

DOCUMENT NAME:	Discrimination Factsheet
LINKED DOCUMENTS:	This factsheet is part of a suite of factsheets.
HEALTH WARNING/USAGE RESTRICTIONS:	This factsheet sets out the basics/law on discrimination.

Disclaimer

This document has been prepared on the basis of what is required by law at April 2025 what is good practice, and our understanding of common issues. This document is not intended to be a comprehensive guide, may not be suitable for your circumstances and should not be considered a substitute for the advice of a lawyer. You agree you use this document at your own risk in these respects.

Discrimination

Factsheet

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1 Legal terms explained

“Direct discrimination” occurs where someone with a protected characteristic is treated less favourably than someone without that protected characteristic;

It also covers situations where someone is treated less favourably because of their association with a person with a protected characteristic or where the person is thought to have a protected characteristic even if they do not (perception discrimination);

“Indirect discrimination” occurs where an employer operates what often appears to be a neutral provision, criteria or practice but which has a negative impact on certain employees or groups of employees who share one of the protected characteristics as the individual concerned;

“Harassment” occurs where a person engages in unwanted conduct towards another person related to a protected characteristic, which has the purpose or effect of violating their dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment;

“Sexual harassment” means unwanted verbal, non-verbal or physical conduct of a sexual nature that has the purpose or effect of violating a person’s dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment;

“Victimisation” occurs where a worker is subjected to a detriment because s/he does or might do “protected acts” such as bringing discrimination claims, complaining about harassment or being involved in some way with another employee’s discrimination complaint such as giving evidence on their behalf;

“Disability” means a physical or mental impairment that has a substantial and long-term adverse effect on an individual’s ability to carry out normal day-to-day activities. The effect must have lasted for 12 months or more or be likely to last 12 months or more. An effect that is likely to recur is treated as continuing for this purpose;

“Equal pay” is a legal concept that implements the principle that men and women should receive equal pay for equal work; and

“Employment Tribunal” means part of the Ministry of Justice, Employment Tribunals determine the validity of disputed employment cases and award compensation.

2 What is discrimination?

Discrimination laws aim to create a “level playing field” so that people are employed, paid, trained and promoted because of their skills and ability to do the job. The laws relating to discrimination are found in the Equality Act 2010 (‘Equality Act’).

The Equality Act applies to all areas of employment including job adverts and the recruitment process, terms and conditions of work, conduct during employment and social events within a work context. It also applies to dismissals and any work related matters arising after employment has ended such as giving references.

However, the Equality Act is not solely an employment measure. It covers non-employment areas such as discrimination in the provision of goods and services, public procurement, discrimination in private members’ club rules and protection for mothers breastfeeding in public.

The Equality Act applies to England, Wales and Scotland. Northern Ireland has its own, similar provisions. The Equality Act applies to workers who work partly outside Great Britain but it will usually not apply if the work is to be done wholly outside Great Britain, although there are some exceptions.

3 Who is protected?

The Equality Act protects most people including employees, workers, former employees, job applicants, directors and partners being treated unfairly because of the following reasons, known as protected characteristics:

- Sex
- Race
- Disability
- Age
- Religion and belief
- Sexual orientation
- Gender reassignment
- Marriage and civil partnership
- Pregnancy and maternity.

4 Liability for discrimination

If an employer, discriminates against their employees they will be liable for your actions.

Employers can also be held responsible for the wrongful actions of their employees and agents and in limited circumstances, third parties. Claims may also be brought against the actual person responsible for the discrimination such as a manager, fellow employee or agent.

Under the Equality Act, anything done by an employee in the course of their employment is treated as having also been done by the employer regardless of whether the employee's acts were done with the employer's knowledge or approval. This is known as vicarious liability.

There is a defence available to the employer, if they can show that they took all reasonable steps to prevent the employee from doing the discriminatory act in question. This will usually involve putting in place an equal opportunities policy, providing regular training on it and taking a robust approach to any evidence of discrimination in the workplace.

5 Forms of discrimination

There are various types of discrimination and other unlawful conduct set out in the Equality Act that apply to most (and in some cases all) of the protected characteristics: These are:

- Direct discrimination
- Indirect discrimination
- Harassment
- Victimisation
- Instructing, causing, inducing and aiding discrimination.

There are also addition types of discrimination that relate to disability discrimination which are set out in further detail below

5.1 Direct discrimination

The following can amount to direct discrimination:

- An employee is treated less favourably because of the race of someone with whom the employee associates
- A job applicant is treated less favourably because employer perceives that the employee is of a certain race
- Employee is treated less favourably where employer refuses to promote a long-standing employee because they are considered to be too old for the new post even though they may have all of the necessary qualifications and experience.

Direct discrimination cannot be justified direct discrimination. This means that once an employee can show they have been subjected to direct discrimination, employer will not be able to provide an excuse for the discriminatory behaviour if that is deemed to be the reason for the treatment.

The only exception is in the case of age discrimination which can be justified provided employer can show that the discrimination is a proportionate means of achieving a legitimate aim. This means that the employer must have a good reason for their actions and must be able to show that there is no other (less onerous) way of achieving the same result.

This is often called the objective justification test and is more easily explained by using examples:

- A building company has a policy of not employing under 18s on its more hazardous building sites. The aim behind this policy is to protect young people from health and safety risks associated with their lack of experience and their generally less developed physical strength. This aim is supported by accident statistics for younger workers on building sites and is likely to be a legitimate one. Imposing an age threshold of 18 would probably be a proportionate means of achieving the aim if this is supported by the evidence. Had the threshold been set at 25, the proportionality test would not necessarily have been met and would be likely to be regarded as discriminatory
- A haulage company introduces a blanket policy forcing its drivers to stop driving articulated lorries at 55, because statistical evidence suggests an increased risk of heart attacks over this age. The aim of public safety would be a legitimate one that is supported by evidence of risk. However, the company would have to show that its blanket ban was a proportionate means of achieving this objective. This might be difficult, as medical checks for individual drivers could offer a less discriminatory means of achieving the same aim.

5.2 Indirect Discrimination

The following can amount to indirect discrimination:

- A requirement to be less than 5' 8" would discriminate against men who generally are taller than this
- A hairdresser refuses to employ stylists who cover their hair, believing it is important for them to exhibit their flamboyant haircuts. This criterion disadvantages certain religious groups as both Muslim women and Sikh men cover their hair
- If an employer were to advertise a position requiring at least five GCSEs at grades A to C without permitting any equivalent qualifications, this criterion would disadvantage everyone born before 1971, as they are more likely to have taken O level examinations rather than GCSEs. This could therefore amount to age discrimination.

The employer may be able to justify indirect discrimination if they can show that they have a justifiable reason for imposing the condition and that there is not a less discriminatory way to achieve the same objective. This is more easily explained by using the following example:

- A food manufacturer has a rule that beards are forbidden for people working on the factory floor. Unless it can be objectively justified, this rule may amount to indirect religion or belief discrimination against the Sikh and Muslim workers in the factory. If the aim of the rule is to meet food hygiene or health and safety requirements, this would be legitimate
- However, the employer would need to show that the ban on beards is a reasonable means of meeting health and safety requirements. When considering whether the policy is justified, an Employment Tribunal is likely to examine closely the reasons given by the employer as to why they cannot fulfil the same food hygiene or health and safety obligations by less discriminatory means, such as by wearing beard guards.

6 Harassment

Harassment need not be targeted at an individual and can consist of a general culture that for instance appears to tolerate the making of, for example, sex related, ageist or racist comments.

Unwanted conduct covers a wide range of behaviour including spoken or written words or abuse, imagery, graffiti, physical gestures, facial expressions, mimicry, jokes, pranks, acts affecting a person's surroundings or other physical behaviour.

The word unwanted means the same as unwelcome or uninvited. It does not mean that a person has to object to the conduct before it is considered to be unwanted. A serious one-off incident can also amount to harassment.

Harassment includes intentional bullying, but will also include less obvious forms of bullying. It may involve nicknames, teasing, name calling, being "sent to Coventry" or other behaviour which the victim finds upsetting.

The following examples can amount to harassment:

- A worker has a son with a severe disfigurement. His work colleagues make offensive remarks to him about his son's disability. This could amount to harassment related to disability
- A worker is subjected to homophobic banter and name calling, even though his colleagues know he is not gay. Because the form of the abuse relates to sexual orientation, this could amount to harassment related to sexual orientation.

The behaviour does not necessarily have to be directed at an individual to constitute harassment.

- For example, during a training session attended by both male and female workers, a male trainer directs a number of remarks of a sexual nature to the group as a whole. A female worker finds the comments offensive and humiliating to her as a woman. She may be able to bring a claim for harassment even though the remarks were not specifically directed at her.

6.1 Sexual harassment/less favourable treatment

Sexual harassment occurs when a worker is treated less favourably by their employer because they submitted to or rejected sexual contact. It also applies to unwanted conduct that is related to the worker's sex or to their gender reassignment. In all cases, the worker has to show that the unwanted behaviour creates a hostile or intimidating working environment.

- For example, a shopkeeper propositions one of his shop assistants. She rejects his advances and then is turned down for a promotion that she believes she would have got if she had accepted her boss's advances. The shop assistant would have a claim for harassment.

6.2 Third party harassment

The position is more complicated when a worker is harassed in the workplace by a third party, such as a customer or visitor.

An employee may be able to argue that their employer's failure to prevent third-party harassment amounted to unwanted conduct.

Employees should notify their employer if they are subjected to any form of discrimination by third parties by raising a formal grievance. The employer should investigate this and, if there are grounds to do so, take appropriate action (e.g. asking the customer not to return to the workplace).

7 Victimization

Victimization occurs where a worker is subjected to a detriment because they have or might do protected acts such as bringing discrimination claims, complaining about harassment or being involved in some way with another employee's discrimination complaint such as giving evidence on their behalf.

Detriment can take many forms. Generally, a detriment is anything which the individual concerned might reasonably consider changed their position for the worse or where it put them at a disadvantage. This could include being rejected for promotion, denied an opportunity to represent the organisation at external events,

being excluded from opportunities to attend training or overlooked in the allocation of discretionary bonuses or performance related awards.

For example, a non-disabled worker gives evidence on behalf of a disabled colleague at an Employment Tribunal hearing where disability discrimination is claimed. If the non-disabled worker is subsequently refused a promotion because of that action, they would have suffered victimisation.

8 Disability

8.1 The meaning of disability

The Equality Act sets out a technical meaning of disability that does not necessarily correspond with common perceptions of disability or with other legal approaches.

Some conditions are expressly deemed to be disabilities. These are:

- Blindness, severe sight impairment, sight impairment and partial sightedness
- Severe disfigurements, with the exception of un-removed tattoos and piercings
- Cancer, HIV infection and multiple sclerosis.

In all other cases a disability must be a physical or mental impairment which has a long-term and substantial adverse effect on a person's ability to carry out normal day to day activities.

8.2 Physical or mental impairment

A physical impairment is any physical difficulty. This can include muscular weaknesses or cramps as well as more obvious conditions such as being unable to walk.

A mental impairment can cover a wide range of problems relating to mental functioning including what are often known as learning disabilities and depression.

8.3 Long term

A condition will be long term if it has lasted at least 12 months or is likely to last at least 12 months or for the rest of the person's life (if shorter).

A condition will still be long term even if in remission and not displaying symptoms, if it is intermittent or likely to recur, such as in the case of conditions such as epilepsy.

8.4 Substantial effect

The condition must be more than minor or trivial. There are three types of case in which a person's ability to carry out normal day-to-day activities is deemed to be substantially adversely affected, even if at the relevant time, the effect may in fact be minor or non-existent. These are where:

- The substantial effect is likely to recur
- The condition is progressive
- Treatment is reducing the effect of the impairment.

8.5 Effect must be on day-to-day activities

The inability to perform normal day-to-day activities focuses on normal activities that are carried out by most people on a fairly regular basis such as walking, driving, shopping, reading, writing, getting washed and dressed rather than specialist activities required for particular jobs. A person's ability to participate fully and effectively in working life on an equal basis with other workers will be also relevant

In the case of mental and emotional illnesses the categories of day-to-day activities most likely to be affected are memory, the ability to concentrate, learn or understand and the perception of physical danger.

There are some conditions that are expressly stated not to be impairments (and therefore are not disabilities). These are:

- Addiction to alcohol, nicotine or any other substance*
- Tendency to set fires, steal or to physically or sexually abuse other people
- Exhibitionism, voyeurism and having tattoos and body piercings.

*Although these conditions cannot be disabilities, it should be borne in mind that the employee may have other physical or mental impairments alongside these conditions which may amount to a disability e.g. serious depression.

8.6 **Discrimination arising from disability**

This is where:

- A worker is treated unfavourably because of something arising in consequence of their disability
- The employer cannot show that the treatment is a proportionate means of achieving a legitimate aim.

For example, if an employee's visual impairment means that he cannot work as quickly as colleagues, and employer dismisses him because of his low output, this dismissal will be discrimination arising from disability unless employer can objectively justify it.

To objectively justify the treatment, employer must produce evidence to support their assertion that it is justified and not rely on generalisations.

If employer genuinely does not know that the employee has a disability, they will not be liable for this type of discrimination. However, they cannot simply ignore the issue. Instead they must do all that can reasonably be expected to find out if a worker has a disability. In some cases, employees may exhibit signs and symptoms of a disability but not think of themselves as a "disabled" person. In other circumstances, an employee may deliberately try to conceal the real reason for their absences. This can be tricky and employers should make reasonable enquiries about the employee's health including speaking with them and seeking a report from an Occupational Health provider or the employee's GP. We recommend employers take appropriate legal advice to ensure you meet your legal obligations fully in this regard.

8.7 **Reasonable adjustments**

Employers have a duty to make reasonable adjustments to premises or working practices to help disabled job applicants and employees. For example:

- Where a provision, criterion or practice puts a disabled person at a substantial disadvantage in comparison with those who are not disabled, employers must take reasonable steps to avoid the disadvantage
- Where a physical feature puts a disabled person at a substantial disadvantage in comparison with those who are not disabled, employers must take reasonable steps to avoid the disadvantage
- Where a disabled person would, but for the provision of an auxiliary aid, be put at a substantial disadvantage in comparison with those who are not disabled, employers must take such steps as it is reasonable to have to take to provide the auxiliary aid.

This could include:

- Making adjustments to premises
- Allocating some of the disabled person's duties to someone else or transferring them to another job
- Altering the disabled person's hours or place of work or allowing time off for treatment
- Providing additional training, supervision or support
- Providing special equipment, or the services of a reader or interpreter
- Modifying testing or assessment methods to avoid disadvantaging the disabled person.

If employer fails to make reasonable adjustments, this constitutes discrimination against the employee.

Employers are only obliged to make reasonable adjustments if doing so will actually assist the employee. They are not obliged to make adjustments where, even if implemented, an employee will still not be able to carry out his or her duties, or where they are prohibitively expensive or time consuming.

Employers must pay for the cost of making an adjustment subject to this being “reasonable” (taking into account the size and resources of your business). They cannot pass this cost onto the employee, although they may ask the employee to apply for funding help through the access to work service.

The employer must have knowledge of the employee’s disability to trigger the duty to make reasonable adjustments. However, they cannot simply ignore the issue and must make enquiries, where for example, it is aware that an employee is suffering from some kind of medical condition.

Obtaining a medical report (Occupational Health or the employee’s own GP) can help employers to determine what adjustments would support the employee and alleviate any disadvantage(s) suffered by them in the workplace. It is sometimes the case that there are no further reasonable adjustments that can be made and which a medical report can also confirm.

8.8 Pre-employment health questions

Generally, employers must not ask about a job applicant’s health including any disability before offering them work. There are some exceptions to this including where it is necessary to establish whether the applicant will be able to carry out a function intrinsic to the work.

Employers can make any job offer conditional upon completion of a satisfactory health questionnaire. If the responses to the questionnaire indicate that the applicant has a disability, employers will be under a duty to consider making reasonable adjustments to enable them to do the job.

9 Pregnancy and maternity

Specific provisions in the Equality Act protect women from discrimination at work because of pregnancy or maternity leave. These apply during the protected period, which starts when a woman becomes pregnant and continues until the end of her maternity leave or until she returns to work if that is earlier. Protection under the Act covers unfavourable treatment during the protected period as well as after it, as long as that treatment is because of the pregnancy or a pregnancy-related illness during the protected period.

It is unlawful discrimination to treat a woman unfavourably because of her pregnancy, a pregnancy related illness or because she is taking or wishes to take maternity leave.

Unfavourable treatment will only be unlawful if employer is aware the woman is pregnant. They must know, believe or suspect that the employee is pregnant. Knowledge can be acquired by formal notification by the employer or through the office “grapevine”.

A pregnant employee does not have to inform her employer of her pregnancy until the 15th week before the expected week of childbirth. However, she will not be able to benefit from protection for pregnancy related discrimination and other rights such as the entitlement to paid time off for antenatal care and risk assessments until her employer is made aware that she is pregnant.

Employers must not demote or dismiss a woman or deny her training or promotion opportunities because she is pregnant or on maternity leave. Nor must they take into account any period of pregnancy related sickness absence when making a decision about her employment.

For example, it will amount to pregnancy and maternity discrimination to treat a woman unfavourably during the protected period for the any of the following reasons:

- The fact that because of her pregnancy, the woman will be temporarily unable to do the job for which she is specifically employed whether permanently or on a fixed term contract
- The pregnant woman is temporarily unable to work because to do so would be a breach of health and safety regulations
- The costs to the business of covering her work

- Any absence due to pregnancy related illness
- Her inability to attend a disciplinary hearing due to morning sickness or other pregnancy related conditions
- Assuming that a woman's work will become less important to her after childbirth and giving her less responsibility or less interesting work as a result.

10 Equal pay

The right to equal pay applies to both men and women. Anyone employed under a contract personally to do work is entitled to enjoy contractual terms that are as favourable as those of someone of the opposite sex in the same employment, if they are employed on like work or work of equal value. These concepts have been interpreted by case law.

The law achieves this by implying an equality clause into a woman's contract of employment, which operates so as to replace her less favourable terms with the equivalent more favourable terms of a man's contract or vice versa.

However, the sex equality clause does not operate if employers show that the difference in contractual terms is due to a material reason that is neither directly nor indirectly sex discriminatory. However, a reason that is, on the face of it, unrelated to the sex of a person but which, in practice, has a disproportionate adverse impact on the opposite sex will need to be objectively justified by employers.

There are also specific provisions aimed at protecting women's pay during pregnancy and maternity leave. A woman who has taken maternity leave must not lose the benefit of any pay rise that she would otherwise have had, in calculating either her maternity pay or her pay on return to work. In addition, she must not lose out on any bonus that she would otherwise have received during her maternity leave, although this is subject to some restrictions. This is referred to as the "maternity equality clause".

11 Exceptions

There are some circumstances where discrimination is lawful. These are limited and are known as occupational requirements and apply to claims concerning recruitment, access to promotion, transfer or training and dismissal. They are summarised below:

Occupational requirement - general exception

This exception is available where, having regard to the nature or context of the work being of a particular sex, race, disability, religion or belief, sexual orientation or age (or not being a transsexual person, married or a civil partner) is an occupational requirement.

For example, employers can restrict applications based on a person's sex if it is crucial to the post:

- Where it is necessary for realism, such as acting or modelling
- Where there are considerations of privacy or decency, such as working in a public changing room or providing intimate personal care
- When a charity is providing a benefit to one sex only, in accordance with its charitable instrument.

There are also exceptions for:

- Organised religion
- Employers with a religious ethos
- Armed forces
- Employment services.

These exceptions are subject to complex rules not covered in this fact sheet.

12 Positive discrimination

In general, positive discrimination that favours someone with a protected characteristic is unlawful. However, there are limited exceptions for what is called positive action, such as allowing members of a disadvantaged group access to facilities for training or encouraging people of a particular protected characteristic to apply for a specific job where their characteristic are under-represented.

In addition, employers can recruit or promote someone from a disadvantaged group but only if the individual is as qualified as other candidates. This is subject to complex rules not covered in this factsheet.

13 Redundancy during maternity and other statutory leave

If a redundancy situation arises during an employee's maternity leave and it is not practicable by reason of redundancy for the employer to continue to employ her under her existing contract, the employee is entitled to be offered a suitable alternative vacancy in preference to other employees at risk of redundancy. The same provisions apply to employees taking adoption leave, additional paternity leave or shared parental leave.

14 Remedies

If an individual has been discriminated against because of any of the protected characteristics they can bring a complaint in an Employment Tribunal. The Tribunal may make a declaration of the employee's rights under the Equality Act, make recommendations as to what actions their employer should take concerning the discrimination and/or award compensation to the employee.

15 Time limit for bringing a claim

Most employment claims can only be brought in the Employment Tribunal which imposes very strict time limits. Discrimination claims have to be issued in the Employment Tribunal within three months of the act complained of. This is known as the "primary limitation date".

However, before a claim can be issued, the employee must engage in a process known as ACAS Early Conciliation. Employees are required to contact ACAS on or before the "primary limitation date" to start Early Conciliation. If they fail to do so, the Employment Tribunal will not be able to consider their claim.

Early Conciliation enables the employee and employer to try and resolve the dispute without the need to bring a claim in the Tribunal. If the parties agree, an ACAS conciliator will act as a "go between" and try and reach agreement. There is no need for the employee to communicate directly with their employer unless they wish to do so.

This process can last for up to twelve weeks. If Early Conciliation fails, the employee will be issued with an Early Conciliation Certificate which the employee needs before he/she can issue a claim in the Employment Tribunal.

Limitation is paused from the day after the employee submits the Early Conciliation Form until the date the employee receives a Certificate. Generally the employee will have a minimum of one calendar month from the date of the Certificate to issue a claim in the Employment Tribunal.

Details about Early Conciliation are available from ACAS: www.acas.org.uk

Calculating the correct time limits for bringing a discrimination claim can be complex and we recommend that specialist advice is obtained.

If a claim is not lodged on time, it is unlikely that the employee will be able to pursue it.

16

Amount of compensation

There is no limit on the maximum award for compensation in discrimination cases. Compensation is calculated so as to put the employee in the financial position they would have been in if they had not been discriminated against. This will include compensation for losses incurred if the employment has been terminated.

Compensation can include a payment to represent the distress and upset caused. This is known as an injury to feelings award. In addition, the employee can receive compensation for psychiatric injury or other injury suffered as a result of the treatment received.

Although there is no cap on the amount of compensation that can be awarded, the tribunal has to follow strict guidelines which means that very few successful claimants receive the substantial sums sometimes reported in the media.

17 Grievances

In most cases, the employee should try and resolve any discrimination by following their employer's grievance procedure.

If the employee has submitted a grievance and employer has not dealt with it properly, a tribunal may increase the compensatory award by up to 25%. Likewise, if an employee has failed to co-operate with the grievance procedure the compensatory award may be reduced by up to 25%.

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