

# Sex Discrimination

## in employment and your legal rights



### Overview

Laws against sex discrimination have been in place since 1975, but several extra measures have been added over the years. From October 2010 the key provisions will be in the Equality Act 2010. Until then, they are in the Sex Discrimination Act 1975, ('the Act'), and the Sex Discrimination Act 1975 (Amendment) Regulations 2008 ('the Regulations').

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

Although the definitions of discrimination in the Act and the Regulations are phrased in terms of discrimination against women, men are given the same protection, apart from specific protections relating to pregnancy and childbirth.

*For more information see the 'Maternity Rights' factsheet, part of the Employment Law Series.*

Discrimination on grounds of married status is also prohibited by the Act. This protection only extends to married people or those in civil partnerships who are discriminated against because they are married or due to their civil partnership status; it does not cover single people who are less favourably treated due to their single status.

Any claim in relation to equal pay or other contractual benefits is covered by the Equal Pay Act 1970. There are also European provisions governing equal pay.

### When is discrimination unlawful?

This factsheet focuses on the provisions of the Act and the Regulations as they affect working life, but it is important to note that the legislation also covers sex discrimination in other areas, such as in education or in the provision of goods and services.

To establish unlawful discrimination within a work context, you must show that the treatment was covered by the Act or Regulations. Specifically, you must show you were denied opportunities, within or for employment (for example, opportunities for promotion, transfer, training or other benefits), or were subjected to a detriment. Detriment means being placed at a disadvantage. You are covered for discrimination which happens during recruitment, or after you have left employment, as well as during your employment.

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

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

### Discrimination

**Direct discrimination** - It is unlawful to treat a person less favourably on grounds of their sex.

Direct discrimination means :

- That you have been treated less favourably (as compared to a person of the opposite sex) and;
- That this treatment was on the grounds of your sex.

The Act requires that 'like must be compared with like', so the less favourable treatment must be compared with that of someone of the opposite sex, known as a comparator. Your comparator must be a person who in all other respects is in a similar or 'not materially different' position to you. The comparator can be a real person or hypothetical. A useful test is the 'but for' test: would I have been treated the same way 'but for' the fact that I am a woman?

**Indirect discrimination** - This arises where an employer's policies or practices place women (or men) as a group at a disadvantage, without good reason.

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

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

The PCP must have been applied universally, to both men and women, for example, a PCP that all candidates for a position are of a minimum height.

A PCP could include a practice such as everybody in an organisation normally working late on a Friday, or a refusal to grant part-time working. Something like this could have a detrimental impact on a female member of staff with young children. This definition extends to practices which tend to discriminate.

If an employer's policies or practices disadvantage women in this way, they will be found to be unlawful unless the employer can show that there is a good business reason for the policies, and that they do not go any further than they need to. Discriminatory practices which can be justified in this way are permitted. Many indirect discrimination claims turn on the question of whether the employer's policies or practices are justifiable.



*"Traditionally, it has always been difficult for those bringing discrimination claims to find evidence to support their case"*

## Victimisation

The prohibition against discrimination by way of victimisation protects people who are seeking to enforce their rights under the equality legislation. Victimisation occurs when you are treated less favourably than another employee would be treated in similar circumstances, because you have done, are about to do, or are suspected of doing, a 'protected act'. You may have done a 'protected act' if you have:

- Brought proceedings against the discriminator or any other person under the Act, the Equal Pay Act or the Pensions Act 1995 (the Acts) or
- Made allegations that the discriminator or any other person has committed an act which contravenes the Acts. This would include raising a grievance of sex discrimination
- Given evidence or information in connection with proceedings against the discriminator or any other person under one of the Acts or
- Otherwise done anything in relation to the discriminator or any other person under or by reference to the Acts.

## Sexual harassment & harassment

Sexual harassment and harassment on the grounds of the victim's sex are forms of sex discrimination in employment. Since October 2005, the Sex Discrimination Act has specifically defined sexual harassment as unlawful conduct. Prior to this, sexual harassment was considered a form of direct sex discrimination under the case law of the tribunals and courts. Arguably, now that there is a specific definition of sexual harassment, protection is enhanced and extended as a result.

In either form of harassment, whether or not the victim and perpetrator are of the opposite sex is irrelevant.

The Regulations have recently amended the definition of harassment, making the protection from harassment much broader. The new definition came into force on 6th April 2008 and has been used here.

Sexual Harassment is defined as:

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

An essential characteristic of the behaviour is that it is unwanted, and it is up to each individual to determine what is acceptable or offensive to them. If you are offended by comments directed at someone else, you could now claim harassment under the new definition.

The Regulations impose a liability (in limited circumstances) on employers for harassment by a third party of an employee. Acts of harassment must have occurred on at least 3 occasions, and your employer must be aware of the harassment. For example, if a customer harasses you more than twice and your employer is aware of this, then your employer could be liable for any further acts of harassment by the customer.

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

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

## Who has what to prove?

Traditionally, it has always been difficult for those bringing discrimination claims to find evidence to support their case.

To combat this, the Sex Discrimination (Indirect Discrimination and Burden of Proof) Regulations 2001 were introduced. So now if you can show the Employment Tribunal clear facts which could enable the tribunal to conclude that discrimination has occurred, then the tribunal will look to your employer to give an adequate non-discriminatory explanation for the conduct. If the employer cannot provide an acceptable explanation, the tribunal must conclude that the treatment was discriminatory.

If an employer has failed to comply with relevant Codes of Practice/Directives, the fact of this may go against them in the tribunal's deliberations. The tribunal may draw an inference of discrimination. For example, if your employer failed to follow the ACAS Codes of Practice in the way they investigated your grievance, then it can be inferred that your employer discriminated against you.



*"The key thing to note is that sexual harassment can either be 'harassment related to the victim's sex' or 'harassment of a sexual nature'"*

### Questionnaires: getting the facts together

You can serve a questionnaire on your employer any time before lodging a claim at the Employment Tribunal or within 21 days from the date proceedings were lodged. The questionnaire can be used to ask your employer useful questions relating to the complaint. If your employer fails to reply to the questionnaire, or makes evasive replies, the tribunal may draw an inference of unlawful discrimination.



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### Time limits

A claim for sex discrimination must be brought in the employment tribunal within 3 months less one day of the treatment you are complaining about. Where a series of acts amounts to a continuing course of conduct by your employer, the claim may be brought within three months less one day from the end of the conduct. In some instances, if a claim is lodged out of time, the Employment Tribunal has the power to extend the time limits if it is just and equitable to do so. However, this should not be relied on.

Please note that in most cases, the time limit will no longer be extended where an internal grievance is lodged first as the rules relating to this have recently changed. You will however need to follow the ACAS Code of Practice on Discipline and Grievance Procedures (which can be downloaded from the ACAS website).

This is aimed at assisting parties to resolve disputes within the workplace. If your claim is successful but the tribunal considers that you have failed to comply with the Code, your compensation could be reduced by up to 25%. (There are also penalties on the employer if they do not comply with the Code). Please note that the time limit for bringing a claim is not affected by compliance with the ACAS Code.

If your claim relates to matters that happened before 6th April 2009, or if it relates to matters that occurred ongoing through 6th April 2009 and you have lodged a grievance or tribunal claim about it, then different rules may apply in relation to grievance procedures and time limits. These issues can be complicated and you should take prompt legal advice if you think you may have a claim.

### Remedies

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

- A declaration on the rights of the parties
- A recommendation that the employer take a particular course of action
- Re-engagement or reinstatement if the individual has been dismissed; and
- Compensation (plus interest) for loss of past and future earnings (if any), loss of congenial employment, injury to feelings and in some cases injury to health. There is no limit on the amount of compensation that can be awarded, but you can only be compensated for the damage which was directly caused by your employer's discrimination.





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## Contact Us

*Please feel free to discuss your own position and concerns. Contact your nearest Russell Jones & Walker office or call:*

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