

Sex Discrimination

Is gender on the agenda?

Overview

Laws against sex discrimination have been consolidated into the Equality Act 2010 ("the Act"). The legislation creates four types of discrimination: direct, indirect, harassment and victimisation. Although the definitions of discrimination in the Act are phrased in terms of discrimination against women, men are given the same protection, apart from specific protections relating to pregnancy and childbirth.

The Act also provides protection if you intend to, have gone through or are going through gender reassignment. This applies equally to both men and women. Discrimination because of married status is also prohibited by the Act. This protection only extends to married people or those in civil partnerships who are discriminated against because they are married or due to their civil partnership status; it does not cover single people who are less favourably treated due to their single status.

There are different provisions relating to claims about gender discrimination in relation to pay, allowances, benefits and terms and conditions. For the police this refers to the terms and conditions of service such as those contained in the Police Regulations 2003 or the Police Pensions Regulations 1987 or 2006. You have a longer time limit for making an equal pay claim. You can bring a claim at any time while you are a police officer or within six months less one day after you have left the service. If your claim is about pay or benefits which are specific to a particular role, the time limit might run from when you leave that role. In that case you should get advice as quickly as possible. Equal pay is not covered further in this factsheet.

Equal pay and sex discrimination are very complicated and technical areas of the law, so you should get advice if you think either applies to you.



When is sex discrimination unlawful?

Who is protected?

In the police sphere, the Act applies to recruitment, service and vocational training. It is unlawful to discriminate against someone because of gender, from the initial job application process through to termination of service. The Act extends the definition of "employment" to cover the police.

What is prohibited?

The Act outlaws direct and indirect discrimination, victimisation and harassment. Importantly, the Act also extends in limited circumstances to discrimination after the working relationship has ended..

Discrimination

Direct discrimination

It is unlawful to treat a person less favourably because of sex. In order to succeed in a claim of direct discrimination, you must show:

- That you have been treated less favourably because of sex;
- That you were subject to disadvantage or detriment as a result of that treatment.

There is no need to show motive or intention behind the discriminatory treatment as it is accepted that discriminatory treatment can be unconscious. Further, it does not matter if the discriminator shares the sex of the individual being discriminated against.

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The Act requires that 'like must be compared with like', so the less favourable treatment must be compared with that of someone of the opposite sex, known as a comparator. Your comparator must be a person who in all other respects is in a similar or 'not materially different' position to you. The comparator can be a real person or hypothetical.

Indirect discrimination

This arises where a Force's policies or practices place women (or men) as a group at a disadvantage, without good reason.

The Act provides that a person indirectly discriminates against a woman if:

- A provision, criterion or practice (PCP) is applied or would be applied equally to a man, which
- Puts women at a particular disadvantage when compared with men; and
- Puts you at that disadvantage; and
- Is not a proportionate means of reaching a legitimate aim.

The PCP must have been applied universally, to both men and women. For example, a PCP that all candidates for a position are of a minimum height would be very likely to disadvantage women and would only be permissible if justifiable.

A PCP could include a practice such as, requiring all officers in a unit to work night shifts, or a refusal to grant part-time or flexible working. Something like this could place female officers at a particular disadvantage because statistically more women are likely to have childcare responsibilities. This definition extends to practices which tend to discriminate.

Whether the policy or practice puts you at a disadvantage compared to men will often depend upon the "pool" of people considered. Sometimes this might be a particular unit, other times it will be the whole Force.

If your Force's policies or practices disadvantage women in this way, they will be found to be unlawful unless the Force can show that they are a proportionate means of achieving a legitimate aim. For example, there may be a good reason as to why a Force requires a particular shift pattern in a particular role. Provided the policy does not go any further than it needs to to meet this aim, the discriminatory practices will be justified and will not be unlawful. Many indirect discrimination claims turn on the question of whether the Force's policies or practices are justifiable.

Victimisation

The law protects those who seek to enforce their rights under the Act. It is unlawful to treat a person unfavourably because they have been involved in a complaint of discrimination under the Act. Discrimination by way of victimisation occurs when you are treated unfavourably because you have done, you are about to do, or you are suspected of doing a 'protected act'.

A protected act includes:

- Bringing proceedings against the discriminator or any other person under the Act or the SDA; or
- Giving evidence or information in connection with proceedings against the discriminator or any other person under the Act or the SDA; or
- Doing anything in relation to the discriminator or any other person under or by reference to the Act or the SDA; or
- Making allegations that the discriminator or any other person has committed an act which contravenes the Act or the SDA. This would include raising a grievance of sex discrimination.

So for example, if you have made a complaint about sex discrimination and are later treated unfavourably for doing so, you should be covered by the Act. Victimisation following termination of employment is also unlawful. A protected act must be done in good faith.



Sexual harassment & harassment

Sexual harassment and harassment on the grounds of the victim's sex are forms of sex discrimination. In either form of harassment, whether or not the victim and perpetrator are of the opposite sex is irrelevant.

Sexual Harassment is defined as:

- Unwanted conduct related to your sex or that of another person that has the purpose or effect of violating your dignity or of creating an intimidating, hostile, degrading, humiliating or offensive environment or
- Unwanted verbal, non-verbal or physical conduct of a sexual nature that has the purpose or effect of violating your dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for you or
- On the ground of your rejection of or submission to unwanted conduct of either type, you are treated less favourably than you would have been if you had not rejected or submitted to the conduct or

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- Unwanted conduct on the grounds that you intend to undergo, are undergoing or have undergone gender reassignment, that has the purpose or effect of violating your dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for you.

It is also sexual harassment to treat you unfavourably because of your reaction to this kind of unwanted behaviour. In any of these types of behaviour it is up to you to decide what is acceptable or offensive to you, but behaviour will only amount to harassment if, having regard to all the circumstances, is reasonably considered to be offensive. An essential characteristic of the behaviour is that it is unwanted. If you are offended by comments directed at someone else, you could claim harassment. In considering the effect of the conduct, the tribunal will consider the individual's own subjective experience together with whether it was reasonable for the conduct to have had that particular effect.

The Act also provides protection against harassment on the grounds of gender reassignment as set out above.



Exceptions

Discrimination in employment is generally prohibited. However, in certain circumstances, the Force may have a defence to an act of discrimination that is otherwise unlawful.

The general occupational requirement exception. This is available where, having regard to the nature or context of the work, being of a particular sex is an occupational requirement. The defence will only succeed if the application of the requirement is a proportionate means of achieving a legitimate aim.

There are two positive action provisions:

- The general positive action rule can apply where the Force reasonably thinks that persons with a particular protected characteristic are disadvantaged, have different needs or are disproportionately under-represented. In those circumstances, the Force can take proportionate measures to enable or encourage persons with the relevant characteristic to overcome that disadvantage, to meet their needs, or to enable or encourage their increased participation
- The provision concerning positive action in recruitment and promotion. This applies where a Force reasonably thinks that persons with a particular protected characteristic are disadvantaged or disproportionately under-represented. In those circumstances, the Force can treat a person with the relevant characteristic more favourably than others in recruitment or promotion, as long as the person with the relevant characteristic is "as qualified as" those others.

Otherwise positive action is generally outlawed.



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Burden of proof

It has long been recognised as difficult for those bringing discrimination claims to find evidence to support their case. To combat this, the Act provides that if the claimant establishes clear facts which could enable the Tribunal to conclude that discrimination has occurred, it is then for the respondent to provide evidence for the reason why the claimant was treated in that way. In the absence of an adequate non-gender based explanation from the respondent, the Tribunal must draw an inference of discrimination.

Where a force has failed to comply with relevant statutory Codes of Practice, the Tribunal may also draw inferences from this failure.

Questionnaires

You can serve a questionnaire on the force to obtain useful information relating to your complaint. Acas have prepared guidance on 'asking and responding to questions of discrimination in the workplace' which is available on their website at www.acas.org.uk.

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Time limits

A claim for sex discrimination must be brought in the employment tribunal within 3 months less one day of the treatment you are complaining about. Where a series of acts amounts to a continuing course of conduct by the Force, the claim may be brought within three months less one day from the end of the conduct. In some instances, if a claim is lodged out of time, the employment tribunal has the power to extend the time limits if it is just and equitable to do so. However, this should not be relied on. The strict time limit applies even if you are going through the Force's internal grievance procedure.

Remedies

If the tribunal finds that you have been unlawfully discriminated against, the tribunal may grant whichever of the following remedies it considers just and equitable:

- A declaration on the rights of the parties
- A recommendation that the force take a particular course of action and
- Compensation (plus interest) for loss of past and future earnings (if any), loss of congenial employment, injury to feelings and in some cases injury to health. There is no limit on the amount of compensation that can be awarded, but you can only be compensated for the damage which was directly caused by the Force's discrimination as found by the tribunal.

Mandatory ACAS Early Conciliation

If you are thinking about making an employment tribunal claim, you will first need to notify details of your claim to ACAS, who will then offer early conciliation to try to resolve the dispute. The conciliation period can be up to one month. If the claim does not settle, ACAS will issue a certificate confirming that the mandatory conciliation process has concluded.

There are changes to time periods within which to lodge claims to allow for the period during which a claim is with ACAS. The period within which a claim is with ACAS will not count for calculation of time limits; and if the time limit would usually expire during that period, or within the month after the certificate is issued, then you will have up to one month following receipt of the conciliation certificate in which to lodge a claim.

The process makes the calculation of time limits in employment tribunal cases more complicated. Claimants are advised to be aware of limitation issues and seek legal advice promptly. For further information on the ACAS early conciliation process visit: www.acas.org.uk

Employment Tribunal Fees

You have to pay a fee when you file your claim in the employment tribunal. Fees are payable when you issue your claim and prior to a final hearing. A fee remission scheme is in place- see the employment tribunal website at www.employmenttribunals.service.gov.uk for further details. The booklet on the website "EX160A Court and Tribunal fees – do I have to pay them?" Provides details for claiming a remission of fees.

If you need further assistance, in the first instance please contact your local Joint Branch Board.

W: www.slatergordon.co.uk/policelaw

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