

Equality Act 2010 Code of Practice

Employment Statutory Code of Practice

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Equality Act 2010 Statutory Code of Practice Employment

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**Equality and
Human Rights
Commission**

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The Equality Act 2010 represents the culmination of years of debate about how to improve British equality law. It offers individuals stronger protection against discrimination. It gives employers and businesses greater clarity about their responsibilities. And it sets a new expectation that public services must treat everyone with dignity and respect.

Foreword

When the Act received Royal Assent in April 2010, it was a moment to celebrate. However, getting the legislation onto the statute books was not an end in itself. What matters is that it should lead to real change: more responsible behaviour from companies, more thoughtful planning of public services and, above all, greater confidence that people will be treated fairly as they go about their everyday lives.

The Equality and Human Rights Commission has a key role to play in bringing the Act to life. We have a set of powerful tools to enforce the law. We can, for example, take organisations to court and intervene in individual discrimination cases. But we only want to intervene when things go wrong as a last resort. Our first priority is to provide information, support and encouragement so that organisations can get it right in the first place.

That is why we are publishing guidance that will give individuals, businesses, employers and public authorities the information they need to understand the Act, exercise their rights, and meet their responsibilities.

The guidance comes in two separate forms. The non-statutory guidance, available separately, is designed to be a first port of call for everyone who has an interest in equality. It is intended to be practical and accessible.

This document is a Statutory Code of Practice. This is the authoritative, comprehensive and technical guide to the detail of law. It will be invaluable to lawyers, advocates, human resources personnel, courts and tribunals, everyone who needs to understand the law in depth, or to apply it in practice.

Reflecting the content of the Act itself, this Code replaces several existing codes, reuniting and, where necessary, harmonising their contents. The Code draws on case law and precedent to illustrate where and how different provisions can be brought to bear in real-life situations.

The initial texts that we drafted have been through a rigorous process of consultation. Colleagues in businesses, trade unions, charities, voluntary groups, government departments and other public bodies have all commented. Their contributions have enriched and improved the text immeasurably, and we are grateful for their help.

Clear and authoritative codes are vital to enable any law to fulfil its promise. We hope that this Code will help you use the Equality Act 2010 to the fullest extent possible.



A handwritten signature in black ink, appearing to read 'Trevor Phillips', with a large, stylized flourish above the name.

Trevor Phillips
Chair, Equality and
Human Rights Commission

Chapter 1:

Introduction

Purpose of the Equality Act 2010

1.1

The Equality Act 2010 (the Act) consolidates and replaces most of the previous discrimination legislation for England, Scotland and Wales. The Act covers discrimination because of age, disability, gender reassignment, marriage and civil partnership, pregnancy and maternity, race, religion or belief, sex and sexual orientation. These categories are known in the Act as ‘protected characteristics’.

1.2

An important purpose of the Act is to unify the legislation outlawing discrimination against people with different protected characteristics, where this is appropriate. There are, however, some significant differences and exceptions, which this Code explains.

1.3

As well as consolidating existing law, the Act makes discrimination unlawful in circumstances not covered previously. Discrimination in most areas of activity is now unlawful, subject to certain exceptions. These areas of activity include, for example: employment and other areas of work; education; housing; the provision of services, the exercise of public functions and membership of associations.

1.4

Different areas of activity are covered under different parts of the Act. Part 3 of the Act deals with discrimination in the provision of services and public functions. Part 4 deals with discrimination in the sale, letting, management and occupation of premises, including housing. Part 5 covers employment and other work-related situations. Part 6 covers education including schools, further education, higher education, and general qualifications bodies. Part 7 deals with discrimination by membership associations. An organisation may have duties under more than one area of the Act because, for example, it employs people and provides services to customers.

Scope of the Code

1.5

This Code covers discrimination in employment and work-related activities under Part 5 of the Act. Part 5 is based on the principle that people with the protected characteristics set out in the Act should not be discriminated against in employment, when seeking employment, or when engaged in occupations or activities related to work.

1.6

In Part 5 of the Act, there are some provisions relating to equal pay between men and women. These provisions create an implied sex equality clause in employment contracts, in order to ensure equality in pay and other contractual terms for women and men doing equal work. Equal pay between men and women is covered in the Equal Pay Code published by the Equality and Human Rights Commission ('the Commission').

1.7

Part 5 also contains sections which make discrimination by trade organisations (including trade unions) and vocational qualifications bodies unlawful. Because the duties of qualifications bodies and trade organisations are different to the duties of employers, these will be covered by a separate Code.

1.8

This Code applies to England, Scotland and Wales.

Purpose of the Code

1.9

The main purpose of this Code is to provide a detailed explanation of the Act. This will assist courts and tribunals when interpreting the law and help lawyers, advisers, trade union representatives, human resources departments and others who need to apply the law and understand its technical detail.

1.10

The Commission has also produced practical guidance for workers and employers which assumes no knowledge of the law and which may be more helpful and accessible for people who need an introduction to the Act. It can be obtained from the Commission, or downloaded from the Commission's website.

1.11

The Code, together with the practical guidance produced by the Commission will:

- help employers and others understand their responsibilities and avoid disputes in the workplace;
- help individuals to understand the law and what they can do if they believe they have been discriminated against;
- help lawyers and other advisers to advise their clients;
- give Employment Tribunals and courts clear guidance on good equal opportunities practice in employment; and
- ensure that anyone who is considering bringing legal proceedings under the Act, or attempting to negotiate equality in the workplace, understands the legislation and is aware of good practice in employment.

Status of the Code

1.12

The Commission has prepared and issued this Code on the basis of its powers under the Equality Act 2006. It is a statutory Code. This means it has been approved by the Secretary of State and laid before Parliament.

1.13

The Code does not impose legal obligations. Nor is it an authoritative statement of the law; only the tribunals and the courts can provide such authority. However, the Code can be used in evidence in legal proceedings brought under the Act. Tribunals and courts must take into account any part of the Code that appears to them relevant to any questions arising in proceedings.

1.14

If employers and others who have duties under the Act follow the guidance in the Code, it may help them avoid an adverse decision by a tribunal or court.

Role of the Equality and Human Rights Commission

1.15

The Commission was set up under the Equality Act 2006 to work towards the elimination of unlawful discrimination and promote equality and human rights.

1.16

In relation to equality, the Commission has duties to promote awareness and understanding and encourage good practice, as well as a power to provide advice and guidance on the law. It also has powers to enforce discrimination law in some circumstances.

Human rights

1.17

Public authorities have a duty under the Human Rights Act 1998 (HRA) not to act incompatibly with rights under the European Convention for the Protection of Human Rights and Fundamental Freedoms (the Convention).

1.18

Courts and tribunals have a duty to interpret primary legislation (including the Equality Act 2010) and secondary legislation in a way that is compatible with the Convention rights, unless it is impossible to do so. This duty applies to courts and tribunals whether a public authority is involved in the case or not. So in any employment discrimination claim made under the Act, the court or tribunal must ensure that it interprets the Act compatibly with the Convention rights, where it can.

1.19

In practice, human rights issues in the workplace are likely to arise in relation to forced labour, privacy and data protection, freedom of expression and thought, trade union activity and harassment.

Large and small employers

1.20

While all employers have the same legal duties under the Act, the way that these duties are put into practice may be different. Small employers may have more informal practices, have fewer written policies, and may be more constrained by financial resources. This Code should be read with awareness that large and small employers may carry out their duties in different ways, but that no employer is exempt from these duties because of size.

How to use the Code

1.21

Section 1 of the Code, comprising **Chapters 2 to 15**, gives a detailed explanation of the Act.

Chapter 2 explains the protected characteristics of age, disability, gender reassignment, marriage and civil partnership, pregnancy and maternity, race, religion or belief, sex and sexual orientation.

Chapters 3 to 9 cover different types of conduct that are prohibited under the Act. **Chapter 3** explains direct discrimination. **Chapter 4** deals with indirect discrimination as well as explaining the objective justification test. **Chapter 5** covers discrimination arising from disability and **Chapter 6** sets out the duty to make adjustments for disabled people. **Chapter 7** explains the provisions on harassment. **Chapter 8** deals with pregnancy and maternity discrimination. **Chapter 9** covers the remaining types of unlawful conduct: victimisation; instructing, causing or inducing discrimination; aiding contraventions of the Act; and gender reassignment discrimination (absence from work).

Chapter 10 explains the obligations and liabilities of the employer and the corresponding rights of workers. **Chapter 11** deals with the wider work relationships covered by Part 5 of the Act. **Chapter 12** sets out the legal provisions relating to positive action and how employers adopting positive action measures can ensure that such measures are lawful under the Act.

Chapter 13 explains occupational requirements and other exceptions related to work. **Chapter 14** covers pay and benefits including several specific exceptions to the work provisions of the Act. **Chapter 15** explains how the Act can be enforced by individuals or the Commission and gives an overview of alternatives to litigation.

Section 2, comprising **Chapters 16 to 19**, sets out recommended practice for employers, to help them comply with the Act and to achieve equality of opportunity and outcomes over the whole employment cycle. Public sector employers have specific obligations under the public sector equality duties and will find that this section helps them to meet these obligations.

Chapter 16 discusses how employers can avoid discrimination during the recruitment process. **Chapter 17** explains how discrimination can be avoided during employment and deals with issues such as working hours, accommodating workers' needs, training and development and disciplinary

and grievance matters. **Chapter 18** discusses equality policies and implementation of such policies in the workplace. **Chapter 19** explains how discrimination can be avoided during termination of employment.

Additional information is appended at the end of the Code. **Appendix 1** gives further information on the definition of disability under the Act; **Appendix 2** provides information about diversity monitoring; and **Appendix 3** explains how leases and other legal obligations affect the duty to make reasonable adjustments to premises.

Examples in the Code

1.22

Examples of good practice and how the Act is likely to work are included in the Code. They are intended simply to illustrate the principles and concepts used in the legislation and should be read in that light. The examples use different protected characteristics and work-related situations to demonstrate the breadth and scope of the Act.

Use of the words ‘employer’ and ‘worker’

1.23

The Act imposes obligations on people who are not necessarily employers in the legal sense – such as partners in firms, people recruiting their first worker, or people using contract workers. In this Code, these people are also referred to as ‘employers’ for convenience. The term ‘employment’ is also used to refer to these wider work-related relationships, except where it is specified that the provision in question does not apply to these wider relationships.

1.24

Similarly, the Code uses the term ‘worker’ to refer to people who are working for an ‘employer’, whether or not this is under a contract of employment with that ‘employer’. These people include, for example, contract workers, police officers and office holders. The word ‘workers’ may also include job applicants, except where it is clear that the provision in question specifically excludes them. Where there is a reference to ‘employees’ in the Code, this indicates that only employees (within the strict meaning of the word) are affected by the particular provision.

References in the Code

1.25

In this Code, ‘the Act’ means the Equality Act 2010. References to particular Sections and Schedules of the Act are shown in the margins, abbreviated as ‘s’ and ‘Sch’ respectively. Occasionally other legislation is also referenced in the margins.

Changes to the law

1.26

This Code refers to the provisions of the Equality Act 2010 that came into force on 1 October 2010. There may be subsequent changes to the Act or to other legislation which may have an effect on the duties explained in the Code.

1.27

The Act contains provisions on dual discrimination (also known as combined discrimination) and the new public sector equality duty. These provisions are not expected to come into force before April 2011. The government is considering how these provisions can be implemented in the best way for business and the public sector respectively.

1.28

Readers of this Code will therefore need to keep up to date with any developments that affect the Act’s provisions and should be aware of the other Codes issued by the Commission. Further information can be obtained from the Commission (see below for contact details).

Further information

1.29

Copies of the Act and regulations made under it can be purchased from The Stationery Office. Separate codes covering other aspects of the Act are also available from The Stationery Office. The text of all the Equality and Human Rights Commission's codes (including this Code) and guidance relating to the codes can also be downloaded free of charge from the Commission's website where Word and PDF versions are also available: www.equalityhumanrights.com

1.30

Free information about the Equality Act can be obtained by contacting the Equality and Human Rights Commission's Helpline, details of which are below.

England

Equality and Human Rights Commission Helpline

FREEPOST RRLG-GHUX-CTR

Arndale House, Arndale Centre, Manchester M4 3AQ

Main number 0845 604 6610

Textphone 0845 604 6620

Fax 0845 604 6630

Scotland

Equality and Human Rights Commission Helpline

FREEPOST RSAB-YJEJ-EXUJ

The Optima Building, 58 Robertson Street, Glasgow G2 8DU

Main number 0845 604 5510

Textphone 0845 604 5520

Fax 0845 604 5530

Wales

Equality and Human Rights Commission Helpline

FREEPOST RRLR-UEYB-UYZL

3rd Floor, 3 Callaghan Square, Cardiff CF10 5BT

Main number 0845 604 8810

Textphone 0845 604 8820

Fax 0845 604 8830

Part one: Code of Practice on Employment

Chapter 2:

Protected characteristics

Introduction

2.1

This chapter outlines the characteristics which are protected under the Act and which are relevant to the areas covered by this Code.

2.2

The ‘protected characteristics’ are: age; disability; gender reassignment; marriage and civil partnership; pregnancy and maternity; race; religion or belief; sex; and sexual orientation.

Age

What the Act says

2.3

- s.5(1) Age is defined in the Act by reference to a person’s age group. In relation to age, when the Act refers to people who share a protected characteristic, it means that they are in the same age group.

2.4

- s.5(2) An age group can mean people of the same age or people of a range of ages. Age groups can be wide (for example, ‘people under 50’; ‘under 18s’). They can also be quite narrow (for example, ‘people in their mid-40s’; ‘people born in 1952’). Age groups may also be relative (for example, ‘older than me’ or ‘older than us’).

2.5

The meaning of certain age-related terms may differ according to the context. For example, whether someone is seen as ‘youthful’ can depend on their role: compare a youthful bartender with a youthful CEO. Age groups can also be linked to actual or assumed physical appearance, which may have little relationship with chronological age – for example, ‘the grey workforce’.

2.6

There is some flexibility in the definition of a person’s age group. For example, a 40 year old could be described as belonging to various age groups, including ‘40 year olds’; ‘under 50s’; ‘35 to 45 year olds’; ‘over 25s’; or ‘middle-aged’. Similarly, a 16 year old could be seen as belonging to groups that include: ‘children’; ‘teenagers’; ‘under 50s’; ‘under 25s’; ‘over 14s’ or ‘16 year olds’.

Example:

A female worker aged 25 could be viewed as sharing the protected characteristic of age with a number of different age groups. These might include ‘25 year olds’; ‘the under 30s’; ‘the over 20s’; and ‘younger workers’.

Example:

A man of 86 could be said to share the protected characteristic of age with the following age groups: ‘86 year olds’; ‘over 80s’; ‘over 65s’; ‘pensioners’; ‘senior citizens’; ‘older people’; and ‘the elderly’.

2.7

Where it is necessary to compare the situation of a person belonging to a particular age group with others, the Act does not specify the age group with which comparison should be made. It could be everyone outside the person’s age group, but in many cases the choice of comparator age group will be more specific; this will often be led by the context and circumstances. (More detail on how to identify a comparator in direct discrimination cases is set out in paragraphs 3.22 to 3.31.)

Example:

In the first example above, the 25 year old woman might compare herself to the ‘over 25s’, or ‘over 35s’, or ‘older workers’. She could also compare herself to ‘under 25s’ or ‘18 year olds’.

Disability

What the Act says

- 2.8**
- s.6 Only a person who meets the Act's definition of disability has the protected characteristic of disability. When the Act refers to people who share a protected characteristic in relation to disability, it means they share the same disability.
- s.6(3)(b)
- 2.9**
- s.6(4) In most circumstances, a person will have the protected characteristic of disability if they have had a disability in the past, even if they no longer have the disability.
- 2.10**
- People who currently have a disability are protected because of this characteristic against harassment and discrimination – including discrimination arising from disability (see Chapter 5) and a failure to comply with the duty to make reasonable adjustments (see Chapter 6). People who have had a disability in the past are also protected against harassment and discrimination (see paragraph 21.3).
- 2.11**
- Non-disabled people are protected against direct disability discrimination only where they are perceived to have a disability or are associated with a disabled person (see paragraphs 3.11 to 3.21). In some circumstances, a non-disabled person may be protected where they experience harassment (see Chapter 7) or some other unlawful act such as victimisation (see Chapter 9).
- 2.12**
- s.6(1) The Act says that a person has a disability if they have a physical or mental impairment which has a long-term and substantial adverse effect on their ability to carry out normal day-to-day activities. Physical or mental impairment includes sensory impairments such as those affecting sight or hearing.
- 2.13**
- Sch. 1, Para 3 An impairment which consists of a severe disfigurement is treated as having a substantial adverse effect on the ability of the person concerned to carry out normal day-to-day activities.
- 2.14**
- Sch. 1, Para 2(1) Long-term means that the impairment has lasted or is likely to last for at least 12 months or for the rest of the affected person's life.

2.15

Substantial means more than minor or trivial.

s.212(1)

2.16

Where a person is taking measures to treat or correct an impairment (other than by using spectacles or contact lenses) and, but for those measures, the impairment would be likely to have a substantial adverse effect on the ability to carry out normal day to day activities, it is still to be treated as though it does have such an effect.

Sch.1,
Para 5

2.17

This means that ‘hidden’ impairments (for example, mental illness or mental health conditions, diabetes and epilepsy) may count as disabilities where they meet the definition in the Act.

2.18

Cancer, HIV infection, and multiple sclerosis are deemed disabilities under the Act from the point of diagnosis. In some circumstances, people who have a sight impairment are automatically treated under the Act as being disabled.

Sch. 1
Para 6

2.19

Progressive conditions and those with fluctuating or recurring effects will amount to disabilities in certain circumstances.

Sch. 1,
Paras 2(2) & 8

2.20

For more on the concept of disability, see Appendix 1 to this Code. Guidance on matters to be taken into account in determining questions relating to the definition of disability is also available from the Office for Disability Issues: <http://www.officefordisability.gov.uk/docs/wor/new/ea-guide.pdf>

Gender reassignment

What the Act says

2.21

The Act defines gender reassignment as a protected characteristic. People who are proposing to undergo, are undergoing, or have undergone a process (or part of a process) to reassign their sex by changing physiological or other attributes of sex have the protected characteristic of gender reassignment.

s.7(1)

2.22

s.7(2) A reference to a transsexual person is a reference to a person who has the protected characteristic of gender reassignment.

2.23

Under the Act 'gender reassignment' is a personal process, that is, moving away from one's birth sex to the preferred gender, rather than a medical process.

2.24

The reassignment of a person's sex may be proposed but never gone through; the person may be in the process of reassigning their sex; or the process may have happened previously. It may include undergoing the medical gender reassignment treatments, but it does not require someone to undergo medical treatment in order to be protected.

Example:

A person who was born physically female decides to spend the rest of his life as a man. He starts and continues to live as a man. He decides not to seek medical advice as he successfully passes as a man without the need for any medical intervention. He would be protected as someone who has the protected characteristic of gender reassignment.

2.25

The Act requires that a person should have at least proposed to undergo gender reassignment. It does not require such a proposal to be irrevocable. People who start the gender reassignment process but then decide to stop still have the protected characteristic of gender reassignment.

Example:

A person born physically male lets her friends know that she intends to reassign her sex. She attends counselling sessions to start the process. However, she decides to go no further. She is protected under the law because she has undergone part of the process of reassigning her sex.

2.26

Protection is provided where, as part of the process of reassigning their sex, someone is driven by their gender identity to cross-dress, but not where someone chooses to cross-dress for some other reason.

2.27

In order to be protected under the Act, there is no requirement for a transsexual person to inform their employer of their gender reassignment status. However, if a worker is proposing to undergo gender reassignment or is still in the process of transitioning, they may want to discuss their needs with their employer so the employer can support them during the process.

Example:

Before a formal dinner organised by his employer, a worker tells his colleagues that he intends to come to the event dressed as a woman 'for a laugh'. His manager tells him not to do this, as it would create a bad image of the company. Because the worker has no intention of undergoing gender reassignment, he would not have a claim for discrimination.

On the other hand, if the employer had said the same thing to a worker driven by their gender identity to cross-dress as a woman as part of the process of reassigning their sex, this could amount to direct discrimination because of gender reassignment.

2.28

Where an individual has been diagnosed as having 'Gender Dysphoria' or 'Gender Identity Disorder' and the condition has a substantial and long-term adverse impact on their ability to carry out normal day-to-day activities, they may also be protected under the disability discrimination provisions of the Act.

Gender recognition certificates

2.29

The Gender Recognition Act 2004 (GRA) provides that where a person holds a gender recognition certificate they must be treated according to their acquired gender (see the GRA for details on those who are covered by that Act; see also the Data Protection Act 1998 which deals with processing sensitive personal information).

2.30

Transsexual people should not be routinely asked to produce their gender recognition certificate as evidence of their legal gender. Such a request would compromise a transsexual person's right to privacy. If an employer requires proof of a person's legal gender, then their (new) birth certificate should be sufficient confirmation.

Marriage and civil partnership

What the Act says

- 2.31**
s.8(1) A person who is married or in a civil partnership has the protected characteristic of marriage and civil partnership.
- 2.32**
Marriage will cover any formal union of a man and woman which is legally recognised in the UK as a marriage. A civil partnership refers to a registered civil partnership under the Civil Partnership Act 2004, including those registered outside the UK.
- 2.33**
s.13(4) Only people who are married or in a civil partnership are protected against discrimination on this ground. The status of being unmarried or single is not protected. People who only intend to marry or form a civil partnership, or who have divorced or had their civil partnership dissolved, are not protected on this ground.
- 2.34**
s.8(2)(b) People who are married or in a civil partnership share the same protected characteristic. For example, a married man and a woman in a civil partnership share the protected characteristic of marriage and civil partnership.

Pregnancy and maternity

What the Act says

- 2.35**
s.4 The Act lists pregnancy and maternity as a protected characteristic. It is unlawful for an employer to subject a woman to unfavourable treatment during the 'protected period' as defined by the Act. Pregnancy and maternity discrimination in the workplace is considered in detail in Chapter 8.
- s.18(6)

Race

What the Act says

2.36

The Act defines 'race' as including colour, nationality and ethnic or national origins. s.9(1) (a) - (c)

2.37

A person has the protected characteristic of race if they fall within a particular racial group. A racial group can also be made up of two or more distinct racial groups. See paragraph 2.46 for the meaning of 'racial group'. s.9(2)

Nationality

2.38

Nationality (or citizenship) is the specific legal relationship between a person and a state through birth or naturalisation. It is distinct from national origins (see paragraph 2.43 below).

Ethnic origins

2.39

Everyone has an ethnic origin but the provisions of the Act only apply where a person belongs to an 'ethnic group' as defined by the courts. This means that the person must belong to an ethnic group which regards itself and is regarded by others as a distinct and separate community because of certain characteristics. These characteristics usually distinguish the group from the surrounding community.

2.40

There are two essential characteristics which an ethnic group must have: a long shared history and a cultural tradition of its own. In addition, an ethnic group may have one or more of the following characteristics: a common language; a common literature; a common religion; a common geographical origin; or being a minority; or an oppressed group.

2.41

An ethnic group or national group could include members new to the group, for example, a person who marries into the group. It is also possible for a person to leave an ethnic group.

2.42

The courts have confirmed that the following are protected ethnic groups: Sikhs, Jews, Romany Gypsies, Irish Travellers, Scottish Gypsies, and Scottish Travellers.

National origins

2.43

National origins must have identifiable elements, both historic and geographic, which at least at some point in time indicate the existence or previous existence of a nation. For example, as England and Scotland were once separate nations, the English and the Scots have separate national origins. National origins may include origins in a nation that no longer exists (for example, Czechoslovakia) or in a 'nation' that was never a nation state in the modern sense.

2.44

National origin is distinct from nationality. For example, people of Chinese national origin may be citizens of China but many are citizens of other countries.

2.45

A person's own national origin is not something that can be changed, though national origin can change through the generations.

Meaning of 'racial group'

2.46

- s.9(3) A racial group is a group of people who have or share a colour, nationality or ethnic or national origins. For example, a racial group could be 'British' people. All racial groups are protected from unlawful discrimination under the Act.

2.47

A person may fall into more than one racial group. For example, a 'Nigerian' may be defined by colour, nationality or ethnic or national origin.

2.48

- s.9(4) A racial group can be made up of two or more distinct racial groups. For example, a racial group could be 'black Britons' which would encompass those people who are both black and who are British citizens. Another racial group could be 'South Asian' which may include Indians, Pakistanis, Bangladeshis and Sri Lankans.

2.49

Racial groups can also be defined by exclusion, for example, those of ‘non-British’ nationality could form a single racial group.

Religion or belief**What the Act says****2.50**

The protected characteristic of religion or belief includes any religion and any religious or philosophical belief. It also includes a lack of any such religion or belief. s.10(1) & (2)

2.51

For example, Christians are protected against discrimination because of their Christianity and non-Christians are protected against discrimination because they are not Christians, irrespective of any other religion or belief they may have or any lack of one.

2.52

The meaning of religion and belief in the Act is broad and is consistent with Article 9 of the European Convention on Human Rights (which guarantees freedom of thought, conscience and religion).

Meaning of religion**2.53**

‘Religion’ means any religion and includes a lack of religion. The term ‘religion’ includes the more commonly recognised religions in the UK such as the Baha’i faith, Buddhism, Christianity, Hinduism, Islam, Jainism, Judaism, Rastafarianism, Sikhism and Zoroastrianism. It is for the courts to determine what constitutes a religion. s.10(1)

2.54

A religion need not be mainstream or well known to gain protection as a religion. However, it must have a clear structure and belief system. Denominations or sects within religions, such as Methodists within Christianity or Sunnis within Islam, may be considered a religion for the purposes of the Act.

Meaning of belief

s.10(2) **2.55** Belief means any religious or philosophical belief and includes a lack of belief.

2.56 'Religious belief' goes beyond beliefs about and adherence to a religion or its central articles of faith and may vary from person to person within the same religion.

2.57 A belief which is not a religious belief may be a philosophical belief. Examples of philosophical beliefs include Humanism and Atheism.

2.58 A belief need not include faith or worship of a God or Gods, but must affect how a person lives their life or perceives the world.

2.59 For a philosophical belief to be protected under the Act:

- it must be genuinely held;
- it must be a belief and not an opinion or viewpoint based on the present state of information available;
- it must be a belief as to a weighty and substantial aspect of human life and behaviour;
- it must attain a certain level of cogency, seriousness, cohesion and importance;
- it must be worthy of respect in a democratic society, not incompatible with human dignity and not conflict with the fundamental rights of others.

Example:

A woman believes in a philosophy of racial superiority for a particular racial group. It is a belief around which she centres the important decisions in her life. This is not compatible with human dignity and conflicts with the fundamental rights of others. It would therefore not constitute a 'belief' for the purposes of the Act.

Manifestation of religion or belief

2.60

While people have an absolute right to hold a particular religion or belief under Article 9 of the European Convention on Human Rights, manifestation of that religion or belief is a qualified right which may in certain circumstances be limited. For example, it may need to be balanced against other Convention rights such as the right to respect for private and family life (Article 8) or the right to freedom of expression (Article 10).

2.61

Manifestations of a religion or belief could include treating certain days as days for worship or rest; following a certain dress code; following a particular diet; or carrying out or avoiding certain practices. There is not always a clear line between holding a religion or belief and the manifestation of that religion or belief. Placing limitations on a person's right to manifest their religion or belief may amount to unlawful discrimination; this would usually amount to indirect discrimination.

Example:

An employer has a 'no headwear' policy for its staff. Unless this policy can be objectively justified, this will be indirect discrimination against Sikh men who wear the turban, Muslim women who wear a headscarf and observant Jewish men who wear a skullcap as manifestations of their religion.

Sex

What the Act says

2.62

Sex is a protected characteristic and refers to a male or female of any age. In relation to a group of people it refers to either men and/or boys, or women and/or girls.

ss.11(a) & (b),
212(1)

2.63

A comparator for the purposes of showing sex discrimination will be a person of the opposite sex. Sex does not include gender reassignment (see paragraph 2.21) or sexual orientation (see paragraph 2.64).

Sexual orientation

What the Act says

2.64

s.12(1) Sexual orientation is a protected characteristic. It means a person's sexual orientation towards:

- persons of the same sex (that is, the person is a gay man or a lesbian);
- persons of the opposite sex (that is, the person is heterosexual); or
- persons of either sex (that is, the person is bisexual).

2.65

Sexual orientation relates to how people feel as well as their actions.

2.66

Sexual orientation discrimination includes discrimination because someone is of a particular sexual orientation, and it also covers discrimination connected with manifestations of that sexual orientation. These may include someone's appearance, the places they visit or the people they associate with.

2.67

s.12(2) When the Act refers to the protected characteristic of sexual orientation, it means the following:

- a reference to a person who has a particular protected characteristic is a reference to a person who is of a particular sexual orientation; and
- a reference to people who share a protected characteristic is a reference to people who are of the same sexual orientation.

2.68

Gender reassignment is a separate protected characteristic and unrelated to sexual orientation – despite a common misunderstanding that the two characteristics are related (see paragraph 2.21).

Restrictions on protection under the Act

2.69

For some protected characteristics, the Act does not provide protection in relation to all types of prohibited conduct.

- In relation to marriage and civil partnership, there is no protection from discrimination if a person is unmarried or single (see paragraph 2.33).
- For marriage and civil partnership, there is no protection from direct discrimination by association or perception (see paragraphs 3.18 and 3.21) or harassment (see paragraph 7.5). However, harassment related to civil partnership would amount to harassment related to sexual orientation.
- For pregnancy and maternity, there is no express protection from direct discrimination by association or perception (see paragraphs 3.18 and 3.21); indirect discrimination (see paragraph 4.1); or harassment (see paragraph 7.5). However, in these three situations, a worker may be protected under the sex discrimination provisions.
- Apart from discrimination by association or perception, protection from direct discrimination because of disability only applies to disabled people (see paragraph 3.35).
- Indirect disability discrimination and discrimination arising from disability only apply to disabled people (see Chapters 4 and 5).
- An employer is only under a duty to make reasonable adjustments for a disabled worker or an actual or potential disabled job applicant (see Chapter 6).

Chapter 3:

Direct discrimination

Introduction

3.1

This chapter explains what the Act says about direct discrimination in employment for all of the protected characteristics. It discusses how the requirement for a comparator may be met.

What the Act says

3.2

s.13(1) Direct discrimination occurs when a person treats another less favourably than they treat or would treat others because of a protected characteristic.

3.3

Direct discrimination is generally unlawful. However, it may be lawful in the following circumstances:

- s.13(2) • where the protected characteristic is age, and the less favourable treatment can be justified as a proportionate means of achieving a legitimate aim (see paragraphs 3.36 to 3.41);
- s.13(3) • in relation to the protected characteristic of disability, where a disabled person is treated more favourably than a non-disabled person (see paragraph 3.35);
- where the Act provides an express exception which permits directly discriminatory treatment that would otherwise be unlawful (see Chapters 12 to 14).

What is 'less favourable' treatment?

3.4

To decide whether an employer has treated a worker 'less favourably', a comparison must be made with how they have treated other workers or would have treated them in similar circumstances. If the employer's treatment of the worker puts the worker at a clear disadvantage compared with other workers, then it is more likely that the treatment will be less favourable: for example, where a job applicant is refused a job. Less favourable treatment could also involve being deprived of a choice or excluded from an opportunity.

Example:

At a job interview, an applicant mentions she has a same sex partner. Although she is the most qualified candidate, the employer decides not to offer her the job. This decision treats her less favourably than the successful candidate, who is a heterosexual woman. If the less favourable treatment of the unsuccessful applicant is because of her sexual orientation, this would amount to direct discrimination.

3.5

The worker does not have to experience actual disadvantage (economic or otherwise) for the treatment to be less favourable. It is enough that the worker can reasonably say that they would have preferred not to be treated differently from the way the employer treated – or would have treated – another person.

Example:

A female worker's appraisal duties are withdrawn while her male colleagues at the same grade continue to carry out appraisals. Although she was not demoted and did not suffer any financial disadvantage, she feels demeaned in the eyes of those she managed and in the eyes of her colleagues. The removal of her appraisal duties may be treating her less favourably than her male colleagues. If the less favourable treatment is because of her sex, this would amount to direct discrimination.

3.6

Under the Act, it is not possible for the employer to balance or eliminate less favourable treatment by offsetting it against more favourable treatment – for example, extra pay to make up for loss of job status.

Direct discrimination

Example:

A saleswoman informs her employer that she intends to spend the rest of her life living as a man. As a result of this, she is demoted to a role without client contact. The employer increases her salary to make up for the loss of job status. Despite the increase in pay, the demotion will constitute less favourable treatment because of gender reassignment.

3.7

- s.18 For direct discrimination because of pregnancy and maternity, the test is whether the treatment is **unfavourable** rather than less favourable. There is no need for the woman to compare her treatment with that experienced by other workers (see Chapter 8).

Segregation

3.8

- s.13(5) When the protected characteristic is race, deliberately segregating a worker or group of workers from others of a different race automatically amounts to less favourable treatment. There is no need to identify a comparator, because racial segregation is always discriminatory. But it must be a deliberate act or policy rather than a situation that has occurred inadvertently.

Example:

A British marketing company which employs predominantly British staff recruits Polish nationals and seats them in a separate room nicknamed 'Little Poland'. The company argues that they have an unofficial policy of seating the Polish staff separately from British staff so that they can speak amongst themselves in their native language without disturbing the staff who speak English. This is segregation, as the company has a deliberate policy of separating staff because of race.

3.9

Segregation linked to other protected characteristics may be direct discrimination. However, it is necessary to show that it amounts to less favourable treatment.

Shared protected characteristics

3.10

Direct discrimination can take place even though the employer and worker share the same protected characteristic giving rise to the less favourable treatment.

s.24(1)

Example:

A Muslim businessman decides not to recruit a Muslim woman as his personal assistant, even though she is the best qualified candidate. Instead he recruits a woman who has no particular religious or non-religious belief. He believes that this will create a better impression with clients and colleagues, who are mostly Christian or have no particular religious or non-religious belief. This could amount to direct discrimination because of religion or belief, even though the businessman shares the religion of the woman he has rejected.

‘Because of’ a protected characteristic

3.11

‘Because of’ a protected characteristic has the same meaning as the phrase ‘on grounds of’ (a protected characteristic) in previous equality legislation. The new wording does not change the legal meaning of what amounts to direct discrimination. The characteristic needs to be a cause of the less favourable treatment, but does not need to be the only or even the main cause.

3.12

In some instances, the discriminatory basis of the treatment will be obvious from the treatment itself.

Example:

If an employer were to state in a job advert ‘Gypsies and Travellers need not apply’, this could amount to direct discrimination because of race against a Gypsy or Traveller who might have been eligible to apply for the job but was deterred from doing so because of the statement in the advert. In this case, the discriminatory basis of the treatment is obvious from the treatment itself.

3.13

In other cases, the link between the protected characteristic and the treatment will be less clear and it will be necessary to look at why the employer treated the worker less favourably to determine whether this was because of a protected characteristic.

Example:

During an interview, a job applicant informs the employer that he has multiple sclerosis. The applicant is unsuccessful and the employer offers the job to someone who does not have a disability. In this case, it will be necessary to look at why the employer did not offer the job to the unsuccessful applicant with multiple sclerosis to determine whether the less favourable treatment was because of his disability.

3.14

Direct discrimination is unlawful, no matter what the employer's motive or intention, and regardless of whether the less favourable treatment of the worker is conscious or unconscious. Employers may have prejudices that they do not even admit to themselves or may act out of good intentions – or simply be unaware that they are treating the worker differently because of a protected characteristic.

Example:

An angling magazine produced by an all-male team does not recruit a female journalist. They are genuinely concerned that she would feel unhappy and uncomfortable in an all-male environment. Although they appear to be well-intentioned in their decision not to recruit her, this is likely to amount to direct sex discrimination.

3.15

Direct discrimination also includes less favourable treatment of a person based on a stereotype relating to a protected characteristic, whether or not the stereotype is accurate.

Example:

An employer believes that someone's memory deteriorates with age. He assumes – wrongly – that a 60-year-old manager in his team can no longer be relied on to undertake her role competently. An opportunity for promotion arises, which he does not mention to the manager. The employer's conduct is influenced by a stereotyped view of the competence of 60 year olds. This is likely to amount to less favourable treatment because of age.

3.16

An employer cannot base their treatment on another criterion that is discriminatory – for example, where the treatment in question is based on a decision to follow a discriminatory external rule.

Example:

A chemical company operates a voluntary redundancy scheme which provides enhanced terms to women aged 55 or older and men aged 60 or older. A woman of 56 is able to take advantage of the scheme and leave on enhanced terms but a man of 56 cannot do this. The company argues that their scheme is based on the original state pension age of 60 for women and 65 for men. The scheme discriminates because of sex against the male workers. The company cannot rely on an external policy which is itself discriminatory to excuse this discrimination, even though that external policy in this case may be lawful.

3.17

A worker experiencing less favourable treatment 'because of' a protected characteristic does not have to possess the characteristic themselves. For example, the person might be associated with someone who has the characteristic ('discrimination by association'); or the person might be wrongly perceived as having the characteristic ('discrimination by perception').

Discrimination by association

3.18

It is direct discrimination if an employer treats a worker less favourably because of the worker's association with another person who has a protected characteristic; however, this does not apply to marriage and civil partnership or pregnancy and maternity. In the case of pregnancy and maternity, a worker treated less favourably because of association with a pregnant woman, or a woman who has recently given birth, may have a claim for sex discrimination.

3.19

Discrimination by association can occur in various ways – for example, where the worker has a relationship of parent, son or daughter, partner, carer or friend of someone with a protected characteristic. The association with the other person need not be a permanent one.

Example:

A lone father caring for a disabled son has to take time off work whenever his son is sick or has medical appointments. The employer appears to resent the fact that the worker needs to care for his son and eventually dismisses him. The dismissal may amount to direct disability discrimination against the worker by association with his son.

Example:

A manager treats a worker (who is heterosexual) less favourably because she has been seen out with a person who is gay. This could be direct sexual orientation discrimination against the worker because of her association with this person.

3.20

Direct discrimination because of a protected characteristic could also occur if a worker is treated less favourably because they campaigned to help someone with a particular protected characteristic or refused to act in a way that would disadvantage a person or people who have (or whom the employer believes to have) the characteristic. The provisions of the Act on instructing, causing or inducing discrimination may also be relevant here (see paragraphs 9.16 to 9.24).

Example:

An employer does not short-list an internal applicant for a job because the applicant – who is not disabled himself – has helped to set up an informal staff network for disabled workers. This could amount to less favourable treatment because of disability.

Discrimination by perception**3.21**

It is also direct discrimination if an employer treats a worker less favourably because the employer mistakenly thinks that the worker has a protected characteristic. However, this does not apply to pregnancy and maternity or marriage and civil partnership.

Example:

An employer rejects a job application form from a white woman whom he wrongly thinks is black, because the applicant has an African-sounding name. This would constitute direct race discrimination based on the employer's mistaken perception.

Example:

A masculine-looking woman applies for a job as a sales representative. The sales manager thinks that she is transsexual because of her appearance and does not offer her the job, even though she performed the best at interview. The woman would have a claim for direct discrimination because of perceived gender reassignment, even though she is not in fact transsexual.

Comparators

3.22

In most circumstances direct discrimination requires that the employer's treatment of the worker is less favourable than the way the employer treats, has treated or would treat another worker to whom the protected characteristic does not apply. This other person is referred to as a 'comparator'. However, no comparator is needed in cases of racial segregation (see paragraph 3.8) or pregnancy and maternity discrimination (see paragraph 3.7 and Chapter 8).

s.13(1)

Who will be an appropriate comparator?

3.23

The Act says that, in comparing people for the purpose of direct discrimination, there must be no material difference between the circumstances relating to each case. However, it is not necessary for the circumstances of the two people (that is, the worker and the comparator) to be identical in every way; what matters is that the circumstances which are relevant to the treatment of the worker are the same or nearly the same for the worker and the comparator.

s.23(1)

Example:

When an employer has a vacancy for an IT supervisor, both the senior IT workers apply for promotion to the post. One of them is Scottish and the other is English. Both are of a similar age, have no disability, are male, heterosexual, and are non-practising Christians. However, the English worker has more experience than his Scottish counterpart. When the Scottish man is promoted, the English worker alleges direct race discrimination because of his national origin. In this case, the comparator's circumstances are sufficiently similar to enable a valid comparison to be made.

Example:

The head office of a Japanese company seconded a limited number of staff from Japan to work for its UK subsidiary, alongside locally recruited UK staff. One of these local workers complains that his salary and benefits are lower than those of a secondee from Japan employed at the same grade. Although the two workers are working for the same company at the same grade, the circumstances of the Japanese secondee are materially different. He has been recruited in Japan, reports at least in part to the Japanese parent company, has a different career path and his salary and benefits reflect the fact that he is working abroad. For these reasons, he would not be a suitable comparator.

Hypothetical comparators**3.24**

In practice it is not always possible to identify an actual person whose relevant circumstances are the same or not materially different, so the comparison will need to be made with a hypothetical comparator.

3.25

In some cases a person identified as an actual comparator turns out to have circumstances that are not materially the same. Nevertheless their treatment may help to construct a hypothetical comparator.

Example:

A person who has undergone gender reassignment works in a restaurant. She makes a mistake on the till, resulting in a small financial loss to her employer, because of which she is dismissed. The situation has not arisen before, so there is no actual comparator. But six months earlier, the employer gave a written warning to another worker for taking home items of food without permission. That person's treatment might be used as evidence that the employer would not have dismissed a hypothetical worker who is not transsexual for making a till error.

3.26

Constructing a hypothetical comparator may involve considering elements of the treatment of several people whose circumstances are similar to those of the claimant, but not the same. Looking at these elements together, an Employment Tribunal may conclude that the claimant was less favourably treated than a hypothetical comparator would have been treated.

Example:

An employer dismissed a worker at the end of her probation period because she had lied on one occasion. While accepting she had lied, the worker explained that this was because the employer had undermined her confidence and put her under pressure. In the absence of an actual comparator, the worker compared her treatment to two male comparators; one had behaved dishonestly but had not been dismissed, and the other had passed his probation in spite of his performance being undermined by unfair pressure from the employer. Elements of the treatment of these two comparators could allow a tribunal to construct a hypothetical comparator showing the worker had been treated less favourably because of sex.

3.27

Who could be a hypothetical comparator may also depend on the reason why the employer treated the claimant as they did. In many cases it may be more straightforward for the Employment Tribunal to establish the reason for the claimant's treatment first. This could include considering the employer's treatment of a person whose circumstances are not the same as the claimant's to shed light on the reason why that person was treated in the way they were. If the reason for the treatment is found to be because of a protected characteristic, a comparison with the treatment of hypothetical comparator(s) can then be made.

Example:

After a dispute over an unreasonably harsh performance review carried out by his line manager, a worker of Somali origin was subjected to disciplinary proceedings by a second manager which he believes were inappropriate and unfair. He makes a claim for direct race discrimination. An Employment Tribunal might first of all look at the reason for the atypical conduct of the two managers, to establish whether it was because of race. If this is found to be the case, they would move on to consider whether the worker was treated less favourably than hypothetical comparator(s) would have been treated.

3.28

Another way of looking at this is to ask, 'But for the relevant protected characteristic, would the claimant have been treated in that way?'

Direct discrimination

Comparators in disability cases

3.29

s.23(2)(a)

The comparator for direct disability discrimination is the same as for other types of direct discrimination. However, for disability, the relevant circumstances of the comparator and the disabled person, including their abilities, must not be materially different. An appropriate comparator will be a person who does not have the disabled person's impairment but who has the same abilities or skills as the disabled person (regardless of whether those abilities or skills arise from the disability itself).

3.30

It is important to focus on those circumstances which are, in fact, relevant to the less favourable treatment. Although in some cases, certain abilities may be the result of the disability itself, these may not be relevant circumstances for comparison purposes.

Example:

A disabled man with arthritis who can type at 30 words per minute applies for an administrative job which includes typing, but is rejected on the grounds that his typing is too slow. The correct comparator in a claim for direct discrimination would be a person without arthritis who has the same typing speed with the same accuracy rate. In this case, the disabled man is unable to lift heavy weights, but this is not a requirement of the job he applied for. As it is not relevant to the circumstances, there is no need for him to identify a comparator who cannot lift heavy weights.

Comparators in sexual orientation cases

3.31

s.23(3)

For sexual orientation, the Act says that the fact that one person is a civil partner while another is married is not a material difference between the circumstances relating to each case.

Example:

A worker who is gay and in a civil partnership complains that he was refused promotion because of his sexual orientation. His married colleague is promoted instead. The fact that the worker is in a civil partnership and the colleague is married will not be a material difference in their circumstances, so he would be able to refer to his married colleague as a comparator in this case.

Advertising an intention to discriminate

3.32

If an employer makes a statement in an advertisement that in offering employment they will treat applicants less favourably because of a protected characteristic, this would amount to direct discrimination. Only people who are eligible to apply for the job in question can make a claim for discrimination under the Act.

Example:

A marketing company places an advert on its web site offering jobs to 'young graduates'. This could be construed as advertising an intention to discriminate because of age. An older graduate who is put off applying for the post, even though they are eligible to do so, could claim direct discrimination.

3.33

The question of whether an advertisement is discriminatory depends on whether a reasonable person would consider it to be so. An advertisement can include a notice or circular, whether to the public or not, in any publication, on radio, television or in cinemas, via the internet or at an exhibition.

Example:

A dress manufacturing company places an advertisement in a local newspaper for a Turkish machinist. A reasonable person would probably view this as advertising an intention to discriminate because of race.

Marriage and civil partnership

3.34

In relation to employment, if the protected characteristic is marriage and civil partnership, direct discrimination only covers less favourable treatment of a worker because the worker themselves is married or a civil partner. Single people and people in relationships outside of marriage or civil partnership (whether or not they are cohabiting), are not protected from direct discrimination because of their status.

s.13(4)

s.8(2)

Example:

An employer offers 'death in service' benefits to the spouses and civil partners of their staff members. A worker who lives with her partner, but is not married to him, wants to nominate him for death in service benefits. She is told she cannot do this as she is not married. Because being a cohabitee is not a protected characteristic, she would be unable to make a claim for discrimination.

When is it lawful to treat a person more favourably?

More favourable treatment of disabled people

- s.13(3) **3.35** In relation to disability discrimination, the Act only protects disabled people, so it is not discrimination to treat a disabled person more favourably than a non-disabled person.

Example:

An employer with 60 staff has no disabled workers. When they advertise for a new office administrator, they guarantee all disabled applicants an interview for the post. This would not amount to direct discrimination because of disability.

Justifiable direct discrimination because of age

- s.13(2) **3.36** A different approach applies to the protected characteristic of age, because some age-based rules and practices are seen as justifiable. Less favourable treatment of a person because of their age is not direct discrimination if the employer can show the treatment is a proportionate means of achieving a legitimate aim. This is often called the 'objective justification test'.

3.37

In considering direct discrimination because of age, it is important to distinguish a rule or practice affecting workers in a particular age group from a neutral provision, criterion or practice applied equally to everyone that may give rise to indirect discrimination (see paragraph 4.6).

3.38

The objective justification test, which also applies to other areas of discrimination law, is explained in more detail in paragraphs 4.25 to 4.32.

3.39

The question of whether an age-based rule or practice is ‘objectively justified’ – that is, a proportionate means of achieving a legitimate aim – should be approached in two stages:

- First, is the aim of the rule or practice legal and non-discriminatory, and one that represents a real, objective consideration?
- Second, if the aim is legitimate, is the means of achieving it proportionate – that is, appropriate and necessary in all the circumstances?

3.40

The following is an illustration of an age-based rule that might well satisfy the objective justification test.

Example:

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 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.

3.41

The following examples illustrate age-based rules that would probably fail the objective justification test.

Example:

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 which 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.

Example:

A fashion retailer rejects a middle-aged woman as a sales assistant on the grounds that she is 'too old' for the job. They tell her that they need to attract the young customer base at which their clothing is targeted. If this corresponds to a real business need on the part of the retailer, it could qualify as a legitimate aim. However, rejecting this middle-aged woman is unlikely to be a proportionate means of achieving this aim; a requirement for all sales assistants to have knowledge of the products and fashion awareness would be a less discriminatory means of making sure the aim is achieved.

Occupational requirements**3.42**

Sch. 9,
Para 1 The Act creates a general exception to the prohibition on direct discrimination in employment for occupational requirements that are genuinely needed for the job. See Chapter 13 for details.

Chapter 4:

Indirect discrimination

Introduction

4.1

This chapter explains indirect discrimination and ‘objective justification’. The latter concept applies to indirect discrimination, direct discrimination because of age, discrimination arising from disability and to some of the exceptions permitted by the Act.

4.2

Indirect discrimination applies to all the protected characteristics apart from pregnancy and maternity (although, in pregnancy and maternity situations, indirect sex discrimination may apply).

What the Act says

4.3

Indirect discrimination may occur when an employer applies an apparently neutral provision, criterion or practice which puts workers sharing a protected characteristic at a particular disadvantage.

s.19(1) & (2)

4.4

For indirect discrimination to take place, four requirements must be met:

s.19(2)

- the employer applies (or would apply) the provision, criterion or practice equally to everyone within the relevant group including a particular worker;
- the provision, criterion or practice puts, or would put, people who share the worker’s protected characteristic at a particular disadvantage when compared with people who do not have that characteristic;
- the provision, criterion or practice puts, or would put, the worker at that disadvantage; and
- the employer cannot show that the provision, criterion or practice is a proportionate means of achieving a legitimate aim.

What constitutes a provision, criterion or practice?

4.5

The first stage in establishing indirect discrimination is to identify the relevant provision, criterion or practice. The phrase ‘provision, criterion or practice’ is not defined by the Act but it should be construed widely so as to include, for example, any formal or informal policies, rules, practices, arrangements, criteria, conditions, prerequisites, qualifications or provisions. A provision, criterion or practice may also include decisions to do something in the future – such as a policy or criterion that has not yet been applied – as well as a ‘one-off’ or discretionary decision.

Example:

A factory owner announces that from next month staff cannot wear their hair in dreadlocks, even if the locks are tied back. This is an example of a policy that has not yet been implemented but which still amounts to a provision, criterion or practice. The decision to introduce the policy could be indirectly discriminatory because of religion or belief, as it puts the employer’s Rastafarian workers at a particular disadvantage. The employer must show that the provision, criterion or practice can be objectively justified.

Is the provision, criterion or practice a neutral one?

4.6

The provision, criterion or practice must be applied to everyone in the relevant group, whether or not they have the protected characteristic in question. On the face of it, the provision, criterion or practice must be neutral. If it is not neutral in this way, but expressly applies to people with a specific protected characteristic, it is likely to amount to direct discrimination.

Example:

A bus company adopts a policy that all female drivers must re-sit their theory and practical tests every five years to retain their category D licence. Such a policy would amount to direct discrimination because of sex. In contrast, another bus company adopts a policy that drivers on two particular routes must re-sit the theory test. Although this provision is apparently neutral, it turns out that the drivers on these two routes are nearly all women. This could amount to indirect sex discrimination unless the policy can be objectively justified.

What does 'would put' mean?

4.7

It is a requirement of the Act that the provision, criterion or practice puts **or would put** people who share the worker's protected characteristic at a particular disadvantage when compared with people who do not have that characteristic. The Act also requires that it puts **or would put** the particular worker at that disadvantage. This allows challenges to provisions, criteria or practices which have not yet been applied but which would have a discriminatory effect if they were.

s.19(2)(b)

4.8

However, for a claim of indirect discrimination to succeed, the worker must show that they would experience a disadvantage if the provision, criterion or practice were applied to them.

s.19(2)(c)

Example:

The contracts for senior buyers at a department store have a mobility clause requiring them to travel at short notice to any part of the world. A female senior buyer with young children considers that the mobility clause puts women at a disadvantage as they are more likely to be the carers of children and so less likely to be able to travel abroad at short notice. She may challenge the mobility clause even though she has not yet been asked to travel abroad at short notice.

By contrast, a female manager in customer services at the same store might agree that the mobility clause discriminates against women – but, as she is not a senior buyer, she cannot challenge the clause.

What is a disadvantage?

4.9

'Disadvantage' is not defined by the Act. It could include denial of an opportunity or choice, deterrence, rejection or exclusion. The courts have found that 'detriment', a similar concept, is something that a reasonable person would complain about – so an unjustified sense of grievance would not qualify. A disadvantage does not have to be quantifiable and the worker does not have to experience actual loss (economic or otherwise). It is enough that the worker can reasonably say that they would have preferred to be treated differently.

4.10

Sometimes, a provision, criterion or practice is intrinsically liable to disadvantage a group with a particular protected characteristic.

Example:

At the end of the year, an employer decides to invite seasonal workers employed during the previous summer to claim a bonus within a 30 day time limit. By writing to these workers at their last known address, the employer is liable to disadvantage migrant workers. This is because these workers normally return to their home country during the winter months, and so they are unlikely to apply for the bonus within the specified period. This could amount to indirect race discrimination, unless the practice can be objectively justified.

4.11

In some situations, the link between the protected characteristic and the disadvantage might be obvious; for example, dress codes create a disadvantage for some workers with particular religious beliefs. In other situations it will be less obvious how people sharing a protected characteristic are put (or would be put) at a disadvantage, in which case statistics or personal testimony may help to demonstrate that a disadvantage exists.

Example:

A hairdresser refuses to employ stylists who cover their hair, believing it is important for them to exhibit their flamboyant haircuts. It is clear that this criterion puts at a particular disadvantage both Muslim women and Sikh men who cover their hair. This may amount to indirect discrimination unless the criterion can be objectively justified.

Example:

A consultancy firm reviews the use of psychometric tests in their recruitment procedures and discovers that men tend to score lower than women. If a man complains that the test is indirectly discriminatory, he would not need to explain the reason for the lower scores or how the lower scores are connected to his sex to show that men have been put at a disadvantage; it is sufficient for him to rely on the statistical information.

4.12

Statistics can provide an insight into the link between the provision, criterion or practice and the disadvantage that it causes. Statistics relating to the workplace in question can be obtained through the questions procedure (see paragraphs 15.5 to 15.10). It may also be possible to use national or regional statistics to throw light on the nature and extent of the particular disadvantage.

4.13

However, a statistical analysis may not always be appropriate or practicable, especially when there is inadequate or unreliable information, or the numbers of people are too small to allow for a statistically significant comparison. In this situation, the Employment Tribunal may find it helpful for an expert to provide evidence as to whether there is any disadvantage and, if so, the nature of it.

4.14

There are other cases where it may be useful to have evidence (including, if appropriate, from an expert) to help the Employment Tribunal to understand the nature of the protected characteristic or the behaviour of the group sharing the characteristic – for example, evidence about the principles of a particular religious belief.

Example:

A Muslim man who works for a small manufacturing company wishes to undertake the Hajj. However, his employer only allows their staff to take annual leave during designated shutdown periods in August and December. The worker considers that he has been subjected to indirect religious discrimination. In assessing the case, the Employment Tribunal may benefit from expert evidence from a Muslim cleric or an expert in Islam on the timing of the Hajj and whether it is of significance.

The comparative approach

4.15

Once it is clear that there is a provision, criterion or practice which puts (or would put) people sharing a protected characteristic at a particular disadvantage, then the next stage is to consider a comparison between workers with the protected characteristic and those without it. The circumstances of the two groups must be sufficiently similar for a comparison to be made and there must be no material differences in circumstances.

s.19(2)(b)

s.23(1)

4.16

It is important to be clear which protected characteristic is relevant. In relation to disability, this would not be disabled people as a whole but people with a particular disability – for example, with an equivalent level of visual impairment. For race, it could be all Africans or only Somalis, for example. For age, it is important to identify the age group that is disadvantaged by the provision, criterion or practice.

Example:

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 put at a particular disadvantage everyone born before 1971, as they are more likely to have taken O level examinations rather than GCSEs. This might be indirect age discrimination if the criterion could not be objectively justified.

The ‘pool for comparison’

4.17

The people used in the comparative exercise are usually referred to as the ‘pool for comparison’.

4.18

In general, the pool should consist of the group which the provision, criterion or practice affects (or would affect) either positively or negatively, while excluding workers who are not affected by it, either positively or negatively. In most situations, there is likely to be only one appropriate pool, but there may be circumstances where there is more than one. If this is the case, the Employment Tribunal will decide which of the pools to consider.

Example:

A marketing company employs 45 women, 10 of whom are part-timers, and 55 men who all work full-time. One female receptionist works Mondays, Wednesdays and Thursdays. The annual leave policy requires that all workers take time off on public holidays, at least half of which fall on a Monday every year. The receptionist argues that the policy is indirectly discriminatory against women and that it puts her at a personal disadvantage because she has proportionately less control over when she can take her annual leave. The appropriate pool for comparison is all the workers affected by the annual leave policy. The pool is not all receptionists or all part-time workers, because the policy does not only affect these groups.

Making the comparison

4.19

Looking at the pool, a comparison must be made between the impact of the provision, criterion or practice on people **without** the relevant protected characteristic, and its impact on people **with** the protected characteristic.

4.20

The way that the comparison is carried out will depend on the circumstances, including the protected characteristic concerned. It may in some circumstances be necessary to carry out a formal comparative exercise using statistical evidence.

Carrying out a formal comparative exercise

4.21

If the Employment Tribunal is asked to undertake a formal comparative exercise to decide an indirect discrimination claim, it can do this in a number of ways. One established approach involves the Employment Tribunal asking these questions:

- What proportion of the pool has the particular protected characteristic?
- Within the pool, does the provision, criterion or practice affect workers without the protected characteristic?
- How many of these workers are (or would be) disadvantaged by it? How is this expressed as a proportion ('x')?
- Within the pool, how does the provision, criterion or practice affect people who share the protected characteristic?
- How many of these workers are (or would be) put at a disadvantage by it? How is this expressed as a proportion ('y')?

4.22

Using this approach, the Employment Tribunal will then compare (x) with (y). It can then decide whether the group with the protected characteristic experiences a 'particular disadvantage' in comparison with others. Whether a difference is significant will depend on the context, such as the size of the pool and the numbers behind the proportions. It is not necessary to show that the majority of those within the pool who share the protected characteristic are placed at a disadvantage.

Example:

A single mother of two young children is forced to resign from her job as a train driver when she cannot comply with her employer's new shift system.

The shift system is a provision, criterion or practice which causes particular disadvantage to this single mother. In an indirect discrimination claim, an Employment Tribunal must carry out a comparative exercise to decide whether the shift system puts (or would put) workers who share her protected characteristic of sex at a particular disadvantage when compared with men.

The Employment Tribunal decides to use as a pool for comparison all the train drivers working for the same employer. There are 20 female train drivers, while 2,000 are men.

It is accepted as common knowledge that men are far less likely than women to be single parents with childcare responsibilities.

- Of the 2,000 male drivers, two are unable to comply with the new shift system. This is expressed as a proportion of 0.001
- Of the 20 female train drivers, five are unable to comply with the new shift system. This is expressed as a proportion of 0.25

It is clear that a higher proportion of female drivers (0.25) than male drivers (0.001) are unable to comply with the shift system.

Taking all this into account, the Employment Tribunal decides that female train drivers – in comparison to their male counterparts – are put at a particular disadvantage by the shift system.

Is the worker concerned put at that disadvantage?

4.23

It is not enough that the provision, criterion or practice puts (or would put) at a particular disadvantage a group of people who share a protected characteristic. It must also have that effect (or be capable of having it) on the individual worker concerned. So it is not enough for a worker merely to establish that they are a member of the relevant group. They must also show they have personally suffered (or could suffer) the particular disadvantage as an individual.

Example:

An airline operates a dress code which forbids workers in customer-facing roles from displaying any item of jewellery. A Sikh cabin steward complains that this policy indirectly discriminates against Sikhs by preventing them from wearing the Kara bracelet. However, because he no longer observes the Sikh articles of faith, the steward is not put at a particular disadvantage by this policy and could not bring a claim for indirect discrimination.

The intention behind the provision, criterion or practice is irrelevant

4.24

Indirect discrimination is unlawful, even where the discriminatory effect of the provision, criterion or practice is not intentional, unless it can be objectively justified. If an employer applies the provision, criterion or practice without the intention of discriminating against the worker, the Employment Tribunal may decide not to order a payment of compensation (see paragraph 15.44).

Example:

An employer starts an induction session for new staff with an ice-breaker designed to introduce everyone in the room to the others. Each worker is required to provide a picture of themselves as a toddler. One worker is a transsexual woman who does not wish her colleagues to know that she was brought up as a boy. When she does not bring in her photo, the employer criticises her in front of the group for not joining in. It would be no defence that it did not occur to the employer that this worker may feel disadvantaged by the requirement to disclose such information.

When can a provision, criterion or practice be objectively justified?

4.25

If the person applying a provision, criterion or practice can show that it is 'a proportionate means of achieving a legitimate aim', then it will not amount to indirect discrimination. This is often known as the 'objective justification' test. The test applies to other areas of discrimination law; for example, direct discrimination because of age (see paragraphs 3.36 to 3.41) and discrimination arising from disability (see Chapter 5).

s.19(2)(d)

4.26

If challenged in the Employment Tribunal, it is for the employer to justify the provision, criterion or practice. So it is up to the employer to produce evidence to support their assertion that it is justified. Generalisations will not be sufficient to provide justification. It is not necessary for that justification to have been fully set out at the time the provision, criterion or practice was applied. If challenged, the employer can set out the justification to the Employment Tribunal.

4.27

The question of whether the provision, criterion or practice is a proportionate means of achieving a legitimate aim should be approached in two stages:

- Is the aim of the provision, criterion or practice legal and non-discriminatory, and one that represents a real, objective consideration?
- If the aim is legitimate, is the means of achieving it proportionate – that is, appropriate and necessary in all the circumstances?

What is a legitimate aim?

4.28

The concept of 'legitimate aim' is taken from European Union (EU) law and relevant decisions of the Court of Justice of the European Union (CJEU) – formerly the European Court of Justice (ECJ). However, it is not defined by the Act. The aim of the provision, criterion or practice should be legal, should not be discriminatory in itself, and must represent a real, objective consideration. The health, welfare and safety of individuals may qualify as legitimate aims provided that risks are clearly specified and supported by evidence.

4.29

Although reasonable business needs and economic efficiency may be legitimate aims, an employer solely aiming to reduce costs cannot expect to satisfy the test. For example, the employer cannot simply argue that to discriminate is cheaper than avoiding discrimination.

Example:

Solely as a cost-saving measure, an employer requires all staff to work a full day on Fridays, so that customer orders can all be processed on the same day of the week. The policy puts observant Jewish workers at a particular disadvantage in the winter months by preventing them from going home early to observe the Sabbath, and could amount to indirect discrimination unless it can be objectively justified. The single aim of reducing costs is not a legitimate one; the employer cannot just argue that to discriminate is cheaper than avoiding discrimination.

What is proportionate?**4.30**

Even if the aim is a legitimate one, the means of achieving it must be proportionate. Deciding whether the means used to achieve the legitimate aim are proportionate involves a balancing exercise. An Employment Tribunal may wish to conduct a proper evaluation of the discriminatory effect of the provision, criterion or practice as against the employer's reasons for applying it, taking into account all the relevant facts.

4.31

Although not defined by the Act, the term 'proportionate' is taken from EU Directives and its meaning has been clarified by decisions of the CJEU (formerly the ECJ). EU law views treatment as proportionate if it is an 'appropriate and necessary' means of achieving a legitimate aim. But 'necessary' does not mean that the provision, criterion or practice is the only possible way of achieving the legitimate aim; it is sufficient that the same aim could not be achieved by less discriminatory means.

4.32

The greater financial cost of using a less discriminatory approach cannot, by itself, provide a justification for applying a particular provision, criterion or practice. Cost can only be taken into account as part of the employer's justification for the provision, criterion or practice if there are other good reasons for adopting it.

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 proportionate means of achieving this aim. When considering whether the policy is justified, the 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, for example by providing a beard mask or snood.

Chapter 5:

Discrimination arising from disability

Introduction

5.1

This chapter explains the duty of employers not to treat disabled people unfavourably because of something connected with their disability. Protection from this type of discrimination, which is known as ‘discrimination arising from disability’, only applies to disabled people.

What the Act says

5.2

The Act says that treatment of a disabled person amounts to discrimination where:

- an employer treats the disabled person unfavourably;
- this treatment is because of something arising in consequence of the disabled person’s disability; and
- the employer cannot show that this treatment is a proportionate means of achieving a legitimate aim,

unless the employer does not know, and could not reasonably be expected to know, that the person has the disability.

How does it differ from direct discrimination?

5.3

Direct discrimination occurs when the employer treats someone less favourably because of disability itself (see Chapter 3). By contrast, in discrimination arising from disability, the question is whether the disabled person has been treated unfavourably because of something arising in consequence of their disability.

s.15

s.15(2)

Example:

An employer dismisses a worker because she has had three months' sick leave. The employer is aware that the worker has multiple sclerosis and most of her sick leave is disability-related. The employer's decision to dismiss is not because of the worker's disability itself. However, the worker has been treated unfavourably because of something arising in consequence of her disability (namely, the need to take a period of disability-related sick leave).

How does it differ from indirect discrimination?

5.4

Indirect discrimination occurs when a disabled person is (or would be) disadvantaged by an unjustifiable provision, criterion or practice applied to everyone, which puts (or would put) people sharing the disabled person's disability at a particular disadvantage compared to others, and puts (or would put) the disabled person at that disadvantage (see Chapter 4).

5.5

In contrast, discrimination arising from disability only requires the disabled person to show they have experienced unfavourable treatment because of something connected with their disability. If the employer can show that they did not know and could not reasonably have been expected to know that the disabled person had the disability, it will not be discrimination arising from disability (see paragraphs 5.13 to 5.19). However, as with indirect discrimination, the employer may avoid discrimination arising from disability if the treatment can be objectively justified as a proportionate means of achieving a legitimate aim (see paragraph 5.11)

Is a comparator required?

5.6

Both direct and indirect discrimination require a comparative exercise. But in considering discrimination arising from disability, there is no need to compare a disabled person's treatment with that of another person. It is only necessary to demonstrate that the unfavourable treatment is because of something arising in consequence of the disability.

Example:

In considering whether the example of the disabled worker dismissed for disability-related sickness absence (see paragraph 5.3) amounts to discrimination arising from disability, it is irrelevant whether or not other workers would have been dismissed for having the same or similar length of absence. It is not necessary to compare the treatment of the disabled worker with that of her colleagues or any hypothetical comparator. The decision to dismiss her will be discrimination arising from disability if the employer cannot objectively justify it.

What is ‘unfavourable treatment’?

5.7

For discrimination arising from disability to occur, a disabled person must have been treated ‘unfavourably’. This means that he or she must have been put at a disadvantage. Often, the disadvantage will be obvious and it will be clear that the treatment has been unfavourable; for example, a person may have been refused a job, denied a work opportunity or dismissed from their employment. But sometimes unfavourable treatment may be less obvious. Even if an employer thinks that they are acting in the best interests of a disabled person, they may still treat that person unfavourably.

s.15(1)(a)

What does ‘something arising in consequence of disability’ mean?

5.8

The unfavourable treatment must be because of something that arises in consequence of the disability. This means that there must be a connection between whatever led to the unfavourable treatment and the disability.

s.15(1)(a)

5.9

The consequences of a disability include anything which is the result, effect or outcome of a disabled person’s disability. The consequences will be varied, and will depend on the individual effect upon a disabled person of their disability. Some consequences may be obvious, such as an inability to walk unaided or inability to use certain work equipment. Others may not be obvious, for example, having to follow a restricted diet.

Example:

A woman is disciplined for losing her temper at work. However, this behaviour was out of character and is a result of severe pain caused by cancer, of which her employer is aware. The disciplinary action is unfavourable treatment. This treatment is because of something which arises in consequence of the worker's disability, namely her loss of temper. There is a connection between the 'something' (that is, the loss of temper) that led to the treatment and her disability. It will be discrimination arising from disability if the employer cannot objectively justify the decision to discipline the worker.

5.10

So long as the unfavourable treatment is because of something arising in consequence of the disability, it will be unlawful unless it can be objectively justified, or unless the employer did not know or could not reasonably have been expected to know that the person was disabled (see paragraph 5.13).

When can discrimination arising from disability be justified?

5.11

s.15(1)(b) Unfavourable treatment will not amount to discrimination arising from disability if the employer can show that the treatment is a 'proportionate means of achieving a legitimate aim'. This 'objective justification' test is explained in detail in paragraphs 4.25 to 4.32.

5.12

It is for the employer to justify the treatment. They must produce evidence to support their assertion that it is justified and not rely on mere generalisations.

What if the employer does not know that the person is disabled?

5.13

s.15(2) If the employer can show that they:

- did not know that the disabled person had the disability in question; and
- could not reasonably have been expected to know that the disabled person had the disability,

then the unfavourable treatment does not amount to discrimination arising from disability.

5.14

It is not enough for the employer to show that they did not know that the disabled person had the disability. They must also show that they could not reasonably have been expected to know about it. Employers should consider whether a worker has a disability even where one has not been formally disclosed, as, for example, not all workers who meet the definition of disability may think of themselves as a ‘disabled person’.

5.15

An employer must do all they can reasonably be expected to do to find out if a worker has a disability. What is reasonable will depend on the circumstances. This is an objective assessment. When making enquiries about disability, employers should consider issues of dignity and privacy and ensure that personal information is dealt with confidentially.

Example:

A disabled man who has depression has been at a particular workplace for two years. He has a good attendance and performance record. In recent weeks, however, he has become emotional and upset at work for no apparent reason. He has also been repeatedly late for work and has made some mistakes in his work. The worker is disciplined without being given any opportunity to explain that his difficulties at work arise from a disability and that recently the effects of his depression have worsened.

The sudden deterioration in the worker’s time-keeping and performance and the change in his behaviour at work should have alerted the employer to the possibility that that these were connected to a disability. It is likely to be reasonable to expect the employer to explore with the worker the reason for these changes and whether the difficulties are because of something arising in consequence of a disability.

5.16

However, employers should note that the Act imposes restrictions on the types of health or disability-related enquiries that can be made prior to making someone a job offer or including someone in a pool of successful candidates to be offered a job when one becomes available (see paragraphs 10.25 to 10.43).

s.60

When can an employer be assumed to know about disability?

5.17

If an employer's agent or employee (such as an occupational health adviser or a HR officer) knows, in that capacity, of a worker's or applicant's or potential applicant's disability, the employer will not usually be able to claim that they do not know of the disability, and that they cannot therefore have subjected a disabled person to discrimination arising from disability.

5.18

Therefore, where information about disabled people may come through different channels, employers need to ensure that there is a means – suitably confidential and subject to the disabled person's consent – for bringing that information together to make it easier for the employer to fulfil their duties under the Act.

Example:

An occupational health (OH) adviser is engaged by a large employer to provide them with information about their workers' health. The OH adviser becomes aware of a worker's disability that is relevant to his work, and the worker consents to this information being disclosed to the employer. However, the OH adviser does not pass that information on to Human Resources or to the worker's line manager. As the OH adviser is acting as the employer's agent, it is not a defence for the employer to claim that they did not know about the worker's disability. This is because the information gained by the adviser on the employer's behalf is attributed to the employer.

5.19

Information will not be attributed ('imputed') to the employer if it is gained by a person providing services to workers independently of the employer. This is the case even if the employer has arranged for those services to be provided.

Example:

An employer contracts with an agency to provide an independent counselling service to workers. The contract states that the counsellors are not acting on the employer's behalf while in the counselling role. Any information obtained by a counsellor during such counselling would not be attributed to the employer.

Relevance of reasonable adjustments

5.20

Employers can often prevent unfavourable treatment which would amount to discrimination arising from disability by taking prompt action to identify and implement reasonable adjustments (see Chapter 6).

5.21

If an employer has failed to make a reasonable adjustment which would have prevented or minimised the unfavourable treatment, it will be very difficult for them to show that the treatment was objectively justified.

5.22

Even where an employer has complied with a duty to make reasonable adjustments in relation to the disabled person, they may still subject a disabled person to unlawful discrimination arising from disability. This is likely to apply where, for example, the adjustment is unrelated to the particular treatment complained of.

Example:

The employer in the example at paragraph 5.3 made a reasonable adjustment for the worker who has multiple sclerosis. They adjusted her working hours so that she started work at 9.30am instead of 9am.

However, this adjustment is not relevant to the unfavourable treatment – namely, her dismissal for disability-related sickness absence – which her claim concerns. And so, despite the fact that reasonable adjustments were made, there will still be discrimination arising from disability unless the treatment is justified.

Chapter 6:

Duty to make reasonable adjustments

Introduction

6.1

This chapter describes the principles and application of the duty to make reasonable adjustments for disabled people in employment.

6.2

The duty to make reasonable adjustments is a cornerstone of the Act and requires employers to take positive steps to ensure that disabled people can access and progress in employment. This goes beyond simply avoiding treating disabled workers, job applicants and potential job applicants unfavourably and means taking additional steps to which non-disabled workers and applicants are not entitled.

6.3

The duty to make reasonable adjustments applies to employers of all sizes, but the question of what is reasonable may vary according to the circumstances of the employer. Part 2 of the Code has more information about good practice in making reasonable adjustments in different work situations, such as in recruitment or during employment.

What the Act says

6.4

s.21(2) Discrimination against a disabled person occurs where an employer fails to comply with a duty to make reasonable adjustments imposed on them in relation to that disabled person.

What is the duty to make reasonable adjustments?

6.5

The duty to make reasonable adjustments comprises three requirements. Employers are required to take reasonable steps to:

- Avoid the substantial disadvantage where a provision, criterion or practice applied by or on behalf of the employer puts a disabled person at a substantial disadvantage compared to those who are not disabled. s.20(3)
- Remove or alter a physical feature or provide a reasonable means of avoiding such a feature where it puts a disabled person at a substantial disadvantage compared to those who are not disabled. s.20(4)
- Provide an auxiliary aid (which includes an auxiliary service - see paragraph 6.13) where a disabled person would, but for the provision of that auxiliary aid, be put at a substantial disadvantage compared to those who are not disabled. s.20(5)

Accessible information

6.6

The Act states that where the provision, criterion or practice or the need for an auxiliary aid relates to the provision of information, the steps which it is reasonable for the employer to take include steps to ensure that the information is provided in an accessible format; for example, providing letters, training materials or recruitment forms in Braille or on audio-tape. s.20(6)

Avoiding substantial disadvantages caused by physical features

6.7

The Act says that avoiding a substantial disadvantage caused by a physical feature includes: s.20(9)

- removing the physical feature in question;
- altering it; or
- providing a reasonable means of avoiding it.

Which disabled people does the duty protect?

6.8

Sch. 8,
Paras 4 & 5

The duty to make reasonable adjustments applies in recruitment and during all stages of employment, including dismissal. It may also apply after employment has ended. The duty relates to all disabled workers of an employer and to any disabled applicant for employment. The duty also applies in respect of any disabled person who has notified the employer that they may be an applicant for work.

6.9

In order to avoid discrimination, it would be sensible for employers not to attempt to make a fine judgment as to whether a particular individual falls within the statutory definition of disability, but to focus instead on meeting the needs of each worker and job applicant.

What is a provision, criterion or practice?

6.10

The phrase ‘provision, criterion or practice’ is not defined by the Act but should be construed widely so as to include, for example, any formal or informal policies, rules, practices, arrangements or qualifications including one-off decisions and actions (see also paragraph 4.5).

Example:

An employer has a policy that designated car parking spaces are only offered to senior managers. A worker who is not a manager, but has a mobility impairment and needs to park very close to the office, is given a designated car parking space. This is likely to be a reasonable adjustment to the employer’s car parking policy.

What is a ‘physical feature’?

6.11

s.20(10),
s.20(12) The Act says that the following are to be treated as a physical feature of the premises occupied by the employer:

- any feature of the design or construction of a building;
- any feature of an approach to, exit from or entrance to a building;

- a fixture or fitting, or furniture, furnishings, materials, equipment or other chattels (moveable property in Scotland) in or on the premises;
- any other physical element or quality of the premises.

All these features are covered, whether temporary or permanent.

6.12

Physical features will include steps, stairways, kerbs, exterior surfaces and paving, parking areas, building entrances and exits (including emergency escape routes), internal and external doors, gates, toilet and washing facilities, lighting and ventilation, lifts and escalators, floor coverings, signs, furniture and temporary or moveable items. This is not an exhaustive list.

Example:

Clear glass doors at the end of a corridor in a particular workplace present a hazard for a visually impaired worker. This is a substantial disadvantage caused by the physical features of the workplace.

What is an ‘auxiliary aid’?

6.13

An auxiliary aid is something which provides support or assistance to a disabled person. It can include provision of a specialist piece of equipment such as an adapted keyboard or text to speech software. Auxiliary aids include auxiliary services; for example, provision of a sign language interpreter or a support worker for a disabled worker. s.20(11)

What disadvantage gives rise to the duty?

6.14

The duty to make adjustments arises where a provision, criterion, or practice, any physical feature of work premises or the absence of an auxiliary aid puts a disabled person at a substantial disadvantage compared with people who are not disabled. s.20(3), s.20(4), s.20(5)

6.15

The Act says that a substantial disadvantage is one which is more than minor or trivial. Whether such a disadvantage exists in a particular case is a question of fact, and is assessed on an objective basis. s.212(1)

6.16

s.23(1)

The purpose of the comparison with people who are not disabled is to establish whether it is because of disability that a particular provision, criterion, practice or physical feature or the absence of an auxiliary aid disadvantages the disabled person in question. Accordingly – and unlike direct or indirect discrimination – under the duty to make adjustments there is no requirement to identify a comparator or comparator group whose circumstances are the same or nearly the same as the disabled person's.

What if the employer does not know that a disabled person is an actual or potential job applicant?

6.17

Sch. 8,
Para 20(1)(a)

An employer only has a duty to make an adjustment if they know, or could reasonably be expected to know, that a disabled person is, or may be, an applicant for work.

6.18

There are restrictions on when health or disability-related enquiries can be made prior to making a job offer or including someone in a pool of people to be offered a job. However, questions are permitted to determine whether reasonable adjustments need to be made in relation to an assessment, such as an interview or other process designed to give an indication of a person's suitability for the work concerned. These provisions are explained in detail in paragraphs 10.25 to 10.43.

What if the employer does not know the worker is disabled?

6.19

Sch. 8,
Para 20(1)(b)

For disabled workers already in employment, an employer only has a duty to make an adjustment if they know, or could reasonably be expected to know, that a worker has a disability and is, or is likely to be, placed at a substantial disadvantage. The employer must, however, do all they can reasonably be expected to do to find out whether this is the case. What is reasonable will depend on the circumstances. This is an objective assessment. When making enquiries about disability, employers should consider issues of dignity and privacy and ensure that personal information is dealt with confidentially.

Example:

A worker who deals with customers by phone at a call centre has depression which sometimes causes her to cry at work. She has difficulty dealing with customer enquiries when the symptoms of her depression are severe. It is likely to be reasonable for the employer to discuss with the worker whether her crying is connected to a disability and whether a reasonable adjustment could be made to her working arrangements.

6.20

The Act does not prevent a disabled person keeping a disability confidential from an employer. But keeping a disability confidential is likely to mean that unless the employer could reasonably be expected to know about it anyway, the employer will not be under a duty to make a reasonable adjustment. If a disabled person expects an employer to make a reasonable adjustment, they will need to provide the employer – or someone acting on their behalf – with sufficient information to carry out that adjustment.

When can an employer be assumed to know about disability?**6.21**

If an employer's agent or employee (such as an occupational health adviser, a HR officer or a recruitment agent) knows, in that capacity, of a worker's or applicant's or potential applicant's disability, the employer will not usually be able to claim that they do not know of the disability and that they therefore have no obligation to make a reasonable adjustment. Employers therefore need to ensure that where information about disabled people may come through different channels, there is a means – suitably confidential and subject to the disabled person's consent – for bringing that information together to make it easier for the employer to fulfil their duties under the Act.

Example:

In the example in paragraph 5.18, if the employer's working arrangements put the worker at a substantial disadvantage because of the effects of his disability and he claims that a reasonable adjustment should have been made, it will not be a defence for the employer to claim that they were unaware of the worker's disability. Because the information gained by the OH adviser on the employer's behalf is assumed to be shared with the employer, the OH adviser's knowledge means that the employer's duty under the Act applies.

6.22

Information will not be ‘imputed’ or attributed to the employer if it is gained by a person providing services to employees independently of the employer. This is the case even if the employer has arranged for those services to be provided.

What is meant by ‘reasonable steps’?**6.23**

The duty to make adjustments requires employers to take such steps as it is reasonable to have to take, in all the circumstances of the case, in order to make adjustments. The Act does not specify any particular factors that should be taken into account. What is a reasonable step for an employer to take will depend on all the circumstances of each individual case.

6.24

There is no onus on the disabled worker to suggest what adjustments should be made (although it is good practice for employers to ask). However, where the disabled person does so, the employer should consider whether such adjustments would help overcome the substantial disadvantage, and whether they are reasonable.

6.25

Effective and practicable adjustments for disabled workers often involve little or no cost or disruption and are therefore very likely to be reasonable for an employer to have to make. Even if an adjustment has a significant cost associated with it, it may still be cost-effective in overall terms – for example, compared with the costs of recruiting and training a new member of staff – and so may still be a reasonable adjustment to have to make.

6.26

Sch. 21 Many adjustments do not involve making physical changes to premises. However, where such changes need to be made and an employer occupies premises under a lease or other binding obligation, the employer may have to obtain consent to the making of reasonable adjustments. These provisions are explained in Appendix 3.

6.27

If making a particular adjustment would increase the risk to health and safety of any person (including the disabled worker in question) then this is a relevant factor in deciding whether it is reasonable to make that adjustment. Suitable and sufficient risk assessments should be used to help determine whether such risk is likely to arise.

6.28

The following are some of the factors which might be taken into account when deciding what is a reasonable step for an employer to have to take:

- whether taking any particular steps would be effective in preventing the substantial disadvantage;
- the practicability of the step;
- the financial and other costs of making the adjustment and the extent of any disruption caused;
- the extent of the employer's financial or other resources;
- the availability to the employer of financial or other assistance to help make an adjustment (such as advice through Access to Work); and
- the type and size of the employer.

6.29

Ultimately the test of the 'reasonableness' of any step an employer may have to take is an objective one and will depend on the circumstances of the case.

Can failure to make a reasonable adjustment ever be justified?

6.30

The Act does not permit an employer to justify a failure to comply with a duty to make a reasonable adjustment. However, an employer will only breach such a duty if the adjustment in question is one which it is reasonable for the employer to have to make. So, where the duty applies, it is the question of 'reasonableness' which alone determines whether the adjustment has to be made.

What happens if the duty is not complied with?

6.31

If an employer does not comply with the duty to make reasonable adjustments they will be committing an act of unlawful discrimination. A disabled worker will have the right to take a claim to the Employment Tribunal based on this.

S.21

Duty to make reasonable adjustments

Reasonable adjustments in practice

6.32

It is a good starting point for an employer to conduct a proper assessment, in consultation with the disabled person concerned, of what reasonable adjustments may be required. Any necessary adjustments should be implemented in a timely fashion, and it may also be necessary for an employer to make more than one adjustment. It is advisable to agree any proposed adjustments with the disabled worker in question before they are made.

6.33

Examples of steps it might be reasonable for employers to have to take include:

Making adjustments to premises

Example:

An employer makes structural or other physical changes such as widening a doorway, providing a ramp or moving furniture for a wheelchair user.

Providing information in accessible formats

Example:

The format of instructions and manuals might need to be modified for some disabled workers (for example, produced in Braille or on audio tape) and instructions for people with learning disabilities might need to be conveyed orally with individual demonstration or in Easy Read. Employers may also need to arrange for recruitment materials to be provided in alternative formats.

Allocating some of the disabled person's duties to another worker

Example:

An employer reallocates minor or subsidiary duties to another worker as a disabled worker has difficulty doing them because of his disability. For example, the job involves occasionally going onto the open roof of a building but the employer transfers this work away from a worker whose disability involves severe vertigo.

Transferring the disabled worker to fill an existing vacancy

Example:

An employer should consider whether a suitable alternative post is available for a worker who becomes disabled (or whose disability worsens), where no reasonable adjustment would enable the worker to continue doing the current job. Such a post might also involve retraining or other reasonable adjustments such as equipment for the new post or transfer to a position on a higher grade.

Altering the disabled worker's hours of work or training

Example:

An employer allows a disabled person to work flexible hours to enable him to have additional breaks to overcome fatigue arising from his disability. It could also include permitting part-time working or different working hours to avoid the need to travel in the rush hour if this creates a problem related to an impairment. A phased return to work with a gradual build-up of hours might also be appropriate in some circumstances.

Assigning the disabled worker to a different place of work or training or arranging home working

Example:

An employer relocates the workstation of a newly disabled worker (who now uses a wheelchair) from an inaccessible third floor office to an accessible one on the ground floor. It may be reasonable to move his place of work to other premises of the same employer if the first building is inaccessible. Allowing the worker to work from home might also be a reasonable adjustment for the employer to make.

Allowing the disabled worker to be absent during working or training hours for rehabilitation, assessment or treatment

Example:

An employer allows a person who has become disabled more time off work than would be allowed to non-disabled workers to enable him to have rehabilitation training. A similar adjustment may be appropriate if a disability worsens or if a disabled person needs occasional treatment anyway.

Duty to make reasonable adjustments

Giving, or arranging for, training or mentoring (whether for the disabled person or any other worker)

This could be training in particular pieces of equipment which the disabled person uses, or an alteration to the standard workplace training to reflect the worker's particular disability.

Example:

All workers are trained in the use of a particular machine but an employer provides slightly different or longer training for a worker with restricted hand or arm movements. An employer might also provide training in additional software for a visually impaired worker so that he can use a computer with speech output.

Acquiring or modifying equipment

Example:

An employer might have to provide special equipment such as an adapted keyboard for someone with arthritis, a large screen for a visually impaired worker, or an adapted telephone for someone with a hearing impairment, or other modified equipment for disabled workers (such as longer handles on a machine).

There is no requirement to provide or modify equipment for personal purposes unconnected with a worker's job, such as providing a wheelchair if a person needs one in any event but does not have one. The disadvantages in such a case do not flow from the employer's arrangements or premises.

Modifying procedures for testing or assessment

Example:

A worker with restricted manual dexterity would be disadvantaged by a written test, so the employer gives that person an oral test instead.

Providing a reader or interpreter

Example:

An employer arranges for a colleague to read mail to a worker with a visual impairment at particular times during the working day. Alternatively, the employer might hire a reader.

Providing supervision or other support

Example:

An employer provides a support worker or arranges help from a colleague, in appropriate circumstances, for someone whose disability leads to uncertainty or lack of confidence in unfamiliar situations, such as on a training course.

Allowing a disabled worker to take a period of disability leave

Example:

A worker who has cancer needs to undergo treatment and rehabilitation. His employer allows a period of disability leave and permits him to return to his job at the end of this period.

Participating in supported employment schemes, such as Workstep

Example:

A man applies for a job as an office assistant after several years of not working because of depression. He has been participating in a supported employment scheme where he saw the post advertised. He asks the employer to let him make private phone calls during the working day to a support worker at the scheme and the employer allows him to do so as a reasonable adjustment.

Employing a support worker to assist a disabled worker

Example:

An adviser with a visual impairment is sometimes required to make home visits to clients. The employer employs a support worker to assist her on these visits.

Modifying disciplinary or grievance procedures for a disabled worker

Example:

A worker with a learning disability is allowed to take a friend (who does not work with her) to act as an advocate at a meeting with her employer about a grievance. The employer also ensures that the meeting is conducted in a way that does not disadvantage or patronise the disabled worker.

Adjusting redundancy selection criteria for a disabled worker

Example:

Because of his condition, a man with an autoimmune disease has taken several short periods of absence during the year. When his employer is taking the absences into account as a criterion for selecting people for redundancy, they discount these periods of disability-related absence.

Modifying performance-related pay arrangements for a disabled worker

Example:

A disabled worker who is paid purely on her output needs frequent short additional breaks during her working day – something her employer agrees to as a reasonable adjustment. It may be a reasonable adjustment for her employer to pay her at an agreed rate (for example, her average hourly rate) for these breaks.

6.34

It may sometimes be necessary for an employer to take a combination of steps.

Example:

A worker who is blind is given a new job with her employer in an unfamiliar part of the building. The employer:

- arranges facilities for her assistance dog in the new area;
- arranges for her new instructions to be in Braille; and
- provides disability equality training to all staff.

6.35

In some cases, a reasonable adjustment will not succeed without the co-operation of other workers. Colleagues as well as managers may therefore have an important role in helping ensure that a reasonable adjustment is carried out in practice. Subject to considerations about confidentiality, employers must ensure that this happens. It is unlikely to be a valid defence to a claim under the Act to argue that an adjustment was unreasonable because staff were obstructive or unhelpful when the employer tried to implement it. An employer would at least need to be able to show that they took such behaviour seriously and dealt with it appropriately. Employers will be more likely to be able to do this if they establish and implement the type of policies and practices described in Chapter 18.

Example:

An employer ensures that a worker with autism has a structured working day as a reasonable adjustment. As part of this adjustment, it is the responsibility of the employer to ensure that other workers co-operate with this arrangement.

The Access to Work scheme

6.36

The Access to Work scheme may assist an employer to decide what steps to take. If financial assistance is available from the scheme, it may also make it reasonable for an employer to take certain steps which would otherwise be unreasonably expensive.

6.37

However, Access to Work does not diminish any of an employer's duties under the Act. In particular:

- The legal responsibility for making a reasonable adjustment remains with the employer – even where Access to Work is involved in the provision of advice or funding in relation to the adjustment.
- It is likely to be a reasonable step for the employer to help a disabled person in making an application for assistance from Access to Work and to provide on-going administrative support (by completing claim forms, for example).

6.38

It may be unreasonable for an employer to decide not to make an adjustment based on its cost before finding out whether financial assistance for the adjustment is available from Access to Work or another source.

6.39

More information about the Access to Work scheme is available from:
http://www.direct.gov.uk/en/DisabledPeople/Employmentsupport/WorkSchemesAndProgrammes/DG_4000347

Chapter 7: Harassment

Introduction

7.1

This chapter explains the Act's general test for harassment. It also explains the provisions on harassment related to a relevant protected characteristic, the provisions on sexual harassment, and less favourable treatment for rejecting or submitting to harassment.

7.2

Unlike direct discrimination, harassment does not require a comparative approach; it is not necessary for the worker to show that another person was, or would have been, treated more favourably. For an explanation of direct discrimination, please see Chapter 4.

What the Act says

7.3

The Act prohibits three types of harassment. These are:

- s.26(1) • harassment related to a 'relevant protected characteristic';
- s.26(2) • sexual harassment; and
- s.26(3) • less favourable treatment of a worker because they submit to, or reject, sexual harassment or harassment related to sex or gender reassignment.

7.4

s.26(5) 'Relevant protected characteristics' are:

- Age
- Disability
- Gender Reassignment
- Race
- Religion or Belief
- Sex
- Sexual Orientation

7.5

Pregnancy and maternity and marriage and civil partnership are not protected directly under the harassment provisions. However, pregnancy and maternity harassment would amount to harassment related to sex, and harassment related to civil partnership would amount to harassment related to sexual orientation.

Harassment related to a protected characteristic

7.6

This type of harassment of a worker occurs when a person engages in unwanted conduct which is related to a relevant protected characteristic and which has the purpose or the effect of:

s.26(1)

- violating the worker's dignity; or
- creating an intimidating, hostile, degrading, humiliating or offensive environment for that worker.

7.7

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.

7.8

The word 'unwanted' means essentially the same as 'unwelcome' or 'uninvited'. 'Unwanted' does not mean that express objection must be made to the conduct before it is deemed to be unwanted. A serious one-off incident can also amount to harassment.

Example:

In front of her male colleagues, a female electrician is told by her supervisor that her work is below standard and that, as a woman, she will never be competent to carry it out. The supervisor goes on to suggest that she should instead stay at home to cook and clean for her husband. This could amount to harassment related to sex as such a statement would be self-evidently unwanted and the electrician would not have to object to it before it was deemed to be unlawful harassment.

‘Related to’

7.9

Unwanted conduct ‘related to’ a protected characteristic has a broad meaning in that the conduct does not have to be because of the protected characteristic. It includes the following situations:

a) Where conduct is related to the worker’s own protected characteristic.

Example:

If a worker with a hearing impairment is verbally abused because he wears a hearing aid, this could amount to harassment related to disability.

7.10

Protection from harassment also applies where a person is generally abusive to other workers but, in relation to a particular worker, the form of the unwanted conduct is determined by that worker’s protected characteristic.

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 would be able to make a claim for harassment, even though the remarks were not specifically directed at her.

b) Where there is any connection with a protected characteristic.

Protection is provided because the conduct is dictated by a relevant protected characteristic, whether or not the worker has that characteristic themselves. This means that protection against unwanted conduct is provided where the worker does not have the relevant protected characteristic, including where the employer knows that the worker does not have the relevant characteristic. Connection with a protected characteristic may arise in several situations:

- The worker may be associated with someone who has a protected characteristic.

Example:

A worker has a son with a severe disfigurement. His work colleagues make offensive remarks to him about his son’s disability. The worker could have a claim for harassment related to disability.

- The worker may be wrongly perceived as having a particular protected characteristic.

Example:

A Sikh worker wears a turban to work. His manager wrongly assumes he is Muslim and subjects him to Islamophobic abuse. The worker could have a claim for harassment related to religion or belief because of his manager's perception of his religion.

- The worker is known not to have the protected characteristic but nevertheless is subjected to harassment related to that characteristic.

Example:

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 unwanted conduct related to a protected characteristic is not directed at the particular worker but at another person or no one in particular.

Example:

A manager racially abuses a black worker. As a result of the racial abuse, the black worker's white colleague is offended and could bring a claim of racial harassment.

- The unwanted conduct is related to the protected characteristic, but does not take place because of the protected characteristic.

Example:

A female worker has a relationship with her male manager. On seeing her with another male colleague, the manager suspects she is having an affair. As a result, the manager makes her working life difficult by continually criticising her work in an offensive manner. The behaviour is not because of the sex of the female worker, but because of the suspected affair which is related to her sex. This could amount to harassment related to sex.

7.11

In all of the circumstances listed above, there is a connection with the protected characteristic and so the worker could bring a claim of harassment where the unwanted conduct creates for them any of the circumstances defined in paragraph 7.6.

Sexual harassment

7.12

s.26(2) Sexual harassment occurs when a person engages in unwanted conduct as defined in paragraph 7.6 and which is of a sexual nature.

7.13

Conduct 'of a sexual nature' can cover verbal, non-verbal or physical conduct including unwelcome sexual advances, touching, forms of sexual assault, sexual jokes, displaying pornographic photographs or drawings or sending emails with material of a sexual nature.

Less favourable treatment for rejecting or submitting to unwanted conduct

7.14

s.26(3) The third type of harassment occurs when a worker is treated less favourably by their employer because that worker submitted to, or rejected unwanted conduct of a sexual nature, or unwanted conduct which is related to sex or to gender reassignment, and the unwanted conduct creates for them any of the circumstances defined in paragraph 7.6.

Example:

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

7.15

s.26(3)(a) Under this type of harassment, the initial unwanted conduct may be committed by the person who treats the worker less favourably or by another person.

Example:

A female worker is asked out by her team leader and she refuses. The team leader feels resentful and informs the Head of Division about the rejection. The Head of Division subsequently fails to give the female worker the promotion she applies for, even though she is the best candidate. She knows that the team leader and the Head of Division are good friends and believes that her refusal to go out with the team leader influenced the Head of Division's decision. She could have a claim of harassment over the Head of Division's actions.

‘Purpose or effect’

7.16

For all three types of harassment, if the **purpose** of subjecting the worker to the conduct is to create any of the circumstances defined in paragraph 7.6, this will be sufficient to establish unlawful harassment. It will not be necessary to inquire into the effect of that conduct on that worker.

7.17

Regardless of the intended purpose, unwanted conduct will also amount to harassment if it has the **effect** of creating any of the circumstances defined in paragraph 7.6.

Example:

Male members of staff download pornographic images on to their computers in an office where a woman works. She may make a claim for harassment if she is aware that the images are being downloaded and the effect of this is to create a hostile and humiliating environment for her. In this situation, it is irrelevant that the male members of staff did not have the purpose of upsetting the woman, and that they merely considered the downloading of images as ‘having a laugh’.

7.18

In deciding whether conduct had that effect, each of the following must be taken into account:

- a) The perception of the worker; that is, did they regard it as violating their dignity or creating an intimidating (etc) environment for them. This part of the test is a subjective question and depends on how the worker regards the treatment. s.26(4)(a)
- b) The other circumstances of the case; circumstances that may be relevant and therefore need to be taken into account can include the personal circumstances of the worker experiencing the conduct; for example, the worker’s health, including mental health; mental capacity; cultural norms; or previous experience of harassment; and also the environment in which the conduct takes place. s.26(4)(b)
- c) Whether it is reasonable for the conduct to have that effect; this is an objective test. A tribunal is unlikely to find unwanted conduct has the effect, for example, of offending a worker if the tribunal considers the worker to be hypersensitive and that another person subjected to the same conduct would not have been offended. s.26(4)(c)

7.19

Where the employer is a public authority, it may also be relevant in cases of alleged harassment whether the alleged perpetrator was exercising any of her/his Convention rights protected under the Human Rights Act 1998. For example, the right to freedom of thought, conscience and religion or freedom of speech of the alleged harasser will need to be taken into account when considering all relevant circumstances of the case.

Liability of employers for harassment by third parties

7.20

Employers may be liable for harassment of their employees or job applicants by third parties – such as customers – who are not directly under their control. This is explained in paragraphs 10.19 to 10.24.

Chapter 8: Pregnancy and maternity

Introduction

8.1

Specific provisions in the Act protect women from discrimination at work because of pregnancy or maternity leave. These apply during the protected period explained at paragraphs 8.9 to 8.13.

8.2

There is also a statutory regime setting out pregnant employees' rights to health and safety protection, time off for antenatal care, maternity leave and unfair dismissal protection.

8.3

European law, including the Pregnant Workers Directive (92/85/EEC) and the recast Equal Treatment Directive (2006/54/EC), gives women who are pregnant or on maternity leave protected status in employment. For example, Article 10 of the Pregnant Workers Directive prohibits the dismissal of pregnant workers and workers on maternity leave other than in exceptional circumstances not connected with their pregnancy or maternity leave.

What the Act says

8.4

It is unlawful discrimination to treat a woman unfavourably because of her pregnancy or a related illness, or because she is exercising, has exercised or is seeking or has sought to exercise her right to maternity leave.

s.18(1)-(4)

8.5

In considering whether there has been pregnancy and maternity discrimination, the employer's motive or intention is not relevant, and neither are the consequences of pregnancy or maternity leave. Such discrimination cannot be justified.

8.6

The meaning of 'because of' is discussed in paragraph 3.11. However, unlike in cases of direct sex discrimination, there is no need to compare the way a pregnant worker is treated with the treatment of any other workers. If she is treated unfavourably by her employer because of her pregnancy or maternity leave, this is automatically discrimination.

8.7

s.18(7) Unfavourable treatment of a woman because of her pregnancy or maternity leave during 'the protected period' is unlawful pregnancy and maternity discrimination. This cannot be treated as direct sex discrimination (for which a comparator, actual or hypothetical, is required).

8.8

s.13(6)(b) In some cases, employers have to treat workers who are pregnant or have recently given birth more favourably than other workers. This is explained at paragraph 8.43. Men cannot make a claim for sex discrimination in relation to any special treatment given to a woman in connection with pregnancy or childbirth, such as maternity leave or additional sick leave.

The protected period

8.9

s.18(6) The protected period 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 (but see paragraphs 8.14 and 8.15 below).

8.10

The maternity leave scheme is set out in Part VIII of the Employment Rights Act 1996 (ERA) and the Maternity and Parental Leave (etc) Regulations 1999 (MPLR).

8.11

The Act refers to the three kinds of maternity leave regulated by the ERA:

s.213

- Compulsory maternity leave – the minimum two-week period (four weeks for factory workers) immediately following childbirth when a woman must not work for her employer. All employees entitled to ordinary maternity leave must take compulsory maternity leave.
- Ordinary maternity leave – all pregnant employees are entitled to 26 weeks ordinary maternity leave (which includes the compulsory leave period), provided they give proper notice.
- Additional maternity leave – all pregnant employees are entitled to a further 26 weeks maternity leave, provided they give proper notice.

8.12

There is no minimum period of qualifying service for ordinary and additional maternity leave but only employees are eligible to take it.

8.13

The protected period in relation to a woman's pregnancy ends either:

s.18(6)

- if she is entitled to ordinary and additional maternity leave, at the end of the additional maternity leave period; or
- when she returns to work after giving birth, if that is earlier; or
- if she is not entitled to maternity leave, for example because she is not an employee, two weeks after the baby is born.

Unfavourable treatment outside the protected period**8.14**

Outside the protected period, unfavourable treatment of a woman in employment because of her pregnancy would be considered as sex discrimination rather than pregnancy and maternity discrimination.

s.18(7)

8.15

However, if a woman is treated unfavourably because of her pregnancy (or a related illness) after the end of the protected period, but due to a decision made during it, this is regarded as occurring during the protected period.

s.18(5)

‘Pregnancy of hers’

- s.18(2) **8.16** For pregnancy and maternity discrimination, the unfavourable treatment must be because of the woman’s own pregnancy. However, a worker treated less favourably because of association with a pregnant woman, or a woman who has recently given birth, may have a claim for sex discrimination.

Knowledge of pregnancy

- Reg 4, Maternity and Parental Leave etc. Regulations 1999 (MPLR) **8.17** There is no obligation on a job applicant or employee to inform the employer of her pregnancy until 15 weeks before the baby is due. However, telling the employer triggers the legal protection, including the employer’s health and safety obligations.

- 8.18** Unfavourable treatment will only be unlawful if the employer is aware the woman is pregnant. The employer must know, believe or suspect that she is pregnant – whether this is by formal notification or through the grapevine.

No need for comparison

- 8.19** It is not necessary to show that the treatment was unfavourable compared with the treatment of a man, with that of a woman who is not pregnant or with any other worker. However, evidence of how others have been treated may be useful to help determine if the unfavourable treatment is in fact related to pregnancy or maternity leave.

Example:

A company producing office furniture decides to exhibit at a trade fair. A pregnant member of the company’s sales team, who had expected to be asked to attend the trade fair to staff the company’s stall and talk to potential customers, is not invited. In demonstrating that, but for her pregnancy, she would have been invited, it would help her to show that other members of the company’s sales team, either male or female but not pregnant, were invited to the trade fair.

Not the only reason

8.20

A woman's pregnancy or maternity leave does not have to be the only reason for her treatment, but it does have to be an important factor or effective cause.

Example:

An employer dismisses an employee on maternity leave shortly before she is due to return to work because the locum covering her absence is regarded as a better performer. Had the employee not been absent on maternity leave she would not have been sacked. Her dismissal is therefore unlawful, even if performance was a factor in the employer's decision-making.

Unfavourable treatment

8.21

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

8.22

As examples only, it will amount to pregnancy and maternity discrimination to treat a woman unfavourably during the protected period for 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;
- performance issues due to morning sickness or other pregnancy-related conditions.

This is not an exhaustive list but indicates, by drawing on case law, the kinds of treatment that have been found to be unlawful.

8.23

The following are further examples of unlawful discrimination:

- failure to consult a woman on maternity leave about changes to her work or about possible redundancy;
- disciplining a woman for refusing to carry out tasks due to pregnancy related risks;
- assuming that a woman's work will become less important to her after childbirth and giving her less responsible or less interesting work as a result;
- depriving a woman of her right to an annual assessment of her performance because she was on maternity leave;
- excluding a pregnant woman from business trips.

Other employment rights for pregnant women

8.24

s.99 & 47(c)
ERA

There are separate legal provisions in the ERA protecting employees from dismissal and other disadvantage (except relating to pay) where the reason or principal reason is related to pregnancy or maternity leave. These ERA rights can overlap with the discrimination provisions and if they are breached this may also constitute pregnancy and maternity discrimination.

Example:

If an employer fails to consult a woman about threatened redundancy because she is absent on maternity leave, this will be unlawful discrimination.

8.25

MPLR, regs
10 & 20(1)(b)

An employee who is made redundant while on statutory maternity leave is entitled to be offered any suitable alternative vacancy, in preference to other employees. If she is not offered it, she can claim automatically unfair dismissal.

8.26

MPLR, regs
18 & 18A

A woman has a statutory right to return to the same job after ordinary maternity leave. After additional maternity leave, she has a right to return to the same job unless that is not reasonably practicable. If that is the case, she is entitled to be offered a suitable alternative job, on terms and conditions which are not less favourable than her original job. If a woman seeks to return on different terms where she does not have a specific contractual

right to do so, a refusal could constitute direct discrimination because of sex, depending on the circumstances.

8.27

In addition, depending on the circumstances, refusing to allow a woman to return to work part-time could be indirect sex discrimination.

8.28

Parents of dependent children have a right to request flexible working set out in the ERA. This right entitles a woman returning from maternity leave to make a request to change her hours and if she does so, her employer must consider her request (see paragraphs 17.8 to 17.12).

ERA 1996,
Part 8A

8.29

An employee on statutory maternity or adoption leave may by agreement work for her employer for up to ten 'keeping in touch' (KIT) days without bringing the leave to an end. This can include training or attending staff meetings, for example.

MPLR,
reg 12A

Health and safety at work

8.30

The Act permits differential treatment of women at work where it is necessary to comply with laws protecting the health and safety of women who are pregnant, who have recently given birth or are breastfeeding.

Sch. 22,
Para 2

8.31

Steps taken to protect pregnant workers' health and safety should not result in them being treated unfavourably.

8.32

Employers have specific obligations to protect the health and safety of pregnant women and women who have recently given birth. Where a workplace includes women of childbearing age, and the work or workplace conditions are of a kind that could involve risk to a pregnant woman, a woman who has given birth within the previous six months or who is breastfeeding, or create a risk to her baby, the employer's general risk assessment must include an assessment of such risks. There is a non-exhaustive list of the working conditions, processes, and physical, chemical or biological agents that may pose a risk in Annexes I and II to the Pregnant Workers Directive.

Pregnant
Workers
Directive, incl
Annex II
MHSW Regs
1999, Reg 16;
The Workplace
(Health, Safety
and Welfare)
Regs 1992,
Reg 25(4)

- MHSW Regs,
reg 18
- 8.33**
In addition, where an employee has given notice in writing that she is pregnant, has given birth within the last six months, or is breastfeeding, the employer must consider the risks in relation to that individual and take action to avoid them. This may involve altering her working conditions or hours of work. For example, as a result of a risk assessment an employer may ensure that the worker takes extra breaks, refrains from lifting, or spends more time sitting rather than standing.
- 8.34**
If it is not reasonable to do this, or it would not avoid the risk, the employer must suspend the woman from work for as long as is necessary to avoid the risk.
- s.67 ERA
1996
- 8.35**
Before being suspended on maternity grounds, a woman is entitled to be offered suitable alternative work if it is available. If she unreasonably refuses an offer of alternative work, she will lose the statutory right to be paid during any period of maternity suspension.
- 8.36**
The Health and Safety Executive produces guidance on New and Expectant Mothers at Work. This is available from: <http://www.hse.gov.uk/mothers/mothers/htm>
- Pay and conditions during maternity leave**
- 8.37**
Employers are obliged to maintain a woman's benefits except contractual remuneration during both ordinary and additional maternity leave. Unless otherwise provided in her contract of employment, a woman does not have a legal right to continue receiving her full pay during maternity leave.
- SMP
(General)
Regs
(Amendment)
2005
- 8.38**
If a woman receives a pay rise between the start of the calculation period for Statutory Maternity Pay (SMP) and the end of her maternity leave, she is entitled to have her SMP recalculated and receive any extra SMP due. She may also, as a result of recalculation following such a pay rise, become eligible for SMP where previously she was not. Employers are reimbursed all or some of the cost of SMP.

Non-contractual payments during maternity leave

8.39

The Act has a specific exception relating to non-contractual payments to women on maternity leave. There is no obligation on an employer to extend to a woman on maternity leave any non-contractual benefit relating to pay, such as a discretionary bonus. For the purposes of this exception, 'pay' means a payment of money by way of wages or salary.

Sch. 9,
Para 17(5)

Sch. 9,
Para 17(5)

8.40

However, this exception does not apply to any maternity-related pay (whether statutory or contractual), to which a woman is entitled as a result of being pregnant or on maternity leave. Nor does it apply to any maternity-related pay arising from an increase that the woman would have received had she not been on maternity leave.

Sch. 9,
Para 17(2)(a),
17(6)

Example:

A woman on maternity leave is receiving contractual maternity pay, which is worked out as a percentage of her salary. The date of her employer's annual review of staff pay falls while she is on maternity leave. All other staff are awarded a 2% pay rise with immediate effect. If the woman on maternity leave does not receive the increase, this would be unlawful discrimination. Her contractual maternity pay should be recalculated so that it is based on her salary plus the 2% increase given to all her colleagues. Any other benefits linked to salary should also be adjusted to take into account the pay rise. When she returns to work her normal pay must reflect the pay rise.

8.41

Any non-contractual bonus relating to the period of compulsory maternity leave is not covered by the exception, so the employer would have to pay this. Neither does the exception apply to pay relating to times when a woman is not on maternity leave.

Sch. 9,
Para 17(2)
(b)&(c)

8.42

Further information on equal treatment and what may be unlawful discrimination in terms and conditions for pregnant women and women on maternity leave is set out in the Equal Pay Code.

ss.72-76

Special treatment in connection with pregnancy and childbirth is lawful

8.43

s.13(6)(b) An employer does not discriminate against a man where it affords a woman 'special treatment' in connection with childbirth and pregnancy.

Example:

A man who is given a warning for being repeatedly late to work in the mornings alleges that he has been treated less favourably than a pregnant woman who has also been repeatedly late for work, but who was not given a warning. The man cannot compare himself to the pregnant woman, because her lateness is related to her morning sickness. The correct comparator in his case would be a non-pregnant woman who was also late for work.

8.44

Treating a woman unfavourably because she is undergoing in vitro fertilisation (IVF) or other fertility treatment would not count as pregnancy and maternity discrimination. This is because a woman is not deemed pregnant until the fertilised ova have been implanted in her uterus. However, such unfavourable treatment could amount to sex discrimination (see paragraph 17.28).

Breastfeeding

8.45

There is no statutory right for workers to take time off to breastfeed. However, employers should try to accommodate women who wish to do so, bearing in mind the following:

- As explained above in paragraph 8.30, where risks to the health and safety of an employee who is breastfeeding have been identified in the employer's risk assessment, and where she has given written notice that she is breastfeeding, it may be reasonable for the employer to alter her working conditions or hours of work. If this is not reasonable or would not avoid the risks identified, the employer should suspend the employee from work for so long as is necessary to avoid the risks; as above, this is subject to the right to be offered alternative work if it is available.
- Employers have a duty to provide suitable workplace rest facilities for women at work who are breastfeeding mothers to use.

- A refusal to allow a woman to express milk or to adjust her working conditions to enable her to continue to breastfeed may amount to unlawful sex discrimination.

Example:

An employer refused a request from a woman to return from maternity leave part-time to enable her to continue breastfeeding her child who suffered from eczema. The woman told her employer that her GP had advised that continued breastfeeding would benefit the child's medical condition. The employer refused the request without explanation. Unless the employer's refusal can be objectively justified, this is likely to be indirect sex discrimination.

Chapter 9: Victimisation and other unlawful acts

Introduction

9.1

This chapter explains what the Act says about the unlawful acts of victimisation, instructing, causing or inducing discrimination, and aiding contraventions. It also sets out the provisions on gender reassignment discrimination (absence from work).

Victimisation

What the Act says

9.2

s.27(1) The Act prohibits victimisation. It is victimisation for an employer to subject a worker to a detriment because the worker has done a ‘protected act’ or because the employer believes that the worker has done or may do a protected act in the future.

9.3

s.27(2)(c) & (d) A worker need not have a particular protected characteristic in order to be protected against victimisation under the Act; to be unlawful, victimisation must be linked to a ‘protected act’ (see paragraph 9.5). Making an allegation or doing something related to the Act does not have to involve an explicit reference to the legislation.

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 in contravention of the Act.

9.4

Former workers are also protected from victimisation.

Example:

A grocery shop worker resigns after making a sexual harassment complaint against the owner. Several weeks later, she tries to make a purchase at the shop but is refused service by the owner because of her complaint. This could amount to victimisation.

What is a 'protected act'?

9.5

A protected act is any of the following:

- bringing proceedings under the Act; s.27(2)(a)
- giving evidence or information in connection with proceedings brought under the Act; s.27(2)(b)
- doing anything which is related to the provisions of the Act; s.27(2)(c)
- making an allegation (whether or not express) that another person has done something in breach of the Act; or s.27(2)(d)
- making or seeking a 'relevant pay disclosure' to or from a colleague (including a former colleague). s.77(3)

9.6

A 'relevant pay disclosure' is explained in paragraph 14.11 and in the Equal Pay Code.

9.7

Protected acts can occur in any field covered by the Act and in relation to any part of the Act. An employer must therefore not victimise a person who has done a protected act in relation to services, for example.

What is a 'detriment'?

9.8

'Detriment' in the context of victimisation is not defined by the Act and could take many forms. Generally, a detriment is anything which the individual concerned might reasonably consider changed their position for the worse or put them at a disadvantage. This could include being rejected for promotion, denied an opportunity to represent the organisation at external events, excluded from opportunities to train, or overlooked in the allocation of discretionary bonuses or performance-related awards.

Example:

A senior manager hears a worker's grievance about harassment. He finds that the worker has been harassed and offers a formal apology and directs that the perpetrators of the harassment be disciplined and required to undertake diversity training. As a result, the senior manager is not put forward by his director to attend an important conference on behalf of the company. This is likely to amount to detriment.

9.9

A detriment might also include a threat made to the complainant which they take seriously and it is reasonable for them to take it seriously. There is no need to demonstrate physical or economic consequences. However, an unjustified sense of grievance alone would not be enough to establish detriment.

Example:

An employer threatens to dismiss a staff member because he thinks she intends to support a colleague's sexual harassment claim. This threat could amount to victimisation, even though the employer has not actually taken any action to dismiss the staff member and may not really intend to do so.

9.10

Detrimental treatment amounts to victimisation if a 'protected act' is one of the reasons for the treatment, but it need not be the only reason.

What other factors are involved in proving that victimisation has occurred?

9.11

Victimisation does not require a comparator. The worker need only show that they have experienced a detriment because they have done a protected act or because the employer believes (rightly or wrongly) that they have done or intend to do a protected act.

9.12

There is no time limit within which victimisation must occur after a person has done a protected act. However, a complainant will need to show a link between the detriment and the protected act.

Example:

In 2006, a trade union staff representative acted on behalf of a colleague in a claim of age discrimination. In 2009, he applies for a promotion but is rejected. He asks for his interview notes which make a reference to his loyalty to the company and in brackets were written the words 'tribunal case'. This could amount to victimisation despite the three-year gap between the protected act and the detriment.

9.13

A worker cannot claim victimisation where they have acted in bad faith, such as maliciously giving false evidence or information or making a false allegation of discrimination. Any such action would not be a protected act.

s.27(3)

9.14

However, if a worker gives evidence, provides information or makes an allegation in good faith but it turns out that it is factually wrong, or provides information in relation to proceedings which are unsuccessful, they will still be protected from victimisation.

9.15

A worker is protected from victimisation by an employer or prospective employer where they do a protected act which is not in relation to employment. For example, a protected act may be linked to accessing goods, facilities and services provided by the employer.

Instructing, causing or inducing discrimination

What the Act says

9.16

It is unlawful to instruct someone to discriminate against, harass or victimise another person because of a protected characteristic or to instruct a person to help another person to do an unlawful act. Such an instruction would be unlawful even if it is not acted on.

s.111(1)

Example:

A GP instructs his receptionist not to register anyone with an Asian name. The receptionist would have a claim against the GP if she experienced a detriment as a result of not following the instruction. A potential patient would also have a claim against the GP under the services provisions of the Act if she discovered the instruction had been given and was put off from applying to register.

9.17

s.111(2), (3) & (8) The Act also makes it unlawful to cause or induce, or to attempt to cause or induce, someone to discriminate against or harass a third person because of a protected characteristic or to victimise a third person because they have done a protected act.

9.18

s.111(4) An inducement may amount to no more than persuasion and need not involve a benefit or loss. Nor does the inducement have to be applied directly: it may be indirect. It is enough if it is applied in such a way that the other person is likely to come to know about the inducement.

Example:

The managing partner of an accountancy firm is aware that the head of the administrative team is planning to engage a senior receptionist with a physical disability. The managing partner does not issue any direct instruction but suggests to the head of administration that to do this would reflect poorly on his judgement and so affect his future with the firm. This is likely to amount to causing or attempting to cause the head of administration to act unlawfully.

9.19

It is also unlawful for a person to instruct, cause or induce a person to commit an act of discrimination or harassment in the context of relationships which have come to an end (see paragraphs 10.57 to 10.62).

9.20

s.111(1)-(3) The Act also prohibits a person from instructing, causing or inducing someone to help another person to do an unlawful act (see paragraph 9.26 below).

9.21

It does not matter whether the person who is instructed, caused or induced to commit an unlawful act carries it out. This is because instructing, causing or inducing an unlawful act is in itself unlawful. However, if the person does commit the unlawful act, they may be liable. The person who instructed, caused or induced them to carry it out will also be liable for it.

s.111(6)

When does the Act apply?**9.22**

For the Act to apply, the relationship between the person giving the instruction, or causing or inducing the unlawful act, and the recipient must be one in which discrimination, harassment or victimisation is prohibited. This will include employment relationships, the provision of services and public functions, and other relationships governed by the Act.

s.111(7)

Who is protected?**9.23**

The Act provides a remedy for:

s.111(5)

- a) the person to whom the causing, instruction or inducement is addressed; and
- b) the person who is subjected to the discrimination or harassment or victimisation if it is carried out,

provided that they suffer a detriment as a result.

Example:

In the example in paragraph 9.18, if the head of administration were to experience a detriment as a result of the managing partner's actions, he would be entitled to a remedy against the managing partner. The disabled candidate is also entitled to a remedy if she suffers a detriment as a result of the managing partner's actions.

9.24

In addition, the Equality and Human Rights Commission has the power to bring proceedings regardless of whether an individual has actually experienced a detriment.

s.111(5)(c)

Aiding contraventions

What the Act says

- 9.25**
- s.112(1) The Act makes it unlawful knowingly to help someone discriminate against, harass or victimise another person. A person who helps another in this way will be treated as having done the act of discrimination, harassment or victimisation themselves. It is also unlawful to help a person to discriminate against or harass another person after a relationship covered by the Act has ended, where the discrimination or harassment arises from and is closely connected to the relationship.
- 9.26**
- s.112(1) The Act also makes it unlawful to help with an instruction to discriminate or with causing or inducing discrimination.

What does it mean to help someone commit an unlawful act?

9.27

‘Help’ should be given its ordinary meaning. It does not have the same meaning as to procure, induce or cause an unlawful act. The help given to someone to discriminate, harass or victimise a person will be unlawful even if it is not substantial or productive, so long as it is not negligible.

Example:

A company manager wants to ensure that a job goes to a female candidate because he likes to be surrounded by women in the office. However the company’s Human Resources (HR) department, in accordance with their equal opportunities policy, has ensured that the application forms contain no evidence of candidates’ sex. The manager asks a clerical worker to look in the HR files and let him know the sex of each candidate, explaining that he wants to filter out the male candidates. It may be unlawful for the clerical worker to give the manager this help, even if the manager is unsuccessful in excluding the male candidates.

What does the helper need to know to be liable?

9.28

For the help to be unlawful, the person giving the help must know at the time they give the help that discrimination, harassment or victimisation is a probable outcome. But the helper does not have to intend that this outcome should result from the help.

Example:

In the example above, the help will be unlawful unless the clerical worker fails to realise that an act of discrimination is a likely outcome of her actions. But she only needs to understand that discrimination is a likely outcome; she does not have to intend that discrimination should occur as a result of her help.

Reasonable reliance on another's statement

9.29

If the helper is told that they are assisting with a lawful act and it is reasonable for them to rely on this statement, then the help they give will not be unlawful even if it transpires that this help assisted with a contravention of the Act. It is a criminal offence to knowingly or recklessly make a false or misleading statement as to the lawfulness of an act.

s.112(2)

s.112(3)

Example:

In the example above, the manager might tell the clerical worker that he has a responsibility as manager to balance the sexes in the workforce and the HR department is mistaken in its approach. If it is reasonable for the worker to believe this, she will escape liability for the discrimination. Whether it is reasonable to believe this depends on all the relevant circumstances, including the nature of the action and the relationship of the helper to the person seeking help to carry out an unlawful act.

If the manager tells the clerical worker that it is all right for her to get the information, either knowing that that is not true or simply not caring whether it is true or not, the manager will not only have civil liability under the Act for discrimination but will also commit a criminal offence.

9.30

'Reasonable' means having regard to all the circumstances, including the nature of the act and how obviously discriminatory it is, the authority of the person making the statement and the knowledge that the helper has or ought to have.

Gender reassignment discrimination - absence from work

What the Act says

- s.16(2)(a) **9.31** If a transsexual worker is absent from work because of gender reassignment, it is unlawful to treat them less favourably than they would be treated if they were absent due to an illness or injury.

Example:

A transsexual worker takes time off to attend a Gender Identity Clinic as part of the gender reassignment process. His employer cannot treat him less favourably than she would treat him for absence due to illness or injury, for example by paying him less than he would have received if he were off sick.

- s.16(2)(b) **9.32** It is also discrimination for an employer to treat a transsexual person less favourably for being absent because of gender reassignment, compared to how they would treat the same worker for being absent for a reason other than sickness or injury and it is unreasonable to treat them less favourably.

Example:

A transsexual worker tells her boss that she intends to undergo gender reassignment and asks him if she can take an afternoon off as annual leave to attend counselling. The request is brusquely refused although there are sufficient staff members on duty that day to cover for her absence. This could amount to gender reassignment discrimination.

- 9.33** The Act does not define a minimum or maximum time which must be allowed for absence because of gender reassignment. It would be good practice for employers to discuss with transsexual staff how much time they will need to take off in relation to the gender reassignment process and accommodate those needs in accordance with their normal practice and procedures.

Chapter 10:

Obligations and liabilities under the Act

Introduction

10.1

Part 5 of the Act sets out the prohibited conduct as it applies in the employment context. It introduces new forms of obligations on employers to protect job applicants and employees from harassment by third parties during the course of employment, and not to enquire about the disability or health of applicants during the recruitment process. Part 8 sets out the circumstances in which liability for breaches of the Act might be incurred and the defences available against allegations of breaches of the Act.

10.2

This chapter explains the obligations of employers to job applicants and employees; liability of employers, principals, employees and agents for breaches of the Act; and the statutory defences available. In addition, this chapter explains employers' obligations when entering into contracts and the territorial scope of the Act.

Definition of employment

10.3

The Act defines employment broadly and covers a wide category of relationships that constitute work. Employment is defined in the Act as:

- a) employment under a contract of employment, a contract of apprenticeship or a contract personally to do work;
- b) Crown employment;
- c) employment as a relevant member of the House of Commons staff; or
- d) employment as a relevant member of the House of Lords staff.

s.83

10.4

The definition of employment in the Act is wider than under many other employment law provisions. So, for example, it covers a wider group of workers than are covered by the unfair dismissal provisions in the Employment Rights Act 1996.

10.5

The fact that a contract of employment is illegal or performed in an illegal manner will not exclude an Employment Tribunal having jurisdiction to hear an employment-related discrimination claim. This will be so provided that the discrimination is not inextricably linked to illegal conduct (so as to make an award of compensation appear to condone that conduct).

Example:

An employee is aware that her employer is not deducting income tax or National Insurance contributions from her wages which, in this particular situation, is illegal. She queries this but her employer tells her: 'It's the way we do business.' Subsequently, she is dismissed after her employer becomes aware that she is pregnant. She alleges that the reason for her dismissal was her pregnancy and claims discrimination because of her pregnancy. While she knew that her employer was not paying tax on her wages, she did not actively participate in her employer's illegal conduct. The illegal performance of the contract was in no way linked to her discrimination claim. In the circumstances, she may be able to pursue her claim, despite her knowledge of her employer's illegal conduct.

Obligations of employers to job applicants and employees**10.6**

ss.39 & 40
s.83(4) An employer has obligations not to discriminate against, victimise or harass job applicants and employees. These obligations also apply to a person who is seeking to recruit employees even if they are not yet an employer.

Example:

A man sets up a new gardening business and advertises for men to work as gardeners. A woman gardener applies for a job but is rejected because of her sex. She would be able to make a claim for direct discrimination even though the businessman is not yet an employer as he does not yet have any employees.

What the Act says about employers' obligations to job applicants

10.7

Employers must not discriminate against or victimise job applicants in:

s.39(1) & (3)

- the arrangements they make for deciding who should be offered employment;
- in the terms on which they offer employment; or
- by not offering employment to the applicant.

What are arrangements?

10.8

Arrangements refer to the policies, criteria and practices used in the recruitment process including the decision making process. 'Arrangements' for the purposes of the Act are not confined to those which an employer makes in deciding who should be offered a specific job. They also include arrangements for deciding who should be offered employment more generally. Arrangements include such things as advertisements for jobs, the application process and the interview stage.

What are terms on which employment is offered?

10.9

The terms on which an employer might offer employment include such things as pay, bonuses and other benefits. In respect of discrimination because of sex or pregnancy and maternity, a term of an offer of employment that relates to pay is treated as discriminatory where, if accepted by the employee, it would give rise to an equality clause or rule; or where the term does not give rise to an equality clause or rule but it nevertheless amounts to direct discrimination. For more information on sex equality and maternity clauses, please see the Equal Pay Code.

s.39(6)

10.10

Employers' obligations to job applicants extend to them not making enquiries about disability or health before the offer of a job is made. This is discussed at paragraph 10.25 below.

s.60

What the Act says about employers' obligations to employees

10.11

s.39(2) & (4) Employers must not discriminate against or victimise an employee:

- as to the terms of employment;
- in the way they make access to opportunities for promotion, transfer or training or for receiving any other benefit, facility or service;
- by dismissing the employee; or
- subjecting them to any other detriment.

Terms of employment

10.12

The terms of employment include such things as pay, working hours, bonuses, occupational pensions, sickness or maternity and paternity leave and pay. The Act has specific provisions on equality of contractual terms between women and men, which are explained in the Code of Practice on Equal Pay.

Dismissals

10.13

s.39(7) & (8) A dismissal for the purposes of the Act includes:

- direct termination of employment by the employer (with or without notice);
- s.39(7)(a) & 39(8) • termination of employment through the expiry of a fixed term contract (including a period defined by reference to an event or circumstance) unless the contract is immediately renewed; and
- s.39(7)(b) • constructive dismissal – that is, where because of the employer's conduct the employee treats the employment as having come to an immediate end by resigning (whether or not the employee gives notice).

10.14

An employee who is dismissed in breach of the Act does not have to complete a qualifying period of service to bring a claim in the Employment Tribunal.

Example:

An employer decides not to confirm a transsexual employee's employment at the end of a six months probationary period because of his poor performance. The employee is consequently dismissed. Yet, at the same time, the employer extends by three months the probationary period of a non-transsexual employee who has also not been performing to standard. This could amount to direct discrimination because of gender reassignment, entitling the dismissed employee to bring a claim to the Employment Tribunal.

Discrimination and unfair dismissal

10.15

Unfair dismissal claims can generally only be brought by employees who have one year or more continuous employment – but many categories of 'automatically unfair' dismissal have no minimum service requirement. For example, where the principal reason for dismissal is related to a request for time off work for family reasons such as maternity or parental leave, there is no minimum qualifying service.

10.16

Provided that the employee had one year or more continuous employment at the date of termination, a dismissal that amounts to a breach of the Act will almost inevitably be an unfair dismissal as well. In such cases, a person can make a claim for unfair dismissal at the same time as a discrimination claim.

Example:

An employee who has worked with his employer for five years provides a witness statement in support of a colleague who has raised a grievance about homophobic bullying at work. The employer rejects the grievance and a subsequent appeal. A few months later the employer needs to make redundancies. The employer selects the employee for redundancy because he is viewed as 'difficult' and not a 'team player' because of the support he gave to his colleague in the grievance. It is likely that the redundancy would amount to unlawful victimisation and also be an unfair dismissal.

Detriment

10.17

A detriment is anything which might cause an employee to change their position for the worse or put them at a disadvantage; for example, being excluded from opportunities to progress within their career. The concept of detriment is explained in paragraph 9.8.

Example:

An employer does not allow a black male employee an opportunity to act up in a management post, even though he has demonstrated enthusiasm by attending relevant training courses and taking on additional work. He has also expressed an interest in progressing within the business. Instead the employer offers the acting up opportunity to an Asian woman because he perceives Asian people as more hard-working than black people. If the black worker were able to demonstrate that he was better qualified for the acting up position compared to his Asian colleague, he could claim discrimination because of race on the basis that he was subjected to a detriment.

Employers' duty to make reasonable adjustments

10.18

- s.39(5) Employers have a duty to make reasonable adjustments in the recruitment and selection process and during employment. Making reasonable adjustments in recruitment might mean providing and accepting information in accessible formats. During recruitment, making reasonable adjustments could entail amending employment policies and procedures to ensure disabled employees are not put at a substantial disadvantage compared to non-disabled employees. (See Chapter 6 for a detailed explanation of the duty to make reasonable adjustments, and Chapters 16 and 17 for information on what employers can do to comply with the law.)

Example:

An employer's disciplinary policy provides that they will make reasonable adjustments for disabled employees in the disciplinary procedure. When the employer decides to take disciplinary action against an employee with a hearing impairment, they pay for a palantypist to enable the employee to discuss her case with her union representative and to attend all meetings and hearings pertaining to the disciplinary hearing.

Harassment of job applicants and employees

10.19

- s.40 Employers have a duty not to harass job applicants or their employees. This duty extends to harassment by third parties of job applicants and employees in the course of employment. (Chapter 7 provides a detailed explanation of the provisions on harassment; see paragraph 10.20 below on harassment by third parties.)

Harassment by third parties

10.20

Employers may be liable for harassment of job applicants and employees by third parties. A third party is anyone who is not the employer or another employee. It refers to those over whom the employer does not have direct control, such as customers or clients. The duty on employers to prevent third party harassment arises where the employee or job applicant has been harassed by a third party on at least two previous occasions, and the employer is aware of the harassment but fails to take 'reasonably practical steps' to prevent harassment by a third party happening again.

s.40(2) & (4)

Example:

A Ghanaian shop assistant is upset because a customer has come into the shop on Monday and Tuesday and on each occasion has made racist comments to him. On each occasion the shop assistant complained to his manager about the remarks. If his manager does nothing to stop it happening again, the employer would be liable for any further racial harassment perpetrated against that shop assistant by any customer.

10.21

The employer will be liable for harassment by a third party whether or not it is committed by the same third party or another third party.

s.40(3)

Example:

An employer is aware that a female employee working in her bar has been sexually harassed on two separate occasions by different customers. The employer fails to take any action and the employee experiences further harassment by yet another customer. The employer is likely to be liable for the further act of harassment.

10.22

It may be difficult to determine whether an employee or job applicant has been subjected to third party harassment. Employers should not wait for harassment by a third party to have occurred on at least two occasions before taking action.

10.23

Employers will be able to avoid liability for third party harassment of their employees if they can show they took reasonably practical steps to prevent it happening.

s.40(2)(b)

10.24

Depending on the size and resources of an employer, reasonably practical steps might include:

- having a policy on harassment;
- notifying third parties that harassment of employees is unlawful and will not be tolerated, for example by the display of a public notice;
- inclusion of a term in all contracts with third parties notifying them of the employer's policy on harassment and requiring them to adhere to it;
- encouraging employees to report any acts of harassment by third parties to enable the employer to support the employee and take appropriate action;
- taking action on every complaint of harassment by a third party.

Pre-employment enquiries about disability and health**10.25**

s.60 Except in the specific circumstances set out below, it is unlawful for an employer to ask any job applicant about their disability or health until the applicant has been offered a job (on a conditional or unconditional basis) or has been included in a pool of successful candidates to be offered a job when a position becomes available. This includes asking such a question as part of the application process or during an interview. Questions relating to previous sickness absence are questions that relate to disability or health.

10.26

It is also unlawful for an agent or employee of an employer to ask questions about disability or health. This means that an employer cannot refer an applicant to an occupational health practitioner or ask an applicant to fill in a questionnaire provided by an occupational health practitioner before the offer of a job is made (or before acceptance into a pool of successful applicants) except in the circumstances set out below.

10.27

This provision of the Act is designed to ensure that disabled applicants are assessed objectively for their ability to do the job in question, and that they are not rejected because of their disability. There are some limited exceptions to this general rule, which mean that there are specified situations where such questions would be lawful.

Exceptions to the general rule prohibiting disability or health-related questions

10.28

There are six situations when it will be lawful for an employer to ask questions related to disability or health.

s.60(6) & (14)

Reasonable adjustment needed for the recruitment process

10.29

It is lawful for an employer to ask questions relating to reasonable adjustments that would be needed for an assessment such as an interview or other process designed to assess a person's suitability for a job. This means in practice that any information on disability or health obtained by an employer for the purpose of making adjustments to recruitment arrangements should, as far as possible, be held separately. Also it should not form any part of the decision-making process about an offer of employment, whether or not conditional.

s.60(6)(a)

10.30

Questions about reasonable adjustments needed for the job itself should not be asked until after the offer of a job has been made (unless these questions relate to a function that is intrinsic to the job – see below at paragraph 10.36). When questions are asked about reasonable adjustments, it is good practice to make clear the purpose of asking the question.

Example:

An application form states: 'Please contact us if you are disabled and need any adjustments for the interview'. This would be lawful under the Act.

10.31

It is lawful to ask questions about disability or health that are needed to establish whether a person (whether disabled or not) can undertake an assessment as part of the recruitment process, including questions about reasonable adjustments for this purpose.

s.60(6)(a)

Example:

An employer is recruiting play workers for an outdoor activity centre and wants to hold a practical test for applicants as part of the recruitment process. He asks a question about health in order to ensure that applicants who are not able to undertake the test (for example, because they have a particular mobility impairment or have an injury) are not required to take the test. This would be lawful under the Act.

Monitoring purposes

10.32

- s.60(6)(c) Questions about disability and health can be asked for the purposes of monitoring the diversity of applicants. (For information on good practice on monitoring, see Chapter 18 and Appendix 2.)

Implementing positive action measures

10.33

- s.60(6)(d) It is also lawful for an employer to ask if a person is disabled so they can benefit from any measures aimed at improving disabled people's employment rates. This could include the guaranteed interview scheme whereby any disabled person who meets the essential requirements of the job is offered an interview. When asking questions about, for example, eligibility for a guaranteed interview scheme, an employer should make clear that this is the purpose of the question (see Chapter 12).

Occupational requirements

10.34

- s.60(6)(e) There would be a need to demonstrate an occupational requirement if a person with a particular impairment is required for a job. In such a situation, where an employer can demonstrate that a job has an occupational requirement for a person with a specific impairment, then the employer may ask about a person's health or disability to establish that the applicant has that impairment.

Example:

An employer wants to recruit a Deafblind project worker who has personal experience of Deafblindness. This is an occupational requirement of the job and the job advert states that this is the case. It would be lawful under the Act for the employer to ask on the application form or at interview about the applicant's disability.

National security

10.35

Questions about disability or health can be asked where there is a requirement to vet applicants for the purposes of national security.

s.60(14)

Function intrinsic to the job

10.36

Apart from the situations explained above, an employer may only ask about disability or health (before the offer of a job is made or before the person is in a pool of candidates to be offered vacancies when they arise) where the question relates to a person's ability to carry out a function that is intrinsic to that job. As explained in paragraphs 16.5 to 16.9, only functions that can be justified as necessary to a job should be included in a job description. Where a disability or health-related question would determine whether a person can carry out this function with reasonable adjustments in place, then such a question is permitted.

s.60(6)(b)

Example:

A construction company is recruiting scaffolders. It would be lawful under the Act to ask about disability or health on the application form or at interview if the questions related specifically to an applicant's ability to climb ladders and scaffolding to a significant height. The ability to climb ladders and scaffolding is intrinsic to the job.

10.37

Where a disabled applicant voluntarily discloses information about their disability or health, the employer must ensure that in responding to this disclosure they only ask further questions that are permitted, as explained above. So, for example, the employer may respond by asking further questions about reasonable adjustments that would be required to enable the person to carry out an intrinsic function of the job. The employer must not respond by asking questions about the applicant's disability or health that are irrelevant to the ability to carry out the intrinsic function.

Example:

At a job interview for a research post, a disabled applicant volunteers the information that as a reasonable adjustment he will need to use voice activated computer software. The employer responds by asking: 'Why can't you use a keyboard? What's wrong with you?' This would be an unlawful disability-related question, because it does not relate to a requirement that is intrinsic to the job – that is, the ability to produce research reports and briefings, not the requirement to use a keyboard.

If the employer wishes to ask any questions arising from the person's disclosure of a disability they would need to confine them to the permitted circumstances, and this can be explained to the candidate. In this instance, this might include asking about the type of adjustment that might be required to enable him to prepare reports and briefings.

10.38

This exception to the general rule about pre-employment disability or health enquiries should be applied narrowly because, in practice, there will be very few situations where a question about a person's disability or health needs to be asked – as opposed to a question about a person's ability to do the job in question with reasonable adjustments in place.

Disability and health enquiries after a job offer**10.39**

Although job offers can be made conditional on satisfactory responses to pre-employment disability or health enquiries or satisfactory health checks, employers must ensure they do not discriminate against a disabled job applicant on the basis of any such response. For example, it will amount to direct discrimination to reject an applicant purely on the grounds that a health check reveals that they have a disability. Employers should also consider at the same time whether there are reasonable adjustments that should be made in relation to any disability disclosed by the enquiries or checks.

10.40

If an employer is not in a position to offer a job, but has accepted applicants into a pool of people to be offered a job when one becomes available, it is lawful for the employer to ask disability or health-related questions at that stage.

10.41

Where pre-employment health enquiries are made after an applicant has been conditionally offered a job subject to such enquiries, employers must not use the outcome of the enquiries to discriminate against the person to whom a job offer has been made.

Example:

A woman is offered a job subject to a satisfactory completion of a health questionnaire. When completing this questionnaire the woman reveals that she has HIV infection. The employer then decides to withdraw the offer of the job because of this. This would amount to direct discrimination because of disability.

10.42

An employer can avoid discriminating against applicants to whom they have offered jobs subject to satisfactory health checks by ensuring that any health enquiries are relevant to the job in question and that reasonable adjustments are made for disabled applicants (see Chapter 6). It is particularly important that occupational health practitioners who are employees or agents of the employer understand the duty to make reasonable adjustments. If a disabled person is refused a job because of a negative assessment from an occupational health practitioner during which reasonable adjustments were not adequately considered, this could amount to unlawful discrimination if the refusal was because of disability.

Example:

An employer requires all successful job applicants to complete a health questionnaire. The questionnaire asks irrelevant questions about mental health and in answering the questions an applicant declares a history of a mental health condition. If the employer then refused to confirm the offer of the job, the unsuccessful disabled applicant would be able to make a claim of direct discrimination because of disability.

10.43

It is good practice for employers and occupational health practitioners to focus on any reasonable adjustments needed even if there is doubt about whether the person falls within the Act's definition of disabled person. (See paragraphs 2.8 to 2.20 and Appendix 1 for further information about the definition of disability).

Armed forces

10.44

Sch. 9,
Para 4 An employer's obligations do not apply to service in the armed forces in relation to the protected characteristics of age or disability (see paragraphs 13.21 to 13.23).

Liability of employers and principals under the Act

Employers

10.45

s.109(1) & (3) Employers will be liable for unlawful acts committed by their employees in the course of employment, whether or not they know about the acts of their employees.

10.46

The phrase 'in the course of employment' has a wide meaning: it includes acts in the workplace and may also extend to circumstances outside such as work-related social functions or business trips abroad. For example, an employer could be liable for an act of discrimination which took place during a social event organised by the employer, such as an after-work drinks party.

Example:

A shopkeeper goes abroad for three months and leaves an employee in charge of the shop. This employee harasses a colleague with a learning disability, by constantly criticising how she does her work. The colleague leaves the job as a result of this unwanted conduct. This could amount to harassment related to disability and the shopkeeper could be responsible for the actions of his employee.

10.47

s.109(4) However, an employer will not be liable for unlawful acts committed by an employee if they can show that they took 'all reasonable steps' to prevent the employee acting unlawfully. It could be a reasonable step for an employer to have an equality policy in place and to ensure it is put into practice. It might also be a reasonable step for an employer to provide training on the Act to employees. (Part 2 of the Code provides detailed explanations of the types of action employers can take to comply with the Act.)

Principals

10.48

Principals are liable for unlawful acts committed by their agents while acting under the principal's authority. It does not matter whether the principal knows about or approves of the acts of their agents. An agent would be considered to be acting with the principal's authority if the principal consents (whether this consent is expressed or implied) to the agent acting on their behalf. Examples of agents include occupational health advisers engaged but not employed by the employer, or recruitment agencies. s.109(2) & (3)

Example:

A firm of accountants engages a recruitment agency to find them a temporary receptionist. The agency only puts forward white candidates, even though there are suitably qualified black and minority ethnic candidates on their books. The firm could be liable for the actions of the agency even though they do not know about or approve of the agency's action.

10.49

The liability of employers and principals does not extend to criminal offences. The only exception to this is offences relating to disabled persons and transport under Part 12 of the Act. s.109(5)

How employers and principals can avoid liability

10.50

An employer will not be liable for unlawful acts committed by their employees where the employer has taken 'all reasonable steps' to prevent such acts. s.109(4)

Example:

An employer ensures that all their workers are aware of their policy on harassment, and that harassment of workers related to any of the protected characteristics is unacceptable and will lead to disciplinary action. They also ensure that managers receive training in applying this policy. Following implementation of the policy, an employee makes anti-Semitic comments to a Jewish colleague, who is humiliated and offended by the comments. The employer then takes disciplinary action against the employee. In these circumstances the employer may avoid liability because their actions are likely to show that they took all reasonable steps to prevent the unlawful act.

10.51

An employer would be considered to have taken all reasonable steps if there were no further steps that they could have been expected to take. In deciding whether a step is reasonable, an employer should consider its likely effect and whether an alternative step could be more effective. However, a step does not have to be effective to be reasonable.

10.52

Reasonable steps might include:

- implementing an equality policy;
- ensuring workers are aware of the policy;
- providing equal opportunities training;
- reviewing the equality policy as appropriate; and
- dealing effectively with employee complaints.

More information on equality policies is set out in Chapter 18.

10.53

A principal will not be liable for unlawful discrimination carried out by its agents where the agent has acted without the authority of the principal, for example, by acting contrary to the principal's instructions not to discriminate.

Example:

An hotel (the principal) uses an agency (the agent) to supply catering staff. The hotel management ensures that the agency is aware of the hotel's equality and diversity policy. Despite this, and without the hotel management's knowledge, the agency decides never to send for interview anyone whom they believe to be gay or lesbian. In this case, the agency has acted without the hotel's authority and the hotel would not, therefore, be liable for the unlawful discrimination by the agency.

Employers' and principals' liability for other unlawful acts**10.54**

Employers and principals will be also liable for aiding, causing, instructing or inducing their employees or agents to commit an unlawful act. Employers and principals will also be liable for discrimination or harassment of former workers if the discrimination or harassment arises out of and is closely connected to a relationship covered by the Act which has ended (see paragraph 10.57 to 10.62 below).

Liability of employees and agents under the Act

10.55

Employees and agents may be personally liable for breaches of the Act where the employer or principal is also liable. Employees may be liable for their actions where the employer is able to rely successfully on the ‘reasonable steps’ defence. An agent may be personally liable for unlawful acts committed under their principal’s authority. The principal may avoid liability if they can show that the agent was not acting with their authority. s.110(1) & (2)

Example:

A line manager fails to make reasonable adjustments for a machine operator with multiple sclerosis, even though the machine operator has made the line manager aware that he needs various adjustments. The line manager is not aware that she has acted unlawfully because she failed to attend equality and diversity training, provided by her employer. The line manager could be liable personally for her actions as her employer’s action, in providing training, could be enough to meet the statutory defence.

10.56

However, if the employee or agent reasonably relies on a statement by the employer or principal that an act is not unlawful, then the employee or agent will not be liable. s.110(3)

Example:

In the example above, the line manager has asked the company director if she needs to make these adjustments and the director has wrongly said, ‘I don’t think he’s covered by the Equality Act because he isn’t in a wheelchair, so don’t bother.’ In this situation, the line manager would not be liable, but the employer would be liable.

Relationships that have ended

What the Act says

10.57

The Act makes it unlawful for employers to discriminate against or harass employees after a relationship covered by the Act has ended. An employer will be liable for acts of discrimination or harassment arising out of the work relationship and which are ‘closely connected to’ it. s.108

10.58

The expression 'closely connected to' is not defined in the Act but will be a matter of degree to be judged on a case-by-case basis.

Example:

A worker who receives an inaccurate and negative job reference from her former employer because she is a lesbian could have a claim against her former employer for direct discrimination because of sexual orientation.

10.59

s.108(3) This protection will apply even if the relationship in question came to an end before this section came into force.

10.60

s.108(4) This protection includes a duty to make reasonable adjustments for disabled ex-employees who are placed at a substantial disadvantage when dealing with their former employer.

Example:

A former worker has lifetime membership of a works social club but cannot access it due to a physical impairment. Once the former employer is made aware of the situation, they will need to consider making reasonable adjustments.

10.61

s.108(3) An employee will be able to enforce protection against discrimination or harassment as if they were still in the relationship which has ended.

10.62

If the conduct or treatment which an individual receives after a relationship has ended amounts to victimisation, this will be covered by the victimisation provisions (see paragraphs 9.2 to 9.15).

Contracts**10.63**

s.142 The Act prevents employers from avoiding their responsibilities under the Act by seeking to enter into agreements which permit them to discriminate or commit other unlawful acts.

Unenforceable terms in contracts and other agreements

10.64

A term of a contract that promotes or provides for treatment that is prohibited by the Act is unenforceable. However, this will not prevent a person who is or would be disadvantaged by an unenforceable term from relying on it to get any benefit to which they are entitled.

s.142(1)

10.65

In relation to disability only, these provisions on unenforceable terms apply to terms of non-contractual agreements pertaining to the provision of employment services, or group insurance arrangements for employees.

s.142(2) & (3)

10.66

The Act also says that a term of a contract that attempts to exclude or limit the anti-discrimination provisions of the Act is unenforceable by a person in whose favour it would operate. However, this does not prevent the parties to a claim in the Employment Tribunal from entering into an agreement to settle the claim, provided the agreement is made with the assistance of Acas or is a 'qualifying compromise contract' (see also paragraph 15.13).

s.144(1)

s.144(4)

Removal or modification of unenforceable terms

10.67

A person who has an interest in or is affected by an unenforceable term in a contract can apply to the county court (or sheriff court in Scotland) to have it modified or removed.

s.143

Void or unenforceable terms in collective agreements and rules of undertakings

10.68

Any term of a collective agreement will be void insofar as it leads to conduct prohibited by the Act. A rule of an undertaking is unenforceable insofar as it also has that effect. A rule of an undertaking is a rule made by a trade organisation, qualifications body or employer which is applied respectively to members or prospective members, holders of relevant qualifications or those seeking them, and employees or prospective employees.

s.145

- s.146 **10.69** Employees and prospective employees can apply to an Employment Tribunal for a declaration that a term is void or that a rule is unenforceable.

Territorial Scope

10.70

The employment provisions in the Act form part of the law of England, Scotland and Wales (Great Britain). The Act leaves it to Employment Tribunals to determine whether these provisions apply to the circumstances being considered, in line with domestic and European case law. This requires that protection be afforded when there is a sufficiently close link between the employment relationship and Great Britain.

10.71

Where an employee works physically wholly within Great Britain, this will be straightforward. Where an employee works partly or wholly outside Great Britain, in considering whether a sufficiently close link exists a tribunal may consider such matters as: where the employee lives and works, where the employer is established, what laws govern the employment relationship in other respects, where tax is paid, and other matters it considers appropriate.

10.72

The protection to be afforded to seafarers and employees who work on an offshore installation, for example an oil rig, a gas rig or a renewable energy installation, ship or hovercraft, will be set out in secondary legislation made under the Act.

Chapter 11: Discrimination in work relationships other than employment

Introduction

11.1

As explained in paragraph 1.22, the Act covers a variety of work relationships beyond employment. This Chapter explains the relevant provisions of Part 5 of the Act which focus specifically on these wider work-related provisions. In other respects, however, the employment provisions of the Act apply in the usual way.

Discrimination against contract workers

What the Act says

11.2

Contract workers are protected to a similar extent to employees against discrimination, harassment and victimisation. They are also entitled to have reasonable adjustments made to avoid being put to a substantial disadvantage compared with non-disabled people.

s.41

s.41(1) & 41(3) **11.3** The Act says that it is unlawful for a ‘principal’ to discriminate against or victimise a contract worker:

- in the terms on which the principal allows the contract worker to work;
- by not allowing the contract worker to do or continue to do the work;
- in the way the principal affords the contract worker access to benefits in relation to contract work, or by failing to afford the contract worker access to such benefits; or
- by subjecting the contract worker to any other detriment.

s.41(2) & (4) **11.4** The Act also says that it is unlawful for a principal to harass a contract worker and that the duty to make reasonable adjustments applies to a principal.

Example:

A meat packing company uses agency workers who are engaged and supplied by an employment business to supplement its own workforce during times of peak demand. The employment business supplies the company with three agency workers, one of whom is gay. The owner of the company discovers this and asks the agency to replace him with someone who is not gay. By not allowing the gay man to continue to work at the meat packing plant, the company will be liable for discrimination as a ‘principal’.

Who is a ‘principal’?

s.41(5) **11.5** A ‘principal’, also known as an ‘end-user’, is a person who makes work available for an individual who is employed by another person and supplied by that other person under a contract to which the principal is a party (whether or not that other person is a party to it). The contract does not have to be in writing.

Example:

A nurse is employed by a private health care company which sometimes uses an employment business to deploy staff to work in the NHS. The employment business arranges for the nurse to work at an NHS Trust. In this case the ‘principal’ is the NHS Trust.

Who is a contract worker?

11.6

A contract worker is a person who is supplied to the principal and is employed by another person who is not the principal. The worker must work wholly or partly for the principal, even if they also work for their employer, but they do not need to be under the managerial power or control of the principal. Contract workers can include employees who are seconded to work for another company or organisation and employees of companies who have a contract for services with an employment business.

s.41(7)

11.7

Agency workers engaged by an employment business may also be contract workers as long as they are employed by the employment business. An agency worker supplied to a principal to do work and paid by an employment business under a contract will also be protected. Self-employed workers who are not supplied through employment businesses are not contract workers but may still be covered by the Act (see paragraph 10.3).

Example:

An individual owns X company of which he is the sole employee. He has a contract for services with an employment business whereby he has to personally do the work. The employment business supplies him to Y company. Although there is no contract between X and Y companies, the employee of X company would be a contract worker and would be protected under the Act.

Example:

A self-employed person is supplied by an employment business to a company. The worker is racially and sexually harassed by an employee of the company. Because the worker is not employed, it is unlikely that she will be protected by the Act unless she is able to convince a tribunal that it is necessary for a contract to be implied between her and the end-user.

11.8

There is usually a contract directly between the end-user and supplier, but this is not always the case. Provided there is an unbroken chain of contracts between the individual and the end-user of their services, that end-user is a principal for the purposes of the Act and the individual is therefore a contract worker.

s.41(5)(b)

Example:

A worker is employed by a perfume concession based in a department store, where the store profited from any sales he made and imposed rules on the way he should behave. In these circumstances, the worker could be a contract worker. The concession would be his employer and the store would be the principal. However, this would not apply if the store simply offered floor space to the concession, the concession paid a fixed fee to the store for the right to sell its own goods in its own way and for its own profit, and concession staff in no way worked for the store.

How does the duty to make reasonable adjustments apply to disabled contract workers?

11.9

s.41(4) The duty to make reasonable adjustments applies to a principal as well as an employer. Therefore, in the case of a disabled contract worker, their employer and the principal to whom they are supplied may each be under a separate duty to make reasonable adjustments.

Example:

A travel agency hires a clerical worker from an employment business to fulfil a three month contract to file travel invoices during the busy summer holiday period. The contract worker is a wheelchair user, and is quite capable of doing the job if a few minor, temporary changes are made to the arrangement of furniture in the office. It is likely to be reasonable for the travel agency to make these.

Employer's duty to make reasonable adjustments

11.10

Sch. 8,
Para 5(1) A disabled contract worker's employer will have to make reasonable adjustments if the contract worker is substantially disadvantaged by their own provisions, criteria and practices, by a physical feature of the premises they occupy, or by the non-provision of an auxiliary aid (see Chapter 6).

11.11

The employer of a disabled contract worker is also under a duty to make reasonable adjustments where the contract worker is likely to be substantially disadvantaged by:

- a provision, criterion or practice applied by or on behalf of all or most of the principals to whom the contract worker is or might be supplied, and where the disadvantage is the same or similar in the case of each principal;
- a physical feature of the premises occupied by each of the principals to whom the contract worker is or might be supplied, and where the disadvantage is the same or similar in the case of each principal; or
- the non-provision of an auxiliary aid which would cause substantial disadvantage, and that disadvantage would be the same or similar in the case of all or most of the principals to whom the contract worker might be supplied.

Sch. 8,
Para 5(2) - (5)

Example:

A blind secretary is employed by a temping agency which supplies her to other organisations for secretarial work. Her ability to access standard computer equipment places her at a substantial disadvantage at the offices of all or most of the principals to whom she might be supplied. The agency provides her with an adapted portable computer and Braille keyboard, by way of reasonable adjustments.

Principal's duty to make reasonable adjustments**11.12**

A principal has similar duties to make reasonable adjustments to those of a disabled contract worker's employer, but does not have to make any adjustment which the employer should make. So, in effect, the principal is responsible for any additional reasonable adjustments which are necessary solely because of its own provision, criterion or practice, the physical feature of the premises it occupies or to avoid the non-provision of or failure to provide an auxiliary aid.

Sch. 8,
Para 6

Example:

In the preceding example, a bank which hired the blind secretary may have to make reasonable adjustments which are necessary to ensure that the computer provided by the employment business is compatible with the system which the bank is already using.

11.13

In deciding whether any, and if so, what, adjustments would be reasonable for a principal to make, the period for which the disabled contract worker will work for the principal is important. It might not be reasonable for a principal to have to make certain adjustments if the worker will be with the principal for only a short time.

Example:

An employment business enters into a contract with a firm of accountants to provide an assistant for two weeks to cover an unexpected absence. The employment business proposes a name. The person concerned finds it difficult, because of his disability, to travel during the rush hour and would like his working hours to be modified accordingly. It might not be reasonable for the firm to have to agree, given the short time in which to negotiate and implement the new hours.

11.14

It would be reasonable for a principal and the employer of a contract worker to co-operate with each other with regard to any steps taken by the other to assist the contract worker. It is good practice for the principal and the employer to discuss what adjustments should be made, and who should make them.

Example:

The bank and the employment business in the example in paragraphs 11.12 above would need to co-operate with each other so that, for example, the employment business allows the bank to make any necessary adaptations to the equipment which the employment business provided to ensure its compatibility with the bank's existing systems.

Discrimination against police officers

What the Act says

11.15

s.42(1) & (2)

The Act says that police officers and cadets are to be treated as employees of the chief officer (chief constable in Scotland) under whose direction and control they are serving, or of the 'responsible' authority. Police officers include special constables and those in private constabularies such as the British Transport Police. Police officers and police cadets have the same rights as employees under the Act and therefore have the same protection against discrimination, harassment and victimisation (see Chapter 10) under

Part 5. The chief officer (chief constable in Scotland) or the responsible authority is liable for their unlawful acts against police officers, cadets and applicants for appointment. They are also vicariously liable for unlawful acts committed by one officer against another.

s.109

11.16

A constable serving with the Serious Organised Crime Agency (SOCA) or Scottish Police Services Authority (SPSA) is treated as employed by those agencies or authorities and is protected by the employment provisions of the Act.

s.42(4) & (5)

11.17

A constable at the Scottish Crime and Drugs Enforcement Agency (SCDEA) is treated as employed by the Director General of SCDEA.

s.42(6)

Discrimination against partners in a firm and members of limited liability partnerships

11.18

The Act provides protection to partners and members of a limited liability partnership (LLP) and a person seeking to become a partner or member of a LLP, similar to that provided to workers and job applicants against an employer.

What the Act says

11.19

It is unlawful for a firm, proposed firm, LLP or proposed LLP to discriminate against or victimise a partner or member:

ss.44(1) & (5),
45(1) & (5)

- in the arrangements they make to determine who should be offered the position of partner or member;
- in the terms on which they offer the person a position as partner or member; or
- by not offering the person a position as partner or member.

Example:

An African Caribbean candidate with better qualifications than other applicants is not shortlisted for partnership with an accountancy firm. The firm is unable to provide an explanation for the failure to shortlist. This could amount to direct discrimination because of race.

- ss.44(2) & (6), 45(2) & (6)
- 11.20** Where the person is already a partner or a member of a LLP, it is unlawful to discriminate against or victimise that person:
- in the terms of partnership or membership;
 - in the way it affords (or by not affording) the person who is a partner or member access to opportunities for promotion, transfer or training or for receiving any other benefits, facility or service;
 - by expelling the person who is a partner or member; or
 - by subjecting the person who is a partner or member to any other detriment.

Example:

An LLP refuses a Muslim member access to its childcare scheme because all the other children who attend the scheme have Christian parents. This could amount to direct discrimination because of religion or belief.

- ss.44(4) & 45(4)
- 11.21** It is also unlawful for a firm, proposed firm, LLP or proposed LLP to subject a partner or member or a person seeking to become a partner or member to harassment.

Example:

A lesbian candidate who applies to become a partner is subjected to homophobic banter during her partnership interview. The banter is offensive and degrading of her sexual orientation and creates an offensive and degrading environment for her at interview. This would amount to harassment related to sexual orientation.

How does the duty to make reasonable adjustments apply to partners, and members of an LLP?

- ss.44(7) & 45(7)
- 11.22** The duty to make reasonable adjustments for disabled partners and members applies to a firm, proposed firm, LLP and proposed LLP in the same way as it applies to an employer (see Chapters 6 and 10).

- Sch. 8, Paras 7 & 8
- 11.23** Where a firm or LLP is required to make adjustments for a disabled partner, disabled prospective partner, disabled member or disabled prospective member, the cost of making the adjustments must be borne by that firm or LLP. Provided that the disabled person is, or becomes, a partner or member, they may be required (because partners or members share the costs of the

firm or LLP) to make a reasonable contribution towards this expense. In assessing the reasonableness of any such contribution (or level of such contribution), particular regard should be had to the proportion in which the disabled partner or member is entitled to share in the firm's or LLP's profits, the cost of the reasonable contribution and the size and administrative resources of the firm or LLP.

Example:

A disabled person who uses a wheelchair as a result of a mobility impairment joins a firm of architects as a partner, receiving 20% of the firm's profits. He is asked to pay 20% towards the cost of a lift which must be installed so that he can work on the premises. This is likely to be reasonable.

Discrimination against barristers and advocates

11.24

In England and Wales, barristers who are tenants and pupil barristers (including persons who apply for pupillage) have rights which are broadly similar to the rights of employees under the Act. Tenants include barristers who are permitted to work in chambers, door tenants and squatters (barristers who can practice from a set of chambers but who are not tenants).

What the Act says

11.25

It is unlawful for a barrister or a barrister's clerk to discriminate against or victimise a person applying for a tenancy or pupillage:

s.47(1) & (4)

- in the arrangements made to determine to whom a tenancy or pupillage should be offered;
- in respect of any terms on which a tenancy or pupillage is offered; or
- by not offering a tenancy or pupillage to them.

Example:

A barristers' chambers reject all CVs for pupillages from applicants who completed their law examinations over three years ago. This criterion tends to exclude older applicants and could amount to indirect age discrimination, unless it can be objectively justified.

11.26

A barrister or barrister's clerk must not in relation to a tenancy or pupillage harass a tenant or pupil or an applicant for a tenancy or pupillage.

s.47(3)

Example:

A male barrister pesters a female applicant for pupillage with repeated invitations to dinner and suggests that her application for pupillage would be viewed more favourably by the barristers' chambers if she accepted his invitation to dinner. This could amount to sexual harassment.

11.27

s.47(2) & (5) The Act also makes it unlawful for a barrister or barrister's clerk to discriminate against or victimise a tenant or pupil:

- in respect of the terms of their tenancy or pupillage;
- in the opportunities for training, or gaining experience, which are afforded or denied to them;
- in the benefits, facilities or services which are afforded or denied to them;
- by terminating their pupillage;
- by subjecting them to pressure to leave their chambers; or
- by subjecting them to any other detriment.

Example:

On receiving a solicitor's instructions on behalf of a Christian client, a clerk puts forward a Christian barrister in his chambers in preference to a Hindu barrister. He does this because he thinks the Hindu barrister's religion would prevent him representing the Christian client properly. This could amount to direct discrimination because of religion or belief as the clerk's action could be a detriment to the Hindu barrister.

11.28

s.47(6) The Act also says it is unlawful for a person (for example, an instructing solicitor, firm of solicitors or client) in relation to instructing a barrister to discriminate against that barrister by subjecting them to a detriment, or harass or victimise that barrister. This includes the giving, withholding or termination of instructions.

Example:

When a clerk puts forward a male barrister for a pregnancy discrimination case, the firm of solicitors representing the employer asks for a female barrister instead, because they consider the case would be represented better by a woman. This could amount to direct discrimination because of sex on the part of the firm of solicitors.

11.29

The provisions applying to barristers and barristers' clerks, set out above, also apply to advocates, advocates' clerks, devils, members of stables and persons seeking to become devils or members of a stable in Scotland.

s.48

How does the duty to make reasonable adjustments apply to barristers and clerks?

11.30

The duty to make reasonable adjustments applies to barristers and barristers' clerks (advocates and advocates' clerks in Scotland) in the same way as it applies to an employer (see Chapters 6 and 10).

ss.47(7)
48(7)**Example:**

Barristers' clerks at a set of chambers routinely leave messages for barristers on scraps of paper. This practice is likely to disadvantage visually impaired members of chambers and may need to be altered for individual disabled tenants and pupils.

Discrimination against personal and public office holders

11.31

It is unlawful to discriminate against, victimise or harass office holders where they are not protected by other provisions (within Part 5) of the Act. Thus an office holder who is an employee will be protected by the provisions dealing with employment. Whilst an office holder may also be an employee, it is important to note that office holders do not hold their position as employees. An office holder's functions, rights and duties may be defined by the office they hold, instead of or in addition to a contract of employment.

ss.49 - 52
Sch.6
Paras 1(1)
& 1(2)**11.32**

The Act affords protection to those seeking to be appointed or those appointed to personal offices and public offices. Office holders include offices and posts such as directors, non-executive directors, company secretaries, positions on the board of non-departmental public bodies, some judicial positions and positions held by some ministers of religion.

What is a personal office?

11.33

A personal office is an office or post to which a person is appointed to discharge a function personally under the direction of another person

s.49(1), (2)
& (11)

(who may be different from the person who makes the appointment) and is entitled to remuneration other than expenses or compensation for loss of income or benefits.

s.52(4) **11.34** Where a personal office is also a public office it is to be treated as a public office only.

What is a public office?

s.50(1) & (2) **11.35** A public office holder is a person who is appointed by a member of the executive or whose appointment is made on the recommendation of, or with the approval of, a member of the executive or either Houses of Parliament, the National Assembly for Wales, or the Scottish Parliament.

What the Act says

ss.49(3),(5) & 50(3),(5) **11.36** It is unlawful for a person who has the power to make an appointment to a personal or public office to discriminate against or victimise a person:

- in the arrangements which are made for deciding to whom to offer the appointment;
- as to the terms on which the appointment is offered;
- by refusing to offer the person the appointment.

Example:

A deaf woman who communicates using British Sign Language applies for appointment as a Chair of a public body. Without interviewing her, the public body making the appointments writes to her saying that she would not be suitable as good communication skills are a requirement. This could amount to discrimination because of disability.

ss.49(4) & 50(4) **11.37** It is unlawful for a person who has the power to make an appointment to a personal or public office to harass a person who is seeking or being considered for appointment in relation to the office.

11.38

It is also unlawful for a ‘relevant person’ in relation to a personal office or public office to discriminate against or victimise an office holder:

- as to the terms of the appointment;
- in the opportunities which are afforded (or refused) for promotion, transfer, training or receiving any other benefit, facility or service;
- by terminating their appointment; or
- by subjecting the person to any other detriment.

ss.49(6),(8) &
50(6),(9),(10)

11.39

The Act also makes it unlawful for a relevant person to harass an appointed office holder in relation to that office.

ss.49(7) &
50(8)

11.40

A ‘relevant person’ is the person who has the power to act on the matter in respect of which unlawful conduct is alleged. Depending on the circumstances, this may be the person who can set the terms of appointment, afford access to an opportunity; terminate the appointment; subject an appointee to a detriment; or harass an appointee.

s.52(6)

11.41

The duty to make reasonable adjustments applies to those who can make an appointment to personal office and to public office and a ‘relevant person’ in relation to the needs of disabled office holders.

ss.49(9) &
50(11)

11.42

In respect of sex or pregnancy and maternity discrimination, if an offer of appointment to an office has a term relating to pay that would give rise to an equality clause if it were accepted, this would be treated as discriminatory. If that is not the case, a term relating to pay will be discriminatory where the offer of the term constitutes direct discrimination.

ss.49(12) &
50(12)

Who can make appointments to a public office?**11.43**

A member of the executive, for example a government Minister, or someone who makes an appointment on the recommendation of or subject to the approval of a member of the executive can make appointments to a public office.

s.50(2)

- s.50(7) & (10) **11.44** Where, in relation to a public office, an appointment is made on the recommendation or is subject to the approval of the House of Commons, the House of Lords, the National Assembly for Wales or the Scottish Parliament, it is unlawful for a relevant person to discriminate against or victimise an office holder in all respects as set out in paragraph 11.38, except by terminating the appointment. However, a relevant person does not include the House of Commons or the House of Lords, the National Assembly for Wales or the Scottish Parliament.
- s.52(6)

Example:

A Secretary of State terminates the appointment of a Commissioner in a non-departmental public body because of the Commissioner's religious beliefs. This could amount to discrimination because of religion or belief.

Recommendations and approvals for the appointment to public offices

- s.51(1) & (3) **11.45** The Act says it is unlawful for a member of the executive or a 'relevant body' who has the power to make recommendations or give approval for an appointment, or a member of the executive, to discriminate or victimise a person:
- in the arrangements made for deciding who to recommend for appointment or to whose appointment to give approval;
 - by not recommending that person for appointment or by not giving approval to the appointment;
 - by making a negative recommendation for appointment.
- s.51(2) **11.46** It is unlawful for a member of the executive or 'relevant body' to harass a person seeking or being considered for a public office in relation to that office.
- s.51(4) **11.47** A 'relevant body' has a duty to make reasonable adjustments to avoid a disabled person being put at a substantial disadvantage compared to non-disabled people.

Example:

A selection process is carried out to appoint a chair for a public health body. The best candidate for the appointment is a disabled person with a progressive condition who is not able to work full-time because of her disability. The person who approves the appointment should consider whether it would be a reasonable adjustment to approve the appointment of the disabled person on a job-share or part-time basis.

What is a 'relevant body'?

11.48

A relevant body is a body established by or in pursuance of an enactment or by a member of the executive, for example a non-departmental public body.

s.51(5)

Example:

A statutory commission which makes recommendations to the Minister for the appointment of its CEO would be a relevant body for the purpose of the Act.

Example:

It could be direct discrimination for the government Minister responsible for approving the appointment of members of the BBC Trust to refuse to approve the appointment of a person because they are undergoing gender reassignment.

Personal and public offices that are excluded from the Act

11.49

Political offices or posts are excluded from the definition of personal or public offices. Political offices and posts include offices of the House of Commons or House of Lords; the office of the leader of the opposition; the Chief or Assistant Opposition Whip; county council offices; an office of the Greater London Authority held by the Mayor of London; or assembly members of the Greater London Authority and offices of registered political parties.

Sch. 6,
Para 2

11.50

Life peerages and any dignity or honour awarded by the Crown are also excluded from the definition of personal and public offices.

What the Act says about the termination of an office holder's post

- s.52(7) & (8) **11.51**
 The provisions on the termination of an office holder's office or post are the same as for termination of employment; that is, it applies to fixed term appointments which are not renewed on the expiration of the term of the appointment, and to termination of the appointment by an office holder because of the conduct of a relevant person.

Qualifications bodies and trade organisations

- ss.53 & 57 **11.52**
 Qualification bodies and trade organisations have the same obligations as employers in their capacity as employers. They also have separate obligations under the Act to members and prospective members and to those on whom they confer qualifications. The nature and effect of the obligations on qualification bodies and trade organisations will be set out in a separate Code of Practice.

Employment services

- s.55 **11.53**
 The Act places obligations on employment service providers that are similar to those placed on employers. The definition of an employment service is set out in paragraph 11.59 below.

What the Act says

- s.55(1) & (4) **11.54**
 An employment service provider must not discriminate against or victimise a person in relation to the provision of an employment service:
- in the arrangements that it makes for selecting people to whom it provides, or offers to provide, the service;
 - in the terms on which it offers to provide the service to that person;
 - by not offering to provide the service to that person.

Example:

An employment agency only offers its services to people with European Economic Area (EEA) passports or identity cards. This could be indirect race discrimination as it would put to a particular disadvantage non-European nationals who do not hold a European passport but have the right to live and work in the UK without immigration restrictions. It is unlikely that the policy could be objectively justified.

11.55

In addition, an employment service provider must not in relation to the provision of an employment service, discriminate against or victimise a person:

- as to the terms upon which it provides the service to that person;
- by not providing the service to that person;
- by terminating the provision of the service to that person; or
- by subjecting that person to a detriment.

s.55(2) & (5)

Example:

A headhunting company fails to put forward women for chief executive positions. It believes that women are less likely to succeed in these positions because they will leave to get married and start a family. This could amount to discrimination because of sex.

11.56

It is also unlawful for an employment service provider to harass, in relation to the provision of an employment service, those who seek to use or who use its services.

s.55(3)

Example:

An advisor for a careers guidance service is overheard by a transsexual client making offensive and humiliating comments to a colleague about her looks and how she is dressed. This could amount to harassment related to gender reassignment.

11.57

Under the Act, an employment service provider has a duty to make reasonable adjustments, except when providing a vocational service. The duty to make reasonable adjustments is an anticipatory duty.

s.55(6)

Example:

A woman who has dyslexia finds it difficult to fill in an employment agency's registration form. An employee of the agency helps her to fill it in. This could be a reasonable adjustment for the employer to make.

- s.55(7) **11.58** However, the anticipatory duty to make reasonable adjustments does not apply to vocational training (that is, training for work or work experience), where the duty is the same as in employment.

What are employment services?**11.59**

'Employment service' includes:

- s.56(2)
- the provision of or making arrangements for the provision of vocational training, that is, training for employment and work experience;
 - the provision of or making arrangements for the provision of vocational guidance, such as careers guidance;
 - services for finding people employment, such as employment agencies and headhunters. It also includes the services provided by, for example, Jobcentre Plus, the Sector Skills Council and intermediary agencies that provide basic training and work experience opportunities such as the Adult Advancement and Careers Service and other schemes that assist people to find employment;
 - services for supplying employers with people to do work, such as those provided by employment businesses.

11.60

- s.56(8) The reference to training applies to facilities for training. Examples of the types of activities covered by these provisions include providing classes on CV writing and interviewing techniques, training in IT/keyboard skills, providing work placements and literacy and numeracy classes to help adults into work.

Which employment services are excluded?**11.61**

- s.56(4) & (5) The provision of employment services does not include training or guidance in schools or to students at universities or further and higher education institutions.

11.62

Those concerned with the provision of vocational services are subject to different obligations which are explained further in the code on Services, Public Functions and Associations under Part 3 of the Act (see Code on Services, Public Functions and Associations).

Discrimination against local authority members

11.63

Local authority members carrying out their official duties are protected against unlawful discrimination, harassment and victimisation.

s.58

What the Act says

11.64

A local authority must not discriminate against or victimise a local authority member while they undertake official business:

s.58(1) & (3)

- a) in the opportunities which are afforded (or refused) for training or receiving any other benefit; or
- b) by subjecting the local authority member to any other detriment.

Example:

A councillor of Chinese origin sits on a local council's policy scrutiny committee. Officers of the council often send him papers for meetings late or not at all which means he is often unprepared for meetings and unable to make useful contributions. His colleagues, none of whom are Chinese, do not experience this problem. This could amount to direct discrimination because of race against the councillor by the authority.

11.65

It is also unlawful for a local authority to harass a local authority member while they undertake official business.

s.58(2)

Example:

A councillor who is a Humanist regularly gets ridiculed about her beliefs by other councillors and council officers when attending council meetings. This could amount to harassment related to religion or belief.

11.66

It will not be a detriment if a local authority fails to elect, appoint or nominate a local authority member to an office, committee, sub-committee or body of the local authority.

s.58(4)

Example:

A local authority councillor who is a Christian fails to get appointed to a planning committee when another councillor who is an Atheist did get appointed. The Christian councillor would not have a claim under the Act.

11.67

- s.58(6) Local authorities are also under a duty to make reasonable adjustments for disabled members of the local authority, who carry out official business, to avoid their being at a substantial disadvantage compared to non-disabled people.

Example:

A local authority fails to provide documents for meetings in Braille for a councillor who is blind. As a result the councillor is unable to participate fully in Council business. By not making the documents available in Braille, the local authority would have failed to comply with its duty to make reasonable adjustments.

What is a local authority?

11.68

- s.59(2) 'Local authority' refers to any of the twelve types of body listed in the Act. The government can by order change the list to add, amend or remove bodies which exercise functions that have been conferred on those covered by (a) to (l) of the list.

Who is a local authority member?

11.69

- s.59(5) A local authority 'member' will usually mean an elected member of a local authority such as a councillor. In relation to the Greater London Authority, 'member' means the Mayor of London or a member of the London Assembly.

What is official business?

11.70

- s.59(4) Official business is anything undertaken by a local authority member in their capacity as a member of:
- a) the local authority;
 - b) a body to which the local authority member is appointed by their authority or by a group of local authorities, for example a planning committee; or
 - c) any other public body.

Chapter 12:

Positive action

Introduction

12.1

The Act permits employers to take positive action measures to improve equality for people who share a protected characteristic. These optional measures can be used by employers, principals, partnerships, LLPs, barristers and advocates, those who make appointments to personal and public offices and employment service providers (the term ‘employer’ is used to refer to all those covered by the provisions).

s.158

12.2

As well as explaining the general positive action provisions in the Act, this chapter outlines the benefits of using these measures, describes the circumstances when positive action could be appropriate and illustrates the law with examples of approaches that employers might consider taking.

12.3

The specific provisions on positive action in recruitment and promotion will not be in force when the Code is laid before Parliament and therefore are not covered in this Code.

s.159

Distinguishing positive action and ‘positive discrimination’

12.4

Positive action is not the same as positive discrimination, which is unlawful. It may be helpful to consider the Act’s positive action provisions within the continuum of actions to improve work opportunities for people who share a protected characteristic.

12.5

First, action taken to benefit those from one particular protected group that does not involve less favourable treatment of those from another protected group, or to eradicate discriminatory policies or practices, will normally be lawful. Examples might include placing a job advertisement in a magazine with a largely lesbian and gay readership as well as placing it in a national newspaper; or reviewing recruitment processes to ensure that they do not contain criteria that discriminate because of any protected characteristic. Such actions would not be classed as ‘positive action’.

12.6

Second, there are actions that fall within the framework of the Act’s positive action provisions, such as reserving places on a training course for a group sharing a protected characteristic. These actions are only lawful if they meet the statutory conditions for positive action measures and do not exceed the limitations set out in the Act.

Example:

A large public sector employer monitors the composition of their workforce and identifies that there are large numbers of visible ethnic minority staff in junior grades and low numbers in management grades. In line with their equality policy, the employer considers the following action to address the low numbers of ethnic minority staff in senior grades:

- Reviewing their policies and practices to establish whether there might be discriminatory criteria which inhibit the progression of visible ethnic minorities;
 - Discussing with representatives of the trade union and the black staff support group how the employer can improve opportunities for progression for the under-represented group;
 - Devising a positive action programme for addressing under-representation of the target group, which is shared with all staff;
 - Including within the programme shadowing and mentoring sessions with members of management for interested members of the target group.
- The programme also encourages the target group to take advantage of training opportunities such as training in management, which would improve their chances for promotion.

12.7

Third, there are actions – often referred to as ‘positive discrimination’ – which involve preferential treatment to benefit members of a disadvantaged or under-represented group who share a protected characteristic, in order to address inequality. However, these actions do not meet the statutory requirements for positive action, and will be unlawful unless a statutory exception applies (see Chapters 13 and 14).

Example:

An LLP seeks to address the low participation of women partners by interviewing all women regardless of whether they meet the criteria for partnership. This would be positive discrimination and is unlawful.

12.8

It is important to note that it is not unlawful for an employer to treat a disabled person more favourably compared to a non-disabled person (see paragraph 3.35).

Voluntary nature of positive action

12.9

Positive action is optional, not a requirement. However, as a matter of good business practice, public and private sector employers may wish to take positive action measures to help alleviate disadvantage experienced in the labour market by groups sharing a protected characteristic; take action to increase their participation in the workforce where this is disproportionately low; or meet their particular needs relating to employment.

12.10

In addition, employers who use positive action measures may find this brings benefits to their own organisation or business. Benefits could include:

- a wider pool of talented, skilled and experienced people from which to recruit;
- a dynamic and challenging workforce able to respond to changes;
- a better understanding of foreign/global markets;
- a better understanding of the needs of a more diverse range of customers – both nationally and internationally.

What the Act says

12.11

Where an employer reasonably thinks that people who share a protected characteristic:

- s.158(1)(a) a) experience a disadvantage connected to that characteristic; or
- s.158(1)(b) b) have needs that are different from the needs of persons who do not share that characteristic; or
- s.158(1)(c) c) have disproportionately low participation in an activity compared to others who do not share that protected characteristic

the employer may take any action which is proportionate to meet the aims stated in the Act (the 'stated aims').

12.12

The 'stated aims' are:

- s.158(2)(a) a) enabling or encouraging persons who share the protected characteristic to overcome or minimise that disadvantage (referred to in this chapter as 'action to remedy disadvantage');
- s.158(2)(b) b) meeting those needs ('action to meet needs'); or
- s.158(2)(c) c) enabling or encouraging persons who share the protected characteristic to participate in that activity ('action to encourage participation in activities').

12.13

Action may be taken when any one or all of these conditions exist. Sometimes the conditions will overlap – for example, people sharing a protected characteristic may be at a disadvantage which may also give rise to a different need or may be reflected in their low level of participation in particular activities.

Example:

National research shows that Bangladeshis have low rates of participation in the teaching profession. A local school governing body seeks to tackle this low participation by offering open days in schools to members of the Bangladeshi community who might be interested in teaching as a profession. This would be a form of positive action to encourage participation.

What does ‘reasonably think’ mean?

12.14

In order to take positive action, an employer must reasonably think that one of the above conditions applies; that is, disadvantage, different needs or disproportionately low participation. This means that some indication or evidence will be required to show that one of these statutory conditions applies. It does not, however, need to be sophisticated statistical data or research. It may simply involve an employer looking at the profiles of their workforce and/or making enquiries of other comparable employers in the area or sector. Additionally, it could involve looking at national data such as labour force surveys for a national or local picture of the work situation for particular groups who share a protected characteristic. A decision could be based on qualitative evidence, such as consultation with workers and trade unions.

12.15

More than one group with a particular protected characteristic may be targeted by an employer, provided that for each group the employer has an indication or evidence of disadvantage, different needs or disproportionately low participation.

Action to remedy disadvantage

What is a disadvantage for these purposes?

12.16

‘Disadvantage’ is not defined in the Act. It may for example, include exclusion, rejection, lack of opportunity, lack of choice and barriers to accessing employment opportunities. Disadvantage may be obvious in relation to some issues such as legal, social or economic barriers or obstacles which make it difficult for people of a particular protected group to enter into or make progress in an occupation, a trade, a sector or workplace (see also paragraphs 4.9 to 4.14).

What action might be taken to overcome or minimise disadvantage?

12.17

The Act enables action to be taken to overcome or minimise disadvantage experienced by people who share a protected characteristic. The Act does not limit the action that could be taken, provided it satisfies the statutory

s.158(2)(a)

conditions and is a proportionate way of achieving the aim of overcoming a genuine disadvantage. Such action could include identifying through monitoring, consultation or a review of policies and practices any possible causes of the disadvantage and then:

- targeting advertising at specific disadvantaged groups, for example advertising jobs in media outlets which are likely to be accessed by the target group;
- making a statement in recruitment advertisements that the employer welcomes applications from the target group, for example ‘older people are welcome to apply’;
- providing opportunities exclusively to the target group to learn more about particular types of work opportunities with the employer, for example internships or open days;
- providing training opportunities in work areas or sectors for the target group, for example work placements.

Example:

Research shows that women in Britain experience significant disadvantage in pursuing careers in engineering, as reflected in their low participation in the profession and their low status within it. Some of the key contributing factors are gender stereotyping in careers guidance and a lack of visible role models. A leading equalities organisation, in partnership with employers in the engineering sector, offers opportunities exclusively to girls and women to learn more about the career choices through a careers fair attended by women working in the profession.

Action to meet needs

What are ‘different’ or ‘particular’ needs?

12.18

A group of people who share a particular protected characteristic have ‘different needs’ if, due to past or present discrimination or disadvantage or due to factors that especially apply to people who share that characteristic, they have needs that are different to those of other groups. This does not mean that the needs of a group have to be entirely unique from the needs of other groups to be considered ‘different’. Needs may also be different because, disproportionately, compared to the needs of other groups, they are not being met or the need is of particular importance to that group.

Example:

An employer's monitoring data on training shows that their workers over the age of 60 are more likely to request training in advanced IT skills compared to workers outside this age group. The employer could provide training sessions primarily targeted at this group of workers.

What action might be taken to meet those needs?

12.19

The Act does not limit the action that employers can take to meet different needs, provided the action satisfies the statutory conditions and is a proportionate means of achieving the aim of meeting genuinely different needs. Such action could include:

- providing exclusive training to the target group specifically aimed at meeting particular needs, for example, English language classes for staff for whom English is a second language;
- the provision of support and mentoring, for example, to a member of staff who has undergone gender reassignment;
- the creation of a work-based support group for members of staff who share a protected characteristic who may have workplace experiences or needs that are different from those of staff who do not share that characteristic. (The Act's provisions on members associations might be relevant here: see the Code on services and public functions).

s.158(2)(b)

Action to encourage participation in activities

What activities does this apply to?

12.20

This provision applies to participation in any activity where the participation of those who share a protected characteristic is disproportionately low; this can include employment and training. Action to increase participation might include making available training opportunities, open days or mentoring and shadowing schemes.

What does 'disproportionately low' mean?

12.21

The Act says that action can only be taken where the employer reasonably thinks that participation in an activity by people sharing a particular protected characteristic is 'disproportionately low.' This means that the

s.158(1)(c)

employer will need to have some reliable indication or evidence that participation is low compared with that of other groups or compared with the level of participation that could reasonably be expected for people from that protected group.

Example:

An employer has two factories, one in Cornwall and one in London. Each factory employs 150 workers. The Cornish factory employs two workers from an ethnic minority background and the London factory employs 20 workers also from an ethnic minority background.

The ethnic minority population is 1% in Cornwall and 25% in London. In the Cornish factory the employer would not be able to meet the test of 'disproportionately low', since the number of its ethnic minority workers is not low in comparison to the size of the ethnic minority population in Cornwall. However, the London factory, despite employing significantly more ethnic minority workers, could show that that the number of ethnic minority workers employed there was still disproportionately low in comparison with their proportion in the population of London overall.

12.22

Participation may be low compared with:

- the proportion of people with that protected characteristic nationally;

Example:

A national labour force survey shows women are under-represented at board level in the financial services sector. An employer could take positive action to increase their representation in the sector.

- the proportion of people with that protected characteristic locally;

Example:

An employer with a factory in Oldham employs 150 people but only one Asian worker. The employer may be able to show disproportionately low participation of Asian workers by looking at their workforce profile in comparison to the size of the Asian population in Oldham.

- the proportion of people with that protected characteristic in the workforce.

Example:

A construction company's workforce monitoring data reveals low participation of women in their workforce. They collaborate with the sector skills council for the electro-technical, heating, ventilation, air conditioning, refrigeration and plumbing industries to provide information targeting women on apprenticeships in construction.

12.23

Employers will need to have some indication or evidence to show low participation. This might be by means of statistics or, where these are not available, by evidence based on monitoring, consultation or national surveys. For more information on evidence, see paragraph 12.14.

What action could be taken?**12.24**

The Act permits action to be taken to enable or encourage people who share the protected characteristic to participate in that activity. Provided that the action is a proportionate means of achieving the aim of enabling or encouraging participation, the Act does not limit what action could be taken. It could include:

- setting targets for increasing participation of the targeted group;
- providing bursaries to obtain qualifications in a profession such as journalism for members of the group whose participation in that profession might be disproportionately low;
- outreach work such as raising awareness of public appointments within the community;
- reserving places on training courses for people with the protected characteristic, for example, in management;
- targeted networking opportunities, for example, in banking;
- working with local schools and FE colleges, inviting students from groups whose participation in the workplace is disproportionately low to spend a day at the company;
- providing mentoring.

s.158(2)(c)

What does 'proportionate' mean?

s.158(2) **12.25** To be lawful, any action which is taken under the positive action provisions must be a proportionate means of achieving one of the 'stated aims' described in paragraph 12.12 above.

12.26

'Proportionate' refers to the balancing of competing relevant factors. These factors will vary depending on the basis for the positive action – whether it is to overcome a disadvantage, meet different needs or address under-representation of a particular group. Other relevant factors will include the objective of the action taken, or to be taken, including the cost of the action.

12.27

The seriousness of the relevant disadvantage, the degree to which the need is different and the extent of the low participation in the particular activity will need to be balanced against the impact of the action on other protected groups, and the relative disadvantage, need or participation of these groups.

12.28

Organisations need to consider:

- Is the action an appropriate way to achieve the stated aim?
- If so, is the proposed action reasonably necessary to achieve the aim; that is, in all of the circumstances, would it be possible to achieve the aim as effectively by other actions that are less likely to result in less favourable treatment of others?

12.29

Paragraphs 4.30 to 4.32 provide a more detailed explanation of proportionality.

Time-limited positive action

12.30

If positive action continues indefinitely, without any review, it may no longer be proportionate, as the action taken may have already remedied the situation which had been a precondition for positive action. This could make it unlawful to continue to take the action.

12.31

Therefore, when undertaking measures under the positive action provisions, it would be advisable for employers to indicate that they intend to take the action only so long as the relevant conditions apply, rather than indefinitely. During that period they should monitor the impact of their action and review progress towards their aim.

Positive action and disability

12.32

As indicated above at paragraph 3.35, it is not unlawful direct disability discrimination to treat a disabled person more favourably than a non-disabled person. This means that an employer, if they wish, can for example restrict recruitment, training and promotion to disabled people and this will be lawful.

s.13(3)

Example:

An employer which has a policy of interviewing all disabled candidates who meet the minimum selection criteria for a job would not be acting unlawfully.

12.33

However, the positive action provisions may still be appropriate to achieve equality of opportunity between disabled people with different impairments. This means that an employer can implement positive action measures to overcome disadvantage, meet different needs or increase participation of people with one impairment but not those with other impairments.

Positive action and the public sector equality duties

12.34

Public authorities which are subject to the public sector equality duties may wish to consider using positive action to help them comply with those duties.

Implementing positive action lawfully

12.35

An employer does not have to take positive action but if they do, they will need to ensure they comply with the requirements of the Act to avoid unlawful discrimination. To establish whether there is any basis to implement a positive action programme, employers should collate evidence, for example through their monitoring data, and analyse that evidence to decide on the most appropriate course of action to take.

12.36

In considering positive action measures, employers might consider drawing up an action plan which:

- sets out evidence of the disadvantage, particular need and/or disproportionately low levels of participation, as appropriate, and an analysis of the causes;
- sets out specific outcomes which the employer is aiming to achieve;
- identifies possible action to achieve those outcomes;
- shows an assessment of the proportionality of proposed action;
- sets out the steps the employer decides to take to achieve these aims;
- sets out the measurable indicators of progress towards those aims, set against a timetable;
- explains how they will consult with relevant groups such as all staff, including staff support groups and members of the protected group for whom the programme is being established;
- specifies the time period for the programme;
- sets out periods for review of progress of the measures towards the aim to ensure it remains proportionate.

Chapter 13: Occupational requirements and other exceptions related to work

Introduction

13.1

The Act contains a number of exceptions that permit discrimination that would otherwise be prohibited. Any exception to the prohibition on discrimination should generally be interpreted restrictively. Where an exception permits discrimination in relation to one protected characteristic, for example nationality, employers must ensure that they do not discriminate in relation to other protected characteristics.

13.2

This chapter explains occupational requirements and other exceptions related to work. There are other exceptions that apply to a particular characteristic, for example pregnancy and maternity, and these are dealt with in the relevant chapters throughout the code. Exceptions relating to pay and benefits are covered in Chapter 14.

Occupational requirements

13.3

In certain circumstances, it is lawful for an employer to require a job applicant or worker to have a particular protected characteristic, provided certain statutory conditions are met.

Sch. 9,
Para 1

13.4

The exception may also be used by a principal, a limited liability partnership (LLP), a firm or a person who has the power to appoint or remove office holders and a person who has the power to recommend an appointment to a public office.

What the Act says**13.5**

Sch. 9, Para 1 An employer may apply, in relation to work, a requirement to have a particular protected characteristic if the employer can show that having regard to the nature or context of the work:

- the requirement is an occupational requirement;
- the application of the requirement is a proportionate means of achieving a legitimate aim (see paragraphs 4.25 to 4.32); and
- the applicant or worker does not meet the requirement; or,
- except in the case of sex, the employer has reasonable grounds for not being satisfied that the applicant or worker meets the requirement.

13.6

Sch. 9, Para 1(3) In the case of gender reassignment and marriage and civil partnership, the requirement is not to be a transsexual person, married or a civil partner.

13.7

The requirement must not be a sham or pretext and there must be a link between the requirement and the job.

13.8

Examples of how the occupational requirement exception may be used include some jobs which require someone of a particular sex for reasons of privacy and decency or where personal services are being provided. For example, a unisex gym could rely on an occupational requirement to employ a changing room attendant of the same sex as the users of that room. Similarly, a women's refuge which lawfully provides services to women only can apply a requirement for all members of its staff to be women.

In what circumstances can an employer apply the occupational requirement exception?

13.9

In the case of an employer, firm, LLP or person with the power to appoint or remove an office holder, an occupational requirement may be applied in relation to:

Sch. 9,
Para 1(2)

- the arrangements made for deciding whom to offer employment or a position as a partner; or appoint as an office holder;
- an offer of employment, the position of partner or member or appointment of an office holder;
- the provision of access to opportunities for promotion, transfer, training; or
- except in relation to sex, dismissals, expulsions and terminations.

Example:

A local council decides to set up a health project which would encourage older people from the Somali community to make more use of health services. The council wants to recruit a person of Somali origin for the post because it involves visiting elderly people in their homes and it is necessary for the post-holder to have a good knowledge of the culture and language of the potential clients. The council does not have a Somali worker already in post who could take on the new duties. They could rely on the occupational requirement exception to recruit a health worker of Somali origin.

13.10

It would be lawful for a principal (end-user) not to allow a contract worker to do work or, except in the case of sex, to continue to do work where the principal relies on the occupational requirement exception.

13.11

In the case of a person who has the power to recommend or approve the appointment of a public office holder, an occupational requirement may only be used in relation to:

- the arrangements that person makes for deciding whom to recommend or approve for appointment;
- not recommending or approving a person for appointment; or
- making a negative recommendation of a person for appointment.

Occupational requirements for the purposes of an organised religion

What the Act says

13.12

Sch. 9,
Para 2(1) The Act permits an employer (or a person who makes, recommends or approves appointments of office holders) to apply a requirement for a person to be of a particular sex or not to be a transsexual person, or a requirement relating to marriage, civil partnership or sexual orientation, if the employer can show that:

- the employment is for the purposes of an organised religion;
- the requirement is applied to comply with the doctrines of the religion (the ‘compliance principle’); or
- because of the nature or context of the employment, the requirement is applied to avoid conflicting with the strongly held religious convictions of a significant number of the religion’s followers (the ‘non-conflict principle’); and
- the applicant or worker does not meet the requirement in question; or, except in the case of sex, the employer is not reasonably satisfied that the person meets it.

Example:

An orthodox synagogue could apply a requirement for its rabbi to be a man.

Example:

An evangelical church could require its ministers to be married or heterosexual if this enables the church to avoid a conflict with the strongly held religious convictions of its congregation.

13.13

The requirement must be a proportionate way of meeting the ‘compliance’ or ‘non-conflict’ principle. The occupational requirement exception should only be used for a limited number of posts, such as ministers of religion and a small number of posts outside the clergy including those which exist to promote or represent the religion.

When may the occupational requirement exception be applied for the purpose of an organised religion?

13.14

In relation to employment and personal or public offices, the occupational requirement exception may be used in:

- the arrangements made for deciding whom to offer employment or an appointment as an office holder;
- an offer of employment or an appointment to a personal or public office;
- the provision of access to opportunities for promotion, transfer or training;
- or
- except in the case of sex, the dismissal or termination of an appointment.

13.15

In the case of public offices for which a recommendation is needed for an appointment, the occupational requirement may be used in relation to:

- the arrangements made for deciding whom to recommend or approve for an appointment;
- not recommending or giving approval to an appointment; or
- making a negative recommendation for appointment.

Example:

The trustees of a Mosque want to employ two youth workers, one who will provide guidance on the teachings of the Koran and the other purely to organise sporting activities not involving promoting or representing the religion. The trustees apply an occupational requirement for both workers to be heterosexual. It might be lawful to apply the occupational requirement exception to the first post but not the second post because the second post does not engage the 'compliance' or the 'non-conflict' principle.

Occupational requirements relating to religion or belief

What the Act says

13.16

The Act says that where an employer has an ethos based on religion or belief, they are permitted to rely on the occupational requirement exception if they can show that, having regard to that ethos and the nature or context of the work:

Sch. 9,
Para 2(2)

Sch. 9,
Para 3

- the requirement of having a particular religion or belief is an occupational requirement;
- the application of the requirement is a proportionate means of achieving a legitimate aim; and
- a person does not meet the requirement or the employer has reasonable grounds for not being satisfied that the person meets the requirement.

13.17

To rely on the exception, the employer must be able to show that their ethos is based on a religion or belief, for example, by referring to their founding constitution. An 'ethos' is the important character or spirit of the religion or belief. It may also be the underlying sentiment, conviction or outlook that informs the behaviours, customs, practices or attitudes of followers of the religion or belief.

13.18

The circumstances in which an employer with a religious or belief ethos may apply the exception are the same as those set out at paragraph 13.14.

Example:

It could be a lawful use of the exception for a Humanist organisation which promotes Humanist philosophy and principles to apply an occupational requirement for their chief executive to be a Humanist.

What can an employer do to ensure they apply the occupational requirement exception lawfully?

13.19

A failure to comply with the statutory conditions described above could result in unlawful direct discrimination. Some of the issues that an employer may wish to consider when addressing the question of whether the application of an occupational requirement is proportionate to a legitimate aim are:

- Do any or all of the duties of the job need to be performed by a person with a particular characteristic?
- Could the employer use the skills of an existing worker with the required protected characteristic to do that aspect of the job?

13.20

Employers should not have a blanket policy of applying an occupational requirement exception, such as a policy that all staff of a certain grade should have a particular belief. They should also re-assess the job whenever it becomes vacant to ensure that the statutory conditions for applying the occupational requirement exception still apply.

Other work-related exceptions**Armed forces****13.21**

The Act permits the armed forces to refuse a woman or a transsexual person employment or access to opportunities for promotion, transfer or training if this is a proportionate way of ensuring the combat effectiveness of the armed forces. This exception does not extend to dismissal or any other detriment.

Sch. 9,
Para 4

13.22

The Act disapplies the provisions relating to age and disability to service in the armed forces and the provisions relating to disability to opportunities for work experience in the armed forces.

13.23

Non-service personnel are covered by the Act's provisions on employees (see Chapter 10).

Employment services**13.24**

The Act permits employment service providers, which include those providing vocational training, to restrict access to training or services to people with a protected characteristic if the training or services relate to work to which the occupational requirement exception has been applied.

Sch. 9,
Para 5

13.25

The employment service provider can rely on this exception by showing that it reasonably relied on a statement from a person who could offer the work or training in question that having the particular protected characteristic was an occupational requirement. It is a criminal offence for such a person to make a statement of that kind which they know to be false or misleading.

Default retirement age

What the Act says

13.26

Sch. 9,
Para 8 Forcing someone to retire at a particular age is, on the face of it, age discrimination. However, the Act provides an exception for retirement; an employer is allowed to retire an employee at or over the age of 65, provided the dismissal satisfies all the legal tests for retirement, and provided the correct procedures are followed. This is known as the Default Retirement Age (DRA).

13.27

The DRA applies to ‘relevant workers’ only; that is:

- employees;
- those in Crown employment; and
- certain parliamentary staff.

13.28

The DRA retirement exception does not apply to any other type of worker, for example a partner, office holder, contract worker or police officer. Forced retirement of these workers is unlawful discrimination unless it can be objectively justified. The circumstances where retirement may be objectively justified are explained further in paragraphs 13.42 to 13.45.

The DRA and normal retirement age

13.29

The DRA means that employers, if they wish, can lawfully operate a ‘normal retirement age’ of 65 or above – that is, one which is the same as, or higher than, the DRA.

13.30

The ‘normal retirement age’ is the age at which employees in the same kind of position within an organisation are usually required to retire. It is not necessarily the same as the contractual retirement age, if in practice employees in that position retire at a different age.

Example:

An employer has a contractual retirement age of 67, but regularly grants requests from employees to work beyond 67. However there is no consistency as to the age when employees then retire. In these circumstances, the employer's contractual retirement age of 67 would be treated as the normal retirement age.

Example:

An employer has a contractual retirement age of 67 but normally grants requests to their senior managers to work until 70. In these circumstances, it is likely that 70 would be treated as the normal retirement age for senior managers.

13.31

Some employers do not operate any 'normal retirement age' for their employees. If this is the case, they can rely on the DRA of 65.

Example:

An employer's employment contracts do not mention retirement and there is no fixed age at which employees retire. The employer can rely on the default retirement age of 65 if they wish to enforce a retirement.

13.32

Employers do not have to retire employees when they reach normal retirement age (or, if none applies, the DRA of 65). Indeed, there may be many good business reasons why an employer might benefit from retaining older employees in employment.

Statutory retirement procedure**13.33**

Where an employer wants to retire an employee who has reached the DRA of 65 (or a normal retirement age of 65 or above), the employer must follow the retirement procedures that are set out in legislation. A dismissal that does not comply with these requirements may be unjustifiable age discrimination. In addition, the dismissal may not qualify as a 'retirement' and could be unfair.

13.34

In summary, the statutory retirement procedure is as follows:

- The employer must give the employee six to 12 months' written notice of impending retirement and advise them of the 'right to request' that they continue working.

- Within three to six months of the intended retirement date, the employee may request in writing to be allowed to continue working indefinitely or for a stated period, quoting Schedule 6, paragraph 5 of the Employment Equality (Age) Regulations 2006.
- The employer has a duty to consider the written request within a reasonable period of receiving it by holding a meeting with the employee and giving written notice of their decision.
- If the request is refused or employment extended for a shorter period than requested, the employee has a right to appeal by giving written notice.
- The employer must consider any appeal by holding an appeal meeting as soon as is reasonably practicable and giving written notice of the appeal decision.

13.35

The dismissal will not amount to age discrimination provided that:

- the employee will be aged 65 or over at the intended date of retirement (or has reached the normal retirement age if this is higher);
- the employer has complied with the notice requirements and advised the employee of the right to request to continue working;
- the employee's contract is terminated on the intended date of retirement, as previously notified.

Example:

An employer normally allows employees to continue working until age 70, but forces one employee to retire at age 65. That employee's dismissal will not qualify as retirement as the employee has been dismissed below the normal retirement age. It is likely to be both age discrimination and an unfair dismissal.

13.36

An employer who gives less than six months' notice of the date of retirement or the employee's right to request to continue working will be liable to pay compensation of up to eight weeks' pay.

13.37

However, even if full notice is not given, the employer might still be able to rely on the exception for retirement to escape liability for age discrimination. They would be expected to give the employee as much written notice as possible (and a minimum of 14 days) of the intended retirement date and of the right to request to continue to work. The employer would then have to comply with all other aspects of the statutory retirement procedure and show that the reason for dismissal is genuinely retirement.

Example:

Because of inaccurate records, an employer only becomes aware that an employee is approaching her 65th birthday three months beforehand. The employer immediately issues her with written notice of intended retirement on her 65th birthday and informs her of the right to request to continue working. She does not pursue the request. Because the employer has given three months' notice and followed the correct procedure, this may qualify as a retirement dismissal. But as less than six months' notice was given, they would be liable for compensation of up to eight week's pay. The employer's safest course of action would be to give six months' notice from the date the error was discovered.

13.38

In certain cases, a dismissal may possibly qualify as a retirement but nonetheless be an unfair dismissal:

- where the employer has given the employee much less than six months' notice of the intended date of retirement; or
- where the employer has not followed the 'duty to consider' procedure under the statutory retirement rules.

Example:

An employer gives an employee only a week's verbal notice that they intend to retire her on her 70th birthday, and fail to tell her of her right to request to continue working. In this case, because this is a serious breach of the legal requirements, retirement is unlikely to qualify as the reason for dismissal. The dismissal is likely to be unfair, as well as an act of unlawful age discrimination. Having breached the notice requirements, the employer would also be liable for compensation of up to eight weeks' pay.

Example:

An employer without a normal retirement age forces an employee to retire at 67 on a month's notice. The employee's request to continue working is ignored. To decide whether the dismissal is a retirement, a tribunal would look at all the circumstances. It would probably find that the retirement was not the reason for the dismissal because the employer failed to consider the request to continue working. Even if the facts do not support a claim of age discrimination, the dismissal would be unfair because of the failure to follow the duty to consider procedure.

Retirement falling outside the DRA exception

13.39

The following types of retirement do not fall within the DRA exception and would therefore be unlawful age discrimination unless they can be objectively justified:

- the retirement, at any age, of someone who is not a ‘relevant worker’ (see paragraph 13.27);
- the retirement of a ‘relevant worker’ at a normal retirement age below 65.

Example:

Partners in a law firm are required to retire from the partnership at 70. Partners are not ‘relevant workers’ for the purposes of the Act and so the retirement age of 70 would have to be objectively justified for it to be lawful.

Example:

An airline company has a normal retirement age of 55 for their cabin attendants. As employees of the airline, the cabin attendants are ‘relevant workers’. The airline would have to objectively justify the retirement age of 55 for it to be lawful.

13.40

Where there is no normal retirement age and an employee is forced to ‘retire’ before the age of 65, the reason for their dismissal cannot be retirement. It will be difficult for the employer to objectively justify the employee’s dismissal; the dismissal is very likely to be unfair as well as being an act of unlawful age discrimination.

13.41

There are other circumstances where, due to a failure on the employer’s part, dismissal of an employee over 65 will not qualify as retirement and is likely to be unfair dismissal and/or unjustifiable age discrimination (see paragraphs 3.36 to 3.41 above).

Objective justification

13.42

To avoid age discrimination, the Act requires employers to objectively justify any retirement that falls outside the DRA exception. This will apply to any normal retirement age below 65, and the forced retirement at any age of those who are not ‘relevant workers’.

s.13(2)

13.43

To objectively justify retirement in these circumstances, the employer must show that the retirement decision or policy is a proportionate means of achieving a legitimate aim. This concept is explained in more detail in paragraphs 4.25 to 4.32.

13.44

The first question is whether the aim behind the retirement decision is legitimate. Depending on the situation, the following are examples of aims that might be considered legitimate:

- to facilitate workforce planning, by providing a realistic long-term expectation as to when vacancies will arise;
- to provide sufficient opportunities for promotion, thereby ensuring staff retention at more junior levels.

However, the legitimacy of such aims would depend on all the circumstances of the case.

13.45

Even if the aim is a legitimate one, the second question is whether retiring someone at a particular age is a proportionate means of achieving that aim. In determining this, a balance must be struck between the discriminatory effect of the retirement and the employer's need to achieve the aim – taking into account all the relevant facts. If challenged in the Employment Tribunal, an employer would need to produce evidence supporting their decision.

Example:

Partners in a small law firm are required to retire from the partnership at 65. The firm prides itself on its collegiate culture and has structured its partnership agreement to promote this. The fixed retirement age avoids the need to expel partners for performance management reasons, which the firm thinks would undermine the collegiate environment. While it is possible that fostering a collegiate environment may be a legitimate aim, the firm would need to show that compulsory retirement at 65 is a proportionate means of achieving it. For example, evidence would be needed to support the assumption that the performance of partners reduces when they reach the age of 65.

Provision of services to the public

13.46

Sch. 9,
Para 19 The Act says that an employer who provides services to the public is not liable for claims of discrimination or victimisation by an employee under Part 5 of the Act (the employment provisions) in relation to those services. Where a worker is discriminated against or victimised in relation to those services, their claim would be in the county court (or sheriff court in Scotland) under Part 3 of the Act relating to services and public functions.

Example:

If an employee of a women's clothing retailer is denied the services of the retailer because she is a transsexual woman, her claim would be made under the services provisions of the Act. This means she should bring her claim in the county court.

13.47

However, where the service provided under the terms and conditions of employment differs from that provided to other employees, or is related to training, the worker can bring a claim in the Employment Tribunal under the employment provisions (Part 5).

Example:

In the example above, the situation would be different if the same transsexual woman's employment contract provided her with a 20% discount on all clothes purchased from her employer, a discount not available to members of the public. If she tried to use the discount and was refused, then she would bring her claim in the Employment Tribunal under the employment provisions of the Act.

Supported employment for disabled people

13.48

s.193(3) The Act allows some charities to provide employment only to people who have the same disability or a disability of a prescribed description where this is to help disabled people gain employment.

Statutory authority

13.49

In relation to age, disability and religion or belief, it is not a contravention of the employment provisions in the Act to do anything that is required under another law. The exception also applies to a requirement or condition imposed pursuant to another law by a Minister of the Crown, a member of the Scottish Executive, the National Assembly for Wales or the Welsh Ministers, the First Minister for Wales or the Counsel General to the Welsh Assembly Government.

Sch. 22,
Para 1

Educational appointments for religious institutions

13.50

The Act allows schools and further and higher education institutions (FHEs) to reserve the posts of head teachers and principals for people of a particular religion and certain academic posts for women where the governing instrument provides for this. The exception for academic posts which are reserved for women only applies where the governing instrument was made before 16 January 1990.

Sch. 22,
Para 3

13.51

The Act also allows ordained priests to hold certain professorships where legislation or a university's governing instrument provides for this.

Sch.22,
Para 3

13.52

Under the Act, faith schools are permitted to take into account religious considerations in employment matters relating to head-teachers and teachers, in accordance with the School Standards and Framework Act 1998. These considerations are different according to the category of school. Voluntary aided and independent faith schools have greater freedom than voluntary controlled and foundation schools. These exceptions only relate specifically to religion or belief – there is no scope in the Act for discrimination because of any other characteristic.

Sch. 22,
Para 4

Crown employment

13.53

- Sch. 22,
Para 5 The Act permits the Crown or a prescribed public body to restrict employment or the holding of a public office to people of a particular birth, nationality, descent or residence.

Nationality discrimination

13.54

- Sch. 23,
Para 1 The Act permits direct nationality discrimination and indirect race discrimination on the basis of residency requirements where other laws, Ministerial arrangements or Ministerial conditions make provision for such discrimination. It does not matter whether the laws, instruments, arrangements or conditions were made before or after the Act was passed.

Training for non-EEA nationals

13.55

- Sch. 23,
Para 4 The Act permits an employer to employ or to contract non-EEA nationals who are not ordinarily resident in an EEA state, where the employment or contract is for the sole or main purpose of training them in skills, for example medical skills. The employer can only rely on the exception if they think that the person does not intend to exercise the skills gained as a result of the training in Great Britain. Where the training provider is the armed forces or the Secretary of State for Defence, the rules differ slightly.

National security

13.56

- s.192 An employer does not contravene the Act only by doing something for the purpose of safeguarding national security and the action is proportionate for that purpose.

Communal accommodation

13.57

An employer does not breach the prohibition of sex discrimination or gender reassignment discrimination by doing anything in relation to admitting persons to communal accommodation or to providing any benefit, facility or service linked to the accommodation, if the criteria set out below are satisfied.

Sch. 23,
Para 3

13.58

Communal accommodation is residential accommodation which includes dormitories or other shared sleeping accommodation which, for reasons of privacy, should be used only by persons of the same sex. It can also include shared sleeping accommodation for men and for women, ordinary sleeping accommodation and residential accommodation, all or part of which should be used only by persons of the same sex because of the nature of the sanitary facilities serving the accommodation.

13.59

A benefit, facility or service is linked to communal accommodation if it cannot properly and effectively be provided except for those using the accommodation. It can be refused only if the person can lawfully be refused use of the accommodation.

13.60

Where accommodation or a benefit, facility or service is refused to a worker, alternative arrangements must be made in each case where reasonable so as to compensate the person concerned.

Example:

At a worksite, the only sleeping accommodation provided is communal accommodation occupied by men. A female worker wishes to attend a training course at the worksite but is refused permission because of the men-only accommodation. Her employer must make alternative arrangements to compensate her where reasonable; for example, by arranging alternative accommodation near the worksite or an alternative course.

13.61

Sex or gender reassignment discrimination in admitting people to communal accommodation is not permitted unless the accommodation is managed in a way which is as fair as possible to both women and men.

13.62

In excluding a person because of sex or gender reassignment, the employer must take account of:

- whether and how far it is reasonable to expect that the accommodation should be altered or extended or that further accommodation should be provided; and
- the relative frequency of demand or need for the accommodation by persons of each sex.

13.63

The Act permits a provider of communal accommodation to exclude people who are proposing to undergo, undergoing or who have undergone gender reassignment from this accommodation. However, to do so will only be lawful where the exclusion is a proportionate means of achieving a legitimate aim. This must be considered on a case-by-case basis; in each case, the provider of communal accommodation must assess whether it is appropriate and necessary to exclude the transsexual person.

Chapter 14:

Pay and benefits

Introduction

14.1

This chapter looks at the implications of the Act for pay and employment benefits, including pensions. Employers must not discriminate directly or indirectly in setting rates of pay or offering benefits to workers. Likewise, they must avoid discrimination arising from disability and, in certain circumstances, may need to consider the duty to make reasonable adjustments to pay or to certain benefits that they provide. The Act also contains a number of specific provisions relating to pay and benefits, including certain exceptions to the general prohibition on discrimination in employment.

Pay

14.2

An employer must not discriminate in setting terms of employment relating to pay, or in awarding pay increases. Pay includes basic pay; non-discretionary bonuses; overtime rates and allowances; performance related benefits; severance and redundancy pay; access to pension schemes; benefits under pension schemes; hours of work; company cars; sick pay; and fringe benefits such as travel allowances.

14.3

Where workers work less than full time hours, employers should ensure that pay and benefits are in direct proportion to the hours worked. This will avoid the risk of the employer putting part-time workers who share a protected characteristic at a disadvantage that could amount to unjustifiable indirect discrimination or that could be unlawful under the Part Time Workers (Prevention of Less Favourable Treatment) Regulations 2000.

Exception for the national minimum wage

14.4

Sch.9,
Para 11 However, there is an exception in the Act which allows employers to base their pay structures for young workers on the pay bands set out in the National Minimum Wage Regulations 1999.

14.5

These Regulations set minimum hourly wage rates, which are lower for younger workers aged 18 to 20, and lower again for those aged 16 and 17. Employers can use the rates of pay set out in the Regulations or may set pay rates that are higher, provided they are linked to the same age bands. However, the higher rates of pay need not be in proportion to the corresponding rates of the national minimum wage.

Example:

A supermarket wants to pay a more attractive rate than the national minimum wage. Their pay scales must be based on the pay bands set out in the National Minimum Wage Regulations 1999. The supermarket opts for the following rates, which would be permissible under the Act:

- 16-17 years of age - 20p per hour more than the national minimum wage for workers in that age band;
- 18-20 years of age - 45p per hour more than the national minimum wage for workers in that age band; and
- 21 years of age or over - 70p per hour more than the national minimum wage for workers aged 21 or over.

14.6

Employed apprentices who are under the age of 19 or in the first year of their apprenticeship are entitled to the apprentice minimum wage which is lower than the ordinary national minimum wage. The apprentice minimum wage applies to all hours of work and training, including training off the job.

Performance related pay and bonuses

14.7

Where an employer operates a pay policy and/or bonus scheme with elements related to individual performance, they must ensure that the policy and/or scheme does not unlawfully discriminate against a worker because of a protected characteristic.

Example:

A trade union equality representative obtains statistics which show that the best scores for appraisals are disproportionately awarded to white male workers. As a result, this group is more likely to receive an increase in pay and annual bonuses. The statistics suggest that the policy could be indirectly discriminatory, either through the criteria that have been selected, or the way that these criteria are applied.

14.8

If a worker has a disability which adversely affects their rate of output, the effect may be that they receive less under a performance related pay scheme than other workers. The employer must consider whether there are reasonable adjustments which would overcome this substantial disadvantage.

Example:

A disabled man with arthritis works in telephone sales and is paid commission on the value of his sales. His impairment gets worse and he is advised to change his computer equipment. He takes some time to get used to the new equipment and, as a consequence, his sales fall. It is likely to be a reasonable adjustment for his employer to pay him a certain amount of additional commission for the period he needs to get used to the new equipment.

Equal pay**14.9**

The Act gives women and men the right to equal pay for equal work.

ss.64 - 66

14.10

The provisions on equal pay operate by implying a sex equality clause into each contract of employment. This clause has the effect of modifying any term that is less favourable than for a comparator of the opposite sex. It also incorporates an equivalent term where the comparator benefits from a term not included in the worker's contract. These provisions are covered in more detail in the Equal Pay Code.

Pay secrecy clauses

- s.77 **14.11** ‘Pay secrecy clauses’ or ‘gagging clauses’ are terms of employment which seek to prevent or restrict workers from discussing or disclosing their pay. Such terms are unenforceable in relation to a person making or seeking a ‘relevant pay disclosure’. This is defined by the Act as a disclosure sought or made for the purpose of finding out whether – or to what extent – any pay differences are related to a protected characteristic.

14.12

The disclosure can be made to anyone (including a trade union representative), or requested from a colleague or former colleague. Any action taken by an employer against a worker who makes such a disclosure, or who receives information as a result, may amount to victimisation (see paragraphs 9.2 to 9.15).

Example:

An African worker thinks he is underpaid compared to a white colleague and suspects that the difference is connected to race. The colleague reveals his salary, even though the contract of employment forbids this. If the employer takes disciplinary action against the white colleague as the result of this disclosure, this could amount to victimisation. But if he had disclosed pay information to the employer’s competitor in breach of a confidentiality obligation, he would not be protected by the Act.

14.13

This provision is designed to improve pay transparency and relates to all protected characteristics. Further guidance in relation to the characteristic of sex can be found in the Equal Pay Code.

Benefits

14.14

Employment-related benefits might include canteens, meal vouchers, social clubs and other recreational activities, dedicated car parking spaces, discounts on products, bonuses, share options, hairdressing, clothes allowances, financial services, healthcare, medical assistance/insurance, transport to work, company car, education assistance, workplace nurseries, and rights to special leave. This is not an exhaustive list. Such benefits may be contractual or discretionary.

14.15

Employers must ensure that they do not deny workers access to benefits because of a protected characteristic. Where denying access to a benefit or offering it on less favourable terms either:

- directly discriminates because of the protected characteristic of age, for example, by imposing an age restriction; or
- indirectly discriminates by putting a group of workers sharing a protected characteristic at a disadvantage when compared with other workers,

the employer must be able to objectively justify the rule or practice as a proportionate means of achieving a legitimate aim.

ss.13(1) &
39(2)(b)

ss.13(2) &
19(2)(d)

14.16

But cost alone is not sufficient to objectively justify the discriminatory rule or practice. Financial cost may be taken into account only if there are other good reasons for denying or restricting access to the benefit. For more information about the application of the objective justification test, see paragraphs 4.25 to 4.32.

Example:

An employer provides a company car to most of their sales staff, but not to those under 25 because of higher insurance costs. This amounts to direct discrimination because of age. The employer may not be able to objectively justify this policy by relying upon cost considerations alone.

14.17

In addition, where a disabled worker is put at a substantial disadvantage in the way that a particular benefit is provided, an employer must take reasonable steps to adjust the way the benefit is provided in order to avoid that disadvantage.

Example:

An employer provides dedicated car parking spaces close to the workplace which are generally used by senior managers. A disabled worker finds it very difficult to get to and from the public car park further away. It is likely to be a reasonable adjustment for the employer to allocate one of the dedicated spaces to that worker.

14.18

Some benefits may continue after employment has ended. An employer's duties under the Act extend to its former workers in respect of such benefits.

Example:

An employer provides a workplace nursery. Parents who leave their jobs with the employer are always offered the chance of keeping their nursery place until their child's fifth birthday – but this opportunity is not offered to a lesbian mother of a three year old. If this less favourable treatment is because of sexual orientation, it would amount to direct discrimination.

14.19

The Act also provides some specific exceptions to the general prohibition of discrimination in employment benefits, which are explained below. Exceptions relating to pregnancy and maternity are covered in Chapter 8 and in the Equal Pay Code.

Exception for service-related benefits**14.20**

Sch. 9,
Para 10(1)

In many cases, employers require a certain length of service before increasing or awarding a benefit, such as pay increments, holiday entitlement, access to company cars or financial advice. On the face of it, such rules could amount to indirect age discrimination because older workers are more likely to have completed the length of service than younger workers. However, the Act provides a specific exception for benefits based on five years' service or less.

14.21

Sch. 9,
Para 10(3)

Length of service can be calculated by the employer in one of two ways:

- a) by the length of time that the person has been working for the employer at or above a particular level; or
- b) by the total length of time that person has been working for the employer.

14.22

Length of service may include employment by a predecessor employer under the Transfer of Undertakings (Protection of Employment) Regulations 2006.

Example:

For junior office staff, an employer operates a five-point pay scale to reflect growing experience over the first five years of service. This would be permitted by the Act.

14.23

Sch. 9,
Para 10(2)

However, it may still be lawful for the employer to use length of service above five years to award or increase a benefit, provided they reasonably believe that this 'fulfils a business need'. Examples of a business need could include

rewarding higher levels of experience, or encouraging loyalty, or increasing or maintaining the motivation of long-serving staff.

14.24

This test of ‘fulfilling a business need’ is less onerous than the general test for objective justification for indirect discrimination (see paragraph 14.15 above and paragraphs 4.25 to 4.32). However, an employer would still need evidence to support a reasonable belief that the length of service rule did fulfil a business need. This could include information the employer might have gathered through monitoring, staff attitude surveys or focus groups. An employer would be expected to take into account the interests of their workers and not be motivated simply by financial self-interest.

Example:

An employer offers one additional day’s holiday for every year of service up to a maximum of four years, to reward loyalty and experience. Although this may mean younger staff having fewer holidays than older workers, this approach is permitted by the Act. The same employer also provides free health insurance to all employees with over five years’ service and will have to justify this by showing that it actually fulfils a business need – for example, by rewarding experience, encouraging loyalty or increasing staff motivation.

14.25

This exception does not apply to service-related termination payments or any other benefits which are provided only by virtue of the worker ceasing employment.

Sch. 9,
Para 10(7)

Exception for enhanced redundancy benefits

14.26

The Act also provides a specific exception for employers who want to make redundancy payments that are more generous than the statutory scheme. The exception allows an employer to use the formula of the statutory scheme to enhance redundancy payments. One of the following methods must be used:

Sch. 9,
Para 13(1)–(6)

- removing the statutory scheme’s maximum ceiling on a week’s pay so that an employee’s actual weekly pay is used in the calculation;
- raising the statutory ceiling on a week’s pay so that a higher amount of pay is used on the calculation; and/or
- multiplying the appropriate amount for each year of employment set out in the statutory formula by a figure of more than one.

Having done this, the employer may again multiply the total by a figure of one or more.

Example:

An employer operates a redundancy scheme which provides enhanced redundancy payments based on employees' actual weekly pay, instead of the (lower) maximum set out in the statutory redundancy scheme. This is lawful under the Act.

Example:

Using the statutory redundancy scheme formula and the scheme's maximum weekly wage, another employer calculates every employee's redundancy entitlement, then applies a multiple of two to the total. This is also lawful under the Act.

14.27

Sch. 9,
Para 13(3)
(b)–(d)

The exception also allows an employer to make a redundancy payment to an employee who has taken voluntary redundancy or to an employee with less than two years continuous service, where no statutory redundancy payment is required. In such cases, an employer may make a payment equivalent to the statutory minimum, or an enhanced payment based on any of the above methods.

14.28

A redundancy payment will fall outside this exception if an employer's calculation is not based on the statutory scheme, or the method of enhancement differs from those set out in paragraph 14.26 above. As using length of service could amount to indirect age discrimination, the employer needs to show that calculating the redundancy payment in this way is justified as a proportionate means of achieving a legitimate aim. In this context, a legitimate aim might be to reward loyalty or to give larger financial payments to protect older employees because they may be more vulnerable in the job market.

14.29

For the means of achieving the aim to be proportionate, the employer would need to show that they had balanced the reasonable needs of the business against the discriminatory effects on the employees who do not stand to benefit. One factor would be the degree of difference between payments made to different groups of employees and whether that differential was reasonably necessary to achieve the stated aim.

Example:

A company's redundancy scheme provides for one and a half weeks' actual pay for each year of employment for employees of all ages. Thus the scheme does not use the formula in the statutory scheme, which has different multipliers for employees under 22 and over 40. Although the company's scheme is less discriminatory because of age and more generous than the statutory scheme, it does not fit in with the calculations permitted by the exception. The company would have to show that their scheme was justified as a proportionate means of achieving a legitimate aim.

Exception relating to life assurance**14.30**

Some employers provide life assurance cover for their workers. If a worker retires early due to ill health, the employer may continue to provide life assurance cover. The Act provides an exception allowing an employer to stop providing cover when the worker reaches the age at which they would have retired had they not fallen ill. If there is no normal retirement age applicable to the worker's job, the employer can stop providing life assurance cover when the worker reaches 65.

Sch. 9,
Para 14

Example:

An employer operates a normal retirement age of 67. They provide life assurance cover to all workers up to this age. When one of their managers takes early retirement at 60 because of ill health, the employer continues her life assurance cover until she reaches 67. This is lawful.

Exception relating to child care benefits**14.31**

The Act creates an exception for benefits relating to the provision of childcare facilities that are restricted to children of a particular age group. It applies not only to natural parents, but also to others with parental responsibility for a child.

Sch. 9,
Paras 15(1)–
(2)

14.32

This exception also applies to actions taken to facilitate the provision of child care, including: the payment for some or all of the cost of the child care; helping a parent to find a suitable person to provide child care; and enabling a parent to spend more time providing care for the child or otherwise assisting the parent with respect to childcare they provide.

Sch. 9,
Para 15(3)

- Sch. 9,
Para 15(4) **14.33** The exception covers benefits relating to the provision of care for children aged under 17.

Example:

A sales assistant lives with his wife and seven year old stepdaughter, who attends an after school club run by the local authority. He receives childcare vouchers from his employer, but these are restricted to workers with children under 10. This restriction would be lawful. In this case, the sales assistant uses the vouchers to help pay for his stepdaughter's after school club.

Exception for benefits based on marital status

- Sch. 9,
Para 18(2) **14.34** Benefits which are restricted on the basis of a worker's marital status are lawful under the Act, provided workers in a civil partnership have access to the same benefit. Workers who are not married or in a civil partnership can be excluded from such benefits.

Example:

An employer gives an additional week's honeymoon leave to a woman who is getting married. Last year, her lesbian colleague who was celebrating a civil partnership was given only one extra day's leave to go on honeymoon. The difference in the treatment would not fall within the marital status exception.

- Sch. 9,
Para 18(1) **14.35** There is also a limited exception for married workers only. This allows employers to provide a benefit exclusively for married workers, provided the benefit in question accrued before 5 December 2005 (the day on which section 1 of the Civil Partnership Act 2004 came into force) or where payment is in respect of periods of service before that date.

Exception for group insurance schemes

- Sch. 9,
Para 20 **14.36** Some employers offer their workers insurance-based benefits such as life assurance or accident cover under a group insurance policy. The Act allows employers to provide for differential payment of premiums or award of benefits based on sex, marital/civil partnership status, pregnancy and maternity or gender reassignment. However, the difference in treatment

must be reasonable, and be done by reference to actuarial or other data from a source on which it is reasonable to rely.

14.37

The Act also clarifies that it is the employer, not the insurer, who is responsible for making sure that provision of benefits under such group insurance schemes complies with the above exception.

Sch. 3,
Para 20

Example:

An employer arranges for an insurer to provide a group health insurance scheme to workers in their company. The insurer refuses to provide cover on the same terms to one of the workers because she is a transsexual person. The employer, who is responsible for any discrimination in the scheme, would only be acting lawfully if the difference in treatment is reasonable in all the circumstances, and done by reference to reliable actuarial or other data.

Pensions

Occupational pension schemes

14.38

Employers may provide benefits to current and former workers and their dependants through occupational pension schemes. The schemes are legally separate from the employers and are administered by trustees and managers. The benefits will be in the form of pensions and lump sums. Special provisions apply to such schemes because of their separate legal status and the nature of the benefits they provide.

14.39

An occupational pension scheme is treated as including a 'non-discrimination rule' by which a 'responsible person' must not discriminate against another person in carrying out any functions in relation to the scheme or harass or victimise another person in relation to the scheme.

s.61(1) & (2)

14.40

A responsible person includes a trustee or manager of a scheme, the employer of members or potential members and a person who can make appointments to offices.

s.61(4)

14.41

s.61(3) The provisions of an occupational pension scheme have effect subject to the non-discrimination rule. So, for example, if the rules of a scheme provide for a benefit which is less favourable for one member than another because of a protected characteristic, they must be read as though the less favourable provision did not apply.

14.42

There are a number of exceptions and limitations to the non-discrimination rule. The rule does not apply:

- s.61(5) • to persons entitled to benefits awarded under a divorce settlement or on the ending of a civil partnership (although it does apply to the provision of information and the operation of the scheme's dispute resolution procedure in relation to such persons);
- s.61(10) • in so far as an equality rule applies – or would apply if it were not for the exceptions described in part 2 of Schedule 7 (for more information on equality rules, please see the Equal Pay Code);
- s.61(8) • to practices, actions or decisions of trustees or managers or employers relating to age specified by order of a Minister of the Crown, introduced under enabling powers in the Act.

14.43

It is expected that the exceptions relating to age will be based on those that previously applied under Schedule 2 to the Employment Equality (Age) Regulations 2006.

14.44

s.61(11) In addition to the requirement to comply with the non-discrimination rule, a responsible person is under a duty to make reasonable adjustments to any provision, criterion or practice relating to an occupational pension scheme which puts a disabled person at a substantial disadvantage in comparison with persons who are not disabled.

Example:

The rules of an employer's final salary scheme provide that the maximum pension is based on the member's salary in the last year of work. Having worked full-time for 20 years, a worker becomes disabled and has to reduce her working hours two years before her pension age. The scheme's rules put her at a disadvantage as a result of her disability, because her pension will only be calculated on her part-time salary. The trustees decide to convert her part-time salary to its full-time equivalent and make a corresponding reduction in the period of her part-time employment which counts as pensionable. In this way, her full-time earnings will be taken into account. This is likely to be a reasonable adjustment to make.

14.45

The Act provides a mechanism for the trustees or managers of occupational pension schemes to make alterations to their schemes to ensure they reflect the non-discrimination rule. As most schemes already give trustees a power of alteration, the mechanism in the Act would only be required if a scheme does not have this. The mechanism would also be needed if the procedure for exercising the power is unduly complex or protracted or involves obtaining consents which cannot be obtained (or which can be obtained only with undue delay or difficulty).

s.62(1) & (2)

14.46

Under this mechanism, the trustees or managers can make the necessary alterations by resolution. The alteration can have effect in relation to a period before the date of the resolution.

s.62(3) & (4)

14.47

The rules on occupational pensions for women on maternity leave are covered in the Equal Pay Code.

Contributions to personal pension schemes**14.48**

The enabling powers under the Act also allow exceptions to be introduced to the non-discrimination rule in respect of contributions to personal pension schemes or stakeholder pension schemes where the protected characteristic is age. As with exceptions for occupational pension schemes, it is expected that these exceptions will be based on those that previously applied under Schedule 2 to the Employment Equality (Age) Regulations 2006.

s.61(8)

Chapter 15:

Enforcement

Introduction

15.1

A worker who considers they have been affected by a breach of the Act has a right to seek redress through the Employment Tribunal (or, in the case of an occupational pension scheme, the county court or sheriff court in Scotland). Employment Tribunals can deal with the unlawful acts that are set out in Chapters 3 to 9. However, because litigation can be a costly and time-consuming exercise, employers should deal with complaints relating to a breach of the Act seriously and rigorously, with support from any recognised trade union, to avoid having recourse to the Employment Tribunal.

15.2

As explained in paragraph 1.22, the term ‘employer’ refers to all those who have duties in the areas covered by the Code. In this chapter, the term ‘claimant’ is used to refer to a worker who brings a claim under the Act and the term ‘respondent’ is used to refer to an employer against whom the claim is made.

15.3

This chapter gives an overview of enforcement by the Employment Tribunals of Part 5 of the Act. It is not intended to be a procedural guide to presenting a claim to an Employment Tribunal. The relevant procedures are set out in Schedule 1 to the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2004.

15.4

This chapter covers the following:

- Obtaining information under the Act
- Settling complaints without recourse to a tribunal
- Jurisdiction for hearing complaints of discrimination related to work
- Time limits

- Burden of proof
- Remedies
- The Commission's enforcement powers
- National security.

The procedure for obtaining information

15.5

A worker who has a complaint under the Act should, as far as possible, seek to raise the complaint with the employer in the first instance. To avoid a claim proceeding to the Employment Tribunal, the employer should investigate thoroughly any allegations of a breach of the Act. This would enable the employer to determine whether there is any substance to the complaint and, if so, whether it can be resolved to the satisfaction of the parties.

15.6

A worker who has a complaint under the Act may request information from their employer about the reason for the treatment which is the subject of the complaint. This is known as the procedure for obtaining information and it is additional to other means of obtaining information under the Employment Tribunal rules.

s.138

15.7

There are standard forms for asking and answering questions, as well as guidance which explains how the procedure works. However, standard forms do not have to be used to present questions or answers.

15.8

For the questions and any answers to be admissible in evidence, the questions should be sent to the employer before a claim is made to the Employment Tribunal, at the same time as the claim is made, or within 28 days of it being made; or if later, within the time specified by the tribunal.

15.9

The questions procedure is a way for workers to obtain information when they believe they have been subjected to conduct which is unlawful under the Act but do not have sufficient information to be sure. It could also assist the worker in their decision about how to proceed with the complaint. The questions and any answers are admissible in evidence in tribunal proceedings.

s.138(3)

Example:

A lesbian employee who suspects that she has been denied a promotion because of her sexual orientation could use the procedure to ask her employer about their decision not to promote her. This information could support her suspicion or resolve her concerns.

15.10

- s.138(4) A respondent is not obliged to answer the questions. However, if they fail to answer within eight weeks (starting on the day the questions are received), or give equivocal or evasive replies, a tribunal may draw an inference from that, which could be an inference of discrimination. A tribunal must not draw an inference from a failure to answer questions if the answers might prejudice or reveal the reasons for bringing or not bringing criminal proceedings or in other circumstances specified in legislation.
- s.138(5)

Settling complaints without recourse to an Employment Tribunal

15.11

Nothing in the Act prevents the parties settling a claim or potential claim before it is decided by the Employment Tribunal (or the civil courts in the case of a claim relating to an occupational pension scheme). An agreement of this nature can include any terms the parties agree to and can cover compensation, future actions by the respondent, costs and other lawful matters.

Example:

A worker raises a grievance with her employers alleging discrimination. The employer investigates this and accepts that there is substance to the complaint. The employer agrees to compensate the worker and undertakes to provide mandatory training for all staff to prevent such a complaint arising again.

15.12

Acas offers a conciliation service for parties in dispute, whether or not a claim has been made to an Employment Tribunal.

15.13

A claim or potential claim to the Employment Tribunal can also be settled by way of a 'qualifying compromise contract'. Although contracts that seek to exclude or limit the application of the Act are normally unenforceable, this provision does not apply to a compromise contract, provided it fulfils certain conditions:

s.147

- the contract is in writing;
- the conditions in the contract are tailored to the circumstances of the claim;
- the claimant has received independent legal advice from a named person who is insured against the risk of a claim arising from that advice; and
- the named legal adviser is a qualified lawyer, a nominated trade union representative, an advice centre worker or another person specified by order under the Act.

Jurisdiction for hearing complaints of discrimination in work cases

15.14

An Employment Tribunal has jurisdiction to determine complaints related to work about a breach of the Act (that is, discrimination, harassment, victimisation, failure to make reasonable adjustments, breach of an equality clause or rule, instructing, causing or inducing and aiding unlawful acts).

s.120(1)

15.15

An Employment Tribunal also has jurisdiction to determine an application relating to a non-discrimination rule of an occupational pension scheme (see paragraph 14.39). A responsible person (that is, the trustees or managers of an occupational pension scheme, the employer or a person who can make appointments to offices) can make an application to an Employment Tribunal for a declaration as to the rights of that person and a worker or member with whom they are in a dispute about the effect of a non-discrimination rule. An Employment Tribunal can also determine a question that relates to a non-discrimination rule which has been referred to it by a court.

s.120(2)

s.120(3)

15.16

Where proceedings relate to a breach of a non-discrimination rule of an occupational pension scheme, the employer is treated as a party to the proceedings and has the right to appear and be heard.

s.120(5)

15.17

s.120(6) The Employment Tribunal's jurisdiction to determine proceedings that relate to a breach of a non-discrimination rule in an occupational pension scheme does not affect the jurisdiction of the High Court or county court, or (in Scotland) the Court of Session or the sheriff court, to also determine such proceedings.

15.18

s.121 An Employment Tribunal will not have jurisdiction to hear a case from a member of the armed forces until a 'service complaint' has been made and not withdrawn (see paragraph 15.21).

15.19

s.60(2) The Employment Tribunal jurisdiction does not extend to complaints relating to disability or health enquiries under section 60(1) of the Act (see paragraphs 10.25 to 10.43). Only the Equality and Human Rights Commission can enforce a breach of the provisions relating to disability or health enquiries. Cases are brought in the county court in England and Wales or the sheriff court in Scotland. However, the Employment Tribunal will have jurisdiction to hear a complaint of discrimination where the worker is, for example, rejected for a job as a result of responding to a disability or health enquiry that is not permitted.

Time limits

15.20

s.123 For work-related cases, an Employment Tribunal claim must be started within three months (less one day) of the alleged unlawful act. Where the unlawful act relates to an equality clause or rule different time limits apply; these are dealt with in the Equal Pay Code of Practice.

15.21

s.123(2) In the case of members of the armed forces, Employment Tribunal proceedings must be started within six months of the date of the alleged unlawful act. The time limit applies whether or not any service complaint has been determined. Civilians working for the armed forces are not governed by these rules and should make their application to an Employment Tribunal within the usual three months time limit.

15.22

If proceedings are not brought within the prescribed period, the Employment Tribunal still has discretion to hear the proceedings, if it thinks it is just and equitable to do so (see paragraph 15.29 to 15.31 below).

s.123(1)(b)

When does the period for bringing the claim start?**15.23**

The Act says that the period for bringing a claim starts with the date of the unlawful act. Generally, this will be the date on which the alleged unlawful act occurred, or the date on which the worker becomes aware that an unlawful act occurred.

s.123(1)(a)

Example:

A male worker applied for a promotion and was advised on 12 March 2011 that he was not successful. The successful candidate was a woman. He believes that he was better qualified for the promotion than his colleague and that he has been discriminated against because of his sex. He sent a questions form to his employer within two weeks of finding out about the promotion and the answers to the questions support his view. The worker must start proceedings by 11 June 2011.

15.24

Sometimes, however, the unlawful act is an employer's failure to do something. The Act says that a failure to do a thing occurs when the person decides not to do it. In the absence of evidence to the contrary, an employer is treated as deciding not to do a thing when they do an act inconsistent with doing the thing.

s.123(3) & (4)

s.123(4)(a)

15.25

If the employer does not carry out an inconsistent act, they are treated as deciding not to do a thing on the expiry of the period in which they might reasonably have been expected to do the thing.

s.123(4)(b)

Example:

A wheelchair-user asks her employer to install a ramp to enable her more easily to get over the kerb between the car park and the office entrance. The employer indicates that they will do so but no work at all is carried out. After a period in which it would have been reasonable for the employer to commission the work, even though the employer has not made a positive decision not to install a ramp, they may be treated as having made that decision.

s.123(3)(a) **15.26** In addition, the Act recognises that where conduct extends over a period, it should be treated as being done at the end of that period for the purposes of calculating when the unlawful act occurred.

15.27 If an employer has a policy, rule, or practice (whether formal or informal) in accordance with which decisions are taken from time to time, this might amount to an 'act extended over a period'. So if an employer maintains an unlawful policy which results in a person being discriminated against on a continuing basis or on many occasions, the period for bringing a claim starts when the last act of discrimination occurred, or when the policy, rule or practice is removed.

Example:

An employer operates a mortgage scheme for married couples only. A civil partner would be able to bring a claim to an Employment Tribunal at any time while the scheme continued to operate in favour of married couples. However, once the scheme ceased to operate in favour of married couples, the time limit for bringing proceedings would be within three months of that date.

15.28 For these purposes, a continuing state of affairs may constitute an act extended over a period. This means that even if the individual acts relied upon are done by different workers and are done at different places, they may be treated as a single act extending over a period. However, a single unlawful act which has continuing consequences will not extend the time period.

Example:

A black worker is graded on lower pay than her Asian counterpart. The time period for starting proceedings is three months from the date the decision was taken to grade the workers or the date the worker discovered that she was being paid at a lower grade.

What happens if the claim is presented outside the correct time limit?

s.123(1)(b) & (2)(b) **15.29** Where a claim is brought outside the time limits referred to above, an Employment Tribunal has discretion to hear the case if it considers it just and equitable to do so.

15.30

In exercising its discretion, a tribunal will consider the prejudice which each party would suffer as a result of the decision to extend the time limit. This means a tribunal will consider what impact hearing the case out of time would have on the respondent and the claimant.

15.31

When a tribunal considers whether to exercise its 'just and equitable' discretion, it will have regard to all the circumstances of the case including in particular:

- the length of and reasons for the delay;
- the extent to which the cogency of the evidence is likely to be affected;
- the extent to which the employer had cooperated with requests for information;
- the promptness with which the claimant bringing the claim acted once they knew of the facts giving rise to the claim;
- the steps taken by the claimant to obtain appropriate legal advice once they knew of the possibility of taking action.

Burden of proof

15.32

A claimant alleging that they have experienced an unlawful act must prove facts from which an Employment Tribunal could decide or draw an inference that such an act has occurred.

s.136

Example:

A worker of Jain faith applies for promotion but is unsuccessful. Her colleague who is a Mormon successfully gets the promotion. The unsuccessful candidate obtains information using the questions procedure in the Act which shows that she was better qualified for the promotion than her Mormon colleague. The employer will have to explain to the tribunal why the Jain worker was not promoted and that religion or belief did not form any part of the decision.

15.33

An Employment Tribunal will hear all of the evidence from the claimant and the respondent before deciding whether the burden of proof has shifted to the respondent.

s.136(2) & (3) **15.34** If a claimant has proved facts from which a tribunal could conclude that there has been an unlawful act, then the burden of proof shifts to the respondent. To successfully defend a claim, the respondent will have to prove, on the balance of probabilities, that they did not act unlawfully. If the respondent's explanation is inadequate or unsatisfactory, the tribunal must find that the act was unlawful.

15.35 Where the basic facts are not in dispute, an Employment Tribunal may simply consider whether the employer is able to prove, on the balance of probabilities, that they did not commit the unlawful act.

Example:

A Jewish trainee solicitor complains that he has not been allowed to take annual leave to celebrate Jewish religious holidays and is able to compare himself to a Hindu trainee solicitor who has been allowed to take annual leave to celebrate Hindu religious holidays. If these facts are not in dispute, a tribunal may proceed directly to consideration of whether the law firm has shown that the treatment was not, in fact, an act of religious discrimination.

s.136(5) **15.36** The above rules on burden of proof do not apply to proceedings following a breach of the Act which gives rise to a criminal offence.

Remedies for unlawful acts relating to work

15.37
An Employment Tribunal may:

- s.124(2)(a) • make a declaration as to the rights of the parties to the claim;
- s.124(2)(b) • award compensation to the claimant for any loss suffered;
- s.124(2)(c) • make an 'appropriate' recommendation, that is a recommendation that a respondent takes specified steps to obviate or reduce the adverse effect of any matter relating to the proceedings on the claimant and/or others who may be affected;
- s.139 • award interest on compensation;
- award costs (expenses in Scotland) if appropriate.

15.38

Information on remedies in equal pay claims is contained in the Equal Pay Code.

Declarations of unlawful acts**15.39**

An Employment Tribunal may make a declaration instead of or as well as making an award of compensation or a recommendation.

s.124(2)(a)

What compensation can an Employment Tribunal award?**15.40**

An Employment Tribunal can award a claimant compensation for injury to feelings. An award for compensation may also include:

ss.124(6) & 119

- past loss of earnings or other financial loss;
- future loss of earnings which may include stigma or ‘career damage’ losses for bringing a claim;
- personal injury (physical or psychological) caused by the discrimination or harassment;
- aggravated damages (England and Wales only) which are awarded when the respondent has behaved in a high-handed, malicious, insulting or oppressive manner; and
- punitive or exemplary damages (England and Wales only) which are awarded for oppressive, arbitrary or unconstitutional action by servants of the government or where the respondent’s conduct has been calculated to make a profit greater than the compensation payable to the claimant.

15.41

Compensation for loss of earnings must be based on the actual loss to the claimant. The aim is, so far as possible by an award of money, to put the claimant in the position they would have been in if they had not suffered the unlawful act.

15.42

Generally, compensation must be directly attributable to the unlawful act. This may be straightforward where the loss is, for example, related to an unlawfully discriminatory dismissal. However, subsequent losses, including personal injury, may be difficult to assess.

15.43

A worker who is dismissed for a discriminatory reason is expected to take reasonable steps to mitigate their loss, for example by looking for new work or applying for state benefits. Failure to take reasonable steps to mitigate loss may reduce compensation awarded by a tribunal. However, it is for the respondent to show that the claimant did not mitigate their loss.

Compensation for complaints of indirect discrimination**15.44**

- s.124(4) & (5) Where an Employment Tribunal makes a finding of indirect discrimination but is satisfied that the provision, criterion or practice was not applied with the intention of discriminating against the claimant, it must not make an award for compensation unless it first considers whether it would be more appropriate to dispose of the case by providing another remedy, such as a declaration or a recommendation. If the tribunal considers that another remedy is not appropriate in the circumstances, it may make an award of damages.

15.45

Indirect discrimination will be intentional where the respondent knew that certain consequences would follow from their actions and they wanted those consequences to follow. A motive, for example, of promoting business efficiency, does not mean that the act of indirect discrimination is unintentional.

Employment Tribunal recommendations**15.46**

- s.124(3) An Employment Tribunal can make an appropriate recommendation requiring the respondent within a specified period to take specific steps to reduce the negative impact of the unlawful act on the claimant or the wider workforce. The power to make a recommendation does not apply to equal pay claims.

15.47

A recommendation might, for example, require a respondent to take steps to implement a harassment policy more effectively; provide equal opportunities training for staff involved in promotion procedures; or introduce more transparent selection criteria in recruitment, transfer or promotion processes.

Example:

An Employment Tribunal makes a finding that a respondent employer's probation policy has an indirect discriminatory impact on transsexual people generally and an individual transsexual worker specifically. The Employment Tribunal in addition to making a declaration to this effect makes a recommendation to the employer to review the policy and to take steps to remove the discriminatory provision.

15.48

Employment Tribunal recommendations often focus on processes (such as adoption of an equality policy or discontinuance of a practice or rule).

15.49

Whether a recommendation is made is a matter for the Employment Tribunal's discretion: the claimant does not have a right to have a tribunal recommend a course of action or process even if the tribunal makes a declaration of unlawful discrimination.

Making recommendations affecting the wider workforce**15.50**

As mentioned above, an Employment Tribunal can make recommendations which affect the wider workforce. A tribunal may consider making a wider recommendation if:

- the evidence in the case suggested that wider or structural issues were the cause of the discrimination and that they are likely to lead to further discrimination unless addressed; and
- it is commensurate (or 'proportionate') to the respondent's capacity to implement it.

15.51

A wider recommendation forms part of the Employment Tribunal decision in any particular case.

s.124(3)(b)

15.52

A recommendation is not contractually binding between the claimant and respondent (unless the parties make a separate agreement for the decision to have this effect).

What happens if a respondent fails to comply with a tribunal recommendation?

15.53

s.124(7) If a respondent fails to comply with an Employment Tribunal recommendation which related to the claimant, the tribunal may:

- increase the amount of any compensation awarded to that claimant; or
- order the respondent to pay compensation to the claimant if it did not make such an order earlier.

15.54

A failure to comply with a recommendation could also be adduced in evidence in any later cases against the same organisation.

15.55

s.125 Recommendations cannot be made in relation to anyone other than the claimant where the effect of the recommendation would have or potentially have an adverse impact on national security.

Remedies in relation to occupational pension schemes

15.56

s.126 If an Employment Tribunal finds that there has been discrimination in relation to:

- a) the terms on which persons become members of an occupational pension scheme; or
- b) the terms on which members are treated;

s.126(2) it may, in addition to the remedies it can make generally, declare that the person bringing the claim has a right to be admitted to the scheme or a right to membership without discrimination.

15.57

The Employment Tribunal's order may also set out the terms of admission or membership for that person. The order may apply to a period before it is made.

s.126(4)

15.58

However, an Employment Tribunal may not make an order for compensation unless it is for injured feelings or for a failure by the recipient of an appropriate recommendation to comply with the recommendation. The tribunal cannot make an order for arrears of benefit.

s.126(3)

The Commission's powers to enforce breaches of the Act

15.59

In addition to the rights given to the individual under the Act, the Commission has a power to apply to the court if it thinks that a person is likely to commit an unlawful act for an injunction (interdict in Scotland) to prohibit them from committing that act.

Equality Act
(EA) 2006,
s.24**15.60**

The Commission also has a power to enforce a breach of the prohibition on pre-employment disability and health enquiries (see paragraphs 10.25 to 10.43).

EA 2006,
s.24A**15.61**

The Commission has power to take action even if no identifiable individual has been (or may be) affected by the unlawful act. It can take action in respect of arrangements which would, if they were applied to an individual, amount to an unlawful act; for example, to deal with the publication of an advertisement which suggests that an employer would discriminate (see Chapter 18 on recruitment). This power could also be used to challenge a provision, criterion or practice that indirectly discriminates, even if it has not yet put any particular person at a disadvantage.

EA 2006,
s.24A**15.62**

If the Commission suspects that an employer has committed an unlawful act, it can conduct an investigation. If it finds that the employer has done so, it can serve a notice requiring them to prepare an action plan to avoid repetition or continuation of that act or recommend that they take action for that purpose.

EA 2006,
s.20

15.63

EA 2006, s.23 The Commission may also, if it suspects that an employer is committing an unlawful act, enter into a binding agreement with the employer to avoid such contraventions.

15.64

EA 2006, s.28 The Commission also has a power to assist a worker who is taking enforcement action against their employer.

National security**15.65**

s.192; Employment Tribunals Rules 2004 (Rule 54) The Act includes an exception for acts for the purpose of safeguarding national security. Special rules apply in cases involving an assertion that national security is involved. The Employment Tribunal rules may allow the tribunal to exclude the claimant and/or their representative from all or part of the proceedings.

15.66

The claimant, and/or their representative who has been excluded, may make a statement to the tribunal before the exclusive part of the proceedings start. The Employment Tribunal may take steps to keep secret all or part of the reasons for its decision.

15.67

The Attorney General for England and Wales or the Advocate General for Scotland may appoint a special advocate to represent the interests of a claimant in the proceedings. However, that representative is not responsible to the claimant whose interest they are appointed to represent.

Part two: Code of Practice on Employment

Chapter 16:

Avoiding discrimination in recruitment

Introduction

16.1

Ensuring fair recruitment processes can help employers avoid discrimination. While nothing in the Act prevents an employer from hiring the best person for the job, it is unlawful for an employer to discriminate in any of the arrangements made to fill a vacancy, in the terms of employment that are offered or in any decision to refuse someone a job (see Chapter 10). With certain limited exceptions, employers must not make recruitment decisions that are directly or indirectly discriminatory. As with other stages of employment, employers must also make reasonable adjustments for disabled candidates, where appropriate.

16.2

It is recognised that employers will have different recruitment processes in place depending on their size, resources, and the sector in which they operate. Whichever processes are used, applicants must be treated fairly and in accordance with the Act. This chapter examines the main issues arising in the recruitment of both external and internal applicants and explains the steps that should be taken to avoid unlawful conduct within each of the recruitment stages that are commonly used. It also makes some recommendations for good practice.

16.3

The Act's prohibition on pre-employment health and disability enquiries is covered more fully in Chapter 10.

Defining the job

General principles

16.4

The inclusion of requirements in a job description or person specification which are unnecessary or seldom used is likely to lead to indirect discrimination. Employers who use job descriptions and person specifications should therefore review them each time they decide to fill a post. Reliance on an existing person specification or job description, may lead to discrimination if they contain discriminatory criteria.

Example:

An employer uses a person specification for an accountant's post that states 'employees must be confident in dealing with external clients' when in fact the job in question does not involve liaising directly with external clients. This requirement is unnecessary and could lead to discrimination against disabled people who have difficulty interacting with others, such as some people with autism.

Job Descriptions

16.5

Job descriptions should accurately describe the job in question. Inclusion of tasks or duties that workers will not, in practice, need to perform has two pitfalls. It may discourage appropriately qualified people from applying because they cannot perform the particular task or fulfil the particular duty specified. It may also lead to discrimination claims if such people believe they have been unfairly denied an opportunity of applying.

16.6

Job titles should not show a predetermined bias for the recruitment of those with a particular characteristic. For example, 'shop girl' suggests a bias towards recruiting a younger woman, and 'office boy' suggests a bias towards recruiting a younger man.

16.7

Tasks and duties set out in the job description should be objectively justifiable as being necessary to that post. This is especially important for tasks and duties which some people may not be able to fulfil, or would be less likely to be able to fulfil, because of a protected characteristic. Similarly, the job description should not overstate a duty which is only an occasional or marginal one.

Example:

A job description includes the duty: 'regular Sunday working'. In reality, there is only an occasional need to work on a Sunday. This overstated duty written into the job description puts off Christians who do not wish to work on a Sunday, and so could amount to indirect discrimination unless the requirement can be objectively justified.

16.8

Where there are different ways of performing a task, job descriptions should not specify how the task should be done. Instead, the job description should state what outcome needs to be achieved.

Example:

A job description includes the task: 'Using MagicReport software to produce reports about customer complaints'. This particular software is not accessible to some disabled people who use voice-activated software. Discrimination could be avoided by describing the task as 'Producing reports about customer complaints'.

16.9

Job descriptions should not specify working hours or working patterns that are not necessary to the job in question. If a job could be done either part-time, full-time, or through job share arrangements, this should be stated in the job description. As well as avoiding discrimination, this approach can also widen the group of people who may choose to make an application.

Example:

A job description for a manager states that the job is full-time. The employer has stated this because all managers are currently full-time and he has not considered whether this is an actual requirement for the role. The requirement to work full-time could put women at a disadvantage compared with men because more women than men work part-time or job share in order to accommodate childcare responsibilities. This requirement could amount to indirect discrimination unless it can be objectively justified.

Person specifications

16.10

Person specifications describe various criteria – including skills, knowledge, abilities, qualifications, experience and qualities – that are considered necessary or desirable for someone fulfilling the role set out in the job description. These criteria must not be discriminatory. Discrimination can be avoided by ensuring that any necessary or desirable criteria can be justified for that particular job.

16.11

Criteria that exclude people because of a protected characteristic may be directly discriminatory unless they are related to occupational requirements (see Chapter 13).

Example:

Stating in a job description for a secretary that the person must be under 40 would amount to direct age discrimination against people over 40. In some circumstances, age criteria can be objectively justified, but in this case it is very unlikely.

16.12

Criteria that are less likely to be met by people with certain protected characteristics may amount to indirect discrimination if these criteria cannot be objectively justified.

Example:

Asking for ‘so many years’ experience could amount to indirect discrimination because of age unless this provision can be objectively justified.

Example:

A requirement for continuous experience could indirectly discriminate against women who have taken time out from work for reasons relating to maternity or childcare, unless the requirement can be objectively justified.

16.13

The person specification should not include criteria that are wholly irrelevant.

Example:

A requirement that the applicant must be ‘active and energetic’ when the job is a sedentary one is an irrelevant criterion. This requirement could be discriminatory against some disabled people who may be less mobile.

16.14

Employers should ensure that criteria relating to skills or knowledge are not unnecessarily restrictive in specifying particular qualifications that are necessary or desirable. It is advisable to make reference to ‘equivalent qualifications’ or to ‘equivalent levels of skill or knowledge’ in order to avoid indirect discrimination against applicants sharing a particular protected characteristic if this group is less likely to have obtained the qualification. The level of qualification needed should not be overstated. Employers should avoid specifying qualifications that were not available a generation ago, such as GCSEs, without stating that equivalent qualifications are also acceptable.

Example:

Requiring a UK-based qualification, when equivalent qualifications obtained abroad would also meet the requirement for that particular level of knowledge or skill, may lead to indirect discrimination because of race, if the requirement cannot be objectively justified.

16.15

As far as possible, all the criteria should be capable of being tested objectively. For example, attributes such as ‘leadership’ should be defined in terms of measurable skills or experience.

Health requirements in person specifications**16.16**

The inclusion of health requirements can amount to direct discrimination against disabled people, where such requirements lead to a blanket exclusion of people with particular impairments and do not allow individual circumstances to be considered. Employers should also be aware that, except in specified circumstances, it is unlawful to ask questions about health or disability before the offer of a job is made or a person is placed in a pool of people to be offered a job (see paragraphs 10.25 to 10.43).

Example:

A person specification states that applicants must have 'good health'. This criterion is too broad to relate to any specific requirement of the job and is therefore likely to amount to direct discrimination because of disability.

16.17

The inclusion of criteria that relate to health, physical fitness or disability, such as asking applicants to demonstrate a good sickness record, may amount to indirect discrimination against disabled people in particular, unless these criteria can be objectively justified by the requirements of the actual job in question.

16.18

Person specifications that include requirements relating to health, fitness or other physical attributes may discriminate not only against some disabled applicants, but also against applicants with other protected characteristics – unless the requirements can be objectively justified.

Example:

A person specification includes a height requirement. This may indirectly discriminate as it would put at a disadvantaged women, some disabled people, and people from certain racial groups if it cannot be objectively justified for the job in question.

Advertising a job

16.19

An employer must not discriminate in its arrangements for advertising jobs or by not advertising a job. Neither should they discriminate through the actual content of the job advertisement (see paragraphs 3.32 and 10.6).

Arrangements for advertising

16.20

The practice of recruitment on the basis of recommendations made by existing staff, rather than through advertising, can lead to discrimination. For example, where the workforce is drawn largely from one racial group, this practice can lead to continued exclusion of other racial groups. It is therefore important to advertise the role widely so that the employer can select staff from a wider and more diverse pool.

16.21

Before deciding only to advertise a vacancy internally, an employer should consider whether there is any good reason for doing so. If the workforce is made up of people with a particular protected characteristic, advertising internally will not help diversify the workforce. If there is internal advertising alone, this should be done openly so that everyone in the organisation is given the opportunity to apply.

16.22

Employers should also ensure that people absent from work (including women on maternity leave, those on long-term sick leave, and those working part-time or remotely) are informed of any jobs that become available so they can consider whether to apply. Failure to do so may amount to discrimination.

Content of job advertisements

16.23

Job advertisements should accurately reflect the requirements of the job, including the job description and person specification if the employer uses these. This will ensure that nobody will be unnecessarily deterred from applying or making an unsuccessful application even though they could in fact do the job.

16.24

Advertisements must not include any wording that suggests the employer may directly discriminate by asking for people with a certain protected characteristic, for example by advertising for a 'salesman' or a 'waitress' or saying that the applicant must be 'youthful'.

Example:

An employer advertises for a 'waitress'. This suggests that the employer is discriminating against men. By using a gender neutral term such as 'waiting staff' or by using the term 'waiter or waitress', the employer could avoid a claim of discrimination based on this advert.

16.25

Advertisements must not include any wording that suggests the employer might indirectly discriminate. Wording should not, for example, suggest criteria that would disadvantage people of a particular sex, age, or any other protected characteristic unless the requirement can be objectively justified or an exception under the Act applies.

16.26

A job advertisement should not include wording that suggests that reasonable adjustments will not be made for disabled people, or that disabled people will be discriminated against, or that they should not bother to apply.

Example:

An employer advertises for an office worker, stating, 'This job is not suitable for wheelchair users because the office is on the first floor'. The employer should state instead, 'Although our offices are on the first floor, we welcome applications from disabled people and are willing to make reasonable adjustments'.

When is it lawful to advertise for someone with a particular protected characteristic?

16.27

Where there is an occupational requirement for a person with a particular protected characteristic that meets the legal test under the Act, then it would be lawful to advertise for such a person; for example, if there is an occupational requirement for a woman (see paragraphs 13.2 to 13.15). Where the job has an occupational requirement, the advertisement should state this so that it is clear that there is no unlawful discrimination.

Example:

An employer advertises for a female care worker. It is an occupational requirement for the worker to be female, because the job involves intimate care tasks, such as bathing and toileting women. The advert states: 'Permitted under Schedule 9, part 1 of the Equality Act 2010'.

16.28

An employer can lawfully advertise a job as only open to disabled applicants because of the asymmetrical nature of disability discrimination (see paragraph 3.35).

Example:

A private nursery advertises for a disabled childcare assistant. This is lawful under the Act.

16.29

An employer may include statements in a job advertisement encouraging applications from under-represented groups, as a voluntary ‘positive action’ measure (see Chapter 12). An employer may also include statements about their equality policy or statements that all applications will be considered solely on merit.

Example:

The vast majority of workers employed by a national retailer are under the age of 40. Consequently, people over the age of 40 are under-represented in the organisation. The retailer is looking to open new stores and needs to recruit more staff. It would be lawful under the Act for that retailer to place a job advert encouraging applications from all groups, especially applicants over the age of 40.

Recruitment through employment services, careers services or other agencies

16.30

When recruiting through recruitment agencies, job centres, career offices, schools or online agencies, an employer must not instruct them to discriminate, for example by suggesting that certain groups would – or would not be – preferred; or cause or induce them to discriminate (see paragraphs 9.16 to 9.24).

16.31

Any agencies involved in an employer’s recruitment should be made aware of the employer’s equality policy, as well as other relevant policies. They should also be given copies of the job descriptions and person specifications for posts they are helping the employer to fill.

Application process

General principles

16.32

An employer must not discriminate through the application process. A standardised process, whether this is through an application form or using CVs, will enable an employer to make an objective assessment of an applicant’s ability to do the job and will assist an employer in demonstrating that they have assessed applicants objectively. It will also enable applicants to compete on equal terms with each other. A standardised

application process does not preclude reasonable adjustments for disabled people (see below).

Example:

An application form asks applicants to provide 400 words stating how they meet the job description and person specification. Applicants are marked for each criterion they satisfy and short-listed on the basis of their marks. This is a standardised application process that enables the employer to show that they have assessed all applicants without discriminating.

Reasonable adjustments during the application process

16.33

An employer must make reasonable adjustments for disabled applicants during the application process and must provide and accept information in accessible formats, where this would be a reasonable adjustment.

16.34

Where written information is provided about a job, it is likely to be a reasonable adjustment for that employer to provide, on request, information in a format that is accessible to a disabled applicant (see paragraphs 6.6 and 6.33). Accessible formats could include email, Braille, Easy Read, large print, audio format, and data formats. A disabled applicant's requirements will depend upon their impairment and on other factors too. For example, many blind people do not read Braille and would prefer to receive information by email or in audio format.

16.35

Where an employer invites applications by completing and returning an application form, it is likely to be a reasonable adjustment for them to provide forms and accept applications in accessible formats. However, a disabled applicant might not have a right to submit an application in their preferred format (such as Braille) if they would not be substantially disadvantaged by submitting it in some other format (such as email) which the employer would find easier to access.

16.36

In employment, the duty to make reasonable adjustments is not anticipatory (see Chapter 6). For this reason, employers do not need to keep stocks of job information or application forms in accessible formats, unless they are aware that these formats will be in demand. However, employers are advised to prepare themselves in advance so they can create accessible format documents quickly, allowing a candidate using that format to have

their application considered at the same time as other applicants. Otherwise, employers may need to make a further adjustment of allowing extra time for return of the form, if the applicant has been put at a substantial disadvantage by having less time to complete it.

16.37

Where applications are invited by completing and returning a form online, it is likely to be a reasonable adjustment for the form to be made accessible to disabled people. If on-line forms are not accessible to disabled people, the form should be provided in an alternative way.

16.38

Where an application is submitted in an accessible format, an employer must not discriminate against disabled applicants in the way that it deals with these applications.

Personal information requested as part of the application process

16.39

An employer can reduce the possibility of discrimination by ensuring that the section of the application form requesting personal information is detachable from the rest of the form or requested separately. It is good practice for this information to be withheld from the people who are short-listing or interviewing because it could allow them to find out about a person's protected characteristics (such as age or sex). However, where an applicant's protected characteristics are suggested by information in an application form or CV (for example, qualifications or work history) those who are short-listing or interviewing must not use it to discriminate against the applicant.

16.40

Where information for monitoring purposes is requested as part of an online application process, employers should find a way to separate the monitoring process from the application process. For example, a monitoring form could be sent out by email on receipt of a completed application form.

16.41

Any other questions on the main application form about protected characteristics should include a clear explanation as to why this information is needed, and an assurance that the information will be treated in strictest confidence. These questions should only be asked where they reflect occupational requirements for the post. Questions related to an occupational requirement should only seek as much information as is required to establish whether the candidate meets the requirement (see Chapter 13)

16.42

Applicants should not be asked to provide photographs, unless it is essential for selection purposes, for example for an acting job; or for security purposes, such as to confirm that a person who attends for an assessment or interview is the applicant.

Selection, assessment and interview process

General principles

16.43

Arrangements for deciding to whom to offer employment include short-listing, selection tests, use of assessment centres and interviews. An employer must not discriminate in any of these arrangements and must make reasonable adjustments so that disabled people are not placed at a substantial disadvantage compared to non-disabled people (see Chapter 10). Basing selection decisions on stereotypical assumptions or prejudice is likely to amount to direct discrimination.

16.44

An employer should ensure that these processes are fair and objective and that decisions are consistent. Employers should also keep records that will allow them to justify each decision and the process by which it was reached and to respond to any complaints of discrimination. If the employer does not keep records of their decisions, in some circumstances, it could result in an Employment Tribunal drawing an adverse inference of discrimination.

16.45

In deciding exactly how long to keep records after a recruitment exercise, employers must balance their need to keep such records to justify selection decisions with their obligations under the Data Protection Act 1998 to keep personal data for no longer than is necessary.

16.46

The records that employers should keep include:

- any job advertisement, job description or person specification used in the recruitment process;
- the application forms or CVs, and any supporting documentation from every candidate applying for the job;
- records of discussions and decisions by an interviewer or members of the selection panel; for example, on marking standards or interview questions;

- notes taken by the interviewer or by each member of the panel during the interviews;
- each interview panel member's marks at each stage of the process; for example, on the application form, any selection tests and each interview question (where a formal marking system is used);
- all correspondence with the candidates.

16.47

An employer is more likely to make consistent and objective decisions if the same staff members are responsible for selection at all stages of the recruitment process for each vacancy. Staff involved in the selection process should receive training on the employer's equality policy (if there is one).

16.48

An employer should ensure that they do not put any applicant at a particular disadvantage in the arrangements they make for holding tests or interviews, or using assessment centres. For example, dates that coincide with religious festivals or tests that favour certain groups of applicants may lead to indirect discrimination, if they cannot be objectively justified.

Example:

An all-day assessment that involves a social dinner may amount to indirect discrimination if the employer has not taken account of dietary needs relating to an applicant's religion – unless the arrangements can be objectively justified.

16.49

An employer is not required to make changes in anticipation of applications from disabled people in general – although it would be good practice to do so. It is only if the employer knows or could be reasonably expected to know that a particular disabled person is (or may be) applying, and that the person is likely to be substantially disadvantaged by the employer's premises or arrangements, that the employer must make reasonable adjustments. If an employer fails to ask about reasonable adjustments needed for the recruitment process, but could reasonably have been expected to know that a particular disabled applicant or possible applicant is likely to be disadvantaged compared to non-disabled people, they will still be under a duty to make a reasonable adjustment at the interview.

Short-listing

16.50

It is recommended that employers build the following guidelines for good practice into their selection procedures. By doing so, they will reduce the possibility of unlawful discrimination and avoid an adverse inference being made, should a tribunal claim be made by a rejected applicant.

- Wherever possible, more than one person should be involved in short-listing applicants, to reduce the chance of one individual's bias prejudicing an applicant's chances of being selected.
- The marking system, including the cut-off score for selection, should be agreed before the applications are assessed, and applied consistently to all applications.
- Where more than one person is involved in the selection, applications should be marked separately before a final mark is agreed between the people involved.
- Selection should be based only on information provided in the application form, CV or, in the case of internal applicants, any formal performance assessment reports.
- The weight given to each criterion in the person specification should not be changed during short-listing; for example, in order to include someone who would otherwise not be short-listed.

Guaranteed interviews for disabled applicants

16.51

Some employers operate a guaranteed interview scheme, under which a disabled candidate who wishes to use the scheme will be short-listed for interview automatically if they demonstrate that they meet the minimum criteria for getting the job. As explained above (paragraph 10.33), the Act permits questions to be asked at the application stage to identify disabled applicants who want to use this scheme.

Selection tests and assessment centres

16.52

Ability tests, personality questionnaires and other similar methods should only be used if they are well designed, properly administered and professionally validated and are a reliable method of predicting an applicant's performance in a particular job. If such a test leads to indirect discrimination or discrimination arising from disability, even if such discrimination is not

intended and the reason for the discrimination is not understood, the test should not be used unless it can be objectively justified.

16.53

Where tests and assessment centres are used as part of the selection process, it is recommended that employers take account of the following guidelines:

- Tests should correspond to the job in question, and measure as closely as possible the appropriate levels of the skills and abilities included in the person specification.
- The Welsh Language Act 1993 puts Welsh and English on an equal basis in the delivery of public services in Wales and bilingual tests may need to be used for recruitment to some public sector jobs, where the ability to speak Welsh is essential or desirable.
- Where the purpose of a test is not to ascertain a person's level of proficiency in English (or Welsh in Wales), special care should be taken to make sure candidates whose first language is not English (or Welsh in Wales) understand the instructions. Tests that are fair for speakers of English (or Welsh) as a first language may present problems for people who are less proficient in the language.
- Deaf people whose first language is British Sign Language may be at a substantial disadvantage if a test is in English (or Welsh). An employer will need to consider what they should do to comply with the duty to make reasonable adjustments for such applicants.
- All candidates should take the same test unless there is a health and safety reason why the candidate cannot do so, for example because of pregnancy, or unless a reasonable adjustment is required (see below).
- Test papers, assessment notes and records of decisions should be kept on file (see paragraph 17.4).

16.54

Employers should make adjustments where a test or assessment would put a disabled applicant at a substantial disadvantage, if such adjustments would be reasonable (see Chapter 6). Examples of adjustments which may be reasonable include:

- providing written instructions in an accessible format;
- allowing a disabled person extra time to complete the test;
- permitting a disabled person the assistance of a reader or scribe during the test;
- allowing a disabled applicant to take an oral test in writing or a written test orally.

16.55

The extent to which such adjustments would be reasonable may depend on the nature of the disabled person's impairment, how closely the test is related to the job in question and what adjustments the employer would be reasonably required to make if the applicant were given the job.

16.56

However, employers would be well advised to seek professional advice in the light of individual circumstances before making adjustments to psychological or aptitude tests.

Interviews

16.57

An employer must not discriminate at the interview stage. In reality, this is the stage at which it is easiest to make judgements about an applicant based on instant, subjective and sometimes wholly irrelevant impressions. If decisions are based on prejudice and stereotypes and not based on factors relating to the job description or person specification, this could lead to unlawful discrimination. By conducting interviews strictly on the basis of the application form, the job description, the person specification, the agreed weight given to each criterion and the results of any selection tests, an employer will ensure that all applicants are assessed objectively, and solely on their ability to do the job satisfactorily.

16.58

Employers should try to be flexible about the arrangements made for interviews. For example, a woman with childcare responsibilities may have difficulties attending an early morning interview or a person practising a particular religion or belief may have difficulty attending on certain days or at certain times.

16.59

By the interview stage, an employer should already have asked whether reasonable adjustments are needed for the interview itself. This should have been covered on the application form or in the letter inviting a candidate for interview. However, it is still good practice for the interviewer to ask on the day if any adjustments are needed for the interview.

16.60

The practical effects of an employer's duties may be different if a person whom the employer previously did not know to be disabled (and it would not be reasonable to expect them to have known this) arrives for interview and is

substantially disadvantaged because of the arrangements. The employer will be under a duty to make a reasonable adjustment from the time that they first learn of the disability and the disadvantage. However, the extent of the duty is less than might have been the case if they had known (or ought to have known) in advance about the disability and its effects.

16.61

An employer can reduce the possibility of unlawful discrimination by ensuring that staff involved in selection panels have had equality training and training about interviews, to help them:

- recognise when they are making stereotypical assumptions about people;
- apply a scoring method objectively;
- prepare questions based on the person specification and job description and the information in the application form; and
- avoid questions that are not relevant to the requirements of the job.

16.62

It is particularly important to avoid irrelevant interview questions that relate to protected characteristics, as this could lead to discrimination under the Act. These could include, for example, questions about childcare arrangements, living arrangements or plans to get married or to have children. Where such information is volunteered, selectors should take particular care not to allow themselves to be influenced by that information. A woman is under no obligation to declare her pregnancy in a recruitment process. If she volunteers that information, it should not be taken into account in deciding her suitability for the job.

16.63

Questions should not be asked, nor should assumptions be made, about whether someone would fit in with the existing workforce.

Example:

At a job interview a woman is asked: 'You would be the only woman doing this job, and the men might make sexist jokes. How would you feel about this?' This question could amount to direct sex discrimination.

16.64

Except in particular circumstances, questions about disability or health must not be asked at the interview stage or at any other stage before the offer of a job (whether conditional or not) has been made, or where the person has been accepted into a pool of applicants to be offered a position when one becomes available. This is explained in paragraphs 10.25 to 10.43.

References

16.65

References should only be obtained, and circulated to members of the selection panel, after a selection decision has been reached. This can help ensure that the selection decision is based on objective criteria and is not influenced by other factors, such as potentially subjective judgments about a candidate by referees. Employers should send referees copies of the job description and person specification, requesting evidence of the candidate's ability to meet the specific requirements of the job. This is more likely to ensure that the reference focuses on information that is relevant to the job. Where a reference is subjective and negative, it is good practice to give the successful applicant an opportunity to comment on it.

Eligibility to work in the UK

16.66

Under the Immigration, Asylum and Nationality Act 2006, all employers (including small employers) are required to obtain information about a person's eligibility to work in the UK before employment begins. Many people from ethnic minorities in this country are British citizens or are otherwise entitled to work here. Employers should not make assumptions about a person's right to work in the UK based on race, colour or national origin, because all applicants should be treated equally under the Act.

16.67

Eligibility to work in the UK should be verified in the final stages of the selection process rather than at the application stage, to make sure the appointment is based on merit alone, and is not influenced by other factors. Depending on the employer's recruitment process, and the type of job being filled, candidates might be asked for the relevant documents when they are invited to an interview, or when an offer of employment is made. Employers can, in some circumstances, apply for work permits and should not exclude potentially suitable candidates from the selection process.

16.68

The UK Border Agency has published a code of practice for employers on how to avoid unlawful racial discrimination when complying with this requirement. Please see: <http://www.ukba.homeoffice.gov.uk/sitecontent/documents/employersandsponsors/preventingillegalworking/>

Job Offers

16.69

As stated at the beginning of this chapter, an employer must not discriminate against a person in the terms on which the person is offered employment.

Example:

An employer offers a job but extends their usual probation period from three months to six months because the preferred candidate is a woman returning from maternity leave or a person with a disability. This would be discrimination in the terms on which the person is offered employment.

16.70

A refusal to recruit a woman because she is pregnant is unlawful even if she is unable to carry out the job for which she is to be employed. This will be the case even if the initial vacancy was to cover another woman on maternity leave. It is irrelevant that the woman failed to disclose that she was pregnant when she was recruited. A woman is not legally obliged to tell an employer during the recruitment process that she is pregnant because it is not a factor which can lawfully influence the employer's decision (see Chapter 8).

16.71

Sch.9,
Para 9 Employers do not discriminate because of age by refusing to recruit someone who is older than 64 years and six months old or within six months of the normal retirement age where such normal retirement age is more than 65. This does not alter an existing employee's right to request to work beyond retirement age (see paragraphs 13.26 to 13.38).

Feedback to short-listed unsuccessful candidates

16.72

Having secured a preferred candidate, it is good practice for an employer to offer feedback to unsuccessful short-listed candidates if this is requested. By demonstrating objective reasons for the applicant's lack of success, based on the requirements of the job, an employer can minimise the risk of any claims for unlawful discrimination under the Act.

Chapter 17:

Avoiding discrimination during employment

Introduction

17.1

As explained in Chapter 10, the Act prohibits discrimination, victimisation and harassment at all stages and in all aspects of the employment relationship, including in workers' training and development. It also places employers under a duty to make reasonable adjustments for disabled workers. This chapter takes a closer look at the implications of the Act for a range of issues that are central to the relationship between employers and workers: working hours; sickness and absence; arranging leave from work; accommodating workers' needs; induction, training and development; disciplinary and grievance matters. Where appropriate, it also makes recommendations for good practice.

17.2

Many aspects of the employment relationship are governed by the contract of employment between the employer and the worker, which may be verbal or written. Practical day-to-day arrangements or custom and practice in the workplace are also important; in some cases, these features are communicated via written policies and procedures.

17.3

In many workplaces, a trade union is recognised by the employer for collective bargaining purposes. Where changes to policies and procedures are being considered, an employer should consult with a recognised trade union in the first instance. It is also good practice for employers to consult with trade union equality representatives as a first step towards understanding the diverse needs of workers. The role of trade unions in meeting the training and development needs of their members should also be recognised.

17.4

Where resources permit, employers are strongly advised to maintain proper written records of decisions taken in relation to individual workers, and the reasons for these decisions. Keeping written records will help employers reflect on the decisions they are taking and thus help avoid discrimination. In addition, written records will be invaluable if an employer has to defend a claim in the Employment Tribunal.

17.5

It is also useful for employers to monitor overall workplace figures on matters such as requests for flexible working, promotion, training and disciplinary procedures to see if there are significant disparities between groups of people sharing different protected characteristics. If disparities are found, employers should investigate the possible causes in each case and take steps to remove any barriers.

Working hours

17.6

Working hours are determined by agreement between the employer and the worker, subject to collective agreements negotiated by trade unions on behalf of workers. The Working Time Regulations 1998 set out certain legal requirements; for example, maximum average working hours per week, minimum rest breaks, daily and weekly rest periods and entitlement to annual leave. There are also special provisions for night workers.

17.7

Established working time agreements can be varied either simply by agreement between the employer and worker or following a statutory request for flexible working.

Flexible working

17.8

There are statutory rules which give employees with caring responsibilities for children or specified adults the right to have a request for flexible working considered. The right is designed to give employees the opportunity to adopt working arrangements that help them to balance their commitments at work with their need to care for a child or an adult.

ERA 1996 ss.
80F- 80I

17.9

The statutory rules are set out in the Employment Rights Act 1996, and expanded in the Flexible Working (Procedural Requirements) Regulations 2002 and the Flexible Working (Eligibility, Complaints and Remedies) Regulations 2002. Under these rules, employees with caring responsibilities who have at least 26 weeks' continuous service are entitled to make a written request for flexible working; that is, to request changes to hours of work, times of work and the location of work. In practice this might mean:

- part-time working, term-time working or home working;
- adjusting start and finish times;
- adopting a particular shift pattern or extended hours on some days with time off on others.

17.10

Employers have a duty to consider a request for flexible working arrangements within specified timescales, and can refuse only on one of the business-related grounds set out in the statutory rules. The refusal must be in writing and include a sufficient explanation of the decision, based on correct facts. Employers who do not comply with these statutory procedures risk being taken to an Employment Tribunal and possibly having to pay compensation to the employee. For further details of the flexible working procedures, see: http://www.direct.gov.uk/en/employment/employees/workinghoursandtimeoff/dg_10029491

17.11

It is also important to bear in mind that rigid working patterns may result in indirect discrimination unless they can be objectively justified. Although a flexible working request may legitimately be refused under the statutory rules, such a refusal may still be indirectly discriminatory if the employer is unable to show that the requirement to work certain hours is justified as a proportionate means of achieving a legitimate aim. For example:

- A requirement to work full-time hours may indirectly discriminate against women because they are more likely to have childcare responsibilities.
- A requirement to work full-time hours could indirectly discriminate against disabled people with certain conditions (such as chronic fatigue syndrome, or ME). It could also amount to a failure to make reasonable adjustments.
- A requirement to work on certain days may indirectly discriminate against those with particular religious beliefs.

Example:

An employee's contractual hours are 9am–3pm. Under the flexible working procedures, she has formally requested to work from 10am–4pm because of childcare needs. Her employer refuses, saying that to provide staff cover in the mornings would involve extra costs. This refusal would be compatible with the flexible working procedures, which do not require a refusal to be objectively justified. However, in some circumstances, this could amount to indirect sex discrimination. Where a refusal to permit certain working patterns would detrimentally affect a larger proportion of women than men, the employer must show that it is based on a legitimate aim, such as providing sufficient staff cover before 10am, and that refusing the request is a proportionate means of achieving that aim.

17.12

Employers should also be particularly mindful of their duty to make reasonable adjustments to working hours for disabled workers.

Example:

A worker with a learning disability has a contract to work normal office hours (9am to 5.30pm in this particular office). He wishes to change these hours because the friend whom he needs to accompany him to work is no longer available before 9am. Allowing him to start later is likely to be a reasonable adjustment for that employer to make.

Rest breaks**17.13**

Minimum rest break periods are set out in the Working Time Regulations 1998. Some employers operate a policy on rest breaks and lunch breaks that is more generous than the provisions of those Regulations.

17.14

In considering requests for additional or different breaks, employers should ensure that they do not discriminate because of any protected characteristic. In some circumstances, an employer's refusal to allow additional breaks or flexibility as to when they are taken might amount to indirect discrimination unless it can be objectively justified. When dealing with requests for additional breaks, an employer should consider whether it is possible to grant the request by allowing the person to work more flexible hours.

Example:

An observant Muslim requests two additional 10-minute breaks every day to allow him to pray at work. The employer allows other workers to take additional smoking breaks of similar length. Refusing this request could amount to direct discrimination because of religion or belief. On the other hand, if the employer took a consistently strict approach to rest breaks, they could allow the prayer breaks on the understanding that the Muslim worker arrives at work 20 minutes earlier or makes up the time at the end of the day.

17.15

Allowing disabled workers to take additional rest breaks is one way that an employer can fulfil their duty to make reasonable adjustments.

Example:

A worker has recently been diagnosed with diabetes. As a consequence of her medication and her new dietary requirements, she finds that she gets extremely tired at certain times during the working day. It is likely to be a reasonable adjustment to allow her to take additional rest breaks to control the effects of her impairment.

Sickness and absence from work

17.16

Sickness and absence from work may be governed by contractual terms and conditions and/or may be the subject of non-contractual practices and procedures. Regardless of the nature of these policies, it is important to ensure that they are non-discriminatory in design, and applied to workers who are sick or absent for whatever reason without discrimination of any kind. This is particularly important when a policy has discretionary elements such as decisions about stopping sick pay or commencing attendance management procedures.

17.17

To avoid discrimination, sickness and absence procedures should include clear requirements about informing the employer of sickness and providing medical certificates. They should also specify the rate and the maximum period of payment for sick pay.

17.18

In order to defend any claims of discrimination, it is advisable for employers to maintain records of workers' absences. In relation to sick leave, this is a legal requirement under the Statutory Sick Pay (General) Regulations 1982. Particular care is needed to ensure that sensitive medical information about workers is kept confidential and handled in accordance with the Data Protection Act 1998.

17.19

When taking attendance management action against a worker, employers should ensure that they do not discriminate because of a protected characteristic. In particular, it will often be appropriate to manage disability, pregnancy and gender reassignment-related absences differently from other types of absence. Recording the reasons for absences should assist that process.

Disability-related absences**17.20**

Employers are not automatically obliged to disregard all disability-related sickness absences, but they must disregard some or all of the absences by way of an adjustment if this is reasonable. If an employer takes action against a disabled worker for disability-related sickness absence, this may amount to discrimination arising from disability (see Chapter 5).

Example:

During a six-month period, a man who has recently developed a long-term health condition has a number of short periods of absence from work as he learns to manage this condition. Ignoring these periods of disability-related absence is likely to be a reasonable adjustment for the employer to make. Disciplining this man because of these periods of absence will amount to discrimination arising from disability, if the employer cannot show that this is objectively justified.

17.21

Workers who are absent because of disability-related sickness must be paid no less than the contractual sick pay which is due for the period in question. Although there is no automatic obligation for an employer to extend contractual sick pay beyond the usual entitlement when a worker is absent due to disability-related sickness, an employer should consider whether it would be reasonable for them to do so.

17.22

However, if the reason for absence is due to an employer's delay in implementing a reasonable adjustment that would enable the worker to return to the workplace, maintaining full pay would be a further reasonable adjustment for the employer to make.

Example:

A woman who has a visual impairment needs work documents to be enlarged. Her employer fails to make arrangements for a reasonable adjustment to provide her with these. As a result, she has a number of absences from work because of eyestrain. After she has received full sick pay for four months, the employer is considering a reduction to half-pay in line with its sickness policy. It is likely to be a reasonable adjustment to maintain full pay as her absence is caused by the employer's delay in making the original adjustment.

17.23

Disabled workers may sometimes require time out during the working day to attend medical appointments or receive treatment related to their disability. On occasions, it may be necessary for them to attend to access needs such as wheelchair maintenance or care of working dogs. If, for example, a worker needs to take a short period of time off each week over a period of several months it is likely to be reasonable to accommodate the time off.

17.24

However, if a worker needs to take off several days per week over a period of months it may not be reasonable for the employer to accommodate this. Whether or not it is reasonable will depend on the circumstances of both the employer and the worker.

Example:

An employer allows a worker who has become disabled after a stroke to have time off for rehabilitation training. Although this is more time off than would be allowed to non-disabled workers, it is likely to be a reasonable adjustment. A similar adjustment may be reasonable if a disability gets worse or if a disabled worker needs occasional but regular long-term treatment.

Pregnancy-related absences**17.25**

All pregnancy-related absences must be disregarded for the purposes of attendance management action. Workers who are absent for a pregnancy-related reason have no automatic right to full pay but should receive no less than the contractual sick pay that might be due for the period in question. However, employers have no obligation to extend contractual sick pay beyond what would usually be payable. Sickness absence associated with a miscarriage should be treated as pregnancy-related sickness. Pregnancy-related absence is covered in more detail in Chapter 8.

Example:

A worker has been off work because of pregnancy complications since early in her pregnancy. Her employer has now dismissed her in accordance with the sickness policy which allows no more than 20 weeks' continuous absence. This policy is applied regardless of sex. The dismissal is unfavourable treatment because of her pregnancy and would be unlawful even if a man would be dismissed for a similar period of sickness absence, because the employer took into account the worker's pregnancy-related sickness absence in deciding to dismiss.

17.26

Pregnant employees are entitled to paid time off for antenatal care. Antenatal care can include medical examinations, relaxation and parenting classes.

Example:

A pregnant employee has booked time off to attend a medical appointment related to her pregnancy. Her employer insists this time must be made up through flexi-time arrangements or her pay will be reduced to reflect the time off. This is unlawful: a pregnant employee is under no obligation to make up time taken off for antenatal appointments and an employer cannot refuse paid time off to attend such classes.

Absences related to gender reassignment

17.27

If a transsexual person is absent from work because they propose to undergo, are undergoing or have undergone gender reassignment, it is unlawful to treat them less favourably than they would be treated if they were absent due to illness or injury, or – if reasonable – than they would be treated for absence for other reasons (see paragraphs 9.31 to 9.33).

Example:

A worker undergoing gender reassignment has to take some time off for medical appointments and also for surgery. The employer records all these absences for the purposes of their attendance management policy. However, when another worker breaks his leg skiing the employer disregards his absences because ‘it wasn’t really sickness and won’t happen again’. This indicates that the treatment of the transsexual worker may amount to discrimination because the employer would have treated him more favourably if he had broken his leg than they treated him because of gender reassignment absences.

Absences related to in vitro fertilisation

17.28

There is no statutory entitlement to time off for in vitro fertilisation (IVF) or other fertility treatment. However, in responding to requests for time off from a woman undergoing IVF, an employer must not treat her less favourably than they treat, or would treat, a man in a similar situation as this could amount to sex discrimination. After a fertilised embryo has been implanted, a woman is legally pregnant and from that point is protected from unfavourable treatment because of her pregnancy, including pregnancy-related sickness. She would also be entitled to time off for antenatal care.

17.29

It is good practice for employers to treat sympathetically any request for time off for IVF or other fertility treatment, and consider adopting a procedure to cover this situation. This could include allowing women to take annual leave or unpaid leave when receiving treatment and designating a member of staff whom they can inform on a confidential basis that they are undergoing treatment.

Example:

A female worker who is undergoing IVF treatment has to take time off sick because of its side effects. Her employer treats this as ordinary sickness absence and pays her contractual sick pay that is due to her. Had contractual sick pay been refused, this could amount to sex discrimination.

Example:

Recently an employer agreed, as a one-off request, a week's annual leave for a male worker who wanted to undergo cosmetic dental surgery. Two months later, one of his female colleagues asks if she can take a week's annual leave to undergo IVF treatment. The employer refuses this request, even though the worker still has two weeks leave due to her. She may be able to show that the employer's refusal to grant her request for annual leave for IVF treatment amounts to sex discrimination, by comparing her treatment to that of her male colleague.

Maternity, paternity, adoption and parental leave**17.30**

When dealing with workers who request or take maternity, paternity, adoption or parental leave, employers should ensure that they do not discriminate against the worker because of a protected characteristic.

Example:

A lesbian worker has asked her employer for parental leave. She and her partner adopted a child two years ago and she wants to be able to look after her child for part of the summer holidays. The worker made sure the time she has requested would not conflict with parental leave being taken by other workers. In exercising his discretion whether to grant parental leave, the woman's line manager refuses her request because he does not agree with same sex couples being allowed to adopt children. This is likely to be direct discrimination because of sexual orientation.

17.31

Detailed provisions dealing with maternity, paternity, adoption and parental leave and workers' rights during such leave are set out in other statutes and regulations; for example, the Employment Rights Act 1996, Maternity and Parental Leave etc Regulations 1999 (as amended), Paternity and Adoption Leave Regulations 2002 (as amended) and the Management of Health and Safety at Work Regulations 1999. For more information, please see Chapter 8.

Emergency leave

17.32

Employees have a statutory right to take reasonable unpaid time off which is necessary to deal with immediate emergencies concerning dependants. Dependants include a spouse or civil partner or partner, a child or a parent, or a person living in the employee's household. In dealing with cases where emergency leave is required, employers should ensure that they do not discriminate.

ERA 1996
s.57A

Example:

A worker receives a telephone call informing him that his civil partner has been involved in an accident. The worker has been recorded as next of kin on his civil partner's medical notes and is required at the hospital. The employer has a policy that only allows emergency leave to be taken where a spouse, child or parent is affected and refuses the worker's request for leave. This would amount to discrimination because of sexual orientation. It would also be a breach of the worker's statutory rights.

Annual leave

17.33

Annual leave policies and procedures must be applied without discrimination of any kind. It is particularly important for employers to avoid discrimination when dealing with competing requests for annual leave, or requests that relate to a worker's protected characteristic such as religion or belief.

17.34

The Working Time Regulations 1998 provide a minimum annual holiday entitlement of 5.6 weeks, which can include public and bank holidays; however, employers may offer workers more holiday than their minimum legal entitlement. The procedure in the Regulations for requesting annual leave and dealing with such requests may be replaced by agreement between the employer and worker. All policies and procedures for handling annual leave requests should be non-discriminatory in design and the employer must not refuse a request for annual leave because of a protected characteristic.

17.35

A policy leading to a refusal is also an application of a provision, criterion or practice. The policy could be indirectly discriminatory if it places the worker and people sharing the worker's characteristic at a particular disadvantage, unless the provision, criterion or practice is a proportionate means of achieving a legitimate aim.

17.36

A worker may request annual leave for a religious occasion or to visit family overseas. To avoid discrimination, employers should seek to accommodate the request – provided the worker has sufficient holiday due to them and it is reasonable for them to be absent from work during the period requested.

Example:

An Australian worker requests three weeks' leave to visit his family in Australia. He works for a large employer, whose annual leave policy normally limits periods of annual leave to a maximum of two weeks at any one time. The two-week limit could be indirectly discriminatory because of nationality, unless it can be objectively justified. In this case, the employer has sufficient staff to cover the additional week's leave. They operate the annual leave policy flexibly, and agree to allow the worker to take three weeks' leave to visit his family.

17.37

Many religions or beliefs have special periods of religious observance, festivals or holidays. Employers should be aware that some of these occasions are aligned with lunar phases. As a result, dates can change from year to year and may not become clear until quite close to the actual day.

Example:

Last year, a Sikh worker took annual leave on 1 and 2 March to celebrate Hola Mohalla. This year, he requests annual leave on 6th and 7th March to celebrate the same holiday. No other staff members in his department have requested leave on these dates. The employer refuses the request but says that the worker can take off the same days as he did last year. Festivals in Sikhism are based on the lunar calendar, so the dates on which they fall differ every year. It could be indirect discrimination for the employer to expect the worker to take annual leave on the same days every year, unless this can be objectively justified.

17.38

Employers who require everyone to take leave during an annual closedown should consider whether this creates a particular disadvantage for workers sharing a protected characteristic who need annual leave at other times, for example, during specific school holidays or religious festivals. This practice could amount to indirect discrimination, unless it can be objectively justified. Although the operational needs of the business may be a legitimate aim, employers must consider the needs of workers in assessing whether the closure is a proportionate means of achieving the aim (see paragraphs 4.25 to 4.32).

Avoiding discrimination – accommodating workers' needs

Dress and business attire

17.39

Many employers enforce a dress code or uniform with the aim of ensuring that workers dress in a manner that is appropriate to the business or workplace or to meet health and safety requirements. However, dress codes – including rules about jewellery – may indirectly discriminate against workers sharing a protected characteristic. To avoid indirect discrimination, employers should make sure that any dress rules can be justified as a proportionate means of achieving a legitimate aim such as health and safety considerations.

17.40

It is good practice for employers to consult with workers as to how a dress code may impact on different religious or belief groups, and whether any exceptions should be allowed – for example, for religious jewellery.

Example:

An employer introduces a 'no jewellery' policy in the workplace. This is not for health and safety reasons but because the employer does not like body piercings. A Sikh worker who wears a Kara bracelet as an integral part of her religion has complained about the rule. To avoid a claim of indirect discrimination, the employer should consider allowing an exception to this rule. A blanket ban on jewellery would probably not be considered a proportionate means of achieving a legitimate aim in these circumstances.

17.41

In some situations, a dress code could amount to direct discrimination because of a protected characteristic. It is not necessarily sex discrimination for a dress code to set out different requirements for men and women (for example, that men have to wear a collar and tie). However, it may be direct discrimination if a dress code requires a different overall standard of dress for men and for women; for example, requiring men to dress in a professional and business-like way but allowing women to wear more casual clothes. It could also be direct discrimination if the dress code is similar for both sexes but applied more strictly to men than women – or the other way round.

17.42

Where men are required to wear suits, it may be less favourable treatment to require women to wear skirts, if an equivalent level of smartness can be achieved by women wearing, for example, a trouser suit. If a male to female transsexual person is prevented from wearing a skirt where other women are permitted to do so, this could amount to direct discrimination because of gender reassignment.

Example:

An employer's dress code requires men to wear shirts and ties and women to 'dress smartly'. The dress code is not enforced as strictly against women as against men. A male worker has been suspended for continually failing to wear a tie, while no action is taken against female colleagues for wearing T-shirts. This could amount to direct discrimination because of sex.

17.43

Employers should also be aware of the duty to make reasonable adjustments to a dress code in order to avoid placing disabled workers at a substantial disadvantage. For example, in some cases uniforms made of certain fabrics may cause a reaction in workers with particular skin conditions.

Language in the workplace**17.44**

A language requirement for a job may be indirectly discriminatory unless it is necessary for the satisfactory performance of the job. For example, a requirement that a worker have excellent English skills may be indirectly discriminatory because of race; if a worker really only needs a good grasp of English, the requirement for excellent English may not be objectively justified. A requirement for good spoken English may be indirectly discriminatory against certain disabled people, for example, deaf people whose first language is British Sign Language. (See Chapter 4 for more information on indirect discrimination.)

Example:

A superstore insists that all its workers have excellent spoken English. This might be a justifiable requirement for those in customer-facing roles. However, for workers based in the stock room, the requirement could be indirectly discriminatory in relation to race or disability as it is less likely to be objectively justified.

17.45

Under the Welsh Language Act 1993, public bodies providing services to the public in Wales must make their services available in Welsh as well as English. This operates as a statutory exception to the Equality Act, and allows a wide range of posts in public bodies in Wales (and some outside Wales) to require workers who can speak, write and read Welsh sufficiently well for the post in question. In some cases, Welsh language skills may be an essential requirement for appointment; in others, the worker may need to agree to learn the language to the required level within a reasonable period of time after appointment. On this issue, employers are recommended to seek advice from the Welsh Language Board.

Example:

A local council in Wales requires all its newly recruited receptionists to speak Welsh or be willing to learn the language within a year of being employed. This requirement would be lawful under the Act.

17.46

In fulfilling the duty to make reasonable adjustments, employers may have to take steps to ensure that information is provided in accessible formats. This requirement is covered in more detail in paragraphs 6.6 and 6.33.

17.47

An employer might also wish to impose a requirement on workers to communicate in a common language – generally English. There is a clear business interest in having a common language in the workplace, to avoid misunderstandings, whether legal, financial or in relation to health and safety. It is also conducive to good working relations to avoid excluding workers from conversations that might concern them.

17.48

However, employers should make sure that any requirement involving the use of a particular language during or outside working hours, for example during work breaks, does not amount to unlawful discrimination. Blanket rules involving the use of a particular language may not be objectively justifiable as a proportionate means of achieving a legitimate aim. An employer who prohibits workers from talking casually to each other in a language they do not share with all colleagues, or uses occasions when this happens to trigger disciplinary or capability procedures or to impede workers' career progress, may be considered to be acting disproportionately.

17.49

English is generally the language of business in Britain and is likely to be the preferred means of communication in most workplaces, unless other languages are required for specific business reasons. There may be some circumstances where using a different language might be more practical for a line manager dealing with a particular group of workers with limited English language skills.

Example:

A construction company employs a high number of Polish workers on one of its sites. The project manager of the site is also Polish and finds it more practical to speak Polish when giving instructions to those workers. However, the company should not advertise vacancies as being only open to Polish-speaking workers as the requirement is unlikely to be justified and could amount to indirect race discrimination.

17.50

Where the workforce includes people sharing a protected characteristic who experience disadvantage within the workplace because of limited English, employers could consider taking proportionate positive action measures to improve their communication skills. These measures might include providing:

- interpreting and translation facilities; for example, multilingual safety signs and notices, to make sure the workers in question understand health and safety requirements;
- English language classes to improve communication skills.

The provisions on positive action are explained in Chapter 12.

17.51

Inappropriate or derogatory language in the workplace could amount to harassment if it is related to a protected characteristic and is sufficiently serious. Workplace policies – if the employer has these in place – should emphasise that workers should not make inappropriate comments, jokes or use derogatory terms related to a protected characteristic (see Chapter 7 on harassment).

Example:

A male worker has made a number of offensive remarks about a worker who is pregnant, such as 'women are only good for making babies'. The employer's equality policy makes it clear that inappropriate and offensive language, comments and jokes related to a protected characteristic can amount to harassment and may be treated as a disciplinary offence. The employer may bring disciplinary proceedings against the male worker for making offensive comments that relate to the pregnant worker's sex.

Understanding a worker's needs

17.52

The employer's duty to make reasonable adjustments continues throughout the disabled worker's employment (see Chapter 6). It is good practice for an employer to encourage disabled workers to discuss their disability so that any reasonable adjustments can be put in place. Disabled workers may be reluctant to disclose their impairment and the Act does not impose any obligation on them to do so. An employer can help overcome any concerns a disabled worker may have in this regard by explaining the reasons why information is being requested (that is, to consider reasonable adjustments). The employer should also reassure the worker that that information about disability is held confidentially.

Example:

An office worker has symptomatic HIV and does not wish to tell his employer. His symptoms get worse and he finds it increasingly difficult to work the required number of hours in a week. At his annual appraisal, he raises this problem with his line manager and discloses his medical condition. As a result, a reasonable adjustment is made and his working hours are reduced to overcome the difficulty.

17.53

Sometimes a reasonable adjustment will not succeed without the co-operation of other workers. To secure such co-operation it may be necessary for the employer, with the disabled worker's consent, to tell their colleague(s) in confidence about a disability which is not obvious. This disclosure may be limited to the disabled person's line manager or it may be appropriate to involve other colleagues, depending on the circumstances.

17.54

However, an employer should obtain a worker's consent before revealing any information about their disability. Employers need to be aware that they have obligations under the Data Protection Act 1998 in respect of personal data.

Example:

A factory worker with cancer tells her employer that she does not want colleagues to know of her condition. As an adjustment she needs extra time away from work to receive treatment and to rest. Neither her colleagues nor her line manager need to be told the precise reasons for the extra leave but the line manager will need to know that the adjustment is required in order to implement it effectively.

17.55

If a worker is undergoing gender reassignment, it is good practice for the employer to consult with them sensitively about their needs in the workplace and whether there are any reasonable and practical steps the employer can take to help the worker as they undergo their gender reassignment process. For further information on gender reassignment, please refer to paragraphs 2.21 to 2.30 and 9.31 to 9.33.

Example:

A worker will soon be undergoing gender reassignment treatment and the employer has accepted that they want to continue working throughout the transition process. To avoid unresolved questions about which toilet facilities the worker should use, their uniform and communications with other members of staff, the employer should arrange to discuss the situation sympathetically with the worker. The discussion could cover setting a date for using different facilities and uniform; the timescale of the treatment; any impact this may have on the worker's job and adjustments that could be made; and how the worker would like to address the issue of their transition with colleagues.

17.56

Consultation will also help an employer understand the requirements of a worker's religion or belief, such as religious observances. This will help avoid embarrassment or difficulties for those who need to practice their religion or belief at the workplace.

Example:

A large employer in an urban area is aware that their workers come from varied backgrounds. As part of their induction meeting, new workers are given the option of disclosing their religion or belief and of discussing whether there is anything the company can do to help them – such as allowing flexible breaks to accommodate prayer times. Workers do not have to disclose anything about their religion or belief if they do not want to. All information provided is kept confidential, unless the worker consents to its disclosure.

Quiet rooms**17.57**

Some religions or beliefs require their followers to pray at specific times during the day. Workers may therefore request access to an appropriate quiet place (or prayer room) to undertake their religious observance.

17.58

The Act does not require employers to provide a quiet room. However, if a quiet place is available and allowing its use for prayer and contemplation does not cause problems for the business or for other workers, an employer with sufficient resources may be discriminating because of religion or belief by refusing such a request – especially if comparable facilities are provided for other reasons.

17.59

On the other hand, employers should be careful to avoid creating a disadvantage for workers who do not need a quiet room (for example, by converting the only rest room), as this might amount to indirect religion or belief discrimination. It would be good practice to consult with all workers before designating a room for prayer and contemplation and to discuss policies for using it, such as the wearing of shoes. If possible, employers may also wish to consider providing separate storage facilities for ceremonial objects.

Example:

A large employer has one meeting room which is generally unused. There is also a separate rest room, and the employer has made provision for smokers by permitting them to use an open porch by the back entrance. A group of Muslim workers has asked the employer to convert the small meeting room into a quiet room. Refusing this request may amount to direct discrimination if the Muslim workers have been treated less favourably because of religion or belief, compared to non-Muslim workers.

Food and fasting**17.60**

Some religions or beliefs have specific dietary requirements. If workers with such needs bring food into the workplace, they may need to store and heat it separately from other food. It is good practice for employers to consult their workforce on such issues and find a mutually acceptable way of accommodating such requirements.

Example:

An orthodox Jewish worker in a small firm has a religious requirement that her food cannot come into direct contact with pork or indirect contact through items such as cloths or sponges. After discussion with staff, the employer allocates one shelf of a fridge for this worker's food, and separate cupboard space for the plates and cutlery that she uses. They also introduce a policy that any food brought into the workplace should be stored in sealed containers.

17.61

Some religions require extended periods of fasting. Although there is no requirement under the Act, employers may wish to consider how they can support workers through a fasting period. However, employers should take care to ensure that, in doing so, they do not place unreasonable extra burdens on other workers. As well as potentially causing conflict in the workplace, this could amount to less favourable treatment because of religion or belief and give rise to claims of discrimination.

Example:

A Muslim teacher is fasting for Ramadan which is an integral part of her religion. The head teacher of the school, in consultation with the other teachers, has agreed to change the dinnertime rota so she does not have to supervise the dining hall during her fasting period. This adjustment to her duties does not amount to unfavourable treatment of non-Muslim staff members, so would not amount to direct discrimination.

Washing and changing facilities

17.62

An employer may require workers to change their clothing and/or shower for reasons of health and safety. Some religions or beliefs do not allow their adherents to undress or shower in the company of others. Insisting upon communal showers and changing facilities, even if segregated by sex, could constitute indirect discrimination as it may put at a particular disadvantage workers sharing a certain religion or belief whose requirement for modesty prevents them from changing their clothing in the presence of others, even others of the same sex. An employer would have to show that this provision, criterion or practice was objectively justified.

17.63

Some needs relating to religion or belief require no change to workplaces. For example, certain religions require people to wash before prayer, which can be done using normal washing facilities. It is good practice for employers to ensure that all workers understand the religion or belief-related observances of their colleagues, to avoid misunderstandings.

Breastfeeding

17.64

Although there is no legal right to take time off to breastfeed, wherever possible employers should try to accommodate workers who wish to do this. Breastfeeding at work is covered in more detail in Chapter 8.

Liability for discrimination outside the workplace

17.65

Employers are liable for prohibited conduct that takes place ‘in the course of employment’. This may extend to discrimination and harassment occurring away from work premises or outside normal working hours where there is sufficient connection with work – for example, at team building days, social events to which all workers are invited, business trips or client events (see paragraph 10.46).

17.66

To avoid liability for discrimination and harassment outside the workplace, employers should consider taking steps such as: drafting disciplinary and equality policies that refer to acceptable behaviour outside the office; checking dietary requirements to ensure that all workers have appropriate food during work-related events; and making it clear to workers what is required of them to comply with acceptable standards of behaviour. Employers should also consider whether they need to make any reasonable adjustments to accommodate the needs of disabled workers.

Example:

A worker aged 17 has a job in a telephone sales company. On Friday nights her team colleagues go to a local club to socialise. During this time they talk mainly about work-related issues. The team manager also buys drinks for the team member who has achieved the most sales that week. The worker cannot attend these events as the club has a strict ‘over-18s only’ policy; she feels excluded and undervalued. This treatment could amount to unjustifiable age discrimination. The manager should consider organising team social events somewhere that accepts under-18s.

Induction, training and development

Induction

17.67

It is important to make sure that induction procedures do not discriminate. Employers should ask themselves whether any changes are needed to remove the indirectly discriminatory effect of a provision, criterion or practice. They must also consider whether any reasonable adjustments are required to enable disabled workers to participate fully in any induction arrangements. In addition, employers may want to consider whether there are any

proportionate positive action measures that would help remedy disadvantage experienced by workers sharing a protected characteristic (see also Chapter 12 on positive action).

Example:

A worker with a hearing impairment is selected for a post as an engineer. He attends the induction course which consists of a video followed by a discussion. The video is not subtitled and thus the worker cannot participate fully in the induction. To avoid discrimination, the employer should have discussed with the worker what type of reasonable adjustment to the format of the induction training would enable him to participate.

Example:

A worker with a learning disability finds it hard to assimilate the material in the employer's induction procedure at the same speed as a colleague who started on the same day. In relation to this worker's induction, it is likely to be a reasonable adjustment for the employer to provide more time, personal support and assistance, such as making available induction materials in Easy Read.

17.68

The induction process is also a good opportunity to make sure all new staff members are trained in the employer's equality policy and procedures. For more information on equality policies, see Chapter 18.

Training and development

17.69

Training and development opportunities, including training provided by a trade union to its members, should be made known to all relevant workers including those absent from the office for whatever reason (see paragraph 16.22 above).

Example:

An employee who is on maternity leave asked to be kept updated about training opportunities, so her knowledge would be up to date when she returns to work. During her maternity leave, all other workers have been sent emails updating them on the latest training opportunities but she has not. Excluding this employee is unfavourable treatment and would amount to unlawful discrimination because of pregnancy and maternity.

17.70

However, it will not be appropriate for an employer to contact a worker who is absent for a disability-related reason if the employer has agreed to have limited contact.

17.71

To avoid discrimination, employers should ensure that managers and supervisors who select workers for training understand their legal responsibilities under the Act. It is advisable to monitor training applications and take-up by reference to protected characteristics, taking steps to deal with any significant disparities. Selection for training must be made without discrimination because of a protected characteristic.

Example:

An employer has opened a new office overseas and is offering managers the chance of a six-month secondment at the new office to assist in the initial set up. They do not select any of the female managers with children who apply for the secondment, as they assume these women would miss their families and would not perform as well as other managers. This is likely to amount to direct discrimination because of sex.

17.72

Employers should be mindful of their duty to make reasonable adjustments in relation to training and development. For example, if a worker with a mobility impairment is expected to be attending a course, it is likely to be a reasonable adjustment for the employer to select a training venue with adequate disabled access. An employer may need to make training manuals, slides or other visual media accessible to a visually impaired worker (perhaps by providing Braille versions or having materials read out), or ensure that an induction loop is available for someone with a hearing impairment.

17.73

Employers should also consider whether opportunities for training are limited by any other potentially discriminatory factors. If food is provided at training events, employers should try to make sure that special dietary requirements are accommodated. If resources permit, training and development opportunities should be offered on a flexible basis, to accommodate those who work part-time, who have atypical working patterns or who cannot attend training on a particular day, for example, because of conflict with a religious festival or a medical appointment.

17.74

Any criteria used to select workers for training should also be regularly reviewed to make sure they do not discriminate.

Example:

An employer offers team leading training for staff who wish to develop management skills. Staff must have been with the company for over seven years to apply for a place on this course. This could be indirectly discriminatory because of age, as older staff are likely to have longer service than younger staff. The employer would have to show that the age criterion is objectively justifiable.

17.75

As explained in Chapter 12, employers may want to consider taking positive action to remedy disadvantage, meet different needs or increase the participation of people who share a protected characteristic. Providing training opportunities for a group which is under-represented in the workforce might be one way of doing this. It is also lawful for employers to provide training for disabled workers, regardless of whether the criteria for positive action are met.

Example:

A national education provider wishes to recruit science teachers for its chain of private colleges. It has evidence that almost all of its teachers are recently qualified and under 40. The provider decides to take positive action measures to increase the participation of older teachers. It undertakes a targeted recruitment drive to attract older teachers and recruits several teachers who are returning to teaching after working in industry for many years. In order to update their skills, the provider then offers them additional training on current curriculum and teaching practices.

17.76

Workers who have been absent (for example, on maternity or adoption leave, or for childcare or disability-related reasons) may need additional training on their return to work. It is good practice for employers to liaise with the worker either before or shortly after their return to work to consider whether any additional training is needed.

17.77

An employee on statutory maternity or adoption leave may by agreement work for her employer for up to 10 'keeping in touch' days (KIT days) without bringing the leave to an end; see paragraph 8.29.

Appraisals

17.78

An appraisal is an opportunity for a worker and their line manager to discuss the worker's performance and development. Appraisals usually review past behaviour and so provide an opportunity to reflect on recent performance. They also form an important part of a worker's continuing training and development programme.

17.79

The Act does not require employers to conduct appraisals, although it is good practice to do so if resources permit. Where a formal appraisal process is used, the starting point should be that employers take a consistent approach. In particular, they should ensure that in awarding marks for performance they do not discriminate against any worker because of a protected characteristic. This is especially important because low appraisal scores can have a negative impact on pay, bonuses, promotion and development opportunities.

Example:

A woman with young children, who works part-time, is given the same performance targets as her full-time colleagues. She fails to meet the targets. When conducting her annual appraisal, her manager gives her a worse score than full-timers. Other part-time workers, who are mainly women, experience similar problems. This practice could amount to indirect sex discrimination; using identical targets regardless of working hours is unlikely to be objectively justified. This could also be considered as less favourable treatment of a part-time worker under the Part-Time Workers (Prevention of Less Favourable Treatment) Regulations 2000.

17.80

Employers should also be aware of the duty to make reasonable adjustments when discussing past performance. For example, they should consider whether performance would have been more effective had a reasonable adjustment been put in place, or introduced earlier. Appraisals may also provide an opportunity for workers to disclose a disability to their employer, and to discuss any adjustments that would be reasonable for the employer to make in future.

Example:

An employer installed voice-activated software as a reasonable adjustment to accommodate the needs of a new manager with a visual impairment. The manager takes several weeks to familiarise herself with the software. After six months in post, the manager undergoes an appraisal. In assessing the manager's performance, it would be a reasonable adjustment for the employer to take account of the time the manager needed to become fully familiar with the software.

17.81

To avoid discrimination when conducting appraisals, employers are recommended to:

- make sure that performance is measured by transparent, objective and justifiable criteria using procedures that are consistently applied;
- check that, for all workers, performance is assessed against standards that are relevant to their role;
- ensure that line managers carrying out appraisals receive training and guidance on objective performance assessment and positive management styles; and
- monitor performance assessment results to ensure that any significant disparities in scores apparently linked to a protected characteristic are investigated, and steps taken to deal with possible causes.

Promotion and transfer

17.82

Issues and considerations that arise on recruitment (see Chapter 16) can arise again in respect of promoting or transferring existing workers to new roles. It is unlawful for employers to discriminate against, victimise or harass workers in the way they make opportunities for promotion or transfer available or by refusing or deliberately failing to make them available. An employer may need to make reasonable adjustments to the promotion or transfer process to ensure that disabled workers are not substantially disadvantaged by the process for promotion or transfer or by the way the process is applied.

17.83

Failure to inform workers of opportunities for promotion or transfer may be direct or indirect discrimination. To avoid discrimination, employers are advised to advertise all promotion and transfer opportunities widely throughout the organisation. This includes development or deputising opportunities or secondments that could lead to permanent promotion.

17.84

If an employer has an equal opportunities policy and/or recruitment policy and procedures, it would be good practice to ensure that these policies are followed when internal promotions or transfers are taking place. This can help ensure that that selection is based strictly on demonstrable merit. Unless a temporary promotion is absolutely necessary, employers should avoid bypassing the procedures they have adopted for recruiting other staff.

Example:

An employer promotes a male worker to the position of section manager without advertising the vacancy internally. There are several women in the organisation who are qualified for the post and who could have applied if they had known about it. The decision not to advertise internally counts as a provision, criterion or practice and could amount to indirect discrimination: if challenged, the employer would need to be able to objectively justify their decision. Recruiting the man could also amount to direct discrimination, as one or more of the women could argue they have been treated less favourably because of their sex.

17.85

Employers should consider whether it is really necessary to restrict applications for promotion and other development opportunities to staff at a particular grade or level. This restriction would operate as a provision, criterion or practice and, unless it can be objectively justified, could indirectly discriminate by putting workers sharing a protected characteristic at a particular disadvantage.

17.86

Employers must also ensure that women on maternity leave are informed of any jobs that become available and must enable them to apply if they wish to do so. Failure to do so may be unfavourable treatment, and thus could amount to discrimination because of pregnancy and maternity (see also Chapter 8).

17.87

Arrangements for promoting workers or arranging transfers must not discriminate because of disability – either in the practical arrangements relating to selection for promotion or transfer, or in the arrangements for the job itself. It is also important for employers to consider whether there are any reasonable adjustments that should be made in relation to promotion or transfer.

Example:

A woman with a disability resulting from a back injury is seeking a transfer to another department. A minor aspect of the role she is seeking is to assist with unloading the weekly delivery van. She is unable to do this because of her disability. In assessing her suitability for transfer, the employer should consider whether reallocating this duty to someone else would be a reasonable adjustment to make.

17.88

Opportunities for promotion and transfer should be made available to all workers regardless of age. Different treatment because of age is only lawful if it can be objectively justified as a proportionate means of achieving a legitimate aim (see paragraphs 3.36 to 3.41).

Example:

An employer decides to impose a maximum age of 60 for promotion to the position of technical manager, for which additional training is required. In deciding whether this age restriction is objectively justifiable, the time and costs of training for the post would be relevant, taking into account that an internal candidate would probably need less training than a new recruit. Average staff turnover across all groups should also be considered. The need for a reasonable period of employment before retirement might also be relevant – although employees' right to request to continue working beyond 65 should be factored in.

17.89

It would be good practice for employers to build the following guidelines into any policies and procedures they may have relating to promotion and career development:

- If posts are advertised internally and externally, the same selection procedures and criteria should apply to all candidates.
- If appropriate – especially with larger employers – selection decisions based on performance assessments should be endorsed by the organisation's human resources department.

17.90

Employers should not make assumptions about the suitability of existing workers for promotion or transfer.

Example:

An employer makes an assumption that a particular woman is unsuitable for promotion because she appears to be of childbearing age and he assumes she might want to have children in the near future. This would amount to direct discrimination because of sex.

Disciplinary and grievance matters

17.91

It is good practice for employers (irrespective of their size) to have procedures for dealing with grievances and disciplinary hearings together with appeals against decisions under these procedures. Where procedures have been put in place, they should not discriminate against workers either in the way they are designed or how the employer implements them in practice. More information about disciplinary and grievance procedures, including a worker's right to be accompanied by a trade union representative or fellow worker, can be found on the Acas website: <http://www.acas.org.uk/index.aspx?articleid=2174>

17.92

An employer may in addition wish to introduce a separate policy designed specifically to deal with harassment. Such policies commonly aim to highlight and eradicate harassment whilst at the same time establishing a procedure for complaints, similar to a grievance procedure, with safeguards to deal with the sensitivities that allegations of harassment often bring.

Example:

An employer has a procedure that allows a grievance relating to harassment to be raised with a designated experienced manager. This avoids the possibility of an allegation of harassment having to be raised with a line manager who may be the perpetrator of the harassment.

17.93

Employers should ensure that when conducting disciplinary and grievance procedures they do not discriminate against a worker because of a protected characteristic. For example, employers may need to make reasonable adjustments to procedures to ensure that they do not put disabled workers at a substantial disadvantage. Procedures might also need to be adapted to accommodate a worker at home on maternity leave.

Dealing with grievances

17.94

Employers must not discriminate in the way they respond to grievances. Where a grievance involves allegations of discrimination or harassment, it must be taken seriously and investigated promptly and not dismissed as ‘over-sensitivity’ on the part of the worker.

17.95

Wherever possible, it is good practice – as well as being in the interests of employers – to resolve grievances as they arise and before they become major problems. Grievance procedures can provide an open and fair way for complainants to make their concerns known, and for their grievances to be resolved quickly, without having to bring legal proceedings.

17.96

It is strongly recommended that employers properly investigate any complaints of discrimination. If a complaint is upheld against an individual co-worker or manager, the employer should consider taking disciplinary action against the perpetrator.

17.97

Whether or not the complaint of discrimination is upheld, raising it in good faith is a ‘protected act’ and if the worker is subject to any detriment because of having done so, this could amount to victimisation (see paragraphs 9.2 to 9.15).

Disciplinary procedures

17.98

Employers must not discriminate in the way they invoke or pursue a disciplinary process. A disciplinary process is a formal measure and should be followed fairly and consistently, regardless of the protected characteristics of any workers involved. Where a disciplinary process involves allegations of discrimination or harassment, the matter should be thoroughly investigated and the alleged perpetrator should be given a fair hearing.

17.99

If a complaint about discrimination leads to a disciplinary process where the complaint proves to be unfounded, employers must be careful not to subject the complainant (or any witness or informant) to any detriment for having raised the matter in good faith. Such actions qualify as 'protected acts' and detrimental treatment amounts to victimisation if a protected act is an effective cause of the treatment.

Avoiding disputes and conflicts**17.100**

To help avoid disputes and conflicts with and between workers with different protected characteristics, employers should treat their workers with dignity and respect and ensure workers treat each other in the same way. If the principle of dignity and respect is embedded into the workplace culture, it can help prevent misunderstandings and behaviour that may lead to prohibited conduct. It is good practice to have a clear policy on 'dignity and respect in the workplace', setting out workers' rights and responsibilities to each other.

17.101

It is also good practice, and in the interests of both employers and their workers, to try to resolve workplace disputes so as to avoid litigation. Employers should have different mechanisms in place for managing disputes, such as mediation or conciliation. Where it is not possible to resolve a dispute using internal procedures, it may be better to seek outside help.

17.102

Employers will sometimes have to deal with complaints about prohibited conduct that arise between members of staff. They can avoid potential conflicts by noticing problems at an early stage and attempting to deal with them by, for example, talking to the people involved in a non-confrontational way. It is important to encourage good communication between workers and managers in order to understand the underlying reasons for potential conflicts. Employers should have effective procedures in place for dealing with grievances if informal methods of resolving the issue fail.

17.103

There may be situations where an employer should intervene to prevent a worker discriminating against another worker or against another person to whom that employer has a duty under the Act (such as a customer). In these circumstances, it may be necessary to take disciplinary action against the worker who discriminates.

Chapter 18:

Equality policies and practice in the workplace

Introduction

18.1

There is no formal statutory requirement in the Act for an employer to put in place an equality policy. However, a systematic approach to developing and maintaining good practice is the best way of showing that an organisation is taking its legal responsibilities seriously. To help employers and others meet their legal obligations, and avoid the risk of legal action being taken against them, it is recommended, as a matter of good practice, that they draw up an equality policy (also known as an equal opportunities policy or equality and diversity policy) and put this policy into practice.

18.2

This chapter describes why an employer should have an equality policy and how to plan, implement, monitor and review that policy.

Why have an equality policy?

18.3

There are a number of reasons why employers should have an equality policy. For example:

- it can give job applicants and workers confidence that they will be treated with dignity and respect;
- it can set the minimum standards of behaviour expected of all workers and outline what workers and job applicants can expect from the employer;

- it is key to helping employers and others comply with their legal obligations;
- it can minimise the risk of legal action being taken against employers and workers; and/or
- if legal action is taken, employers may use the equality policy to demonstrate to an Employment Tribunal that they take discrimination seriously and have taken all reasonable steps to prevent discrimination.

18.4

Equality policies and practices are often drivers of good recruitment and retention practice. Information on these policies, as well as on equality worker network groups, on the organisation's website and/or in induction packs, send a very positive and inclusive signal encouraging people to apply to work for the organisation. This can indicate that the organisation seeks to encourage a diverse workforce and that, for example, applicants with any religion or belief and/or sexual orientation would be welcome in the organisation.

Example:

For one organisation which is part of a multi-national corporation, being sensitive to local contexts is an important part of their operation. All their branches aim to reflect the local communities in which they operate in terms of their customers and their staff. In ethnically mixed areas, they aim to reflect this in the products they sell and in the mix of staff. This makes strong business sense since having a greater ethnic diversity of staff will attract more customers from that group.

Planning an equality policy

18.5

It is essential that a written equality policy is backed by a clear programme of action for implementation and continual review. It is a process which consists of four key stages: planning, implementing, monitoring and reviewing the equality policy.

18.6

The content and details of equality policies and practices will vary according to the size, resources and needs of the employer. Some employers will require less formal structures but all employers should identify a time scale against which they aim to review progress and the achievement of their objectives.

18.7

A written equality policy should set out the employer's general approach to equality and diversity issues in the workplace. The policy should make clear that the employer intends to develop and apply procedures which do not discriminate because of any of the protected characteristics, and which provide equality of opportunity for all job applicants and workers.

Planning the content of equality policies

18.8

Most policies will include the following:

- a statement of the employer's commitment to equal opportunity for all job applicants and workers;
- what is and is not acceptable behaviour at work (also referring to conduct near the workplace and at work-related social functions where relevant);
- the rights and responsibilities of everyone to whom the policy applies, and procedures for dealing with any concerns and complaints;
- how the policy may apply to the employer's other policies and procedures;
- how the employer will deal with any breaches of policy;
- who is responsible for the policy; and
- how the policy will be implemented and details of monitoring and review procedures.

Example:

An organisation informs new recruits that abuse and harassment are unacceptable and staff who make offensive, racist or homophobic comments are automatically subject to disciplinary proceedings.

18.9

It will help an employer avoid discrimination if the equality policy covers all aspects of employment including recruitment, terms and conditions of work, training and development, promotion, performance, grievance, discipline and treatment of workers when their contract ends. Areas of the employment relationship are covered in more detail in this Code and cross-references to the relevant chapters/sections are provided below:

- monitoring (see paragraph 18.23 and Appendix 2)
- recruitment (see Chapter 16)
- terms and conditions of work (see Chapter 17)
- pay and benefits (see Chapter 14)
- leave and flexible working arrangements (see Chapter 17)

- the availability of facilities, such as quiet/prayer rooms and meal options in staff canteens (see Chapter 17)
- pensions (see Chapter 14)
- dress codes (see Chapter 17)
- training and development (see Chapter 17)
- promotion and transfer (see Chapter 17)
- grievance and disciplinary issues (see Chapter 17)
- treatment of employees when their contract ends (see Chapter 9)
- health and safety (see Chapter 8 in relation to pregnancy and maternity)

Planning an equality policy – protected characteristics

18.10

It is recommended that adopting one equality policy covering all protected characteristics is the most practical approach. Where separate policies are developed, such as a separate race equality or sex equality policy, they should be consistent with each other and with an overall commitment to promoting equality of opportunity in employment.

Implementing an equality policy

18.11

An equality policy should be more than a statement of good intentions; there should also be plans for its implementation. The policy should be in writing and drawn up in consultation with workers and any recognised trade unions or other workplace representatives, including any equality representatives within the workforce.

18.12

Employers will be of different sizes and have different structures but it is advisable for all employers to take the following steps to implement an equality policy:

- audit existing policies and procedures;
- ensure the policy is promoted and communicated to all job applicants and workers and agents of the employer; and
- monitor and review the policy.

Promotion and communication of an equality policy

18.13

Employers should promote and publicise their equality policy as widely as possible and there are a number of ways in which this can be done. Promoting the policy is part of the process of effective implementation and will help an employer demonstrate that they have taken all reasonable steps to prevent discrimination.

18.14

Employers may use a number of methods of communication to promote their policy, including:

- email bulletins
- intranet and/or website
- induction packs
- team meetings
- office notice boards
- circulars, newsletters
- cascade systems
- training
- handbooks
- annual reports.

18.15

These methods of communication may not be appropriate in all cases. Some workers, for example those in customer-facing or shop floor roles, may not have regular access to computers. Alternative methods of communication, such as notice boards and regular staff meetings, should also be considered. Employers must also consider whether reasonable adjustments need to be made for disabled people so that they are able to access the information.

18.16

Promoting and communicating an equality policy should not be a one-off event. It is recommended that employers provide periodic reminders and updates to workers and others such as contractors and suppliers. Employers should also periodically review their advertising, recruitment and application materials and processes.

Responsibility for implementing an equality policy

18.17

The policy should have the explicit backing of people in senior positions such as the chair, owner, chief executive, or board of directors. Senior management should ensure that the policy is implemented, resourced, monitored and reviewed, and that there is regular reporting on its effectiveness.

Example:

When a large company introduces a new equality policy, they might ask an external training company to run training sessions for all staff, or they might ask their human resources manager to deliver training to staff on this policy.

Example:

A small employer introducing an equality policy asks the managing director to devote a team meeting to explaining the policy to her staff and discussing why it is important and how it will operate.

Implementing an equality policy – training

18.18

Employers should ensure that all workers and agents understand the equality policy, how it affects them and the plans for putting it into practice. The best way to achieve this is by providing regular training.

18.19

Some workers may need more specific training, depending on what they do within the organisation. For example, line managers and senior management should receive detailed training on how to manage equality and diversity issues in the workplace.

18.20

The training should be designed in consultation with workers, their workplace representatives and managers and by incorporating feedback from any previous training into future courses.

18.21

Employers should make sure in-house trainers are themselves trained before running courses for other workers. External trainers also need to be fully informed about the employer's policies, including their equality policy.

18.22

Training on the equality policy may include the following:

- an outline of the law covering all the protected characteristics and prohibited conduct;
- why the policy has been introduced and how it will be put into practice;
- what is and is not acceptable conduct in the workplace;
- the risk of condoning or seeming to approve inappropriate behaviour and personal liability;
- how prejudice can affect the way an employer functions and the impact that generalisations, stereotypes, bias or inappropriate language in day-to-day operations can have on people's chances of obtaining work, promotion, recognition and respect;
- the equality monitoring process (see paragraph 18.23 and Appendix 2).

Example:

A large employer trains all their workers in the organisation's equality policy and the Equality Act. They also train all occupational health advisers with whom they work to ensure that the advisers have the necessary expertise about the Act and the organisation's equality policy.

Monitoring and reviewing an equality policy

18.23

Equality monitoring enables an employer to find out whether their equality policy is working. For example, monitoring may reveal that:

- applicants with a particular religion or belief are not selected for promotion;
- women are concentrated in certain jobs or departments;
- people from a particular ethnic group do not apply for employment or fewer apply than expected;
- older workers are not selected for training and development opportunities.

18.24

Equality monitoring is the process that employers use to collect, store and analyse data about the protected characteristics of job applicants and workers. Employers can use monitoring to:

- establish whether an equality policy is effective in practice;
- analyse the effect of other policies and practices on different groups;

- highlight possible inequalities and investigate their underlying causes;
- set targets and timetables for reducing disparities; and
- send a clear message to job applicants and workers that equality and diversity issues are taken seriously within the organisation.

Example:

A large employer notices through monitoring that the organisation has been successful at retaining most groups of disabled people, but not people with mental health conditions. They act on this information by contacting a specialist organisation for advice about good practice in retaining people with mental health conditions.

Monitoring an equality policy – law and good practice

18.25

Public sector employers may find that monitoring assists them in carrying out their obligations under the public sector equality duty. For employers in the private sector, equality monitoring is not mandatory. However, it is recommended that all employers carry out equality monitoring. The methods used will depend on the size of the organisation and can be simple and informal. Smaller organisations may only need a simple method of collecting information about job applicants and workers. Larger organisations are likely to need more sophisticated procedures and computerised systems to capture the full picture across the whole of their organisation.

18.26

Monitoring will be more effective if workers (or job applicants) feel comfortable about disclosing personal information. This is more likely to be the case if the employer explains the purpose of the monitoring and if the workers or job applicants believe that the employer is using the information because they value the diversity of their workforce and want to use the information in a positive way.

18.27

Employers must take full account of the Data Protection Act 1998 (DPA) when they collect, store, analyse and publish data.

Monitoring an equality policy – key areas

18.28

Employers should monitor the key areas of the employment relationship including:

- recruitment and promotion
- pay and remuneration
- training
- appraisals
- grievances
- disciplinary action
- dismissals and other reasons for leaving

18.29

Employers who are carrying out equality monitoring will find it useful to compare progress over a period of time and against progress made by other employers in the same sector or industry.

Monitoring an equality policy – reporting back

18.30

It is important for employers to communicate on a regular basis to managers, workers and trade union representatives on the progress and achievement of objectives of the equality policy. Employers should also consider how the results of any monitoring activity can be communicated to the workforce. However, care should be taken to ensure that individuals are not identifiable from any reports.

Monitoring an equality policy – taking action

18.31

Taking action based on any findings revealed by the monitoring exercise is vital to ensure that an employer's equality policy is practically implemented. There are a number of steps employers can take, including:

- examine decision-making processes, for example recruitment and promotion;
- consider whether training or further guidelines are required on how to avoid discrimination;
- consider whether any positive action measures may be appropriate (see Chapter 12);

- work with network groups and trade union equality representatives to share information and advice;
- set targets on the basis of benchmarking data and develop an action plan.

Reviewing an equality policy and other employment policies

18.32

It is good practice for employers to keep both their equality policy and all other policies and procedures (such as those listed below) under regular review at least annually and to consider workers' needs as part of the process.

18.33

Policies which should be reviewed in light of an employer's equality policy might include:

- recruitment policies
- leave and flexible working arrangements
- retirement policies
- health and safety, for example, emergency evacuation procedures
- procurement of equipment, IT systems, software and websites
- pay and remuneration
- grievance policies, including harassment and bullying
- disciplinary procedure
- appraisal and performance-related pay systems
- sickness absence policies
- redundancy and redeployment policies
- training and development policies
- employee assistance schemes offering financial or emotional support

18.34

Part of the review process may entail employers taking positive action measures to alleviate disadvantage experienced by workers who share a protected characteristic, meet their particular needs, or increase their participation in relation to particular activities (see Chapter 12). Employers must also ensure they make reasonable adjustments where these are required by individual disabled workers. The review process can help employers to consider and anticipate the needs of disabled workers (see Chapter 6).

Chapter 19:

Termination of employment

Introduction

19.1

The employment relationship can come to an end in a variety of ways and in a range of situations. A worker may resign under normal circumstances, or resign in response to the employer's conduct and treat the resignation as a constructive dismissal. On the other hand, an employer may dismiss a worker, for example, for reasons of capability, conduct or redundancy. The Act makes it unlawful for an employer to discriminate against or victimise a worker by dismissing them (see paragraphs 10.11 and 10.13 to 10.16).

19.2

This chapter focuses on termination of employment by the employer, including in redundancy situations. It explains how to avoid discrimination in decisions to dismiss and in procedures for dismissal. The question of retirement is dealt with separately in paragraphs 13.26 to 13.45.

Terminating employment

19.3

Those responsible for deciding whether or not a worker should be dismissed should understand their legal obligations under the Act. They should also be made aware of how the Act might apply to situations where dismissal is a possibility. Employers can help avoid discrimination if they have procedures in place for dealing with dismissals and apply these procedures consistently and fairly. In particular, employers should take steps to ensure the criteria they use for dismissal – especially in a redundancy situation – are not indirectly discriminatory (see paragraph 19.11 below).

19.4

It is also important that employers ensure they do not dismiss a worker with a protected characteristic for performance or behaviour which would be overlooked or condoned in others who do not share the characteristic.

Example:

A Sikh worker is dismissed for failing to meet her set objectives, which form a part of her annual performance appraisal, in two consecutive years. However, no action is taken against a worker of the Baha'i faith, who has also failed to meet her objectives over the same period of time. This difference in treatment could amount to direct discrimination because of religion or belief.

19.5

Where an employer is considering dismissing a worker who is disabled, they should consider what reasonable adjustments need to be made to the dismissal process (see Chapter 6). In addition, the employer should consider whether the reason for dismissal is connected to or in consequence of the worker's disability. If it is, dismissing the worker will amount to discrimination arising from disability unless it can be objectively justified. In these circumstances, an employer should consider whether dismissal is an appropriate sanction to impose.

Example:

A disabled worker periodically requires a limited amount of time off work to attend medical appointments related to the disability. The employer has an attendance management policy which results in potential warnings and ultimately dismissal if the worker's absence exceeds 20 days in any 12-month period. A combination of the worker's time off for disability-related medical appointments and general time off for sickness results in the worker consistently exceeding the 20 day limit by a few days. The worker receives a series of warnings and is eventually dismissed. This is likely to amount to disability discrimination.

19.6

Based on the facts in the example above, it is very likely to have been a reasonable adjustment for the employer to ignore the absences arising out of the worker's disability or increase the trigger points that would invoke the attendance policy. By making one or both of these adjustments, the employer could have avoided the possibility of claims for both a failure to make adjustments and discrimination arising from disability.

19.7

Employers must not discriminate against a transsexual worker when considering whether to dismiss the worker for absences or other conduct because of gender reassignment (see paragraphs 9.31 to 9.33). To avoid discrimination because of gender reassignment when considering the dismissal of a transsexual worker, employers should make provision within their disciplinary policy for dealing with such dismissals.

Example:

A transsexual worker who experiences gender dysphoria and is considering gender reassignment takes time off from work because of his condition. The employer's attendance management policy provides that absence exceeding eight days or more in a 12-month rolling period will trigger the capability procedure. As the worker has had over eight days off, the employer invokes the procedure and consequently decides to dismiss him. However, over a previous 12-month rolling period, the worker was absent from work for more than eight days with various minor illnesses. The employer took no action against the worker because they viewed these absences as genuine. The dismissal could amount to an unlawful dismissal because of gender reassignment.

Dismissal for reasons of capability and conduct

19.8

As noted in Chapter 17, employers must not discriminate against or victimise their workers in how they manage capability or conduct issues. To avoid discrimination in any disciplinary decision that leads to a dismissal (or could lead to a dismissal after a subsequent disciplinary matter), employers should have procedures in place for managing capability and conduct issues. They should apply these procedures fairly and in a non-discriminatory way.

Example:

A white worker and a black worker are subjected to disciplinary action for fighting. The fight occurred because the black worker had made derogatory remarks about the white worker. The employer has no disciplinary policy and consequently does not investigate the matter. Instead, the employer decides to dismiss the white worker without notice and give the black worker a final written warning. This could amount to a discriminatory dismissal because of race. Had the employer had a disciplinary procedure in place and applied it fairly, they could have avoided a discriminatory outcome.

19.9

Where an employer is considering the dismissal of a disabled worker for a reason relating to that worker's capability or their conduct, they must consider whether any reasonable adjustments need to be made to the performance management or dismissal process which would help improve the performance of the worker or whether they could transfer the worker to a suitable alternative role.

How can discrimination be avoided in capability and conduct dismissals?

19.10

To avoid discrimination when terminating employment, an employer should, in particular:

- apply their procedures for managing capability or conduct fairly and consistently (or use Acas's Guide on Disciplinary and Grievance at Work, if the employer does not have their own procedure);
- ensure that any decision to dismiss is made by more than one individual, and on the advice of the human resources department (if the employer has one);
- keep written records of decisions and reasons to dismiss;
- monitor all dismissals by reference to protected characteristics (see paragraph 18.28 and Appendix 2); and
- encourage leavers to give feedback about their employment; this information could contribute to the monitoring process.

Redundancy

19.11

A redundancy amounts to a dismissal and it is therefore unlawful for an employer to discriminate against or victimise a worker in a redundancy situation. Where an employer is planning dismissals because of redundancy, they should consult affected workers about ways of avoiding dismissals. They should also consult any recognised trade unions (and are required to consult with the unions if planning 20 or more redundancies in a 90-day period).

19.12

To avoid discrimination, an employer should, in consultation with any recognised trade union, adopt a selection matrix containing a number of separate selection criteria rather than just one selection criterion, to reduce the risk of any possible discriminatory impact.

19.13

Employers should ensure that the selection criteria are objective and do not discriminate directly or indirectly. Many of the selection criteria used in redundancy situations carry a risk of discrimination.

19.14

For example, 'last in, first out' may amount to indirect age discrimination against younger employees; indirect sex discrimination against women who may have shorter service due to time out for raising children; or indirect race discrimination where an employer might have only recently adopted policies that have had the effect of increasing the proportion of employees from ethnic minority backgrounds.

19.15

However, used as one criterion among many within a fair selection procedure, 'last in, first out' could be a proportionate means of achieving the legitimate aim of rewarding loyalty and creating a stable workforce. If it is the only or determinant selection criterion, or given disproportionate weight within the selection matrix, it could lead to discrimination.

Example:

An employer wishing to make redundancies adopts a selection matrix which includes the following criteria: expertise/knowledge required for posts to be retained; disciplinary records; performance appraisals; attendance and length of service. Each person in the pool of employees who are potentially redundant is scored against each criterion from 1 to 4 points on a range of poor to excellent. There is provision in the matrix for deducting points for episodes of unauthorised absence in the prescribed period. Points are also added for length of service. Although length of service does have the potential to discriminate, in this redundancy selection process it is not obviously dominant or necessarily determinative of who will be selected for redundancy. In this context, length of service is likely to be an objectively justifiable criterion.

19.16

'Flexibility' – for example, willingness to relocate or to work unsocial hours, or ability to carry out a wide variety of tasks – may amount to discrimination because of (or arising from) disability or because of sex.

19.17

When setting criteria for redundancy selection, employers should consider whether any proposed criterion would adversely impact upon a disabled employee. If so, the employer will need to consider what reasonable adjustments will be necessary to avoid such discriminatory impact.

Example:

A call centre re-tenders for a large contract and has to reduce its price to secure the work in the face of low-cost competition from overseas. The employer therefore decides that attendance records are a particularly important selection criterion for redundancy. This has the potential to disadvantage disabled employees who require additional time off for medical treatment. It is likely to be a reasonable adjustment to discount some disability-related sickness absence when assessing attendance as part of the redundancy selection exercise.

When should employers offer suitable alternative employment?**19.18**

During a redundancy exercise, if alternative vacancies exist within the employer's organisation or with an associated employer, these should be offered to potentially redundant employees using criteria which do not unlawfully discriminate.

19.19

However, where there is a potentially redundant female employee on ordinary or additional maternity leave, she is entitled to be offered any suitable available vacancy with the employer, their successor or any associated employer. The offer must be of a new contract taking effect immediately on the ending of the worker's previous contract and must be such that:

- the work is suitable and appropriate for her to do; and
- the capacity, place of employment and other terms and conditions are not substantially less favourable than under the previous contract.

Example:

A company decides to combine their head office and regional teams and create a 'centre of excellence' in Manchester. A new organisation structure is drawn up which involves a reduction in headcount. The company intends that all employees should have the opportunity to apply for posts in the new structure. Those unsuccessful at interview will be made redundant. At the time this is implemented, one of the existing members of the team is on ordinary maternity leave. As such, she has a priority right to be offered a suitable available vacancy in the new organisation without having to go through the competitive interview process.

Appendix 1: The meaning of disability

1.

This Appendix is included to aid understanding about who is covered by the Act. Government guidance on determining questions relating to the definition of disability is also available from the Office of Disability Issues: <http://www.officefordisability.gov.uk/docs/wor/new/ea-guide.pdf>

When is a person disabled?

2.

A person has a disability if they have a physical or mental impairment, which has a substantial and long-term adverse effect on their ability to carry out normal day-to-day activities.

3.

However, special rules apply to people with some conditions such as progressive conditions (see paragraph 19 of this Appendix) and some people are automatically deemed disabled for the purposes of the Act (see paragraph 18).

What about people who have recovered from a disability?

4.

People who have had a disability within the definition are protected from discrimination even if they have since recovered, although those with past disabilities are not covered in relation to Part 12 (transport) and section 190 (improvements to let dwelling houses).

What does 'impairment' cover?

5.

It covers physical or mental impairments. This includes sensory impairments, such as those affecting sight or hearing.

Are all mental impairments covered?

6.

The term 'mental impairment' is intended to cover a wide range of impairments relating to mental functioning, including what are often known as learning disabilities.

What if a person has no medical diagnosis?

7.

There is no need for a person to establish a medically diagnosed cause for their impairment. What it is important to consider is the effect of the impairment, not the cause.

What is a 'substantial' adverse effect?

8.

A substantial adverse effect is something which is more than a minor or trivial effect. The requirement that an effect must be substantial reflects the general understanding of disability as a limitation going beyond the normal differences in ability which might exist among people.

9.

Account should also be taken of where a person avoids doing things which, for example, cause pain, fatigue or substantial social embarrassment; or because of a loss of energy and motivation.

10.

An impairment may not directly prevent someone from carrying out one or more normal day-to-day activities, but it may still have a substantial adverse long-term effect on how they carry out those activities. For example, where an impairment causes pain or fatigue in performing normal day-to-day activities, the person may have the capacity to do something but suffer pain in doing so; or the impairment might make the activity more than usually fatiguing so that the person might not be able to repeat the task over a sustained period of time.

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What is a 'long-term' effect?

11.

A long-term effect of an impairment is one:

- which has lasted at least 12 months; or
- where the total period for which it lasts is likely to be at least 12 months; or
- which is likely to last for the rest of the life of the person affected.

12.

Effects which are not long-term would therefore include loss of mobility due to a broken limb which is likely to heal within 12 months, and the effects of temporary infections, from which a person would be likely to recover within 12 months.

What if the effects come and go over a period of time?

13.

If an impairment has had a substantial adverse effect on normal day-to-day activities but that effect ceases, the substantial effect is treated as continuing if it is likely to recur; that is, if it might well recur.

What are 'normal day-to-day activities'?

14.

They are activities which are carried out by most men or women on a fairly regular and frequent basis. The term is not intended to include activities which are normal only for a particular person or group of people, such as playing a musical instrument, or participating in a sport to a professional standard, or performing a skilled or specialised task at work. However, someone who is affected in such a specialised way but is also affected in normal day-to-day activities would be covered by this part of the definition.

15.

Day-to-day activities thus include – but are not limited to – activities such as walking, driving, using public transport, cooking, eating, lifting and carrying everyday objects, typing, writing (and taking exams), going to the toilet, talking, listening to conversations or music, reading, taking part in normal social interaction or forming social relationships, nourishing and caring for one's self. Normal day-to-day activities also encompass the activities which are relevant to working life.

What about treatment?

16.

Someone with an impairment may be receiving medical or other treatment which alleviates or removes the effects (though not the impairment). In such cases, the treatment is ignored and the impairment is taken to have the effect it would have had without such treatment. This does not apply if substantial adverse effects are not likely to recur even if the treatment stops (that is, the impairment has been cured).

Does this include people who wear spectacles?

17.

No. The sole exception to the rule about ignoring the effects of treatment is the wearing of spectacles or contact lenses. In this case, the effect while the person is wearing spectacles or contact lenses should be considered.

Are people who have disfigurements covered?

18.

People with severe disfigurements are covered by the Act. They do not need to demonstrate that the impairment has a substantial adverse effect on their ability to carry out normal day-to-day activities. However, they do need to meet the long-term requirement.

Are there any other people who are automatically treated as disabled under the Act?

19.

Anyone who has HIV, cancer or multiple sclerosis is automatically treated as disabled under the Act. In some circumstances, people who have a sight impairment are automatically treated as disabled under Regulations made under the Act.

What about people who know their condition is going to get worse over time?

20.

Progressive conditions are conditions which are likely to change and develop over time. Where a person has a progressive condition they will be covered by the Act from the moment the condition leads to an impairment which has some effect on ability to carry out normal day-to-day activities, even though not a substantial effect, if that impairment might well have a substantial adverse effect on such ability in the future. This applies provided that the effect meets the long-term requirement of the definition.

Appendix 2:

Monitoring – additional information

What to monitor?

1.

It is recommended that employers consider monitoring the list of areas below. This list is not exhaustive and an employer, depending on its size and resources, may wish to consider monitoring additional areas.

Recruitment

- Sources of applications for employment
- Applicants for employment
- Those who are successful or unsuccessful in the short-listing process
- Those who are successful or unsuccessful at test/assessment stage
- Those who are successful or unsuccessful at interview

During employment

- Workers in post
- Workers in post by type of job, location and grade
- Applicants for training
- Workers who receive training
- Applicants for promotion and transfer and success rates for each
- Time spent at a particular grade/level
- Workers who benefit or suffer detriment as a result of performance assessment procedures
- Workers involved in grievance procedures
- Workers who are the subject of disciplinary procedures

Termination of employment

- Workers who cease employment
- Dismissals for gross misconduct
- Dismissals for persistent misconduct
- Dismissals for poor performance
- Dismissals for sickness
- Redundancies
- Retirement
- Resignation
- Termination for other reasons

Considering categories

2.

It is recommended that employers ask job applicants and workers to select the group(s) they want to be associated with from a list of categories. The 2001/2011 census provides comprehensive data about the population in England, Scotland and Wales. This is supplemented by the Labour Force Survey and other survey statistics produced by the Office for National Statistics. Employers can therefore use categories which are compatible with the categories contained in these sources, for consistency.

3.

Set out below are some of the issues to consider when monitoring particular protected characteristics. Please see the Commission's Non Statutory Guidance for further information.

Age

4.

Monitoring age may not initially appear as controversial as some of the other protected characteristics.

The following age bands might provide a useful starting point for employers monitoring the age of job applicants and workers:

- 16-17
- 18-21
- 22-30
- 31-40
- 41-50
- 51-60
- 61-65
- 66-70
- 71+

Disability

5.

Disclosing information about disability can be a particularly sensitive issue. Monitoring will be more effective if job applicants and workers feel comfortable about disclosing information about their disabilities. This is more likely to be the case if employers explain the purpose of monitoring and job applicants and workers believe that the employer genuinely values disabled people and is using the information gathered to create positive change. Asking questions about health or disability before the offer of a job is made or a person is placed in a pool of people to be offered a vacancy is not unlawful under the Act where the purpose of asking such questions is to monitor the diversity of applicants (see paragraphs 10.25 to 10.43).

Example:

Through monitoring of candidates at the recruitment stage a company becomes aware that, although several disabled people applied for a post, none were short-listed for interview. On the basis of this information, they review the essential requirements for the post.

6.

Some employers choose to monitor by broad type of disability to understand the barriers faced by people with different types of impairment.

Example:

A large employer notices through monitoring that the organisation has been successful at retaining most groups of disabled people, but not people with mental health conditions. They act on this information by contacting a specialist organisation for advice about good practice in retaining people with mental health conditions.

Race

7.

When employers gather data in relation to race, a decision should be made as to which ethnic categories to use. It is recommended that employers use the ethnic categories that were used in the 2001 census (or categories that match them very closely). If different categories are used, it may make it difficult to use the census data or other national surveys, such as the annual Labour Force Survey, as a benchmark (see also Chapter 18).

8.

Subgroups are intended to provide greater choice to encourage people to respond. Sticking to broad headings may otherwise hide important differences between subgroups and the level of detail will provide employers with greater flexibility when analysing the data. Employers may wish to add extra categories to the recommended subcategories of ethnic categories. However, this should be considered carefully.

9.

Employers should be aware that the way people classify themselves can change over time. It may therefore become necessary to change categories.

Religion and belief

10.

Monitoring religion and belief may help employers understand workers' needs (for example, if they request leave for festivals) and ensure that staff turnover does not reflect a disproportionate number of people from specific religion or beliefs.

Sex

11.

As well as the male and female categories, employers should consider whether to monitor for part-time working and for staff with caring responsibilities, including child-care, elder-care or care for a spouse or another family member. Both groups are predominantly women at a national level and are likely to be so for many employers as well.

Sexual orientation

12.

Sexual orientation (and sexuality) may be considered to be a private issue. However, it is relevant in the workplace, particularly where discrimination and the application of equality policies, and other policies, are concerned. The way in which the question is asked is very important, particularly if employers are to ensure that the monitoring process does not create a further barrier.

13.

The recommended way to ask job applicants and workers about their sexual orientation is outlined below:

What is your sexual orientation?

- Bisexual
- Gay man
- Gay woman/lesbian
- Heterosexual/straight
- Other
- Prefer not to say

14.

Some employers, as an alternative, provide one option ('gay/lesbian') rather than the two options above, and then cross-reference the results of their data on gender in order to examine differences in experiences between gay men and gay woman.

15.

It also acknowledges that some women identify themselves as gay rather than as lesbians. The option of 'other' provides an opportunity for staff to identify their sexual orientation in another way if the categories are not suitable.

16.

Employers should note that transsexual or transgender status should not fall within the section on sexual orientation. It should instead have a section on its own (see paragraph 21 below).

17.

In some monitoring exercises, for example, staff satisfaction surveys, it may be appropriate to ask a further question about how open an employee is about their sexual orientation:

If you are lesbian, gay or bisexual, are you open about your sexual orientation (Yes, Partially, No)

- At home
- With colleagues
- With your manager
- At work generally

The results from the above question may indicate wider organisational issues which need to be addressed.

Transgender status

18.

Monitoring numbers of transsexual staff is a very sensitive area and opinion continues to be divided on this issue. While there is a need to protect an individual's right to privacy, without gathering some form of evidence, it may be difficult to monitor the impact of policies and procedures on transsexual people or employment patterns such as recruitment, training, promotion or leaving rates.

19.

Because many transsexual people have had negative experiences in the workplace, many may be reluctant to disclose or may not trust their employers fully. (In order to obtain more reliable results, some employers have chosen to conduct monitoring through a neutral organisation under a guarantee of anonymity.)

20.

If employers choose to monitor transsexual staff using their own systems, then privacy, confidentiality and anonymity should be paramount. For example, diversity statistics should not be linked to IT-based personnel records that indicate grade or job title, as the small number of transsexual workers in an organisation may be identified by these or other variables, compromising confidentiality.

21.

Employers should note that it is important to recognise that transsexual people will usually identify as men or women, as well as transsexual people. In light of this, it is not appropriate to offer a choice between identifying as male, female or transsexual.

Appendix 3: Making reasonable adjustments to work premises – legal considerations

Introduction

1.

In Chapter 6 it was explained that one of the situations in which a duty to make reasonable adjustments may arise is where a physical feature of premises occupied by an employer places a disabled worker at a substantial disadvantage compared with people who are not disabled. In such circumstances the employer must consider whether any reasonable steps can be taken to overcome that disadvantage. Making physical alterations to premises may be a reasonable step for an employer to have to take. This appendix addresses the issues of how leases and other legal obligations affect the duty to make reasonable adjustments to premises.

What happens if a binding obligation other than a lease prevents a building being altered?

2.

An employer may be bound by the terms of an agreement or other legally binding obligation (for example, a mortgage, charge or restrictive covenant or, in Scotland, a feu disposition) under which they cannot alter the premises without someone else's consent.

3.

In these circumstances, the Act provides that it is always reasonable for the employer to have to request that consent, but that it is never reasonable for the employer to have to make an alteration before having obtained that consent.

Sch. 21,
Para 2

What happens if a lease says that certain changes to premises cannot be made?

Sch. 21,
Para 3 4. Special provisions apply where an employer occupies premises under a lease, the terms of which prevent them from making an alteration to the premises.

5. In such circumstances, if the alteration is one which the employer proposes to make in order to comply with a duty of reasonable adjustment, the Act enables the lease to be read as if it provided:

- for the employer to make a written application to the landlord for that consent;
- for the landlord not to withhold the consent unreasonably;
- for the landlord to be able to give consent subject to reasonable conditions; and
- for the employer to make the alteration with the written consent of the landlord.

6. If the employer fails to make a written application to the landlord for consent to the alteration, the employer will not be able to rely upon the fact that the lease has a term preventing them from making alterations to the premises to defend their failure to make an alteration. In these circumstances, anything in the lease which prevents that alteration being made must be ignored in deciding whether it was reasonable for the employer to have made the alteration.

7. Whether withholding consent will be reasonable or not will depend on the specific circumstances.

8. For example, if a particular adjustment is likely to result in a substantial permanent reduction in the value of the landlord's interest in the premises, the landlord is likely to be acting reasonably in withholding consent. The landlord is also likely to be acting reasonably if it withholds consent because an adjustment would cause significant disruption or inconvenience to other tenants (for example, where the premises consist of multiple adjoining units).

9.

A trivial or arbitrary reason would almost certainly be unreasonable. Many reasonable adjustments to premises will not harm the landlord's interests and so it would generally be unreasonable to withhold consent for them.

10.

In any legal proceedings on a claim involving a failure to make a reasonable adjustment, the disabled person concerned or the employer may ask the Employment Tribunal to direct that the landlord be made a party to the proceedings. The tribunal will grant that request if it is made before the hearing of the claim begins. It may refuse the request if it is made after the hearing of the claim begins. The request will not be granted if it is made after the tribunal has determined the claim.

Sch. 21,
Para 5

11.

Where the landlord has been made a party to the proceedings, the tribunal may determine whether the landlord has refused to consent to the alteration, or has consented subject to a condition, and in each case whether the refusal or condition was unreasonable.

12.

If the tribunal finds that the refusal or condition is unreasonable it can:

- make an appropriate declaration;
- make an order authorising the employer to make a specified alteration (subject to any conditions); or
- order the landlord to pay compensation to the disabled person.

13.

If the tribunal orders the landlord to pay compensation, it cannot also order the employer to do so.

What about the need to obtain statutory consent for some building changes?

14.

An employer might have to obtain statutory consent before making adjustments involving changes to premises. Such consents include planning permission, Building Regulations approval (or a building warrant in Scotland), listed building consent, scheduled monument consent and fire regulations approval. The Act does not override the need to obtain such consents.

15.

Employers should plan for and anticipate the need to obtain consent to make a particular adjustment. It might take time to obtain such consent, but it could be reasonable to make an interim or other adjustment – one that does not require consent – in the meantime.

16.

Employers should remember that even where consent is not given for removing or altering a physical feature, they still have a duty to make all the adjustments that are reasonable to have to make to remove any substantial disadvantage faced by the disabled worker.

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