

# Sex discrimination

## In employment and your legal rights



### Overview

Laws against sex discrimination have been in place since 1975, but several extra measures have been added over the years. The main legislative framework is now contained the Equality Act 2010 ('The Act'). The legislative creates four types of discrimination: direct, indirect, harassment and victimisation.

Although the definitions of discrimination in 'The Act' and the Regulations are phrased in terms of discrimination against women, men and given the same protection, apart from specific protection relating to pregnancy and childbirth. For more information see the '**Maternity Rights**' factsheet, part of the Employment Law Series.

Discrimination on grounds 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 or other contractual benefits. For more information, see our '**Equal Pay**' factsheet, part of the Employment Law Series.

### When is discrimination unlawful?

**Who is protected?** - In the employment sphere, 'The Act' applies to recruitment, employment and vocational training. It is unlawful to discriminate against someone because of gender, from

the initial job application process through to dismissal. Under 'The Act', 'employment' is widely defined to include workers, those working under apprenticeships, Crown employees and members of the House of Commons and House of Lords. If you are supplied by your employer to work for another employer (contract workers), or are an office holder (company director and members of some independent public bodies) you will also be protected. 'The Act' extends still further to the police, barristers, partnerships, providers of vocational training, employment agencies and trade organisations, amongst others. There is no opt-out clause for small employers.

**What is prohibited?** - 'The Act' outlaws direct and indirect discrimination, victimisation and harassment. The prohibited behaviour does not have to be directly committed by the employer. In fact, employers may be responsible for the acts of their agents, as well as the acts of their employees.

Importantly, 'The Act' also extends in limited circumstances to discrimination after the working relationship has ended. For instance, if a former employer provides a discriminatory reference, or refuses to provide a reference at

all, because of a person's gender, this could amount to unlawful discrimination.

'The Act' also provides protection if you intend to, have gone through or are going through gender reassignment, or because you are married or in a civil partnership. This applies equally to both men and women.

For more information of Gender Reassignment and your rights see our factsheet '**Gender Recognition**', part of the Employment Law Series.

### 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 the '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 an employer'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 women 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 everybody in an organisation normally working late on a Friday, or refusal to grant part-time working. Something like this could have a detrimental impact on a female member of staff with young children. The definition extends to practices which tend to discriminate.

If an employer's policies or practices disadvantage women in this way, they will be found to be unlawful unless the employer can show that there is a good business reason for the policies, and that they do not

go any further than they need to. Discriminatory practices which can be justified in this way are permitted. Many indirect discrimination claims turn on the question of whether the employer's policies or practices are justifiable.

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### 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
- Giving evidence or information in connection with proceedings against the discriminator or any other person under 'The Act'; or

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***"The legislation creates four types of discrimination: direct, indirect, harassment and victimisation."***

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- Doing anything in relation to the discriminator or any other person under or by reference to 'The Act'; or
- Making allegations that the discriminator or any other person has committed an act which contravenes 'The Act'. 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'. A protected act must be done in good faith.

Victimisation following termination of employment is also unlawful.

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### Sexual harassment and harassment

Sexual harassment and harassment related to the victim's sex are forms of sex discrimination in employment. 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 or 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 a submission to unwanted conduct of either type, you are treated less favourably than you would have been if you have not rejected or submitted to the conduct; or
- 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.

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 the particular effect.

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

This is covered in more detail in our factsheet '**Gender Recognition**' which is part of the Employment Law Series.

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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 an employer has failed to comply with relevant statutory Codes of Practice, the Tribunal may also draw inferences from this failure. For example, an employer may have failed to follow the Codes of Practice in relation to the way in which they have investigated the employee's grievance or recruited an individual to a post.

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### Questionnaires

You can serve a questionnaire to obtain information regarding 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](http://www.acas.org.uk).

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### Time limits and the correct legislation

A claim for sex discrimination must be brought in the Employment Tribunal within three months less

one day of the treatment you are complaining about. Where a series of acts amounts to a continuing course of conduct by your employer, 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.

You will need to follow the ACAS Code of Practice on Discipline and Grievance Procedures (which can be downloaded from the ACAS website). This is aimed at assisting parties to resolve disputes within the workplace. If your claim is successful but the Tribunal considers that you have failed to comply with the Code, your compensation could be reduced by up to 25%. (There are also penalties on the employer if they do not comply with the Code).

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### 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; are 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](http://www.acas.org.uk).

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### 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 employer take a particular course of action;
- Re-engagement or reinstatement if the individual succeeds in an unfair dismissal claim; and
- Compensation (plus interest) for loss or past and future earnings (if any), loss of congenial employment, injury to feeling 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 damages which was directly caused by your employer's discrimination

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