Court has thrown some confusion into the area. The case was taken in order to establish the position of people who were eg biologically male, but sought to use single-sex facilities reserved to women, on the basis that they had transitioned physically and/or legally.

On 16 April 2025, the Supreme Court ruled that in the Equality Act 2010 (the Act), 'sex' means biological sex. The impact of the decision was explained by the Employment and Human Rights Commission as follows.

Under the Act:

- A 'woman' is a biological woman or girl (a person born female)
- A 'man' is a biological man or boy (a person born male)

If somebody identifies as trans, they do not change sex for the purposes of the Act, even if they have a Gender Recognition Certificate (GRC).

- A trans woman is a biological man
- A trans man is a biological woman

This judgment has implications for many organisations, including:

- workplaces
- services that are open to the public, such as hospitals, shops, restaurants, leisure facilities, refuges and counselling services
- sporting bodies
- schools
- associations (groups or clubs of more than 25 people that have rules of membership)

In **workplaces**, it is compulsory to provide sufficient single-sex toilets, as well as sufficient single-sex changing and washing facilities where these facilities are needed. It is not compulsory for **services** that are open to the public to be provided on a single-sex basis or to have single-sex facilities such as toilets. These can be single-sex if it is a proportionate means of achieving a legitimate aim and they meet other conditions in the Act. However, it could be indirect sex discrimination against women if the only provision is mixed sex.

In workplaces and services that are open to the public:

- Trans women (biological men) should not be permitted to use the women's facilities and trans men (biological women) should not be permitted to use the men's facilities, as this will mean that they are no longer single-sex facilities and must be open to all users of the opposite sex.
- In some circumstances the law also allows trans women (biological men) not to be permitted to use the men's facilities, and trans men (biological woman) not to be permitted to use the women's facilities.
- However, where facilities are available to both men and women, trans people should not be put in a position where there are no facilities for them to use.
- Where possible, mixed-sex toilet, washing or changing facilities in addition to sufficient single-sex facilities should be provided.
- Where toilet, washing or changing facilities are in lockable rooms (not cubicles) that are intended for the use of one person at a time, they can be used by either women or men.

It would therefore appear that where a workplace has lockable rooms, they can be designated as mixed sex and used by male and female, and male and female trans-persons equally. However, where they have toilets that consist of a room with cubicles, these need to be reserved for one sex or the other and cannot be used by people who are of a different biological sex.

For more information on this, please see the EHRC's interim update.

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 the fact that they may be vicariously liable for harassment where they have permitted or condoned 'banter' of a homophobic nature. It is critical that employers take action to tackle any such issue within their workforce and show that they have well 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 philosophical 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. Two cases relating to this are discussed in the section on indirect discrimination above.

The law covers any religion, religious belief or philosophical belief; this is a deeply held 'weighty and substantial aspect of human life and behaviour' that is worthy of respect in a democratic society. (The Acas guidance states 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, with recent cases granting protection to ethical veganism (*Casamitjana v The League Against Cruel Sports 2020*) and gender-critical beliefs (*Maya Forstater v CGD Europe and Others 2021*).

Where a worker makes a request based on some religious observance – for example,

provision of a 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 fully explain to the employee why, on good business grounds, their request cannot be granted. This process this should always be documented.

Rehabilitation of Offenders Act 2014

This 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.

Under this 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 has 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 in a Ministry of Justice press release.

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 and limitation periods

Tribunal fees were abolished in July 2017, and there is currently no charge for making a claim before a UK employment tribunal. This has led to a significant increase in cases being taken year on year. In discrimination cases, claims must be lodged within three months (minus one day) of the act or acts of discrimination about which the worker is

complaining. Where there has been continuing discrimination or a series of acts of discrimination, the date from which the time limit starts to run will differ. It can be difficult to determine the correct time limit if the case involves a series of linked acts or separate distinct acts, and it is always advisable to seek legal advice on this complicated matter.

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, or negotiations do not yield agreement, 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 dealt with 21,000 notifications in the first quarter of 2024. The limitation period of three months is affected where the parties enter conciliation, but the rules are complex and it is best for the parties to be guided by Acas on this.

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. This is covered by the so-called ‘Vento’ guidelines, where awards are grouped according to level of seriousness. The lower band will range from £1,200 to £12,100 for less severe cases. The middle band will span from £12,100 to £36,400, for cases not warranting an upper band award. The upper band extends from £36,400 to £60,700 for the most severe instances.
- 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 that 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 in the Employment Tribunal Rules of Procedure.

Technical factsheet
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