Discrimination in the workplace may take various forms. When new job vacancies arise employers may discriminate in the way that they choose to advertise them. Their application forms or selection tests may be drafted in such a way as to discriminate against some applicants. When selecting candidates to interview they may discriminate by rejecting a category of person without even reading their forms.

At the interview itself questions that discriminate may be asked and these may result in the employer deciding not to offer a job to a particular candidate. When the employer does select the successful candidate offering that person the job, the employer may have discriminated against the others for reasons not related to their suitability or previous experience. An employer may also discriminate against existing employees. This may take place when the employer refuses an employee training or promotion, or dismisses an employee for reasons unrelated to his work record or skill.

Discrimination is not confined to the workplace and we all experience it at some stage in life for whatever reason. Whilst the law cannot prevent employers from making subjective decisions based on their perceptions of an applicant or employee, it does attempt to regulate those areas in which discrimination is known to be widespread.

Discrimination on the basis of sex, race or disability are the most common forms but a person can also be discriminated against on the grounds of age, religious beliefs, political persuasion, trade-union membership, sexual orientation or for having a criminal record.

Anti-discrimination legislation makes it unlawful to discriminate both during the recruitment and selection process and after appointment. It provides individuals who feel that they have experienced discrimination with the right to complain to an Employment Tribunal.

The Equality and Human Rights Commission plays a significant role in the enforcement of anti-discrimination law and the promotion of equal opportunities in the workplace. The role of the EHRC is discussed in Chapter 1 at pages 27–28. These paragraphs should be re-read as an introduction to this chapter. Note that the Equality Act 2010 received Royal Assent in April 2010. At the time of writing there is no firm information on when the provisions relevant to employment law will come into force. The EA 2010 came into force in 2010. Relevant sections are due to come into force on different dates. Students should check on relevant EA 2010 provisions when studying this topic.

By first giving an overview of existing anti-discrimination law and defining what is meant by the term ‘discrimination’ this chapter goes on to discuss:

- the types of discrimination, direct, indirect and victimisation;
- direct and indirect sex discrimination;
Anti-discrimination law

- direct and indirect racial discrimination;
- victimisation;
- the stages at which discrimination may take place;
- possible defences – justification, genuine occupational qualifications;
- other unlawful acts such as the use of discriminatory job advertisements;
- positive discrimination;
- European sex discrimination law;
- discrimination on the grounds of sexual orientation and transsexualism;
- discrimination on the grounds of pregnancy;
- sexual and racial harassment;
- the Equality and Human Rights Commission;
- disability discrimination, stages at which discrimination may take place, the duty to make reasonable adjustments, justification;
- discrimination on the grounds of age, political persuasion, religion or belief, trade-union involvement, and the rehabilitation of offenders;
- making a discrimination claim to the Employment Tribunal, remedies and awards;
- the use of equal opportunities in the workplace and the Equality Act 2010.

ANTI-DISCRIMINATION LAW

The law aims to control discrimination mainly on the grounds of sex, race and disability. The main statutes are:

- Sex Discrimination Act 1975
- Sex Discrimination Act 1986
- Race Relations Act 1976
- Disability Discrimination Act 1995
- Disability Discrimination Act 2005
- Equality Act 2006

The law aims to ensure that all people are treated equally at work irrespective of their sex, race or disability. The Sex Discrimination Act 1975 also prohibits discrimination on the grounds of marital status.

The Acts protect both those people applying for jobs and those already employed. An employee is protected from the first day of employment. There is no need for the employee to have worked for a particular employer for any length of time before making a tribunal claim. The Acts also extend protection to independent contractors and agency workers employed on a temporary basis.

The following statutes prohibit discrimination in the areas of trade-union membership and the rehabilitation of those people with criminal records:

- Trade Union and Labour Relations (Consolidation) Act 1992
European law has played a significant role in the development of the areas of sex discrimination and sexual harassment. The most significant piece of European law with regard to discrimination to date is the Equal Treatment Directive, referred to as the: ‘EC Council Directive No. 76/207 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions’. Over the last few years there has also been an expansion of European law in this area, a wider approach that takes into account more than just the problems of sex discrimination and sexual harassment. Article 13 of the Amsterdam Treaty states that appropriate action should be taken to ‘combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation’.

A new framework Equal Treatment Directive (EC 2000/78) was adopted in November 2000. This Directive is concerned with preventing discrimination on the grounds of religion or belief, disability, age or sexual orientation. The provisions in relation to religion or belief and sexual orientation were to be implemented by December 2003. The provisions were given legislative effect by the Employment Equality (Sexual Orientation) Regulations 2003 and the Employment Equality (Religion or Belief) Regulations 2003. A time extension was given with regard to provisions on age and disability discrimination. They were to be given legislative effect by 2006. The Disability Discrimination Act 1995 (Amendment) Regulations 2003 came into force on 1 October 2004. The Employment Equality (Age) Regulations 2006 came into force on 1 October 2006.


The Equal Treatment Amending Directive (EC 2002/73) amends the Equal Treatment Directive (EC 76/207). The Directive was to be implemented by 5 October 2005. These amendments make minor changes to the Sex Discrimination Act 1975 (in relation to harassment and indirect discrimination), and were implemented in the form of the Employment Equality (Sex Discrimination) Regulations 2005. These regulations came into force on 1 October 2005. More recently, the Employment Equality (Sex Discrimination) Regulations 2008 amended the provisions of the Sex Discrimination Act 1975 with regard to the definition of sexual harassment, the definition of discrimination on grounds of pregnancy or maternity leave and the exceptions applicable to claims of discrimination on grounds of maternity leave. These regulations came into force on 6 April 2008.

In summary, the main Regulations issued in response to these imposed changes are the:

- Disability Discrimination Act 1995 (Amendment) Regulations 2003
- Employment Equality (Religion or Belief) Regulations 2003
- Employment Equality (Sexual Orientation) Regulations 2003
- Race Relations Act 1976 (Amendment) Regulations 2003
- Employment Equality (Sex Discrimination) Regulations 2005
- Employment Equality (Age) Regulations 2006

These developments are discussed where appropriate in this chapter and summarised alongside other proposals for reform at pages 103–104.

**WHAT IS ‘DISCRIMINATION’?**

The dictionary definition of ‘to discriminate’ is ‘to single someone out for a special favour or disfavour’. To single someone out for a special favour is to positively discriminate. (This is discussed further at page 63.) Here, we are concerned with the other form of discrimination, negative discrimination. To single someone out for disfavour means to come to a decision which
What is ‘discrimination’?

disadvantages that person in some way. If this decision is made, for example, on the basis of gender, race or disability, it discriminates against the individual and is unlawful.

The law recognises three forms of discrimination:

- direct discrimination
- indirect discrimination
- victimisation.

**Direct discrimination**

Direct discrimination occurs when a person is treated less favourably because, for example, of that person's sex, marital status, race or disability. This is overt or blatant discrimination.

**Example**

Margo applies for a teaching job at her local school. She is shortlisted and attends an interview. Before the interview the school headmaster informs the interview panel that he does not want to appoint a woman. He asks them to reject all female candidates. Margo is interviewed along with two other women and one man, Michael. Michael is offered the job. He has fewer qualifications and less teaching experience than Margo and the other women.

Margo has been directly discriminated against because she is a woman.

The same scenario could be used to illustrate discrimination against a man, someone from a particular racial group or someone with a disability.

When trying to decide whether direct discrimination has occurred the question to ask is:

Had this person been of a different sex, race or have no disability would he or she have been treated in the same way?

If the answer is ‘no’, direct discrimination has occurred. Examples of direct discrimination include:

- refusing to employ a woman because she has four children and so may have to take time off work when they are ill;
- refusing to interview a black candidate when white candidates with equivalent qualifications and experience are interviewed;
- refusing to employ a disabled person because of their disability.

**Indirect discrimination**

Indirect discrimination is hidden or covert discrimination. An action which may at first appear not to discriminate may on reflection be said to indirectly discriminate against a group of people.

**Example**

A job advertisement states that applicants should be ‘over 6 feet tall’. Christine applies for the job but is only 5 feet 4 inches tall. Her application is rejected on the basis of her height.
The height requirement indirectly discriminates against women because fewer women than men are over 6 feet tall. This means that fewer women could comply with the height requirement and so be able to apply for the job.

Other examples of indirect discrimination include:

- a requirement that disadvantages part-time workers, many of whom are women;
- treatment that disadvantages workers with young children;
- the imposition of language tests which would exclude a large number of persons from ethnic minorities;
- a requirement that applicants live in a certain area of town which may exclude areas with a predominantly ethnic population.

**Victimisation**

A person is discriminated against if he is victimised because of some previous or current involvement in a complaint made against his employer. The person may have:

- previously made a discrimination claim or other type of tribunal claim against the employer;
- started grievance proceedings at work; or
- given evidence in tribunal proceedings on behalf of a colleague or assisted him in the organisation of any proceedings.

In a claim alleging victimisation the employee would have to show that he has been treated less favourably as a result of his actions.

**Example**

*William and Sharma work for Cool Sounds Ltd. Sharma has been refused promotion and believes that she has been discriminated against on racial grounds. She intends to make a complaint to the Employment Tribunal. William has agreed to be a witness in any tribunal proceedings and has advised her to go ahead with her claim. He has been told by his manager that if he does give evidence he can ‘forget any chance of a bonus or promotion in the future’. He later gives evidence and is demoted.*

*William has been victimised for offering to help his colleague.*

Other examples of victimisation include:

- pressurising an employee to withdraw a discrimination complaint;
- refusing holiday leave requests;
- writing poor references; or
- the over-monitoring of work and timekeeping.

The following cases highlight situations in which victimisation was alleged.


An employer accused of victimising an employee may be able to defend his actions if he can show that the original allegations were false or that the employee did not make them in good faith.
What is ‘discrimination’?

**Nagarajan v London Regional Transport** (1999)

Mr Gregory Nagarajan was well known to London Regional Transport. He had previously pursued various racial discrimination claims against both them and London Underground. Here, he had applied for a job as a Travel Information Assistant with London Regional Transport. He attended an interview but was unsuccessful in securing the position. He claimed that this was because the interview panel knew that he had previously brought discrimination claims against the organisation and that they had been influenced by that fact.

*Held (HL)* He had been victimised. He had been treated less favourably than the other candidates due to the fact that the panel had known that he had previously made a racial discrimination claim.

**Northants County Council v Dattani** (1994)

Dattani had complained of racial discrimination. Northants County Council (NCC) began an internal investigation into the allegations. It began to interview witnesses and collect evidence but when Dattani made a complaint to the Industrial Tribunal, NCC’s attitude changed. It halted the internal investigation and refused to discuss the matter further.

*Held* The stopping of the investigation amounted to victimisation because it would have been allowed to continue had Dattani not made the tribunal claim.

**St Helens MBC v Mrs J Derbyshire** (2007)

A group of dinner ladies who worked for St Helens Council had initiated an equal pay claim. Many of the ladies were able to reach a settlement with their employer but a small group refused to settle. The Council then wrote a letter to each of them which outlined the possible consequences of them continuing to pursue their claim. The letter stated that if the Council had to pay an increased amount in damages then job cuts would be inevitable. It also alleged that the increased cost to the Council would disadvantage school pupils. The claimants alleged that the letter had only been sent because of their original claim and that it and its contents amounted to victimisation.

*Held (HL)* By sending the letter the Council had victimised the claimants. The letter would not have been sent if they had not made their initial claim to the Employment Tribunal.

**Sex, race and disability discrimination**

The Sex Discrimination Act 1975 and the Race Relations Act 1976 recognise all three forms of discrimination. The Disability Discrimination Act 1995 only recognises direct discrimination and victimisation. The 1995 Act outlines other ways in which an employer may discriminate against disabled persons. These are the employer’s duty to make reasonable adjustments to their premises and ‘disability related discrimination’. This is further discussed below.

The Acts also create other offences relating to, for example, the use of discriminatory job advertisements. The 1975 and 1976 Acts also recognise the possible defence to a job being specifically offered to a man, woman or person from a particular racial group where this is a
Sex discrimination

genuine occupational qualification. All three Acts recognise situations where an employer may be
able to justify their discriminatory actions.

Whilst the areas of direct and indirect sex and race discrimination are discussed separately
below, the other areas concerning victimisation, justification and genuine occupational qualifica-
tion are discussed under one heading. Disability discrimination is discussed separately towards
the end of the chapter.

SEX DISCRIMINATION

The Sex Discrimination Act 1975 states that it is unlawful to discriminate against a person on the
basis of that individual’s sex or marital status.

It recognises direct and indirect discrimination and victimisation. Whilst sex discrimination is
usually thought of as being discrimination against women, s 2 of the Act states that it applies
equally to discrimination against men (s 11, EA 2010).

The 1975 Act makes it unlawful for an employer to discriminate either during the recruitment
and selection process or after appointment. It does not apply to any special treatment given to
women in connection with pregnancy or childbirth or for health and safety reasons.

The Sex Discrimination Act 1986 amended the 1975 Act. It is concerned mainly with discrim-
ination in collective bargaining and retirement ages. This section deals exclusively with the 1975
Act. A new s 1 and s 3 were inserted into the 1975 Act by the Sex Discrimination (Indirect
Discrimination and Burden of Proof) Regulations 2001. The general scope of the sections remains
unaffected. The changes were made to bring the legislation into line with the EC Directive on the
Burden of Proof in Sex Discrimination Cases (77/80/EC). The Sex Discrimination Act 1975
(Amendment) Regulations 2003 came into force on 19 July 2003. These regulations state that:

(a) Chief Constables will be liable for sex discriminatory acts committed by officers in their force
which were committed ‘in the course of their employment’, and that

(b) sex discriminatory acts which are committed by an employer after the affected employee’s
employment has ended will be unlawful.

Note also that the Employment Equality (Sex Discrimination) Regulations 2005 provided new
definitions of ‘indirect discrimination’ and ‘harassment’ and that the Sex Discrimination Act 1975
(Amendment) Regulations 2008 amended the 1975 Act with regard to the definition of ‘sexual
harassment’ and discrimination on grounds of pregnancy/maternity leave.

A sex discrimination claim

Figure 2.1 outlines the possible stages involved in deciding whether or not a claim can be made
for sex discrimination.

Discrimination on the ground of marital status

Section 3 of the Sex Discrimination Act 1975 (s 8, EA 2010) states that it is unlawful to discrimi-
nate against a person because he or she is married. Note that ‘being married’ also includes per-
sons who enter into a civil partnership. This means that a person cannot be discriminated
against on the basis of her sex or marital status. In Graham v Chief Constable of the Bedfordshire
Constabulary (2002) the EAT held that a police officer had been discriminated against due to the
fact that she was married to a fellow officer. Had she been given the promotion she desired it
would have meant that she would have been working in the same division as her husband. This
was the only reason why she had not been successful in her application.
Figure 2.1 Is there a valid claim for sex discrimination?

Until recently it was not unlawful to discriminate against single people. In *Bick v School for the Deaf* (1976) a female teacher was dismissed just before she was due to be married. The school had a policy of not employing married staff. She was unable to make a discrimination claim because at the time of her dismissal she was not married and so was not protected by the 1975 Act. However, a recent ruling now seems to differentiate between single people and those who are engaged to be married. The ruling in *Bick* was not followed in the case of *Turner v Turner* (2005). Here, the claimant brought an action against her former employer. Her claim was for unfair dismissal on the grounds of discrimination on the basis of her marital status. Her employer
had dismissed her from her job when she became engaged to his son. The Employment Tribunal held in her favour stating that s 3 of the Sex Discrimination Act 1975 should be interpreted in light of s 3 of the Human Rights Act 1998 and arts 8 and 12 of the Convention. The Tribunal held that the 1975 Act must be interpreted as encompassing discrimination not only against married persons but also against those who were about to marry.

It would seem, therefore, that s 3 of the 1975 Act will now be interpreted as applying to persons who can show that they are engaged to be married. The position in relation to single persons who are not engaged remains the same. This question of applicability will inevitably come before the Employment Tribunal again in the near future.

**Direct sex discrimination**

Section 1(1)(a) of the Sex Discrimination Act 1975 (s 13, EA 2010) states that a person discriminates against another if:

* on the ground of her sex he treats her less favourably than he treats or would treat a man.

The employer’s motive for treating a person ‘less favourably’ is irrelevant and there is no defence to a claim of direct discrimination once it has been proved.

Direct sex discrimination is overt or blatant discrimination. The following cases highlight situations in which direct sex discrimination was alleged.

**R v Birmingham City Council, ex parte Equal Opportunities Commission** (1989)

The City Council allocated 390 of 600 available school places to boys and only 210 to girls. 

*Held (HL)* This was an example of direct discrimination as the girls would not have received the same treatment had they been boys.

**Hereford County Council v Clayton** (1996)

A Council manager was held to have directly discriminated against a female employee when he announced to his other staff the ‘bad news’ concerning her appointment because she was a woman.

**Less favourable treatment**

In order to prove that there has been direct discrimination, an individual has to show that he or she has been treated less favourably because of their sex. This means that the individual has been disadvantaged in some way because of being female or male. This is often referred to as the ‘but for’ test. Would the individual have been treated less favourably ‘but for’ their gender? See: **James v Eastleigh Borough Council** (1990). A person may also be treated less favourably due to the fact of being married. Not all actions will amount to less favourable treatment. In **Shamoon v Chief Constable of the Royal Ulster Constabulary** (2003) the House of Lords stressed that when carrying out a comparison in order to show less favourable treatment it is important that any actual comparators are in the same circumstances as the complainant. Where there is no actual comparator the tribunal may try to assess the way in which a hypothetical comparator would have been treated. In **Igen Ltd & ors v Wong** (2005) it was held that if an individual is able to show that there was a difference in treatment between them and an actual or hypothetical comparator and
42 Sex discrimination

their employer is unable to give an adequate reason for this difference (which is not based on their gender) then the tribunal must uphold their complaint. An employer would have to provide an adequate explanation to prove that the person's sex was not the reason why they were treated differently. See also: Madarassy v Nomura International plc (2007).

In Stewart v Cleveland Guest (Engineering) Ltd (1994) the Employment Appeal Tribunal held that there had been no discrimination when female nude pin-ups were displayed in a factory. Even though her employers knew that she found such material offensive, Ms Stewart had not been treated any less favourably. The pictures could be seen by all of the workforce.

In British Telecom plc v Roberts (1996) it was held that there had been no discrimination when a woman returning from maternity leave was told that she could not return to her job on a job-share basis. She had not been treated any less favourably than a man would have been in the same circumstances. Her employers had refused her request on the basis that the job needed to be done by a full-time employee and not because she was a woman.

In Moyhing v Barts and London NHS Trust (2006) the Trust’s policy of requiring a male student nurse to be accompanied by a female colleague when administering an ECG to a female patient (because the procedure involved touching the patient's breasts) was held to be direct discrimination. Mr Moyhing had claimed direct sex discrimination as there was no requirement for a female nurse to have a male chaperone when dealing with male patients. He had been treated less favourably because of his sex. Compensation for injury to feelings was limited to £750 because the policy was unlawful only because statute specifically provides that there is no defence of justification in direct discrimination cases. In B and C v A (2008) the EAT held that an employer had not made any decision based on an employee’s gender when it failed to follow its disciplinary process prior to dismissing him. An allegation of rape had been made against him but there was no evidence that he had been discriminated against because he was a man. It could not be proved that the employer would have treated a female employee any differently and so there had been no less favourable treatment and so no direct discrimination.

It could be said that the decision in Smith v Safeway Plc (1996), below, is unfair because had Mr Smith been a woman the length and appearance of his ponytail would have been acceptable!

In 2003 there were two interesting ‘dress code’ cases concerning the wearing of ties at work. In both cases it was questioned whether or not it was discriminatory to force a man to wear a tie in the workplace. In March 2003 Exeter Employment Tribunal held that it was not discriminatory for the prison service to require an employee (Mark Coldicott) to wear a tie at work.

**Smith v Safeway Plc (1996)**

Mr Smith worked as a delicatessen assistant. Safeway Plc dismissed him because they said that his ponytail breached their ‘dress code’ rules. The rules stated that male staff should have ‘tidy hair not below collar length and no unconventional styles’. Mr Smith alleged direct discrimination saying that he had been treated less favourably than female employees who were allowed to wear their hair long. Although successful when his claim was heard by the EAT Mr Smith eventually lost his claim in the Court of Appeal.

**Held (CA)** The dress code did not discriminate just because the employer had a ‘conventional outlook’. Judge Phillips stated that he did not ‘believe that this renders discriminatory an appearance code which applies a standard of what is conventional’.

In the same month a Manchester Employment Tribunal held that it was discriminatory for Stockport Job Centre to require an employee (Matthew Thompson) to wear a tie at work.
On appeal the Employment Appeal Tribunal remitted this case back to a different Employment Tribunal, stating that in considering whether a requirement of an employer’s dress code imposed on men but not on women, e.g. to wear a collar and tie, is sex discrimination, the question must be considered in the overall context of the code as a whole, such as an overreaching requirement for staff to dress in a professional and businesslike way. In the light of the EAT ruling the Department for Work and Pensions withdrew from the case and allowed men to work without ties when they were not in direct contact with the public. This ensured that the 7,000 other applications made by male workers following Mr Thompson’s claim were withdrawn. This case is reported at Thompson v Department for Work and Pensions (2004). In Dansie v Commissioner of Police for Metropolis (2009) it was held that there was no discrimination if the compliance requirements of a dress code (in this case the length of an employee’s hair) applied equally to both sexes. Here a male trainee police officer had to cut his shoulder length hair prior to being admitted for training. He alleged direct sex discrimination but was unsuccessful, the EAT finding that a female recruit would have been treated in the same way. There had not been any ‘less favourable treatment’.

Other conflicting (but interesting) decisions on the use of dress codes include: Schmidt v Austicks Bookshops Ltd (1977), Burrett v West Birmingham Health Authority (1994), Fuller v Mastercare Service & Distribution (EAT) (2001).

A specific definition of direct discrimination is included in the amendments made to the Equal Treatment Directive (2002/73/EC). This defines direct discrimination as ‘where one person is treated less favourably on grounds of sex than another is, has been or would be treated in a comparable situation’.

### Indirect sex discrimination

Section 1(2)(b) of the Sex Discrimination Act 1975 (s 19, EA 2010) was initially amended by the Sex Discrimination (Indirect Discrimination and Burden of Proof Regulations) 2001. A new s 1(2)(b) was inserted into the 1975 Act by reg 3 of the Employment Equality (Sex Discrimination) Regulations 2005. From 1 October 2005 a person indirectly ‘discriminates against a woman if:

... (b) he applies to her a provision, criterion or practice which he applies or would apply equally to a man, but –

(i) which puts or would put women at a particular disadvantage when compared with men,

(ii) which puts her at that disadvantage, and

(iii) which he cannot show to be a proportionate means of achieving a legitimate aim.’

In most cases the new definition will be of little practical significance but it is hoped that it will make it easier for claimants to bring indirect discrimination claims. Since 1 October 2005 there has no longer been a need to consider what is a ‘considerably smaller group’ or who should be included in the ‘pool of comparison’. The claimant has to show that the employer applied a provision, criterion or practice which would apply equally to men but which puts women at a disadvantage compared to men and which put her at that disadvantage. On this basis the ‘pool of comparison’ remains relevant.

An employer may be able to defend an indirect discrimination claim by showing that its actions were justified, or a ‘proportionate means of achieving a legitimate aim’.

The examples below are cases that dealt with the old terminology. However, as the new changes do not make any real difference to the application of the law they will still be relevant.

Indirect discrimination is hidden discrimination. What may or may not constitute indirect discrimination may often be difficult to grasp. The easiest way to work out whether there is a possible case of indirect discrimination is to take the situation where it may have occurred and apply it to the above definition.
Sex discrimination

Taking the height example noted above (page 36), we can see that there is clear evidence of indirect discrimination. In this example Christine has read a job advertisement. It does not say that she cannot apply because she is a woman, but it does say that she cannot apply unless she is over 6 feet tall.

On the face of it, the advertisement applies to both sexes. However, due to the fact that fewer women than men are over 6 feet tall the advertisement puts women at a particular disadvantage when compared with men.

In order to dispute any claim of indirect discrimination, an employer would have to show justification in imposing the height qualification, showing that his actions were a proportionate means of achieving a legitimate aim (see page 54).

Applies in principle to both sexes . . .
Here, an applicant or employee would have to show that in principle the provision, criterion or practice, for example, to work particular shifts or be of a certain weight, applies to both sexes.

. . . which puts or would put women at a particular disadvantage when compared with men
Here, an applicant or employee would have to show that the provision, criterion or practice puts or would put women at a particular disadvantage when compared with men.

In Jones v University of Manchester (1993) the court laid down guidelines to assist in the identification of the ‘pool for comparison’. The guidelines show that the correct ‘pool’ is identified by highlighting those people who could comply with the condition, for example 70 per cent of the population. Then you would ask which proportion of that 70 per cent are male and which are female. If, for instance, the statistics show that 60 per cent of men could comply with the condition as opposed to 10 per cent of women, then the condition is discriminatory.

This is a rather simplified account of the guidelines but serves as an illustration of the way in which statistics can be used to isolate the ‘pool’ of comparison and so prove that there has been indirect discrimination.

Puts her at that disadvantage
In order to prove indirect discrimination, the applicant or employee must be able to show that the actions of the employer put her at a disadvantage. Often this will mean having been deprived of the chance of applying for a job or an application being rejected for not meeting the imposed requirement. Alternatively, it could mean a refusal relating to training or promotion. To be put at a disadvantage is similar to the concept of less favourable treatment in direct discrimination.

The following cases highlight situations where indirect sex discrimination was alleged.

Price v Civil Service Commission (1978)
Ms Price was a 35-year-old mother. She wanted to apply for a job as a Civil Service executive officer. The job advertisement stated that only people aged 17–28 years could apply. She claimed that she had suffered indirect discrimination because she could not comply with the age requirement.

Held As a woman she had suffered indirect discrimination; fewer women than men could comply with the age barrier. This was because a large number of women from that age group were occupied in the bearing and bringing up of children.
London Underground v Edwards (No. 2) (1999)

Ms Edwards was employed as a tube train driver. She was a single mother and had worked for London Underground (LU) for almost ten years. She had worked a shift system which allowed her to take care of her son outside of school hours. LU then introduced a new variable shift system which prevented her from being able to organise regular childcare. She asked LU to help her by rearranging her shifts to fit in with her parental responsibilities. LU refused and she was forced to resign. She claimed that she had been indirectly discriminated against because as a female she was less likely to be able to comply with the new shift system than her male colleagues.

Held (CA) There had been indirect discrimination. There were only 21 women train drivers employed as part of a workforce of over 2,000. The new shift system had had a far greater impact on female drivers than it did on male drivers.

Ministry of Defence v DeBique (2009)

The claimant, a soldier from St Vincent who was also a single mother, was required by the Army to be available to work 24 hours a day. She could be called upon to go to work at any time. She was unable to arrange childcare for her son at such short notice and so was forced to resign from the Army.

Held (EAT) The claimant had been indirectly discriminated against on the basis of both her sex and race. The Army had applied two provisions, criteria or practices to the situation. It had prevented her from inviting her sister (from St Vincent) to live with her to help with childcare and had expected her still to be available 24 hours a day. Whilst the tribunal accepted that the Army was entitled to expect its staff to be available 24 hours a day, 7 days a week, it was held that, taken with the refusal to allow her sister to move to the UK, this had put her at a particular disadvantage.


Racial Discrimination

The Race Relations Act 1976 states that it is unlawful for a person to discriminate against another on the basis of the other person’s: colour, race, nationality, ethnic origin or national origin.

The Act recognises direct and indirect discrimination and victimisation. It is unlawful for an employer to discriminate on the grounds of race either during the recruitment and selection process or after appointment.

A racial discrimination claim

Figure 2.2 outlines the possible stages involved in deciding whether there can be a claim for racial discrimination.
Has the employer made a decision based on race?

If no, no claim for discrimination; if yes, do the employer’s actions fall within one of the stages outlined in s 4?

If no, no claim for discrimination; if yes, is it direct or indirect discrimination or victimisation?

Direct if person treated less favourably because of his colour, race, ethnic origin or nationality

Indirect (colour/nationality) if employer has imposed a requirement/condition that applies equally to all races but the number of one race that can comply is considerably smaller than the number from the other races and this is to that person’s detriment, or

Indirect (race, ethnic/national origins) if employer has applied a provision, criterion or practice equally to all races, ethnic/national origins but which puts or would put persons of the same race, ethnic/national origins at a disadvantage when compared with other persons and that person is put at a disadvantage

Victimisation if employer treats person less favourably because of, e.g., involvement in other tribunal cases or complaints

If indirect, are the employer’s actions justified? If yes, possible defence to discrimination; if no, actions were discriminatory

If actions relate to recruitment, transfers or training is there a genuine occupational reason for employing someone from a particular race?

If yes, possible defence to discrimination; if no, actions were discriminatory

If discrimination has taken place, applicant or employee makes a complaint to the Employment Tribunal

Figure 2.2 Is there a valid claim for racial discrimination?
What is a racial group?

Section 3 of the Race Relations Act 1976 (s 9, EA 2010) states that it applies only to people who belong to a recognised racial group. A racial group is defined as being:

- a group of persons defined by reference to colour, race, nationality or ethnic or national origins.

In some situations a tribunal may have to decide on whether or not an applicant or employee belongs to a particular racial group. If a person cannot show that he belongs to such a group, he will not be protected under the Act and so will not be able to proceed with a claim for racial discrimination.

In Mandla v Lee (1983) Mr Mandla, a Sikh, complained of racial discrimination when his local school refused to admit his son. He said that his son had been refused entry because he was a Sikh. He could only bring a claim under the 1976 Act if being a Sikh was taken to mean that he belonged to a particular racial group.

Using the s 3 definition, the House of Lords held that being a Sikh did constitute being part of a particular racial group. Their lordships defined a racial or ethnic group as being identifiable by things such as:

- a long shared history;
- a cultural tradition of its own including family and social customs;
- a common geographical origin;
- a common language;
- a common religion.

In Seide v Gillette Industries (1980) the tribunal held that people belonging to the Jewish faith could be classed as belonging to a particular racial group. Similarly in Commission for Racial Equality v Dutton (1989) Gypsies were also held to belong to a particular racial group. See also, Catton v Hudson Shribman (2002).

The Scots and English are covered by the Race Relations Act 1976 but only in relation to ‘national origins’, not ‘ethnic origins’. See: BBC Scotland v Souster (2001), British Airways v Boyce (2001). In the following case, however, a Rastafarian was held not to be part of a particular racial group.

See also, Gwynedd County Council v Jones (1986), J H Walker Ltd v Hussain (1996).

Crown Suppliers v Dawkins (1993)

Mr Dawkins complained to the Industrial Tribunal stating that he had not been given a job as a van driver because he was a Rastafarian with dreadlocks. Crown Suppliers had offered him the job if he would cut his hair but he had refused to do so. The tribunal had to decide whether, as a Rastafarian, Dawkins belonged to a particular racial group.

**Held** Although Rastafarianism was a ‘twentieth-century movement with an irregular and uncertain history which might be a religious sect’, it could not be a racial group. Consequently, Dawkins could not make a claim for racial discrimination because he was not protected under the 1976 Act.

Recently, in the following case, the Supreme Court held that there had been direct racial discrimination on the ground of ‘ethnic origin’.
Racial discrimination

**R (E) v Governing Body of JFS & anor** (2009)

Here, a faith school had refused to admit a pupil because he was descended from a woman they did not recognise as being Jewish. The school prioritised places for children who were recognised as being descended from a Jewish mother in preference to those whose mothers had converted to Judaism. It was held that this was direct racial discrimination.

**Held (SC)** Membership of a religious group based on descent was held to amount to membership of the group by reason of ‘ethnic origins’.

### Direct racial discrimination

Section 1(1)(a) of the Race Relations Act 1976 (s 13, EA 2010) states that a person discriminates against another if:

- on racial grounds he treats that other less favourably than he treats or would treat other persons.

Direct racial discrimination is overt or blatant discrimination. The following case highlights a situation in which direct discrimination was alleged.

**Owen & Briggs v James** (1982)

James advertised regularly for new staff. Ms Owen had applied for a job as a secretary on two occasions but had been rejected. She was black and on the second occasion the job was offered to a white girl who had fewer qualifications and less experience. When the white girl was offered the job one of the interview panel said, ‘why take on coloured girls when English girls are available?’ Owen complained to the Industrial Tribunal, stating that she had been discriminated against on the ground of race.

**Held (CA)** The discriminatory statement showed that the employers had deliberately not offered her the job because she was not white. They directly discriminated against her because she had been treated less favourably than she would have been had she been white.

The employers’ motive for treating a person ‘less favourably’ is irrelevant and there is no defence to a claim of direct discrimination once it has been proved.

### Less favourable treatment

In order to prove that there had been direct racial discrimination, an individual has to show that he has been treated less favourably because of his race. This means that he will have been disadvantaged in some way because of being from a particular racial group.

In **Serco Ltd v Redfearn** (2006) it was held that where an employee who is a member of a racist group (here the British National Party) is dismissed because of the danger that his continued employment might lead to violence in the workplace, the dismissal was properly regarded as being for health and safety reasons and was not unlawful racial discrimination.

### Indirect racial discrimination

The Race Relations Act 1976 (Amendment) Regulations came into force on 19 July 2003. These regulations brought the terminology used in racial discrimination claims in line with those of sex
Racial discrimination. The regulations inserted a new s 1(1A) into the Race Relations Act 1976 and consequently there are now two definitions of what will amount to indirect racial discrimination.

The original definition from s 1(1)(b) of the Act still applies to claims that relate to colour or nationality. The new definition in s 1(1A) applies to claims on the basis of ‘race, ethnic origins or national origins’.

| colour or nationality = s 1(1)(b) original definition |
| race, ethnic origins or national origins = s 1(1A) new definition |

It is unfortunate that we now have two separate definitions of what will amount to racial discrimination. However, in practice it is thought that most claims will be made under the s 1(1A) definition. Both the original and the new definitions are outlined below.

Section 1(1)(b), RRA 1976 (s 19(2), EA 2010) - colour or nationality

Section 1(1)(b) of the Race Relations Act 1976 states that a person discriminates against another on the grounds of race if:

he applies to that other a requirement or condition which he applies or would apply equally to persons not of the same racial group as that other, but –

(i) which is such that the proportion of persons of the same racial group as that other who can comply with it is considerably smaller than the proportion of persons not of that racial group who can comply with it; and

(ii) which he cannot show to be justifiable irrespective of the colour, race, nationality or ethnic or national origins of the person to whom it is applied; and

(iii) which is to the detriment of that other because he cannot comply with it.

Applies in principle to all races

An applicant or employee would have to show that in principle the requirement or condition applies to all races.

But only a considerably smaller group of one race can comply

Here, it has to be shown that even though the requirement or condition applies to all races only a considerably smaller group from a particular race are able to comply. This can be done with the aid of statistics. The applicant or employee must choose the correct ‘pool’ for comparison. See Perera v Civil Service Commission (1982) (below) and TNT Express Worldwide (UK) Ltd v Brown (2001).

Suffering a detriment

In order to prove indirect discrimination, the applicant or employee must be able to show that he has suffered a detriment. Often this will mean having been deprived of the chance of applying for a job or an application having been rejected for not meeting the imposed requirement.

Alternatively, it could mean a refusal for training or promotion. To suffer a detriment is similar to the concept of less favourable treatment in direct discrimination.
Racial discrimination

The following case highlights a situation where indirect racial discrimination was alleged.

**Perera v Civil Service Commission (1982)**

Mr Perera had been born in Sri Lanka and emigrated to the United Kingdom as an adult. He worked for the civil service as an executive officer. He had applied for promotion on several occasions but had been rejected despite the fact that he had numerous accountancy and legal qualifications. He alleged racial discrimination and during tribunal proceedings it was shown that it was civil service policy not to promote anyone from Perera's grade who was over 32 years old.

**Held (EAT)** There had been indirect racial discrimination. The age limit was a requirement or condition that had indirectly discriminated against the large number of black people who had emigrated to Britain as adults. This meant that a considerably smaller percentage of blacks than whites could comply with the age requirement.

**Section 1(1A), RRA 1976 (s 13, EA 2010) – race, ethnic origins or national origins**

Section 1(1A) of the Race Relations Act 1976 states that a person discriminates against another on the grounds of race, ethnic or national origins if:

- he applies to that other person a provision, criterion or practice which he applies or would apply equally to persons not of the same race or ethnic or national origins as that other, but –
  - (a) which puts or would put persons of the same race or ethnic or national origins as that other at a particular disadvantage when compared with other persons,
  - (b) which puts or would put that other at a disadvantage, and
  - (c) which he cannot show to be a proportionate means of achieving a legitimate aim.

**Provision, criterion or practice**

The provision, criterion or practice applies to persons of all races and ethnic/national origins.

**Puts/would put at a disadvantage when compared with other persons**

Here, it has to be shown that the provision, criterion or practice puts or would put persons from a particular race or ethnic/national origin at a particular disadvantage when compared with other persons.

**Is put at a disadvantage**

The applicant/employee is put at a disadvantage. Often this will mean having been deprived of the chance of applying for a job, or an application being rejected for not meeting the required provision, criterion or practice.

As with cases of indirect sex discrimination, indirect racial discrimination can often be difficult to define. Again the applicant or employee must work through the definition in stages, collecting evidence to support any claim. Consider again the example at page 36. The same logic would apply if Christine was Chinese and so unable to comply with the height restriction because people from her race are less likely to be of the required height.

In order to dispute any claim of indirect discrimination, an employer has to show justification in imposing the requirement or condition. Under the new definition he has to show that his actions were justified as a proportionate means of achieving a legitimate aim. (See page 54.) See also: **MOD v DeBique (2009)** (page 45).
Discrimination on the ground of another’s race

Whilst the Sex Discrimination Act relates to discrimination aimed at the individual, the Race Relations Act states that discrimination claims may be made by a person even where the discrimination was aimed at someone else. The following cases highlight situations where such claims have succeeded.

In Wilson v TB Steelworks (1979) a job offer to a white woman was withdrawn when she revealed that her husband was black. In Zarcynska v Levy (1978) a barmaid was dismissed because she refused to follow orders not to serve black customers. Similarly, in Showboat Entertainment Centre v Owens (1984) Owens, a white amusement arcade manager was sacked after refusing to obey an order to exclude black people from the arcade.

In these cases, even though the discrimination was actually aimed at a third party or group of people, those instructed were also able to make successful claims. A further case on this point is detailed below.

Weathersfield (Van and Truck) Rentals v Sargent (1999)

Ms Sargent began to work as a receptionist for Weathersfield Rentals. She was told by her manager that if any coloured or Asian person visited the premises asking to hire a car or van they should be told that no vehicles were available. She resigned after a few days because she found the above instruction to be very distasteful.

Held (CA) The ‘orders’ given by the manager were discriminatory. Ms Sargent had suffered a detriment as a result of her refusal to carry out a policy, which involved unlawful race discrimination and so was successful in her claim.

Victimisation

Victimisation was discussed at page 37. Section 4 of the Sex Discrimination Act 1975 (s 27, EA 2010) and s 2 of the Race Relations Act 1976 (s 27, EA 2010) state that victimisation will occur where a person treats another less favourably because:

- he has begun tribunal or grievance proceedings against the discriminator or any other person under the Act; or
- he has given evidence in any such proceedings.

Victimisation may also occur where, for instance, an employee has done neither of the above but the employer mistakenly believes that he has done so or will do so in the future.

Section 4(2) of the 1975 Act (s 27(3), EA 2010) and s 2(2) of the 1976 Act (s 27(3), EA 2010) state that an employer will be able to defend a claim of victimisation where he can show that any allegations involved were ‘false and not made in good faith’.

What if an employer does not intend to discriminate?

An employer may not intentionally discriminate against an applicant or employee. However, the law is not concerned with motive and the employer may still be found to have discriminated unlawfully even where he did not intend to do so.

The following cases highlight a situation where no discrimination was intended but was nevertheless found to have occurred.
52 Stages at which discrimination may take place

In relation to racial discrimination, in *Hafeez v Richmond School* (1981) Mr Hafeez's application to work in the school was rejected because he was not English. The position involved teaching English and the students made it known that they would rather be taught by an English teacher. Even though the school's headmaster had not meant to discriminate, he was found to have acted unlawfully.


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**James v Eastleigh Borough Council** (1990)

Mr and Mrs James both went swimming at their local pool. They were both 61 years of age. Mrs James was allowed a free swim because she was a pensioner but her husband was asked to pay 75p because he was not. The Council had not intended to discriminate against male pensioners; it was merely observing the ages at which people received their pension.

*Held (HL)* Although the Council did not intend to discriminate on the ground of sex, its actions amounted to direct discrimination. As a man Mr James had been treated less favourably than he would have been had he been a woman.

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**Greig v Community Industries** (1979)

Two women were offered jobs working as part of a team of painters and decorators. On the first day one woman did not turn up. Greig did attend but she was dismissed because her employer thought that it would be ‘for her own good’. He genuinely believed that it would not be good for her to work as the only female on the team.

*Held* Although the employer’s intentions were honest, he was found to have discriminated against Greig on the ground of her sex.

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**STAGES AT WHICH DISCRIMINATION MAY TAKE PLACE**

Section 6 of the Sex Discrimination Act 1975 (ss 39 & 40, EA 2010) and s 4 of the Race Relations Act 1976 (s 39, EA 2010) recognise that discrimination may take place either during the recruitment and selection process or when a person is already employed. These sections state that it is unlawful for an employer to discriminate on the grounds of sex, marital status or race in the following situations:

- in the arrangements made for the purpose of deciding who should be employed;
- on the terms on which a person is offered a job;
- by refusing to employ a person because of his sex/marital status or race;
- by refusing access to opportunities at work such as promotion, transfers, training, benefits, facilities or services;
- by dismissing a person or subjecting him to any other detriment.
Discrimination in employment

Stages at which discrimination may take place

In the arrangements made for the purpose of deciding who should be employed

This relates to discrimination that may take place during the recruitment and selection process. Employers should not discriminate on the grounds of sex, marital status or race during this process. Selection procedures should focus on the suitability of the candidate as regards previous experience and aptitude for the job and not on the candidate’s gender or race.

Employers should take care when drafting application forms and conducting interviews. Likely acts of discrimination at this stage would include rejecting an application form on the basis that it was sent by a woman or because it was sent by someone from an ethnic minority. Employers may also discriminate during the interview stage by asking discriminatory questions.

In *Hurley v Mustoe* (1981) it was held that to assume that a woman with young children would be an unreliable employee was direct sex discrimination.

As a general guideline, employers should only ask questions in interviews that they could put to both male and female applicants. The questions should also be capable of being asked to applicants from all races. For example, a woman should not be asked questions about her childcare arrangements if the same questions are not asked to a man with a family. Applicants from ethnic minorities should not be asked questions such as ‘were you born in England?’.

Not all questions will be discriminatory. In *Saunders v Richmond-upon-Thames Borough Council* (1977) a female golfer had applied for a job as a golf professional. At her interview she was asked questions such as ‘are there any other female golf professionals?’ and ‘are you blazing a trail?’ When she did not get the job she alleged that the questions had been discriminatory. It was held that in this case the questions were not discriminatory. On this occasion this may be because they were asked by a woman.

When selecting employees for interview, employers should not discriminate in their choices.

In *Hussein v Saints Complete House Furnishers* (1979) Saints were held to have discriminated during the recruitment and selection process when they stipulated that when selecting candidates for interview they would not choose people who lived in the city-centre area of Liverpool. The tribunal held that this discriminated on racial grounds because the people who lived in that area were predominantly from ethnic minorities.

**Johnson v Timber Tailors (Midlands) (1978)**

Mr Johnson, a black Jamaican, applied for a job as a wood machinist. A manager at Timber Tailors told him that he would be contacted a few days after interview and told whether or not he had been successful. After a week during which he was not contacted, he rang Timber Tailors and was told that the vacancy had been filled. Later that day he noticed that another advert for the same job had appeared in his local newspaper. He applied for the same job again and was again told that the position had been filled. Yet another advert for the same job appeared in the newspaper a few days later.

*Held (IT)* Johnson had suffered blatant racial discrimination. Timber Tailors had discriminated against him during the recruitment and selection process because he was Jamaican.

On the terms on which a person is offered a job

Employers should not discriminate in the terms on which they offer employment. For example, if an employer employs one male and one female employee to the same job, they should be given
Does an employer have any defence to a discrimination claim?

The same holiday entitlement. To offer the man two extra weeks just because he is male would be discriminatory. This relates to both sex and race discrimination.

By refusing to employ a person on the basis of his/her sex or marital status or race

It is unlawful for an employer to refuse to employ a person just because of being female, male or married. In Batisha v Say (1971) a woman was refused a job as a cave guide because the employer thought that it was ‘a man’s job’. This was held to be direct discrimination. It is also discriminatory to refuse to employ a person on the basis of their race.

By refusing access to opportunities at work

The refusal may relate to promotion, transfers, training, benefits, facilities or services. Access to all of these things should be available equally to both sexes and irrespective of marital status or race. In Timex Corporation Ltd v Hodgson (1982) a male employee was made redundant and was not offered an alternative position. The alternative job was given to a female employee. The EAT held that the refusal was capable of falling within the definition of a transfer and that consequently Timex’s refusal to appoint Hodgson amounted to discrimination.

By dismissing a person or subjecting him/her to any detriment

An employer should not dismiss or subject an employee to any other detriment on the basis of his sex, race or marital status. To ‘put to a detriment’ simply means to disadvantage the employee in some way.

Coleman v Skyrail Oceanic Ltd (1981)

Ms Coleman worked as a booking clerk for Skyrail Oceanic Ltd, a travel agency. She married an employee from a rival firm and was dismissed by Skyrail because it was thought that she might leak confidential information to her husband. Skyrail assumed that her dismissal was reasonable because her husband was the higher earner and so could continue to support their family.

Held (CA) In dismissing Coleman, Skyrail had directly discriminated against her on the basis that she was female. In the circumstances, had she been a man, Skyrail would have perceived her as the family ‘breadwinner’ and she would not have been dismissed.

Does an employer have any defence to a discrimination claim?

There can be no defence to a claim of direct discrimination but in cases of indirect discrimination employers may be able to show that they were justified in attaching a requirement or condition/provision, criterion or practice to, for example, a job advertisement.

Section 1(1)(b) of both the Sex Discrimination Act 1975 and the Race Relations Act 1976 (s 19(2)(b), EA 2010) state that an employer does not indirectly discriminate where it can show that there was a justifiable reason for using the requirement or condition/provision (race), criterion or practice (sex), and that that reason does not relate to gender or race.

In relation to sex discrimination the employer must be able to show that its actions were a proportionate means of achieving a legitimate aim.
Does an employer have any defence to a discrimination claim?

Section 1(1A) of the Race Relations Act 1976 (s 13, EA 2010) states that an employer does not indirectly discriminate where he can show that there was a justifiable reason for applying a provision, criterion or practice and that his actions were a proportionate means of achieving a legitimate aim.

In practice, the differing terminology makes little difference to the way in which the tribunal will consider the claim.

It is a question of fact as to what a tribunal would consider to be justifiable. It is not sufficient that the employer believes his actions to be justified. An employer would have to produce evidence to support such a defence.

The tribunal will consider the requirement or condition/provision, criterion or practice and balance the effect of the discrimination on the individual involved against the reasonable needs of the employer. This was discussed in the case of *Hampson v Department of Education and Science* (1989). Here, the House of Lords held that in order to prove justification, an employer must show that there was a real need to impose the requirement or condition. This need can be either economic or administrative and must relate to the running of the employer’s business.

This means that in order to prove that their actions were justified employers must show:

- that the requirement or condition/provision, criterion or practice was objectively justified regardless of sex or race; or
- that it served a real business need and the need was justifiable on economic or administrative grounds;
- in cases of sex discrimination and racial discrimination under s 1(1A) (race, ethnic/national origins) that his actions were a proportionate means of achieving a legitimate aim.

The following cases highlight situations in which employers have tried to show that their requirements or conditions were justified.

**Home Office v Holmes** (1984)
The Home Office had refused to employ women on a part-time basis. It said that if it did employ part-time workers, accommodation and insurance costs would rise. On this basis it said that its actions were justified.

*Held (EAT)* There was no justification for the Home Office’s actions. The EAT had considered a report which showed that the civil service was losing valuable trained workers when they left to have a family. The report also showed that in some departments efficiency increased when part-timers were introduced. There could be no justification for imposing such a condition.

**Panesar v Nestlé Co Ltd** (1979)
A rule at the Nestlé factory stated that workers were not allowed to have beards or excessively long hair. This was held to indirectly discriminate against Sikhs because they had beards for religious reasons and so could not cut them to comply with the condition.

*Held* Even though the condition did discriminate, the employers were justified in imposing it on health and safety grounds and in the interests of hygiene. The rule against the wearing of beards was essential in a factory making chocolate to prevent it from becoming contaminated by bacteria.

A similar decision was made in the case of *Singh v Rowntree Mackintosh Ltd* (1979).
Genuine occupational qualifications

In *Singh v British Rail Engineering Ltd* (1986) British Rail rules stated that safety headgear had to be worn in designated areas. Mr Singh objected to this because he was unable to wear headgear whilst wearing his turban. The tribunal held that British Rail was justified in imposing this condition. Again, this decision was taken on health and safety grounds.

The following recent cases highlight situations where an employer has tried to avoid liability by showing that its actions were justifiable or that the situation could be seen as being a proportionate means of achieving a legitimate aim.

**Osborne Clarke Services v Purohit** (2009)
Here, an employer argued that it was justified in applying a provision, criterion or practice when it refused to accept job applications from non-EEA nationals.

*Held (EAT)* This policy was not justified; the employer had indirectly discriminated against the claimant. The company had argued that its reasoning was ‘cost related’. The EAT stated that this was ‘an unattractive way of justifying indirect discrimination’.

**Azmi v Kirklees Metropolitan Borough Council** (2007)
The Council set the requirement that teachers were not allowed to wear veils whilst in the classroom. The claimant alleged that she was being discriminated against because she was unable to attend work whilst wearing a veil.

*Held* This requirement was held to be a proportionate means of achieving a legitimate aim, that of teaching students. It was thought that the wearing of a veil whilst teaching would make it more difficult for the teacher to communicate with her pupils.

**GENUINE OCCUPATIONAL QUALIFICATIONS**
An employer may be able to discriminate against one sex or race if appointing a man, woman or someone from a particular racial group to the job is a genuine occupational qualification. This exception applies only to recruitment, transfers and training.

**Sex genuine occupational qualifications**
The Sex Discrimination Act 1975 recognises eight situations where an employer is able to discriminate by favouring someone from a particular sex. In these situations being either a man or a woman is a genuine occupational qualification for the job. Section 7 of the Act (Sch 9, paras 1 & 2, EA 2010) states that it will be possible for an employer to discriminate where:

1. The job needs to be done by a man or woman for reasons of physiology (excluding physical strength or stamina) or in dramatic performances or other entertainment for reasons of authenticity.

*Example*
- Employing a man to play Romeo or a woman to play Juliet in Romeo and Juliet.
- Employing a woman to model wedding dresses.
2 The job needs to be done by a man or woman to preserve decency or privacy because it is likely to involve physical contact with men or women, and these people would object to the presence of someone of the opposite sex.

**Example**  
A job working in an all-male or all-female retirement home, working as a live-in carer.

3 The job involves working or living in a private home and there may be either a degree of physical/social contact with the person living in the home or the worker may acquire intimate knowledge of the person’s life.

**Example**  
A job working as a home-help for an elderly woman.

4 The nature of the job means that the employee will have to live at his place of work and the accommodation provided is only suitable for either men or women, and it is not reasonable to expect the employer to make adjustments to that accommodation.

5 The job involves working in a single-sex prison or hospital.

6 The holder of the job will be expected to provide individuals with personal services promoting welfare or education, and those services could most effectively be provided by a man or a woman.

**Example**  
Employing a woman to counsel victims in a rape crisis centre.

7 The job needs to be held by a man because it is likely to involve duties outside of the United Kingdom in a country where laws or customs would prevent a woman from being able to carry out their duties effectively or at all.

**Example**  
Appointing a man where the job involves a posting to a Middle Eastern country where women are not allowed to drive.

8 The job is one of two to be held by a married couple.

**Example**  
Housekeeper/gardener or jobs involving the looking after of children where one person from each sex is required.

The following cases highlight situations in which employers have argued that employing either a man or woman was a genuine occupational qualification for the job.

In *Wylie v Dee* (1978) a woman was refused employment in a tailoring establishment because she would have to take men’s inside leg measurements. In these circumstances it was held that
Genuine occupational qualifications

being a woman was not a genuine occupational qualification for the job. Had she been offered the job her manager could have asked one of her male colleagues to deal with all measurements.

Similarly, in *Etam plc v Rowan* (1989) it was held to be discriminatory not to employ a man in a shop selling only female clothing. Etam’s argument had been that appointing women only was a genuine occupational qualification because men would not be able to assist customers in the changing rooms. The tribunal said that, whilst this may have been the case, the store manager could have asked female employees to perform those tasks whilst Mr Rowan was, for example filling shelves or dealing with customer queries. There was no genuine occupational qualification for Etam offering employment only to women.

**Sisley v Britannia Security Systems** (1983)

Sisley’s application for a job at Britannia’s security station was rejected. Britannia had a policy of employing women only. The women at the station worked 12-hour shifts. During rest breaks they undressed down to their underwear, rested and slept on the beds provided. Sisley claimed that he had been discriminated against because he was a man. Britannia claimed that for reasons of privacy and to preserve decency, being a woman was a genuine occupational qualification for the job.

*Held (EAT)* In the circumstances and to preserve decency and privacy employing a woman was a genuine occupational qualification.

**Lasertop Ltd v Webster** (1997)

Mr Webster had applied for a job in a women’s health club. He was told that only female staff would be employed and refused employment. He claimed that he had been discriminated against on the ground of his sex. The health club defended this claim, stating that being a woman was a genuine occupational qualification for the job.

*Held (EAT)* The employer was entitled to rely on this defence and that it was lawful to appoint a woman to preserve privacy and decency. It could not be said that the post-holder’s duties, which would include showing prospective club members around the premises, could be undertaken by male employees without undue disruption.

**Racial genuine occupational qualifications**

The Race Relations Act 1976 recognises four situations where an employer is able to discriminate by favouring someone from a particular race. In these situations being from a particular race is a genuine occupational qualification for the job.

Section 5 of the 1976 Act (Sch 9, para 1, EA 2010) states that it will be possible for an employer to discriminate where:

- The job involves participation in a dramatic performance or other entertainment in a role where a person of a particular racial group is required for reasons of authenticity.

**Example**

*Employing a black actor to play Othello.*
Genuine occupational qualifications

- The job involves participation as an artist’s or photographic model and a person from a particular race is needed for reasons of authenticity.
- The job involves working in a place where food or drink is provided for and consumed by the public in a particular setting in which a person of a particular race is required for reasons of authenticity.

**Example**
Advertising for a Chinese chef and waiting staff to work in a Chinese restaurant.

- The holder of the job provides persons of a particular racial group with personal services promoting their welfare, and those services can be most effectively provided by a person from that racial group.

**Example**
Advertising for or appointing an Asian welfare or legal adviser to provide advice in an area with a predominantly Asian population.

An illustration of the application of this last exception appears in the *Tottenham Green* case below.


The Centre had a policy of maintaining an ethnic balance between its staff and children. An Afro-Caribbean worker had resigned and the recruitment advertisement for a replacement specified that the position was only open to Afro-Caribbean applicants. Mr Marshall’s application was rejected on the basis that he was not Afro-Caribbean. He complained to the Industrial Tribunal alleging racial discrimination. The Centre stated that there had been no discrimination because they had a genuine occupational reason for advertising for an Afro-Caribbean worker. This was because the new employee would be expected to provide personal services, read and talk to the children in Afro-Caribbean dialect.

**Held (EAT)** The requirement that the worker was of Afro-Caribbean origin was a genuine occupational qualification for the job and so there had been no discrimination.

In *London Borough of Lambeth v Commission for Racial Equality* (1990) the Council advertised for two people to work in the housing department. The advertisements stated that the jobs were only open to Asian or Afro-Caribbean candidates. At the bottom of the advertisement there was a statement that it was made in accordance with s 5(2)(d) of the Race Relations Act (Sch 9, para 1, EA 2010), meaning that it was covered by the exception of genuine occupational qualification relating to welfare.

The Borough’s argument was that as half of its council-house tenants were from those particular racial groups, workers from the same groups would be most effective in the roles.

The Commission for Racial Equality complained to the Industrial Tribunal. The Commission argued that the jobs were not covered by the genuine occupational exclusion and so discriminated against people who did not belong to the ethnic groups mentioned in the advertisement. The tribunal agreed with them, saying that, for the type of work that the new employees would be expected to do, their racial group was irrelevant. The Borough had discriminated on the ground of race.
Racial ‘genuine occupational requirement’

Regulation 7 of the Race Relations Act 1976 (Amendment) Regulations 2003 inserted a new s 4A into the Race Relations Act 1976 (Sch 9, para 1, EA 2010). This section refers to exceptions for ‘genuine occupational requirements’ and states that the rules will not apply if:

(a) being of a particular race or particular ethnic or national origin is a genuine and determining occupational requirement;

(b) it is proportionate to apply that requirement in the particular case; and

(c) either –
   (i) the person to whom that requirement is applied does not meet it, or
   (ii) the employer is not satisfied, and in all the circumstances it is reasonable for him not to be satisfied, that that person meets it.

The Regulations amend s 5 of the 1976 Act, meaning that a genuine occupational qualification exception will only be available if a genuine occupational requirement is not.

OTHER DISCRIMINATORY ACTS

Both the Sex Discrimination Act 1975 and the Race Relations Act 1976 recognise other discriminatory offences. Employers may also discriminate by:

- using discriminatory job advertisements
- using discriminatory practices
- instructing others to discriminate
- pressurising another to discriminate
- aiding unlawful discriminatory acts.

Using discriminatory advertisements

Section 38 of the Sex Discrimination Act 1975 (s 39, EA 2010) and s 29 of the Race Relations Act 1976 (s 13, EA 2010) state that it is unlawful for employers to discriminate when advertising job vacancies. They state that it is unlawful:

- to publish or cause to be published an advertisement which indicates or might reasonably be understood to indicate an intention to sexually or racially discriminate.

Employers should take care not to discriminate when drafting advertisements to ensure that they do not include any words with sexual or racial connotations. Examples of potentially discriminatory advertisements are:

- those with pictures of existing employees who are all from one sex or race;
- those which use male connotations, for example, suggesting that the employer only intends to employ a man, e.g. ‘salesman’, ‘waiter’, ‘postman’.

An interesting example of a situation where an employer tried to get around this rule is the case of *Equal Opportunities Commission v Robertson* (1980). Here, the employer advertised for a ‘good bloke (or blokess to satisfy fool legislators)’. It was held that this advertisement could reasonably be understood to indicate that the advertiser intended to employ a man and so discriminated against women.

If there is a genuine occupational reason for advertising for applicants from a particular sex or race, this should be stated at the bottom of the advertisement. Any use of this exception should
be explained to the publishers before publication to ensure that they are fully aware of the reasons why the advertisement is drafted in a particular way.

This is because ss 38 and 29 impose liability both on the employer who drafts the advertisement and on those who publish it. Both parties are liable to be fined if discrimination can be proved. This means that newspapers or magazines which publish job advertisements could also be said to have discriminated by allowing a discriminatory advert to appear in their publication.

A publisher will have a defence to a discrimination claim if it can be shown that the publisher relied on a statement from the employer stating that there was no intention to discriminate.

Employers may also indicate in the advertisement that there is no intention to discriminate by stating that they are an ‘equal opportunities employer’.

Only the Equality and Human Rights Commission can bring proceedings for a breach of these sections. Individuals cannot complain to an Employment Tribunal on this basis, but they are able to use copies of advertisements in tribunal proceedings. Such copies would support a claim for discrimination after they have applied for a job and been rejected.

In Centrum voor Gelijkheid van Kansen en voor Racismebestrijding v Ferma Feryn NV (2008) the ECJ confirmed that a Belgian employer’s public statement that it would not recruit persons of Moroccan origin amounted to direct discrimination.

Using discriminatory practices

Section 37 of the Sex Discrimination Act 1975 (s 19, EA 2010) and s 28 of the Race Relations Act 1976 (s 19, EA 2010) state that it is unlawful for employers to use discriminatory practices. This would cover things such as having a policy of not employing women or people from ethnic minorities. Individuals cannot make a complaint to the Employment Tribunal under these sections. Actions can only be brought by the EHRC. The Commission may issue a non-discrimination notice to an employer warning it not to use discriminatory practices in the future. If an employer does not adhere to this notice, the commission may apply for a court injunction to prevent further discrimination. (See further Chapter 1 at pages 27 and 28.)

Instructing someone to discriminate

Section 39 of the Sex Discrimination Act 1975 (s 111, EA 2010) and s 30 of the Race Relations Act 1976 (ss 111 & 112, EA 2010) state that it is unlawful to instruct someone to discriminate. An example of this offence would be an employer instructing an employment agency not to send it workers from ethnic minorities.

Pressurising someone to discriminate

Section 40 of the Sex Discrimination Act 1975 (s 111, EA 2010) and s 31 of the Race Relations Act 1976 (ss 111 & 112, EA 2010) state that it is unlawful to pressurise or attempt to induce a person to discriminate. Employers should not offer an employee incentives to discriminate or threaten them with, for example, demotion or dismissal if they do not.

Aiding unlawful discriminatory acts

Section 42 of the Sex Discrimination Act 1975 (ss 111 & 112, EA 2010) and s 33 of the Race Relations Act 1976 (ss 111 & 112, EA 2010) state that it is unlawful to assist someone in the commission of discriminatory acts.
Are employers liable for the discriminatory actions of their employees?

ARE EMPLOYERS LIABLE FOR THE DISCRIMINATORY ACTIONS OF THEIR EMPLOYEES?

Section 41 of the Sex Discrimination Act 1975 (s 109, EA 2010) and s 32 of the Race Relations Act 1976 state that employers may be vicariously liable for the discriminatory actions of their employees. For a general discussion on vicarious liability, see Chapter 9 at page 349.

Generally, employers will only be liable for those actions of their employees which take place in the ‘course of their employment’. However, in discriminatory situations employers may be liable even where employees act outside the scope of their employment. An employer may be able to defend such a claim if he can show that he took all reasonable steps to prevent the discrimination from taking place.

The following cases highlight situations where employers have been held to be vicariously liable for the actions of their employees.

Burton & Rhule v De Vere Hotels (1996)

Ms Burton worked as a waitress at a De Vere Hotel. A ‘comedian’ began to make an after dinner speech while she was clearing tables. His ‘jokes’ and remarks were racially motivated and directed at herself and the other black waitresses. She became very distressed. She made a claim to the Industrial Tribunal alleging racial discrimination, stating that her employers had created a discriminatory environment by inviting the particular ‘comedian’ on to the premises.

Held The employers were responsible for the discrimination as they had known that this particular ‘comedian’ was likely to be offensive and even when alerted to the situation had done nothing to prevent him from continuing. They should have taken all reasonable steps to prevent the discrimination from either continuing or taking place.

Jones v Tower Boot Co Ltd (1997)

Jones, a 16-year-old boy of mixed race, was severely racially abused by his colleagues. They had called him names, stuck offensive notes to his back, assaulted him, branded him with a hot screwdriver, whipped him and generally made his time at work unbearable. He alleged that his employers were vicariously liable for the racial abuse.

Held For an employer to be vicariously liable for their acts, the employees have to be acting ‘in the course of their employment’. Whilst it was admitted that the acts here were not done within the ‘course of employment’, the Court of Appeal said that it would be wrong to allow racial harassment on this scale to go unpunished. In this case the actions were so severe that the employers were held to be vicariously liable.

The decision in Burton was disapproved by the House of Lords in Pearce v Governing Body of Mayfield School (2002). Here, the House of Lords suggested (obiter) that an employer will not be liable for unlawful sexual or racial discrimination unless the reason why it failed to prevent the harassment was related to the sex or race of the employee.

POSITIVE DISCRIMINATION

It is unlawful to positively discriminate in favour of one particular sex or racial group. This means that although advertisements may explicitly encourage applications from, for example ‘women, or persons from ethnic minorities’, an employer cannot refuse to send out job information to men or persons from a different racial group.

In relation to training while at work, s 45 of the Sex Discrimination Act 1975 (s 22, EA 2010) states that an employer can encourage people from one sex to train for a particular job if in the preceding 12 months the job has been done exclusively by people from the opposite sex. This exception also applies to situations where the number of persons from one sex doing a particular job is so small that it creates a sexual imbalance in the workforce.

Section 38 of the Race Relations Act 1976 (s 158, EA 2010) contains a similar provision allowing employers to encourage the training of employees from a particular racial group if in the preceding 12 months the job has been done exclusively by people from another racial group or where the number of ethnic employees are under-represented in the workplace. Where any such preferential treatment is afforded to those of one sex or race, employers should take care to document their reasoning carefully. An example of a case involving positive discrimination is Arnold v Barnfield College (2004). Here, the college had a deliberate policy of encouraging job applications from persons from ethnic minorities. The college appointed Mrs Akhtar who was of Pakistani origin rather than Ms Arnold who was white but had more experience. Ms Arnold brought a racial discrimination claim against the college. She alleged that the college had been affected by ‘unconscious discrimination’ from a desire to improve the proportion of staff from ethnic minorities.

The Employment Tribunal found that Ms Arnold had been discriminated against but on appeal the EAT rejected this decision, stating that there had been no discrimination. This was because the college was able to show that it had conducted interviews properly and that it had genuinely appointed Mrs Akhtar because she was found to be the most suitable candidate for the job.


EUROPEAN SEX DISCRIMINATION LAW

European law has had a major impact on our national sex discrimination law. Many of the sex discrimination cases referred to in this chapter have been referred to the European Court of Justice. In the context of discrimination law, the Equal Treatment Directive has widened the scope of our national law.

The Equal Treatment Directive of 1976 establishes the principle of equal treatment for men and women ‘as regards access to employment, vocational training and promotion, and working conditions’.

Article 2 of the Directive states that there shall be ‘no discrimination whatsoever on grounds of sex either directly or indirectly by reference in particular to marital or family status’.

Individuals are able to rely on the Directive in tribunal proceedings but only where their employer is a state authority. This decision stems from the case of Marshall v Southampton & South West Hampshire Area Health Authority (1986). In Foster v British Gas (1991) the European
Discrimination on the ground of pregnancy

Court of Justice held that state employers include local governments, health authorities, the police force, the post office and nationalised industries. Private-sector workers cannot use the Directive to claim against their employer.

However, under the principles laid down in *Francovich v Italian Republic* (1992), where employees suffer loss as a direct result of the government’s failure to implement the Directive, they may be able to sue the government for compensation.

The Directive has also been used to clarify the provisions surrounding retirement and pensions. In the *Marshall* case noted above the health authority dismissed Mrs Marshall because she had reached the normal retirement age of 60. The health authority was following the provision of its retirement policy and accepted that she would not have been dismissed had she been a man. Men were not forced to retire until they were 65. Marshall claimed discrimination under European law as at the time the Sex Discrimination Act 1975 did not cover retirement provisions. This situation has now been remedied by the Sex Discrimination Act 1986.

The European Court of Justice held that the health authority had breached the Equal Treatment Directive and discriminated against Marshall.

See also: *Barber v Guardian Royal Exchange Assurance Group* (1990).

Note also:
- Article 13 Amsterdam Treaty
- Framework Equal Treatment Directive 2000/78
- Race Discrimination Directive 2000/43

**DISCRIMINATION ON THE GROUND OF PREGNANCY**

It is unlawful to discriminate against a woman because she is pregnant or for any reason connected to her pregnancy. Discrimination on the ground of pregnancy will constitute direct sex discrimination. The following cases highlight situations in which discrimination on the ground of pregnancy has been alleged.

*Webb v EMO Air Cargo (UK) Ltd (No. 2)* (1995)

Ms Webb was employed on a temporary basis to cover the work of another employee who was on maternity leave. Webb then became pregnant and, as she would then need to take maternity leave and be unable to cover for the absent employee, she was dismissed. She alleged sex discrimination. The case was eventually referred to the ECJ and such discrimination was held to be in breach of the Equal Treatment Directive and capable of amounting to direct sex discrimination.


The Regulations inserted two new sections into the 1975 Act. Section 3A (s 18, EA 2010) relates to ‘discrimination on the grounds of pregnancy or maternity leave’, and s 6A (s 17, EA 2010) relates to ‘terms and conditions during maternity leave’.
Both sections have recently been amended by the Sex Discrimination Act 1975 (Amendment) Regulations 2008. Section 3A now states that:

’a person discriminates against a woman if –

(a) at a time in a protected period, and on the ground of the woman’s pregnancy, the person treats her less favourably, or

(b) on the ground that the woman is exercising or seeking to exercise, or has exercised or sought to exercise, a statutory right to maternity leave, the person treats her less favourably.’

The ‘protected period’ begins when the woman becomes pregnant and ends at the time at which her maternity leave ends.

The Regulations have put into statute form what had already been held in the courts in cases such as Webb, namely that it is unlawful to discriminate against a woman because she is pregnant or for a reason connected to her pregnancy.

The 2005 Regulations specifically extend protection to women who miscarry before becoming entitled to maternity leave.

There is now no requirement for a comparator in pregnancy discrimination cases. This requirement was removed by the 2008 amendment regulations which came into force on 6 April 2008.

RELEVANT CODES OF PRACTICE

The Equal Opportunities Commission and the Commission for Racial Equality both published codes of practice with the objective of preventing discrimination and promoting equal opportunities in the workplace. Whilst the codes do not contain any legal sanctions, they can be used as evidence in tribunal proceedings. Even though the roles of the EOC and the CRE have been taken over by the Equality and Human Rights Commission, their original codes of practice are not obsolete. Section 42(3)(a) of the Equality Act 2006 states that codes issued prior to the formation of the EHRC continue to have effect until the Commission requests that the Secretary of State revoke them. At the time of writing no such request has been made. The EHRC can revise the existing codes and is also able to issue new codes of practice.

EOC code (1985)

This code is referred to as the ‘Code of Practice for the elimination of discrimination on the grounds of sex and marriage and the promotion of equal opportunity in employment’.

It provides guidance to employers, trade unions and employment agencies on measures that can be taken to achieve equality in the workplace. It provides guidance on advertising job vacancies, selection methods, interviews, the use of appraisal schemes and disciplinary and grievance procedures. It also provides guidelines on the drafting of equal opportunities policies and on the ways in which equal opportunity in the workplace can be monitored. The EOC also issued the ‘Gender Equality Duty’ code of practice in 2007.

CRE code (2006)

This code is referred to as the ‘Statutory Code of Practice on Racial Equality in Employment’. It came into force on 6 April 2006.
Sexual and racial harassment

The Code provides guidance to employers, trade unions and employment agencies on measures that can be taken to promote racial equality in the workplace. It provides advice on how to implement an equal opportunities policy and how best to advertise job vacancies, interview candidates and implement disciplinary and grievance procedures.

The 2006 Code replaced the original 1983 code of practice ‘for the elimination of racial discrimination and the promotion of equality of opportunity in employment’.

The CRE has also produced a second code of practice aimed at public authorities. This gives guidance in connection with their new general duties under the Race Relations (Amendment) Act 2000. This code was published in 2002. The 2006 Code remains the main source of guidance for employers.

SEXUAL AND RACIAL HARASSMENT

The law also recognises situations in which discrimination occurs in the form of sexual and racial harassment. Until recently there was no statutory definition of what types of action can amount to sexual or racial harassment but various cases and, in relation to sexual harassment, European law did provide some guidelines.

Historically, sexual or racial harassment could amount to direct discrimination. This is still the case where the harassment is on the grounds of colour/nationality. If an employee wants to bring a claim on the grounds of colour/nationality, he must show that he has suffered less favourable treatment and that this treatment has caused him to suffer a detriment.

The following cases highlight those situations in which both sexual and racial harassment has been alleged. As noted above, the situation remains the same with regards to complaints involving harassment on the basis of colour or nationality.

However, with regard to sexual harassment and harassment on the grounds of race, ethnic or national origin, regulations have recently inserted new ‘harassment’ definition sections into both the Sex Discrimination Act 1975 and the Race Relations Act 1976. These developments are outlined at the end of this section.

Porcelli v Strathclyde Regional Council (1986)

Ms Porcelli worked for the Council as a laboratory technician. She had been subjected to a persistent campaign of verbal and physical sexual harassment by two of her male colleagues. They wanted her to transfer to another department. She claimed that she had been discriminated against because she was female. The Council argued that she had been treated badly, not because she was a woman but because the other employees did not like her.

Held: The men had sexually harassed Porcelli because she was a woman and the actions of the other employees would not have been the same had she been an equally disliked man. She had been treated less favourably on the grounds of her sex.

In Bracebridge Engineering v Darby (1990) the EAT held that one act of harassment could constitute ‘suffering a detriment’. Consequently, one isolated incident may amount to harassment in the same way as would a continued and lengthy campaign. In Bracebridge, a worker had been sexually assaulted by two supervisors. Bracebridge Engineering had argued that a single incident could not amount to harassment. The EAT disagreed with this, saying that ‘whether or not harassment is a continuing course of conduct, there was here an act which was an act of discrimination against a woman because she was a woman’.
Sexual and racial harassment

The victim of harassment in claims involving harassment on the basis of colour or nationality must show that he has suffered a detriment. In other words, he must show that the harassment has disadvantaged him in some way. This principle is the same as that in general discrimination claims and could relate, for example, to an employee having been refused promotion, training or being dismissed.

Various forms of sexual and racial harassment may be discriminatory, for instance:

- suggesting that sexual activity may help to further a career, or that refusal may mean that an employee is dismissed, or that it might hinder his career;
- unwelcome sexual attention;
- sustained obscene racist language, insults or discriminatory behaviour;
- the display of sexually suggestive or racially discriminatory material in the workplace.

If an employer has reason to believe that sexual harassment is taking place it has a duty to investigate the matter, and to take some action if necessary. It should not wait for a formal complaint to be made. See: Reed & Bull Information Systems Ltd v Stedman (1999).

There have been several European developments in relation to sexual harassment. In 1991 the European Commission issued a Recommendation on the Protection of the Dignity of Women and Men at Work. It does not impose direct legal obligations but encourages the development of policies to prevent and combat sexual harassment.

The code of practice on Protecting the Dignity of Women and Men at Work attached to the Recommendation defines sexual harassment as ‘unwanted conduct of a sexual nature, or other conduct based on sex affecting the physical, verbal or non-verbal conduct’.

As noted above, regulations have inserted new ‘harassment’ definition sections into both the Sex Discrimination Act 1975 and the Race Relations Act 1976. Regulations 5 and 6 of the Race Relations Act 1976 (Amendment) Regulations 2003 inserted a new s 3A (s 26, EA 2010) and amended s 4 of the 1976 Act (s 39, EA 2010). Section 3A(1) of the 1976 Act provides that:

‘an employer will be unlawfully discriminating against a job applicant or employee if on grounds of race or ethnic or national origins, he engages in unwanted conduct which has the purpose or effect of

(a) violating that other person’s dignity, or

(b) creating an intimidating, hostile, degrading, humiliating or offensive environment for him.’

The conduct will be regarded as having the above effect if having regard to all the circumstances it should reasonably be considered as having that effect.

Regulation 5 of the Employment Equality (Sex Discrimination) Regulations 2005 inserted a new s 4A into the Sex Discrimination Act 1975. Section 4A (as amended by the SDA 1975 (Amendment) Regulations 2008) provides that:

’a person subjects a woman to harassment if –

(a) he engages in unwanted conduct that is related to her sex or that of another person that has the purpose or effect –

(i) of violating her dignity, or

(ii) of creating an intimidating, hostile, degrading, humiliating or offensive environment for her,

(b) he engages in any form of unwanted verbal, non-verbal or physical conduct of a sexual nature that has the purpose or effect –

(i) of violating her dignity, or

(ii) of creating an intimidating, hostile, degrading, humiliating or offensive environment for her, or

(continued...
Discrimination on the ground of sexual orientation

(c) on the ground of her rejection of or submission to unwanted conduct of a kind mentioned in paragraph (a) or (b), he treats her less favourably than he would treat her had she not rejected, or submitted to, the conduct.’

The conduct will be regarded as having had the above effect if having regard to all the circumstances it should reasonably be considered as having that effect.


OTHER HARASSMENT

The Criminal Justice and Public Order Act 1994 created a new offence of intentional harassment. This offence appears as the new s 4A inserted into the Public Order Act 1986 and carries a penalty of up to six months’ imprisonment or a fine not exceeding £5,000.

This offence covers harassment on the grounds of sex, race, disability, age and sexual orientation. This means that workplace harassment is covered and that employees who suffer harassment from colleagues or employers are now able to report the matter to the police.

The Protection from Harassment Act 1997 created two new criminal offences. This Act was primarily intended as an ‘anti-stalking’ measure and in some situations victims may suffer this form of harassment by work colleagues. The Act also allows the victim to apply for an injunction to prevent further harassment.

DISCRIMINATION ON THE GROUND OF SEXUAL ORIENTATION - THE EMPLOYMENT EQUALITY (SEXUAL ORIENTATION) REGULATIONS 2003

Prior to the implementation of the Employment Equality (Sexual Orientation) Regulations 2003, it was lawful for an employer to discriminate solely on the basis of a person’s sexual orientation. The Regulations came into force on 1 December 2003. Following this time, employees who are subjected to homophobic abuse at work will not have to undertake the virtually impossible task of trying to present their case under the Sex Discrimination Act 1975.


The Regulations make it unlawful to discriminate against a straight person because they are straight or against a gay man or lesbian because they are a homosexual. There are two exceptions, namely where being of a particular sexual orientation is a genuine occupational requirement or where national security is at risk. Prior to 2003 some successful claims were made by referring cases to the European Court of Justice and the ECHR under the Equal Treatment Directive and the Convention on Human Rights but the decisions both from the courts and tribunals do not form any uniform set of rules or guidelines.

The pre-2003 case law is outlined here mainly for historical reasons but the decisions remain interesting in that we are able to follow the reasoning of the judges at the time. Secondly, the 2003 Regulations only apply to discrimination on the basis of sexual orientation in the employment field. Consequently, the pre-2003 case law is still relevant in cases of discrimination on the grounds of sexual orientation in other fields. Note, however, that in relation to employment matters it is now unlawful to discriminate on the basis of sexual orientation. The Equality Act 2006 (Sexual Orientation) Regulations 2007 now cover non-employment-related sexual orientation discrimination.

In Smith v Gardner Merchant Ltd (1996) the EAT held that discriminating against a person for being either a male homosexual or a lesbian was discrimination on the ground of sexual
Discrimination on the ground of sexual orientation

orientation and not on the ground of sex. Consequently, as neither the Sex Discrimination Act 1975 nor the Equal Treatment Directive recognised sexual orientation, they provided no protection.

\[ R \text{ v Ministry of Defence, ex parte Smith} (1996) \]

The tribunal was asked to consider whether the Ministry of Defence had discriminated against members of the armed forces when it dismissed them on the ground of their homosexuality. In 1994 the Ministry had reaffirmed its policy that being homosexual was incompatible with army life and that persons known to be gay would be dismissed. A soldier who had been discharged argued that this decision breached the Equal Treatment Directive.

**Held (CA)** Appeal dismissed because the Ministry’s policy could not be questioned and the Directive was not intended to protect discrimination on the ground of sexual orientation.

A year later, the High Court held that it was likely that the Equal Treatment Directive did apply to homosexuals. In \[ R \text{ v Secretary of State for Defence, ex parte Perkins} (1997) \] a Royal Navy officer was discharged from the navy when he revealed that he was homosexual. However, in July 1998 the European Court of Justice ruled that such dismissals were not discriminatory as they did not fall under the remit of the Equal Treatment Directive: See: \[ R \text{ v Secretary of State for Defence, ex parte Perkins (No. 2)} (1998) \].

In \[ Grant \text{ v South West Trains} (1998) \] Ms Grant was denied travel concessions for her lesbian partner. Her male predecessor had been given travel concessions for his female partner, regardless of whether they were married. The European Court of Justice held that stable single-sex relationships did not have to be treated in the same way as marriages or relationships between men and women.

On an appeal hearing of \[ Smith \text{ v Gardner Merchant Ltd} (1999) \] the CA held that the Sex Discrimination Act 1975 would apply to a male homosexual who had been harassed because he was gay. However, it would only apply if he could show that a female homosexual would not have been treated in the same way. In the Scottish case of \[ MacDonald \text{ v Ministry of Defence} (2001) \] it was held that the SDA did not apply to issues of sexual orientation. Mr MacDonald was a RAF Flight lieutenant who had been dismissed because he was homosexual. Whilst it was agreed that he had a viable action under articles 8 and 14 of the Human Rights Convention, it was said that he had no claim under the 1975 Act. The court reiterated the point that the 1975 Act refers to discrimination against a person because of their gender and not their sexual orientation. These cases provide an interesting analysis of the confusion surrounding the law in this area.

\[ Pearce \text{ v Governing Body of Mayfield Secondary School} (2002) (CA) \]

Ms Pearce, a homosexual teacher, had been subjected to regular homophobic taunts and abuse by pupils. These included students referring to her as a ‘lesbian’ and a ‘dyke’. She failed in her claim that the use of those words to describe her (as opposed to gender neutral words such as ‘gay’) was discrimination on the ground of her sex. She had alleged this even though she could not show that she had been treated less favourably than a male homosexual. The Human Rights Act was not in force at the time of her original complaint and so the court held that it could not take it into account.

**Held** Ms Pearce failed in her claim; the Sex Discrimination Act 1975 did not apply to questions of sexual orientation.

Both \[ Pearce \text{ and MacDonald} \] were appealed to the House of Lords. In \[ Pearce \text{ v Governing Body of Mayfield School} (2002) \] and \[ MacDonald \text{ v Advocate General for Scotland} (2003) \] the House of
Discrimination on the ground of sexual orientation

Lords made it clear that the Sex Discrimination Act 1975 made it unlawful to discriminate on the basis of gender only and that this did not cover discrimination on the ground of sexual orientation.

The 2003 Regulations

The Regulations specify four types of discrimination: direct discrimination, indirect discrimination, victimisation and harassment. They protect the rights of workers and apply to all employers/businesses whatever their size and whether in the public or private sector. The Regulations apply to recruitment, terms and conditions, pay, promotion, transfers and dismissals. The Regulations are broadly similar in structure to the Sex Discrimination Act 1975 and the Race Relations Act 1976 and implement the sexual orientation strands of the Framework Directive 2000/78/EC.

The scope of the Regulations is wide ranging. Although the law seeks mainly to protect gay men, lesbians and bisexuals, the Regulations also protect every individual from discrimination based on their sexuality. Homosexuals, heterosexuals and bisexuals are protected against discrimination but other forms of sexual orientation such as sadomasochism or paedophilia are not covered. The Regulations do not cover sexual practices or sexual conduct. The Regulations also protect against discrimination on the grounds of perceived, as well as actual, sexual orientation. The actual sexual orientation of a complainant to the Employment Tribunal is irrelevant. This point was discussed in the following case.

**English v Thomas Sanderson Blinds** (2009)

Mr English had been harassed at work on the basis of his perceived sexual orientation. He alleged that he had been subjected to homophobic banter from his colleagues for some time. This was based on the fact that he had attended public school and lived in Brighton. He was a heterosexual man and his colleagues were aware of the fact that he was married and had three children. Both the Employment Tribunal and the EAT held that the 2003 Regulations did not cover this situation.

**Held (CA)** The CA held that the crucial point was that English had been repeatedly taunted as though he were gay. His actual or perceived sexual orientation was irrelevant. The 2003 Regulations were held to cover this situation.

See also: **Brian Lacey v University of Ulster and Paul Davidson** (2007).

**What is sexual orientation? – regulation 2(1) (s 12, EA 2010)**

Regulation 2 acts as an interpretation section. Regulation 2(1) states that:

‘sexual orientation’ means a sexual orientation towards –

(a) persons of the same sex;
(b) persons of the opposite sex; or
(c) persons of the same sex and of the opposite sex.

**Direct sexual orientation discrimination – regulation 3(1)(a) (s 13, EA 2010)**

Regulation 3(1)(a) states that:

For the purposes of these Regulations, a person (‘A’) discriminates against another person (‘B’) if –

(a) on grounds of sexual orientation, A treats B less favourably than he treats or would treat other persons.
Discrimination on the ground of sexual orientation

Direct discrimination is overt or blatant discrimination. It occurs where a person treats another less favourably on the ground of their sexual orientation.

**Example**

Victoria is an accountant. She is interviewed for a new position. Whilst being interviewed she mentions that she has a same-sex partner. Although she has all of the skills required for the job the firm decides not to offer her the position because she is a lesbian.

Direct discrimination may also be based on the ground of a person’s perceived sexual orientation. Direct discrimination may also occur when a person is treated less favourably because they associate with gay friends, or because they refuse to carry out an employer’s instruction to discriminate against homosexual persons. In bringing a claim the individual does not have to declare their sexual orientation. They only have to show that they were treated less favourably than a heterosexual person because the employer believed them to be a homosexual.

Direct discrimination cannot be justified. In very limited circumstances an employer may be able to discriminate where a genuine occupational requirement can be shown to apply (see below).

The following cases highlight situations in which direct discrimination on the basis of sexual orientation has been alleged.

**Mann v (1) BH Publishing Ltd and (2) Tim Henderson** (2006)

Here, the claimant had only been employed for two weeks. His sales director had mimicked his South African accent and Mann argued that this behaviour had created a homophobic atmosphere within the workplace. Even after he complained to his manager the taunts did not stop and he was eventually unable to return to work. He alleged that he had been discriminated against on the basis of his sexual orientation.

**Held** The ET upheld complaints of both discrimination and harassment on the grounds of sexual orientation. It was said that initially the actions could have been taken to be non-discriminatory but that once the manager had been informed that Mann considered the conduct to be linked to his sexual orientation the actions became discriminatory.

**Jonah Ditton v CP Publishing Ltd** (2007)

Here, Ditton had only worked for his employer for eight days during which he was subjected to homophobic abuse from a company director. He was dismissed by the agency who had been involved in his recruitment after the director referred to him as ‘psychologically unbalanced’. He was then refused access to the work premises to collect his belongings and was threatened with physical violence.

**Held** Ditton was successful in his claim for both discrimination and harassment. He had been discriminated against on the basis of his sexual orientation. He was awarded £118,000 in compensation.

Discrimination on the ground of sexual orientation

Indirect sexual orientation discrimination - regulation 3(1)(b) (s 19, EA 2010)

Regulation 3(1)(b) states that:

(1) a person ('A') discriminates against another person ('B') if –

(b) A applies to B a provision, criterion or practice which he applies or would apply equally to persons not of the same sexual orientation as B, but –

(i) which puts or would put persons of the same sexual orientation as B at a particular disadvantage when compared with other persons,

(ii) which puts B at that disadvantage, and

(iii) which A cannot show to be a proportionate means of achieving a legitimate aim.

Example

A brewery advertises for a couple to run a pub but stipulates that the couple must be married. This preference for a married couple would be a 'provision, criterion or practice' which, although not on the face of it discriminatory, would put homosexual couples at a particular disadvantage as they cannot marry in the legal sense of the word. The brewery would have to show that the requirement pursued a legitimate aim and that it was proportionate to apply it in this instance.

Indirect discrimination is covert or hidden discrimination. If the person claiming indirect discrimination can show that they have suffered a disadvantage, then the provision, criterion or practice is indirectly discriminatory. Indirect discrimination is unlawful whether it is intentional or not.

Indirect discrimination will not be unlawful if it can be shown to be justified. To justify its actions, an employer must show that there was a legitimate aim, e.g. a real business need and that the practice was proportionate to that aim. The practice will be proportionate to the aim if it is necessary and there are no alternative means available.

Victimisation - regulation 4 (s 27, EA 2010)

Regulation 4(1) states that:

A person ('A') discriminates against another person ('B') if he treats B less favourably than he treats or would treat other persons in the same circumstances, and does so by reason that B has –

(a) brought proceedings against A or any other person under these Regulations;

(b) given evidence or information in connection with proceedings brought by any person against A or any other person under these Regulations;

(c) otherwise done anything under or by reference to these Regulations in relation to A or any other person; or

(d) alleged that A or any other person has committed an action which (whether or not the allegation so states) would amount to a contravention of these Regulations, or by reason that A knows that B intends to do any of those things, or suspects that B has done or intends to do any of them.

An employer will not have victimised an individual where the allegation was false and not made or given in good faith. Victimisation on the basis of a person's sexual orientation takes place where they are treated less favourably because of something they have done, e.g. the person may have made a formal discrimination complaint or given evidence in a tribunal case.
Harassment – regulation 5 (s 26, EA 2010)

Regulation 5 states that:

a person (‘A’) subjects another person (‘B’) to harassment where, on grounds of sexual orientation, A engages in unwanted conduct which has the purpose or effect of –

(a) violating B’s dignity; or
(b) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.

Conduct will be regarded as violating a person’s dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment if, having regard to all the circumstances, it should reasonably be considered as having that effect.

Example

Helen gave evidence for her colleague Clare in a sexual orientation discrimination tribunal claim. She is then branded a troublemaker by her boss and her application for promotion is rejected even though she has all of the required experience/skills for the position. Her boss tells her that he would not promote troublemakers and that she would have been promoted had she not given evidence for Clare. Here, Helen has been victimised.

Example

A male worker who has a same-sex partner is continually referred to by female nicknames, which he finds humiliating and distressing. This would amount to harassment.

Behaviour that is offensive, frightening or distressing is likely to be termed harassment. The Regulations apply equally to the harassment of heterosexual people as they do to the harassment of lesbians, gay men and bisexual persons. Employers may be held to be responsible for any harassment carried out by their employees (see regulation 22). Individual employees may also be liable for any harassment that they themselves instigate.

The following case highlights a situation where discrimination on the ground of sexual orientation was alleged.


When her employers found out that she was a lesbian, Ms Robertson saw their attitude towards her change. She was spoken to in a derogatory manner and comments were made about her sexuality. Mr Norris, a gay man, claimed that he was also singled out for different treatment because he was gay. Whilst intervening in an argument between Ms Robertson and their employers he was grabbed by the arm and pushed down a corridor.

Held Both parties had been discriminated against on the basis of their sexual orientation. The tribunal held that Norris had been subjected to unwanted conduct which violated his dignity and created an intimidating, hostile, degrading, humiliating and offensive working environment. He had suffered harassment due to his sexual orientation.

Discrimination on the ground of sexual orientation

**Stages at which discrimination may take place**

Regulation 6 states that it is unlawful for an employer to discriminate against an individual in:

(a) the arrangements he makes for determining to whom he should offer employment;
(b) the terms on which he offers that person employment;
(c) refusing to offer, or deliberately not offering him employment;
(d) the terms of employment in existence during employment;
(e) the opportunities which he affords for promotion, transfer, training, or the receipt of any other benefit;
(f) refusing to afford or deliberately not affording him such opportunity; or
(g) in dismissing him, or subjecting him to any other detriment.

**Discrimination after the employment has ended – regulation 21 (s 108, EA 2010)**

Regulation 21 states that it is unlawful for an employer to discriminate against or harass a former employee after the working relationship between them has ended. The act of discrimination or harassment must be closely linked to the former relationship.

**Genuine occupational requirements – regulation 7 (Sch 9, paras 1 & 2, EA 2010)**

Regulation 7 states that there are two very limited situations in which an employer may discriminate against a person on the basis of their sexual orientation. These are where:

(a) having regard to the nature of the employment being of a particular sexual orientation is a genuine and determining occupational requirement and it is proportionate to apply that requirement, and
(b) the employment is for the purposes of any organised religion.

In relation to (b), an employer may discriminate on the ground of a person’s sexual orientation either to comply with particular religious beliefs or to avoid a situation in which other workers’ beliefs conflict with that person’s sexual orientation. In *R (Amicus – MSF Section) v Secretary for Trade and Industry* (2004) the unions applied for judicial review on the basis that the 2003 Regulations did not properly implement the EC Equal Treatment Directive. Their claim was unsuccessful. Leave to appeal to the Court of Appeal was granted but the appeal was withdrawn.

In *Reaney v Hereford Diocesan Board of Finance* (2007) the claimant had applied for a job as a Diocesan Youth Officer. He was a homosexual man with considerable experience in Christian Youth Ministry work. The Bishop of Hereford vetoed his appointment because of his homosexuality. Reaney made it known that he was not in a relationship at the time and that he did not intend to enter into one in the future. He was the only suitable candidate for the job but the Bishop still vetoed the appointment. Reaney claimed that he had been discriminated against on the basis of his sexual orientation. The Diocese argued that the appointment fell within the exception ‘for the purpose of organised religion’ within regulation 7. It was held that he had been discriminated against. Even though the post fell within the small number of jobs outside the clergy that were ‘for the purpose of organised religion’ the refusal to appoint him because he was a homosexual was direct discrimination. He was awarded £47,000 in compensation.

**National security – regulation 24 (s 192, EA 2010)**

This regulation states that an employer may lawfully discriminate on the basis of sexual orientation where it does so to safeguard national security. Its actions must be justified.
Making a sexual orientation discrimination claim to the Employment Tribunal

A person who believes that they have been discriminated against on the ground of their sexual orientation may make a claim to the Employment Tribunal. The claim must be made within three months of the act complained of. The Regulations provide for a questionnaire procedure which allows an applicant to ask their employer/prospective employer to provide information prior to the tribunal hearing. If the claimant is successful the Employment Tribunal may make a declaration or recommendation stating that the employer should take action to prevent or reduce the impact of the discrimination. The tribunal may also make a compensatory award. There is no limit set on the amount of compensation that may be awarded.

Acas has produced a useful guide to the Regulations: Sexual Orientation and the Workplace – Putting the Employment Equality (Sexual Orientation) Regulations 2003 into practice. The Stonewall website also contains a wealth of useful information on this form of discrimination. This can be accessed at www.stonewall.org.uk. In 2009 the Equality and Human Rights Commission produced a research document on sexual orientation discrimination. It is entitled ‘Beyond tolerance: making sexual orientation a public matter’. This document is available via the Commission’s website.

Civil partnerships

The Civil Partnership Act 2004 came into force on 18 November 2004. Under the provisions of this statute, same-sex couples are able to obtain legal recognition of their relationship by registering as ‘civil partners’.

Discrimination against transsexuals

Tribunals have also had to consider cases concerning discrimination against transsexuals. In the case of P v S and Cornwall County Council (1996) P was a manager at a council-run educational department. S was its Chief Executive. P had been born male, but had announced her intention to undergo a sex change. She was then dismissed and claimed that it was because she had made the announcement. The Council argued that the real reason for P’s dismissal was redundancy.

It was held that the true reason behind P’s dismissal was her intention to undergo a sex change and as such she had been discriminated against. However, she was unable to make a claim as she was not protected by the Sex Discrimination Act 1975. P was not protected by the 1975 Act because it only referred to people of one sex or another and not those in a transsexual condition. The case was referred to the ECJ which held that the Equal Treatment Directive did cover gender reassignment. This meant that P was eventually successful in her claim. The Council was in breach of the Equal Treatment Directive when it dismissed her on the ground of her gender reassignment.

In the case of Chessington World of Adventure v Reed (1997) the Employment Appeal Tribunal stated that the Sex Discrimination Act 1975 would apply to cases involving discrimination against transsexuals.

The law on such discrimination is now covered by the Sex Discrimination (Gender Reassignment) Regulations 1999 (1999/1102). These Regulations inserted a new s 2A into the Sex Discrimination Act 1975. The Act now states that it is unlawful to discriminate against a person who ‘intends to undergo, is undergoing, or has undergone gender reassignment’. It is unlawful to treat them less favourably on the basis of their gender reassignment. If a person is going to be absent from work because they are having treatment which will lead to gender reassignment they should not be treated any less favourably than they would have been had they been absent due to illness or injury.

There are exceptions to this rule which relate to genuine occupational qualifications. If being a man or woman is a genuine occupational qualification for a job – for example, the job involves performing intimate physical searches subject to statutory powers – then to refuse to employ a
Transsexual will not be discriminatory. Details on valid genuine occupational qualifications can be found in ss 7A–7B of the 1975 Act.

In July 2002 the European Court of Human Rights ruled that transsexuals should be legally recognised as having changed sex for all purposes. In December 2002 the government announced that it was committed to changing the law in this area to bring it into line with the European Convention on Human Rights. This was achieved by the introduction of the Gender Recognition Act 2004. This Act came into force on 1 July 2004. Transsexuals are now able to apply for the right (from the date of recognition) to marry in their acquired gender, claim benefits and state pensions at the appropriate age, and request an updated birth certificate.

**THE IMMIGRATION, ASYLUM AND NATIONALITY ACT 2006**

If an employer employs someone who does not have the right to remain in the United Kingdom or does not have a work visa the employer may be guilty of an offence under this Act. All workers must have ‘permission to work’ in order to work legally in the United Kingdom. The Immigration, Asylum and Nationality Act 2006 received Royal Assent on 30 March 2006. This Act repealed and replaced s 8 of the Asylum and Immigration Act 1996. The 2006 Act imposes civil penalties on employers who employ illegal workers. An employer found to be employing an illegal worker will be liable to pay a penalty of up to £2,000 per illegal employee. The Act also introduces a new criminal offence of employing a person knowing that they are not legally entitled to work in the United Kingdom. The maximum penalty for contravention of this provision is two years’ imprisonment and/or a fine.

It is not discriminatory for an employer to ask a job applicant or employee to provide evidence of his residence or work visa. Work visas were referred to as ‘work permits’ until this term was abolished at the end of November 2008. A worker must now have either an old work permit visa or a new points-based work visa. An employer may be able to defend a charge under the Act if it is able to show that such evidence (which appeared to be legitimate) was shown to it before the person was employed/during employment.

**Dhatt v McDonald’s Hamburgers Ltd** (1991)

McDonald’s asked Mr Dhatt, an Indian, to provide a work permit. This would not have been required of a British applicant.

*Held (CA)* This request was not discriminatory but justified in light of British immigration laws.


When the claimant stated on her job application that she was Nigerian her prospective employer asked her to produce her passport. She claimed racial discrimination.

*Held (EAT)* Her claim was unsuccessful. It was not discriminatory for the employer to ask for information which proved that the claimant was legally entitled to work in the United Kingdom.

In 2009 the government introduced new proposals to simplify immigration law. A draft Immigration Bill was published in November 2009. At the time of writing there is no information as to when this Bill will enter the Parliamentary process. Under the changes contained within the Bill the five current application categories available to migrants will be replaced by one clear concept, that of ‘permission to be in the United Kingdom’.

DISABILITY DISCRIMINATION

The Disability Discrimination Act 1995 has been amended by the Disability Discrimination Act 1995 (Amendment) Regulations 2003. These regulations came into force on 1 October 2004. There has also been an addition to legislation in this area in the form of the Disability Discrimination Act 2005.

The Employment Tribunals Service annual report (2008/9) states that there were 6,578 disability discrimination claims during that year. The Acas annual report (2008/9) states that dealt with 3,941 claims involving alleged disability discrimination. Most cases concerned dismissal, followed by recruitment and the duty of employers to make reasonable adjustments to the working environment to accommodate a disabled person.

The Disability Discrimination Act 1995 is the main statute on disability discrimination but there is also additional guidance to be found in the:

- Disability Discrimination Act 1995 (Amendment) Regulations 2003;
- Guidance on matters to be taken into account in determining questions relating to the definition of disability (in force 1 May 2006); and

As noted above, the 2003 Amendment Regulations made significant changes to the 1995 Act. These regulations implement the disability discrimination provisions within the EC Equal Treatment Framework Directive (2000/78). The guidance notes provide clear information on both the 1995 and 2005 Acts (plus relevant amendments), and the new code of practice replaces the original 1996 code to take into account the new legislation. (The code of practice is discussed further at page 88.)

The scope of the Disability Discrimination Act 1995

The 1995 Act recognises five forms of discrimination:

1. direct discrimination
2. disability related discrimination
3. failure to make reasonable adjustments
4. victimisation
5. harassment.

The Act differs from the sex and race legislation in that it does not recognise indirect discrimination. The Act only protects disabled people. This means that a non-disabled person cannot rely on it to show that discrimination has occurred. An employer is able to positively discriminate in favour of disabled people.

What will be classed as a ‘disability’?

A person cannot make a discrimination claim under the 1995 Act unless classed as a ‘disabled person’ under the definition in s 1. Section 1 (s 6(1) & (2), EA 2010) of the 1995 Act defines a disabled person as one who:

... has a physical or mental impairment which has a substantial and long-term adverse effect on his ability to carry out normal day-to-day activities.

Both physical and mental conditions are recognised. To have a substantial effect the condition must not be minor or trivial and must have a long-term adverse effect on the employee’s ability
Disability discrimination

to perform daily activities. This means that it must be likely to last either for 12 months or more or for the rest of a person’s life. In Abadeh v British Telecommunications plc (2001) it was held that the issue of whether a condition has a ‘substantial’ effect is a question for the tribunal and not a doctor. This does not mean, however, that the tribunal can ignore medical evidence. Day-to-day activities include things such as the use of memory, concentration, speech, hearing, eyesight, mobility and dexterity.

Rowley v Walkers Nonsuch Ltd (1997)
Rowley had suffered a back injury at work and had to go on sick leave for six months.

Held This injury did not constitute a ‘disability’ under the 1995 Act. It did not have a substantial and long-term adverse effect on Rowley’s ability to carry out daily activities.

It used to be the case that a mental illness had to be ‘clinically well recognised’ in order for it to be regarded as a mental impairment for the purposes of the 1995 Act. The Disability Discrimination Act 2005 removed this requirement from 5 December 2005. This Act also widened the definition of those persons who will be classed as having a disability. The following people are deemed to meet the definition of ‘disability’ without having to show that they have an impairment that has (or is likely to have) a substantial, adverse, long-term effect on the ability to carry out normal day-to-day activities:

- those with cancer, HIV/Aids, or multiple sclerosis
- those certified blind or partially sighted.

Anyone whose condition does not come under the above will have to show that their particular condition meets the requirements as outlined below.

Both the Disability Discrimination (Meaning of Disability) Regulations 1996 and the 2006 guidance notes define what types of condition will and will not constitute a disability. The following conditions will not be regarded as impairments for the purposes of the 1995 Act:

- addiction to alcohol, nicotine or drugs;
- hay fever;
- pyromania (tendency to set fires);
- kleptomania (tendency to steal);
- tendency to physical or sexual abuse of other persons;
- exhibitionism;
- voyeurism; and
- disfigurements which consist of a tattoo, non-medical body piercing or something attached through piercing.

In Morgan v Staffordshire University (2002) it was held that suffering from ‘stress’ did not amount to a disability. However, there is now no need for ‘mental illness’ to be clinically well recognised to qualify as a ‘disability’ for the purposes of the Act. This means that a person may be able to claim on the basis of having a stress-related illness. In Secretary of State for the Department for Work and Pensions v Alam (2009) a lack of concentration, loss of temper and occasional severe headaches were accepted as amounting to stress-related disability for the purposes of the 1995 Act. In Quinn v Schwarzkopf (2002) it was held that suffering from rheumatoid arthritis did constitute a disability. In Hewett v Motorola Ltd (2004) it was held that suffering from
autism amounted to having a disability for the purposes of the 1995 Act. In *Whitbread Hotel Co Ltd v Bayley* (2006) and *Paterson v Commissioner of Police of the Metropolis* (2007) dyslexia was held to qualify as a ‘disability’ for the purposes of the Act. In *Goodwin v The Patent Office* (1999) general guidelines were set out in order to assist the tribunal. These state that the tribunal should ask:

1. whether the applicant has a mental or physical impairment;
2. whether the impairment affects the applicant’s ability to carry out normal day-to-day activities;
3. whether the adverse effect is substantial;
4. whether the adverse effect is long term.

Once a person is recognised as being disabled under the Act, this recognition remains with him for the rest of his life. There is no need for him to reapply at any time in the future.

**Direct discrimination**

Section 3A(5) (s 13, EA 2010) of the Disability Discrimination Act 1995 states that an employer directly discriminates against a disabled person if:

\[
\text{on the ground of the disabled person’s disability, he treats the disabled person less favourably than he treats or would treat a person not having that particular disability whose relevant circumstances, including his abilities, are the same as, or not materially different from, those of the disabled person.}
\]

Direct discrimination is blatant or overt discrimination. Here, the comparator must be someone who does not have the same disability and may be someone who is not disabled. Their circumstances must be the same or not materially different to those of the disabled person. A hypothetical comparator may be used. Section 3A(4) of the 1995 Act (s 15, EA 2010) states that there can be no justification in relation to direct disability discrimination. An employer is unable to justify the fact that it discriminated on the basis of a person’s disability.

Paragraph 4.8 of the disability code of practice provides examples of what will amount to direct discrimination. An example from paragraph 4.8 is set out below:

\[
\text{A blind woman is not shortlisted for a job involving computers because the employer wrongly assumes that blind people cannot use them. The employer makes no attempt to look at the individual circumstances. The employer has treated the woman less favourably than other people by not shortlisting her for the job. The treatment was on the ground of the woman’s disability (because assumptions would not have been made about a non-disabled person).}
\]

See also the following decision on direct disability discrimination.

**Tudor v Spen Corner Veterinary Centre Ltd & anor** (2006)

Ms Tudor had been employed as a veterinary nursing assistant and receptionist. In May 2005 she suffered a stroke and in the June of 2005 (while she was in hospital) she was told that she had gone blind and that her doctors were unsure whether her sight would return. Ms Tudor’s mother informed her daughter’s employer of her condition. In July 2005 she was then dismissed by her employer. Her employer had made no effort to meet with her or to establish her accurate medical condition or future prognosis.

*Held* Ms Tudor had suffered direct discrimination in breach of s 3A(5).
Disability discrimination

**Disability-related discrimination**

Section 3A(1) of the Disability Discrimination Act 1995 (s 13, EA 2010) states that an employer discriminates against a disabled person if:

(a) for a reason which relates to the disabled person’s disability, he treats him less favourably than he treats or would treat others to whom that reason does not or would not apply, and

(b) he cannot show that the treatment in question is justified.

The phrase ‘disability related discrimination’ is not used in the 1995 Act but is used in the disability code of practice. Treatment is justified if the reason is both material to the circumstances of the particular case and substantial. The employer’s treatment of the disabled person must be compared with that of a person to whom the disability-related reason does not apply. The comparator may be disabled or non-disabled but the disability-related reason for the less favourable treatment must not apply to him.

**Less favourable treatment**

What will amount to less favourable treatment differs in relation to direct disability discrimination and disability-related discrimination. The following diagrams highlight the difference between the forms of less favourable treatment.

To treat a person less favourably on the ground of a disability-related reason means that the person is refused some advantage, such as employment or training, or e.g. they are dismissed. There has been some discussion as to who would be an appropriate ‘comparator’. In bringing a claim the disabled employee will have to identify an actual or hypothetical comparator to whom the disability-related reason does not apply. In *Clark v Novacold Ltd* (1999) the Court of Appeal held that the less favourable treatment did not run on a like-for-like comparison with the disabled person and of others in similar circumstances. This meant that the correct comparator was someone who was not disabled. They did not have to be in the same circumstances as the claimant. However, in the following decision the House of Lords held that this case was wrongly decided.

In *London Borough of Lewisham v Malcolm* (2008) *HL* it was held that Lewisham Council had not discriminated against its tenant Mr Malcolm. He was disabled with schizophrenia and as a
result of this had moved out of his council flat (for over a year) and sublet it to other people. Here, it was held that the correct comparator would be someone who had been absent for a year and had sublet their flat but who was not disabled. This means that the correct comparison is to compare the treatment of the disabled person with that of a non-disabled person who is otherwise in the same circumstances. As the council would have evicted anyone who had been absent for a year and sublet their flat, Mr Malcolm had not been subjected to disability-related discrimination. This is a more narrow comparison than that outlined in Novacold.

The dictum from Malcolm has since been approved in Child Support Agency (Dudley) v Truman (2009) EAT, Countrywide Estate Agents & ors v Rice (2008) EAT and Stockton-on-Tees Borough Council v Aylott (2009) EAT.

Paragraph 4.30 of the disability code of practice provides examples of what will amount to disability related discrimination. An example from paragraph 4.30 is set out below:

A disabled man is dismissed for taking 6 months’ sick leave which is disability related. The employer’s policy, which has been applied equally to all staff (whether disabled or not) is to dismiss all employees who have taken this amount of sick leave. The disability related reason for the less favourable treatment of the disabled person is the fact of having to take 6 months’ sick leave, and the correct comparator is a person to whom that reason does not apply – that is, someone who has not taken 6 months’ sick leave. Consequently, unless the employer can show the treatment is justified, it will amount to disability related discrimination because the comparator would not have been dismissed. However, the reason for the treatment is not the disability itself (it is only a matter related thereto, namely the amount of sick leave taken), so, there is no direct discrimination.

Duty to make reasonable adjustments

As noted above, s 3A(2) of the 1995 Act (s 21, EA 2010) states that an employer discriminates against a disabled person if he fails to comply with a duty to make reasonable adjustments. An employer’s failure to make reasonable adjustments cannot be justified. Section 4A(1) of the 1995 Act (s 20, EA 2010) states that:

Where –

(a) a provision, criterion or practice applied by or on behalf of an employer, or

(b) any physical feature of premises occupied by the employer,

places the disabled person concerned at a substantial disadvantage in comparison with persons who are not disabled, it is the duty of the employer to take such steps as it is reasonable, in all the circumstances of the case, for him to have to take in order to prevent the provision, criterion or practice, or feature having that effect.

If an employer fails to make reasonable adjustments, he can be said to have discriminated against the disabled person. This will then form part of an action for direct discrimination. In Tarbuck v Sainsbury’s Supermarkets Ltd (2006) the EAT held that a failure to consult with an employee does not of itself amount to a failure to make a reasonable adjustment. The employer does not have any duty to make reasonable adjustments under s 4A(3) if he did not know, and could not reasonably have known, that an applicant for employment is disabled. In Eastern and Coastal Kent Primary Care Trust v Grey (2009) the EAT held that an employer is exempt from the duty to make reasonable adjustments only if they can answer ‘yes’ to the following four questions. These are that they:

- do not know that the disabled person has a disability,
- do not know that the disabled person is likely to be at a substantial disadvantage compared with persons who are not disabled,
Disability discrimination

- could not reasonably be expected to know that the disabled person had a disability, and
- could not reasonably be expected to know that the disabled person is likely to be placed at a substantial disadvantage in comparison with persons who are not disabled.

However, this decision was criticised in Secretary of State for the Department for Work and Pensions v Alam (2009) in which the EAT stated that the first question to ask is:

- did the employer know both that the employee was disabled and that his or her disability was liable to place him or her at a substantial disadvantage in comparison with persons who are not disabled?

If the answer to that question is ‘no’ then the second question to ask is:

- ought the employer to have known both that the employee was disabled and that his or her disability was liable to place him or her at a substantial disadvantage in comparison with persons who are not disabled?

The EAT held that if the answer to both questions is ‘no’ then the employer is taken to be exempt from the duty to make reasonable adjustments.

There is no requirement, however, for an employer to have knowledge of a person’s disability in order to treat them less favourably for reasons connected with it. See: London Borough of Hammersmith v Farnsworth (2000), HJ Heinz & Co Ltd v Kenrick (2000). Section 18B of the 1995 Act (s 20, EA 2010) provides a list of examples of what may amount to making reasonable adjustments.

Example

Reasonable adjustments might include:

- making adjustments to premises, for instance, widening doorways, providing wheelchair ramps or repositioning shelves;
- changing working hours; allocating some of the disabled person’s duties to another person;
- allowing the disabled person to be absent during working hours to attend rehabilitation sessions or obtain medical treatment;
- acquiring or modifying equipment;
- providing training; providing supervision;
- providing a reader or interpreter.

The extent of the adjustments needed is subject to a test of what is ‘reasonable’ in the particular circumstances. An employer should carry out an assessment of what steps may be required to aid an employee in carrying out their employment within the workplace. Paragraph 5.3 of the disability code of practice provides the following example of what might be likely to be a reasonable adjustment.

A man who is disabled because he has dyslexia applies for a job which involves writing letters. The employer gives all applicants a test of their letter-writing ability. The man can generally write letters very well but finds it difficult to do so in stressful situations and within short deadlines. He is given longer to take the test. This adjustment is likely to be a reasonable one for the employer to make.

Section 18B(1) of the 1995 Act (s 20, EA 2010) provides guidance on what would or would not be regarded as ‘reasonable’ action on the part of the employer.
Section 18B(1) states that:

In determining whether it is reasonable for a person to have to take a particular step in order to comply with a duty to make reasonable adjustments, regard shall be had, in particular to –

- the extent to which taking the step would prevent the effect in relation to which the duty is imposed;
- the extent to which it is practicable for him to take the step;
- the financial and other costs which would be incurred by him in taking the step and the extent to which it would disrupt any of his activities;
- the extent of his financial and other resources;
- the availability to him of financial or other assistance with respect to taking the step;
- the nature of his activities and the size of his undertaking;
- where the step would be taken in relation to a private household, the extent to which taking it would –
  (i) disrupt that household, or
  (ii) disturb any person residing there.

The following decisions are illustrative of cases in which it was alleged that an employer failed to make reasonable adjustments.

**Tarling v Wisdom Toothbrushes** (1997)

Tarling suffered from a club foot and had trouble standing or sitting for long periods of time. He was dismissed because of this disability.

**Held** He had been discriminated against because his employer had not taken steps to make reasonable adjustments to the workplace. It would not have been prohibitively expensive or inconvenient for the employer to have provided Tarling with special seating.

**Meikle v Nottinghamshire County Council** (2004)

Gaynor Meikle worked as a schoolteacher for a local authority. She suffered from deteriorating vision. Eventually she lost the sight in one eye and had limited vision in the other. When she arrived at work each morning she was handed a timetable detailing which classes she was to cover that day. Ms Meikle found these timetables very difficult to read. She made several requests to her Head of Department asking for an enlarged copy of the timetable. No arrangements were ever made to provide her with this. Secondly, she was told that she would have to teach in a classroom which was some distance away from the one in which she generally taught. Ms Meikle asked for her timetable to be adjusted so that she would easily be able to find her way to her classroom. She also requested extra preparation time, and that school notices should be provided in enlarged print. No adjustments were ever made following her requests even though it would have been practicable for the school to make such changes. Ms Meikle had to take time off sick due to eye strain and eventually resigned, claiming constructive dismissal and that her employer had failed to make reasonable adjustments.

**Held (CA)** The school should have made the reasonable adjustments outlined above. They were wrong to reduce Ms Meikle’s salary when she took sick leave following their failure to make reasonable adjustments to her working environment.
Disability discrimination


Ms Archibald had been employed by the council as a road sweeper since 1997. After undergoing surgery she became unable to walk without the aid of sticks and consequently could not continue to do her job. She could do sedentary work and so approached the council asking for a ‘desk job’. The council was aware of its need to make reasonable adjustments and sent Ms Archibald on several computer and administration courses. She then applied for over 100 jobs at the council but failed to impress the panel during ‘competitive interviews’. It was council policy that candidates had to attend such an interview prior to being offered a job. She was dismissed when the council thought that it had exhausted all possible redeployment measures. Ms Archibald stated that the council should have placed her in a new role without the need for her to attend an interview and that there had therefore been a failure to make reasonable adjustments.

**Held (HL)** The council had breached its duty to make reasonable adjustments. In the House of Lords Lady Hale stated that ‘The 1995 Act . . . does not regard the differences between disabled people and others as irrelevant. It does not expect each to be treated in the same way. It expects reasonable adjustments to be made to cater for the special needs of disabled people. It necessarily entails an element of more favourable treatment.’ In some cases the Act obliges employers to treat a disabled person more favourably than others and this may even require transferring them to a higher-level position without the need for a competitive interview.

**Williams v J Walter Thompson Group Ltd** (2005)

Ms Williams is completely blind. She was appointed as an IT developer in June 1999 and was told that she would be working with Lotus Notes software. It was established that she would need specific training on the use of this software. She was also aware that she would need specialist equipment, e.g. a Braille display to enable her to do her job. This equipment was not provided when she began work and when it arrived four months later it took several weeks to install. She made several requests for training and work to be provided but her requests were ignored. Ms Williams resigned.

**Held (CA)** Her employer had failed to make reasonable adjustments. They had known when they appointed Ms Williams that she was completely blind and that she would require training in order to be able to do her job. They had failed to provide her with the training or equipment that she needed and had thus failed in their duty.

**Rothwell v Pelikan Hardcopy Scotland Ltd** (2006)

Mr Rothwell has Parkinson’s disease. He was assessed by an occupational doctor and a consultant. However, he was not shown his medical reports. He was invited to a meeting with his employer and was told that he was to be dismissed on health grounds. His employer was not fully aware of his current medical circumstances and did not consult with him before taking the decision to dismiss. There was no discussion as to whether his condition might improve enough to enable him to continue to work.

**Held (EAT)** The employer’s failure to consult with Mr Rothwell before dismissing him on the grounds of ill health amounted to a failure to make reasonable adjustments. He should have been consulted before the decision was taken and it was not unreasonable to expect his employer to tolerate a delay while this consultation took place.
Disability discrimination


**Victimisation – section 55 (s 27, EA 2010)**

Section 55 of the 1995 Act states that a person is victimised on the ground of disability where he is treated less favourably because:

- he has brought proceedings under the 1995 Act; or
- he has given evidence in any such proceedings.

An employer may defend such an action if it believes that the original allegations were false or not made in good faith.

**Harassment – section 4(3) (s 26, EA 2010)**

The 2003 Regulations inserted a new offence of harassment into the 1995 Act. Harassment is defined in s 3B of the 1995 Act, which states that:

[A] person subjects a disabled person to harassment where, for a reason which relates to the disabled person’s disability, he engages in unwanted conduct which has the purpose or effect of –

(a) violating the disabled person’s dignity, or
(b) creating an intimidating, hostile, degrading, humiliating or offensive environment for him.

Arthur v Northern Ireland Housing Executive (2007)

Here, an employer had allowed a dyslexic job applicant 20 per cent extra time to complete a pre-interview aptitude test. The claimant had argued that the employer had failed to make reasonable adjustments to accommodate his dyslexia.

**Held (CA)** The employer had fulfilled its duty to make reasonable adjustments. The extra time provided to the applicant had placed him on the same level as other non-disabled candidates. He had not been under any substantial disadvantage.


Here, the EAT overturned the previous ET decision that had found that the employer had failed to make reasonable adjustments to accommodate a disabled employee. Ms Wilson suffered from panic attacks and anxiety. She was told that she was to be redeployed when the Job Centre closed down a particular office. At that time her job was located very near to her home. She would have had to travel to reach the new office. She asked if the employer would make the reasonable adjustment of allowing her to work from home. She indicated that this was the only basis upon which she was willing to work. She took sick leave and was eventually dismissed. The Job Centre stated that her job could not be done from home.

**Held** (EAT) Ms Wilson’s refusal to work other than from home made any reasonable adjustment impracticable. The Job Centre had done everything possible to resolve the situation.
Disability discrimination

The conduct will be taken to be harassment only if having regard to all the circumstances it can reasonably be considered as having the effect of harassment.

The following diagrams highlight the different forms of disability discrimination.

**Stages at which discrimination may take place**

Section 4 of the 1995 Act (s 39, EA 2010) states that it is unlawful for an employer to discriminate:

- in the arrangements which he makes for the purpose of determining to whom he should offer employment;
- in the terms on which he offers that person employment; or
- by refusing to offer, or deliberately not offering, him employment;
- in the opportunities which he affords him for promotion, a transfer, training or receiving of any other benefit;
- by refusing to afford him, or deliberately not affording him any such opportunity; or
- by dismissing him or subjecting him to any other detriment.

**Job advertisements**

The Disability Discrimination Act 1995 did not contain any specific provision relating to job advertisements until it was amended by the 2003 Regulations. Whilst there was no specific rule banning employers from using advertisements that discriminate against disabled people, it was assumed that they would not. Section 11 of the 1995 Act stated that ‘if an advertisement blatantly infers that the employer does not intend to employ a disabled person then it is for the employer to show that he did not intend to discriminate’. This section has been replaced by a section which specifically prohibits discriminatory advertisements.
Disability discrimination

Section 168 of the 1995 Act (s 39, EA 2010) states that it is unlawful for a person to publish or cause to be published an advertisement which:

(a) invites applications for a relevant appointment or benefit; and
(b) indicates, or might reasonably be understood to indicate, that an application will or may be determined to any extent by reference to –
   (i) the applicant not having any disability, or any particular disability,
   (ii) the applicant not having had any disability, or any particular disability, or
   (iii) any reluctance of the person determining the application to comply with a duty to make reasonable adjustments.

Many advertisements contain statements reinforcing the fact that employers welcome applications from disabled people.

Application forms and interviews
Employers should take care not to discriminate against disabled persons when drafting application forms and when selecting and interviewing potential candidates. Employers should offer disabled applicants assistance during this process. This could mean the changing of interview times, location, or the provision of assistance during the interview.

Offers of employment and access to promotion
Employers should not discriminate against disabled persons when making an offer of employment. They should not be disadvantaged in relation to transfers, promotion, terms and conditions, benefits, pension schemes, harassment, victimisation, redundancy or dismissal.

Defences to disability discrimination
As noted above, direct disability discrimination, failure to make reasonable adjustments and victimisation can never be justified. However, in relation to disability-related discrimination an employer may be able to show that their conduct was justified. Their treatment will only be justified if the reason for it is both material to the circumstances of the particular case and substantial.

Employer’s liability – section 58 (s 109, EA 2010)
As with sex and race discrimination, s 58 of the 1995 Act states that employers may be vicariously liable for the discriminatory actions of their employees.

Exclusions
When it first became law, the Disability Discrimination Act 1995 did not apply to businesses which employed fewer than 20 employees. In 1998 the law changed and from that time the 1995 Act did not apply to employers with fewer than 15 employees. This exception could still be said to be unfair because, whether an employer with 2,000 or 10 employees discriminates against a disabled person, his actions and the consequences remain the same.

From 1 October 2004 the ‘exemption for small employers’ was removed from the 1995 Act by the Disability Discrimination Act 1995 (Amendment) Regulations 2003. The Disability Discrimination Act 1995 now applies to all employers regardless of the number of persons that they employ.
The Disability Rights Commission

The Disability Rights Commission was set up under the Disability Rights Commission Act 1999. It had a similar role to that of the Equal Opportunities Commission and the Commission for Racial Equality. The DRC ceased to exist in 2007. The Equality and Human Rights Commission is now responsible for issues related to disability discrimination.

Disability code of practice (2004)

The disability code of practice is referred to as the ‘Code of Practice on employment and occupation’.

It came into force on 1 October 2004 and, although it does not impose any legal sanctions, it can be used as evidence in tribunal proceedings. It provides employers with general guidance on issues involving disability discrimination. The code gives examples and explanations of likely interpretations of the Disability Discrimination Act 1995. It also provides assistance on how to make a disability discrimination claim to the employment tribunal. The code is accompanied by a guidance document referred to as ‘Guidance on matters to be taken into account in determining questions relating to the definition of disability’. This was produced in 2006. Even though the role of the DRC has been taken over by the Equality and Human Rights Commission, the code of practice is not obsolete. Section 42(3)(a) of the Equality Act 2006 states that codes issued prior to the formation of the EHRC continue to have effect until the Commission requests that the Secretary of State revoke them. At the time of writing, no such request has been made. The EHRC can revise the existing code and is also able to issue new codes of practice.

DISCRIMINATION ON THE GROUNDS OF AGE, POLITICAL PERSUASION OR RELIGION

An employer is able to discriminate on the basis of political persuasion. However, it is now unlawful to discriminate on the basis of a person’s religion or belief. The Employment Equality (Religion or Belief) Regulations came into force on 2 December 2003. Following detailed consultation the Employment Equality (Age) Regulations 2006 came into force on 1 October 2006.

Age discrimination

Age discrimination has been unlawful in the United States and Australia for some time. Here in the United Kingdom the issue of age discrimination has been a source of debate for many years. Some employers have already introduced schemes whereby they recruit from the older section of the workforce. The Office of National Statistics has indicated that nearly a third of the labour force will be over 50 by 2020.

There has long been support for some form of anti-age discrimination legislation in this country. However, it took until 2006 for any such provisions to materialise. In 1998 a Bill was introduced which sought to combat age discrimination in advertisements. This was the Employment (Age Discrimination in Advertisements) Bill 1998. This Bill would have regulated the way in which employers could have advertised job vacancies. Unfortunately, it did not get government support and did not become law.

The Employment Equality (Age) Regulations 2006 came into force on 1 October 2006. The government had until the end of 2006 to implement age discrimination legislation. The regulations stem from the Equal Treatment Directive 2000/78. The ‘age’ elements of that Directive were to be given legislative effect by the end of 2003 but the government was given extra time
Discrimination on the grounds of age, political persuasion or religion

in which to consult on and then develop the Regulations. The 2006 Regulations apply to persons of all ages, not just older workers. Younger workers may also experience discrimination on the ground of their age. The Regulations apply to employment and vocational training. The Regulations apply to actual/prospective employees, ex-employees, apprentices, some self-employed workers, contract workers, actual and prospective partners, and people undertaking or seeking vocational training. In X v Mid Sussex Citizens’ Advice Bureau & anor (2010) it was held that a voluntary worker who had a contract to carry out work personally was protected under the 2006 Regulations but that a voluntary worker without a legally binding contract would not be protected.

In summary, the regulations:

- remove the current upper age limits for unfair dismissal rights and statutory redundancy;
- provide exemptions for many age-based rules in occupational pension schemes;
- make all retirement ages under 65 illegal unless objectively justified;
- require employers to properly consider an employee’s request to continue to work beyond retirement age;
- require employers to give written notice to employees at least six months in advance of their intended retirement date;
- provide for a questionnaire procedure to aid a claimant in bringing a discrimination claim;
- remove the age limits for statutory sick pay, statutory maternity pay and statutory adoption pay; and
- make it unlawful to discriminate against someone, in certain circumstances, after the working relationship has ended.

Scope of the Regulations - regulation 7 (ss 39 & 40, EA 2010)

Regulation 7(1) states that it is unlawful for an employer to discriminate against a person:

(a) in the arrangements he makes for the purpose of determining to whom he should offer employment;
(b) in the terms on which he offers that person employment; or
(c) by refusing to offer, or deliberately not offering, him employment.

Regulation 7(2) (s 39, EA 2010) states that it is unlawful for an employer to discriminate against an employee:

(a) in the terms of employment which he affords him;
(b) in the opportunities which he affords him for promotion, transfer, training, or receiving any other benefit;
(c) by refusing to afford him, or deliberately not affording him, any such opportunity; or
(d) by dismissing him or subjecting him to any other detriment.

The 2006 Age Regulations also prohibit:

- direct discrimination – reg 3 (ss 13 & 19, EA 2010);
- indirect discrimination – reg 3 (ss 13 & 19, EA 2010);
- victimisation – reg 4 (ss 27, EA 2010); and
- harassment – reg 6 (ss 26, EA 2010).
Discrimination on the grounds of age, political persuasion or religion

Direct discrimination on the basis of age – regulation 3(1)(a) (s 13, EA 2010)

Regulation 3(1)(a) states that:

(a) on the grounds of B’s age, A treats B less favourably than he treats or would treat other persons.

This is overt blatant discrimination in which a person is treated less favourably than another on the basis of their age.

Example

Sally (aged 54) and Jennifer (aged 36) apply for a job at a local firm of IT consultants. They have very similar experience and qualifications. The firm does not want to employ what they perceive to be ‘over the hill workers’ and so do not invite Sally for interview. She has been directly discriminated against on the basis of her age.

The less favourable treatment can relate to a person’s actual or apparent age. A person does not have to disclose their actual age in order to bring a claim. Note that an employer may be able to justify their actions.

The following cases highlight situations in which direct age discrimination was alleged.

Court v Dennis Publishing (2007)

Here, the employer based its decision to select an employee for redundancy on his age. He was 55 years old. The company had developed a culture that assumed that younger employees were less expensive and so preferable to older staff. It had not considered selecting any younger employees for redundancy.

Held The employer had directly discriminated against Mr Court on the basis of his age.

Mayor and Burgesses of the London Borough of Tower Hamlets v Wooster (2009)

Here, the Council made an employee redundant when he was 49 years old in order to avoid paying an early retirement pension that he would have been entitled to if he left its employment when he became 50.

Held This was direct age discrimination – dismissal had occurred only to avoid paying any pension entitlement.

Wilkinson v Springwell Engineering Ltd (2009)

Here, a teenage female employee was dismissed because her employer thought her ‘too young for the job’.

Held This was direct discrimination as the decision had been taken on the basis of her age.
Discrimination on the grounds of age, political persuasion or religion

Indirect discrimination on the basis of age – regulation 3(1)(b) (s 19, EA 2010)

Regulation 3(1)(b) states that a person (‘A’) discriminates against another person (‘B’) if:

A applies to B a provision, criterion or practice which he applies or would apply equally to persons not of the same age group as B, but –

(i) which puts or would put persons of the same age group as B at a particular disadvantage when compared with other persons, and

(ii) which puts B at that disadvantage,

and A cannot show the treatment or, as the case may be, provision, criterion or practice to be a proportionate means of achieving a legitimate aim.

A comparison of B’s case with that of another person under this section must be such that the relevant circumstances in the one case are the same, or not materially different, in the other. Note that an employer may be able to justify treating an individual differently because of their age if they can show that the treatment, provision or practice can be objectively justified as a proportionate means of achieving a legitimate aim.

The following case highlights a situation in which indirect age discrimination was alleged.

Rainbow v Milton Keynes Council (2008)

Here, the Council placed an advertisement in order to recruit new teachers. The advert said that those who applied should be ‘in the first five years of their career’. The claimant had 34 years’ teaching experience and felt that the advert indirectly discriminated against her on the basis of her age. The Council stated that it had placed this requirement in order to save on costs. It argued that this meant that its actions were justified.

Held This argument was rejected. The cost of employing someone could not be used as a means of justifying indirect age discrimination.

Victimisation – regulation 4 (s 27, EA 2010)

Regulation 4(1) states that a person (‘A’) discriminates against another person (‘B’) if he treats B less favourably than he treats or would treat other persons in the same circumstances, and does so by reason that B has:

(a) brought proceedings against A or any other person under or by virtue of these Regulations;

(b) given evidence or information in connection with proceedings brought by any person against A or any other person under or by virtue of these Regulations;

(c) otherwise done anything under or by reference to these Regulations in relation to A or any other person; or

(d) alleged that A or any other person has committed an act which (whether or not the allegation so states) would amount to a contravention of these Regulations, or by reason that A knows that B intends to do any of those things, or suspects that B has done or intends to do any of them.
Discrimination on the grounds of age, political persuasion or religion

Example

Margaret and Sara work for a local department store. Margaret recently brought an age discrimination claim against her employer in the Employment Tribunal. Sara gave evidence for Margaret during the tribunal hearing. Sara recently asked if she could attend a training course in London. Her boss refused her request, stating that she was a troublemaker and that she would never be taken seriously at work again. Sara has been victimised because she gave evidence for her colleague.

An employer does not victimise an employee if any of the allegations made by the employee, or any information/evidence given by him was false and not made or given in good faith.

Harassment – regulation 6 (s 26, EA 2010)
Regulation 6(1) states that a person (‘A’) subjects another person (‘B’) to harassment where, on grounds of age, A engages in unwanted conduct which has the purpose or effect of:
(a) violating B’s dignity; or
(b) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.
The conduct shall only be regarded as having the effect specified if having regard to all the circumstances, including in particular the perception of B, it should reasonably be considered as having that effect.

Justification
An employer may be able to justify both direct and indirect age discrimination. Discrimination on the basis of age will be lawful if the employer can show that the treatment, or provision, criterion or practice was a proportionate means of achieving a legitimate aim. In Seldon v Clarkson Wright & Jakes (2009) the EHRC had argued that the threshold for justification in an age discrimination claim should be higher than that required to justify other forms of indirect discrimination. The EAT disagreed with this approach, stating that the principles of ‘legitimate aim and proportionality’ should be applied in all cases.

See also: MacCulloch v Imperial Chemical Industries plc (2008), Rolls Royce plc v UNITE (2009).

Genuine occupational requirement – regulation 8 (Sch 9, para 1, EA 2010)
Regulation 8 provides an exception where possessing a characteristic related to age is a genuine and determining occupational requirement for a post if it is proportionate to apply the requirement in the particular case. Examples of such an occupational requirement may include:

- casting a play which has parts for older or younger characters; or
- an organisation advising on and promoting rights for older people stipulating that its Chief Executive must be of ‘certain age’.

Retirement
An employee has the right to request to continue to work beyond their expected retirement age. If an employee makes this request then an employer must take this request seriously. An
Discrimination on the grounds of age, political persuasion or religion

employee must make this request at least three months before their expected retirement date. The right to work beyond normal retirement age is not automatic. An employer does not have to agree to the request or even provide any reason for not agreeing with it.

Section 98 of the Employment Rights Act 1996 states that in relation to the retirement of an employee an employer has a duty to:

(a) notify the employee of the date when he is due to retire,

(b) notify the employee of his right to request to work beyond the retirement date, and

(c) consider any such request, allowing the employee a right to appeal against any refusal to allow him to work beyond the retirement date.

The national compulsory retirement age is 65 years old. In 2007 the National Council on Ageing (operating under the names Heyday and Age Concern) brought a claim alleging that the default retirement age of 65 years was incompatible with the Framework Directive (2000/78). In this case, R (on the application of the Incorporated Trustees of the National Council on Ageing (Age Concern England)) v Secretary of State for Business, Enterprise and Regulatory Reform (2009), the ECJ held that the provisions were not incompatible with the directive because they could be justified ‘by legitimate social policy objectives, such as those related to employment policy, the labour market or vocational training’.

This decision was referred back to the High Court in 2009. Here, in R (on the application of Age UK) v Secretary of State for Business, Innovation and Skills (2009), the court held that the default retirement age of 65 years was lawful. However, the court did comment that this view was likely to be untenable following the government’s review on the national/compulsory retirement age. This review was due to take place in 2011 but it has been brought forward to 2010. The review is intended to consider whether the default compulsory retirement age of 65 years is still appropriate and necessary in the economic climate of today. At the time of writing, consultation for interested parties has closed (February 2010) and we await comment on the outcome of this research.

The review is being conducted by the Department for Business, Innovation and Skills and the Department for Work and Pensions. Further information on the review is available via their websites.

Code of Practice

The Age Diversity at Work Code of Practice was issued in 2002 by the Department for Work and Pensions. The code covered recruitment, selection, promotion, training and development, redundancy selection decisions and retirement schemes. As with other codes of practice, the code did not have statutory effect. The code has now been removed from the department’s website and the EHRC website states that there are no codes of practice relating to age discrimination. However, Acas has produced very useful guidance on the 2006 Regulations. The Acas publication Guidance on Age and the workplace: a guide for employers is a very comprehensive and easy to read guide to the 2006 Regulations.

Making an age discrimination claim to the Employment Tribunal

A person who believes that they have been discriminated against on the ground of their age may make a claim to the Employment Tribunal. The claim must be made within three months of the act complained of. The Regulations provide for a questionnaire procedure which allows an applicant to ask their employer/prospective employer to provide information prior to the tribunal hearing. If the claimant is successful the Employment Tribunal may make a declaration or recommendation stating that the employer should take action to prevent or reduce the impact of the
Discrimination on the grounds of age, political persuasion or religion
discrimination. The tribunal may also make a compensatory award. There is no limit set on the
amount of compensation that may be awarded.

Acas has produced a useful guide to the regulations: Age and the workplace: Putting the Employ-
ment Equality (Age) Regulations 2006 into practice.

Political persuasion

At the present time it is lawful for an employer to discriminate on the ground of political persua-
sion. However, in Northern Ireland the Fair Employment (Northern Ireland) Acts of 1976 and
1989 prohibit both direct and indirect discrimination on the grounds of religious and political
belief. Since 2003 the Employment Equality (Religion or Belief) Regulations have made it unlaw-
ful to discriminate on the grounds of religion or belief in the United Kingdom.

Discrimination on the grounds of religion or belief

The Employment Equality (Religion or Belief) Regulations 2003 came into force on 2 December
2000/78/EC. The Regulations specify four types of discrimination: direct discrimination, indirect
discrimination, victimisation and harassment. They protect the rights of workers and apply to all
employers/businesses whatever their size and whether in the public or private sector.

The Regulations prohibit discrimination in the fields of employment and vocational training.
They apply to recruitment, terms and conditions, pay, promotion, transfers and dismissals. The
Regulations are broadly similar in structure to the Sex Discrimination Act 1975 and the Race Rela-
tions Act 1976.

What is classed as a ‘religion’ or ‘belief’ – regulation 2 (s 10, EA 2010)

Under regulation 2(1) ‘religion or belief’ is defined as meaning ‘any religion’ and any ‘religious or
philosophical belief’. This section was amended by the Equality Act 2006. Any reference to reli-
gion or belief also includes a reference to a lack of religion or lack of belief.

This section does not really provide much of an explanation as to what will be classed as being
either a ‘religious or philosophical belief’. However, the Explanatory Notes for the 2003 Regula-
tions state that this definition will include widely recognised religions such as Christianity,
 Judaism, Islam and Hinduism. Branches or sects within a particular religion will also be covered.
For example, Catholics or Protestants would be recognised as being part of the Christian faith.
Acas guidance on the Regulations states that factors such as collective worship, a clear belief sys-
tem and a profound belief that affects a person’s way of life should be considered.

It will be left to the Employment Tribunal or court to decide on what will or will not be classed
as being a valid ‘religion’ or ‘belief’. In Harris v NLK Automotive Ltd and Matrix Consultancy UK
Ltd (2007) being a Rastafarian was held to be a philosophical belief. In Power v Greater Manchester
Police (2009) spiritualism was held to be a philosophical belief for the purposes of the 2003
Regulations.

Direct discrimination on the grounds of religion or belief – regulation 3(1)(a)
(s 13, EA 2010)

Regulation 3(1)(a) (as amended by the Equality Act 2006) states that:

For the purposes of these Regulations, a person (‘A’) discriminates against another person
(‘B’) if –

(a) on the grounds of the religion or belief of B or of any other person except A (whether or
not it is also A’s religion or belief) A treats B less favourably than he treats or would treat
other persons.
Discrimination on the grounds of age, political persuasion or religion

Direct discrimination is overt or blatant discrimination. It occurs where a person treats another less favourably on the grounds of their religion or belief.

Example

Reshwana is a solicitor. She is interviewed for a new position. While being interviewed she mentions that she is a Muslim. Although she has all the skills required for the job, the firm decides not to offer her the position because they do not employ any Muslims and do not think that she will ‘fit in’.

In Azmi v Kirklees Metropolitan Borough Council (2007) a teacher alleged that the Council had directly discriminated against her on the basis of her religion when it required her to remove her veil whilst teaching. It was held that this was not direct discrimination as any teacher, whatever their religion, would have been expected to comply with the same requirement. Similarly, in Eweida v British Airways plc (2006) the fact that the airline had refused to allow Eweida to wear a cross outside her uniform was held not to be direct religious discrimination. Any employee, whatever their religion, would have had to adhere to the same rule and the airline did not prevent the wearing of a cross underneath a uniform.

Direct discrimination may also be based on the grounds of a person’s perceived religion or belief. Direct discrimination may also occur when a person is treated less favourably because they associate with persons of a particular religion/belief, or because they refuse to carry out an employer’s instruction to discriminate against such persons. In bringing a claim the individual does not have to declare their religion or belief. They only have to show that they were treated less favourably because the employer believed them to be part of a particular religion or to have particular beliefs.

Direct discrimination cannot be justified. In very limited circumstances an employer may be able to discriminate where a genuine occupational requirement can be shown to apply or where there is an issue of national security (see below).

Indirect discrimination on the basis of religion or belief – regulation 3(1)(b)

Regulation 3(1)(b) states that:

(1) For the purposes of these Regulations, a person (‘A’) discriminates against another person (‘B’) if –

(b) A applies to B a provision, criterion or practice which he applies or would apply equally to persons not of the same religion or belief as B, but –

(i) which puts or would put persons of the same religion or belief as B at a particular disadvantage when compared with other persons,

(ii) which puts B at that disadvantage, and

(iii) which A cannot show to be a proportionate means of achieving a legitimate aim.

Example

Martin refuses to give his shift employees work breaks between 7 a.m. and 9 a.m. This practice is applied to all employees but may discriminate against Muslim employees who are required to stop work to pray at intervals during the day. A Muslim employee could show that this practice puts him at a disadvantage. It would then be for Martin to show that this practice was justified.
Discrimination on the grounds of age, political persuasion or religion

In *Williams-Drabble v Pathway Care Solutions Ltd* (2005) an employer had imposed a permanent shift change on all employees. This meant that the claimant, a Christian employee, would not be able to attend church on a Sunday. It was held that this was indirect religious discrimination and that the employer’s actions could not be justified. In *McClintock v Department of Constitutional Affairs* (2008) the claimant, a Christian Justice of the Peace had asked to be excused from making decisions relating to adoption by same-sex couples. His employer refused this request and he alleged that he had been both directly and indirectly discriminated against on the basis of his religion. His claim was dismissed. In relation to indirect discrimination the EAT held that the obligation that he hear all cases (the provision, criterion or practice in question) was justified. The Department was justified in insisting that Magistrates hear each case regardless of their own personal beliefs or objections. At the time of writing the claimant is appealing this decision to the Court of Appeal.

The reference to religion or belief does not include the employer’s religion or belief. A comparison of B’s case with that of another person must be such that the relevant circumstances in the one case are the same, or not materially different, in the other.

Indirect discrimination is covert or hidden discrimination. If the person claiming indirect discrimination can show that they have suffered a disadvantage, then the provision, criterion or practice is indirectly discriminatory. Indirect discrimination is unlawful whether it is intentional or not.

Indirect discrimination will not be unlawful if it can be shown to be justified. To justify its actions, an employer must show that there was a legitimate aim, e.g. a real business need, and that the practice was proportionate to that aim. The practice will be proportionate to the aim if it is necessary and there are no alternative means available.

**Victimisation – regulation 4 (s 27, EA 2010)**

Regulation 4(1) states that:

A person (‘A’) discriminates against another person (‘B’) if he treats B less favourably than he treats or would treat other persons in the same circumstances, and does so by reason that B has –

(a) brought proceedings against A or any other person under these Regulations;
(b) given evidence or information in connection with proceedings brought by any person against A or any other person under these Regulations;
(c) otherwise done anything under or by reference to these Regulations in relation to A or any other person; or
(d) alleged that A or any other person has committed an act which (whether or not the allegation so states) would amount to a contravention of these Regulations, or by reason that A knows that B intends to do any of those things, or suspects that B has done or intends to do any of them.

An employer will not have victimised an individual where the allegation was false and not made or given in good faith. Victimisation on the basis of a person’s religion or belief takes place where they are treated less favourably because of something they have done, e.g. the person may have made a formal discrimination claim or given evidence in a tribunal case.

**Example**

Eve gave evidence for her colleague Sherin in a religious discrimination tribunal claim. She is then branded a troublemaker by her boss and her application to attend a training course is rejected even though all her colleagues are allowed to attend. Her boss tells her that it is ‘payback’ time for her getting involved in Sherin’s claim. Eve has been victimised because she previously gave evidence to support her colleague.
Discrimination on the grounds of age, political persuasion or religion

Harassment – regulation 5 (s 26, EA 2010)

Regulation 5 states that:

- a person ('A') subjects another person ('B') to harassment where, on grounds of religion or belief, A engages in unwanted conduct which has the purpose or effect of –
  - (a) violating B's dignity; or
  - (b) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.

Conduct will be regarded as violating a person’s dignity or creating an intimidating, hostile, degrading or humiliating or offensive environment if having regard to all the circumstances it should reasonably be considered as having that effect.

Behaviour that is offensive, frightening or distressing is likely to be termed harassment.

Employers may be held to be responsible for any harassment carried out by their employees (see: regulation 22). Individual employees may also be liable for any harassment that they themselves instigate.

In Saini v All Saints Haque Centre & ors (2009) it was held that regulation 5(1)(b) will be breached not only where an employee is harassed on the ground of his own religious belief but also where he is harassed because of someone else’s religious belief.

Stages at which discrimination may take place – regulation 6 (ss 39 & 40, EA 2010)

Regulation 6 states that it is unlawful for an employer to discriminate against an individual in:

- (a) the arrangements he makes for determining to whom he should offer employment;
- (b) the terms on which he offers that person employment; or
- (c) refusing to offer, or deliberately not offering, him employment;
- (d) the terms of employment in existence during employment;
- (e) the opportunities which he affords for promotion, transfer, training, or the receipt of any other benefit;
- (f) refusing to afford or deliberately not affording him such opportunity; or
- (g) in dismissing him, or subjecting him to any other detriment.

Discrimination after employment has ended – regulation 21 (s 108, EA 2010)

Regulation 21 states that it is unlawful for an employer to discriminate against or harass a former employee after the working relationship between them has ended. The act of discrimination or harassment must be linked to the former relationship.

Genuine occupational requirements – regulation 7 (Sch 9, paras 1 & 2, EA 2010)

Regulation 7 states that there are two very limited situations in which an employer may discriminate against a person on the basis of their religion or belief. These are where:

- (a) having regard to the nature of the employment or the context in which it is carried out being of a particular religion or belief is a genuine and determining occupational requirement, and it is proportionate to apply that requirement, and
- (b) where an employer has an ethos based on religion or belief and, having regard to that ethos and to the nature of the employment or the context in which it is carried out –
  - (i) being of a particular religion or belief is a genuine occupational requirement for the job; and
  - (ii) it is proportionate to apply that requirement in the particular case.

In the first requirement, religion or belief must be a genuine and determining occupational requirement.
Discrimination on the ground of trade-union involvement

In both situations it has to be proportionate to apply the requirement to be of a particular religion or belief in each case. The burden of proof is on the employer to show that the genuine occupational requirement applies to a particular job.

Glasgow City Council v McNab (2007)

Here, the claimant had applied for a job as a teacher of pastoral care at a Roman Catholic school. He was not of the Roman Catholic faith and so the school refused to interview him. He alleged that he had been discriminated against on the basis of religion but the school argued that being a Roman Catholic was a genuine occupational requirement attached to the appointment.

Held (EAT) There was no genuine occupational requirement for a teacher to be of the Roman Catholic faith. McNab had been discriminated against on the basis of religion.

Example

If a care home for elderly Christian gentlemen were to employ a Minister to provide services and prayers for their residents it may specify that that Minister be of the Christian faith.

National security – regulation 24 (s 192, EA 2010)

This regulation states that an employer may lawfully discriminate on the basis of religion or belief where they do so to safeguard national security. Their actions must be justified.

Making a religion or belief discrimination claim to the Employment Tribunal

A person who believes that they have been discriminated against on the grounds of their religion or belief may make a claim to the Employment Tribunal. The claim must be made within three months of the act complained of. The Regulations provide for a questionnaire procedure which allows an applicant to ask their employer/prospective employer to provide information prior to the tribunal hearing. If the claimant is successful the Employment Tribunal may make a declaration or recommendation stating that the employer should take action to prevent or reduce the impact of the discrimination. The tribunal may also make a compensatory award. There is no limit set on the amount of compensation that may be awarded.

Acas has produced a useful guide to the Regulations: Religion or Belief in the Workplace – Putting the Employment Equality (Religion or Belief) Regulations 2003 into practice.

DISCRIMINATION ON THE GROUND OF TRADE-UNION INVOLVEMENT

Section 137 of the Trade Union and Labour Relations (Consolidation) Act 1992 states that it is unlawful for an employer to discriminate when making offers of employment because:

(a) he is, or is not, a member of a trade union, or
(b) he is unwilling to accept a requirement –
   (i) to take steps to become or cease to be, or to remain or not become, a member of a trade union, or
   (ii) to make payments or suffer deductions in the event of his not being a member of a trade union.
Section 146 extends this protection by stating that it is unlawful for an employer to take any action against an employee, such as preventing him from joining a union or taking part in union activities. It is also unlawful for an employer to force an employee to join a union.

THE REHABILITATION OF OFFENDERS

In some situations it is unlawful for an employer to discriminate against a job applicant or an employee because of a previous criminal record. One of the aims of sentencing an offender is rehabilitation.

The Rehabilitation of Offenders Act 1974 states that a person should not be discriminated against because of ‘spent’ previous convictions. This is based on the idea that once a person has held the conviction for a specified period of time that conviction then becomes ‘spent’ and the person is treated as though it never existed. In the case of imprisonment, it is the period of sentence imposed by the court which counts (including any suspended sentence) not the actual time spent in prison. The period of rehabilitation runs from the date of the conviction.

Once a conviction is ‘spent’ and the ex-offender rehabilitated, potential employers should not ask him about his convictions and there is no requirement to declare spent convictions on any application form (unless, of course, the job in question falls under one of the exceptions noted below). An employer should not exclude or dismiss a person on the basis of his spent convictions.

Property Guards Ltd v Taylor & Kershaw (1982)

When applying for a job two security guards signed a statement saying that they had no previous convictions. They were entitled to do this because their minor convictions were ‘spent’. After a few months Property Guards found out about the convictions and dismissed the men.

Held The dismissals were unfair. The men had been entitled not to divulge their previous convictions. The convictions were spent and so covered by the 1974 Act.

The time at which a conviction will become ‘spent’ will depend on the original sentence imposed. Sentences of imprisonment of 30 months or more will never become spent.

If someone over 18 years old is sentenced to a term of imprisonment of between 6 months and 2½ years then their conviction is not spent until 10 years have passed. If they are sentenced to a term of imprisonment of 6 months or less then the rehabilitation period is 7 years. If a person is punished by way of a fine, community punishment order, or community rehabilitation order then the period of rehabilitation is 5 years.

If a person is given a conditional discharge, bind over, care order or supervision order then the period of rehabilitation is one year, or until the order expires, whichever is the longer. If a person is given an absolute discharge then the rehabilitation period is 6 months. The rehabilitation period for those fined or given prison sentences is halved if the offender was aged 17 or below at the date of conviction.

The 1974 Act does not apply to all types of employment. The Rehabilitation of Offenders Act 1974 (Exceptions) Order 1975 (as amended by the Rehabilitation of Offenders Act 1974 (Exceptions) (Amendment) (England and Wales) Order 2003) states that when applying for some jobs applicants must divulge all previous convictions. Exempted professions include teaching, social work, accountancy, the law and the police force.
THE FIXED-TERM EMPLOYEES (PREVENTION OF LESS FAVOURABLE TREATMENT) REGULATIONS 2002 AND THE PART-TIME WORKERS (PREVENTION OF LESS FAVOURABLE TREATMENT) REGULATIONS 2000

The Fixed-term Employees (Prevention of Less Favourable Treatment) Regulations came into force in October 2002 (under the Employment Act 2002). Under the regulations a worker on a fixed-term contract has the right not to be discriminated against just because they are not a permanent employee. It is unlawful to discriminate against a fixed-term worker in this way. A fixed-term worker is classed as being one who works under a contract for a specific fixed time, for a specific task, or a contract which will terminate on the happening or not happening of some future event.

An employer does have a possible defence to a claim of less favourable treatment if he can show that his actions were objectively justified. The Regulations state that a fixed-term contract will automatically become a permanent contract of indefinite length after four years. The start date for this provision was 10 July 2002 meaning that the first automatic conversion could not take place until 10 July 2006. They also remove the ability of an employer to ask an employee to waive their right to a redundancy payment at the end of the fixed term. They also provide that the ‘completion of a task’ contract is seen as a dismissal for the purpose of an unfair dismissal claim.

Similarly, the Part-time Workers (Prevention of Less Favourable Treatment) Regulations 2000 (as amended) are designed to ensure that part-time workers are given the same rights as full-time employees in relation to their terms and conditions of work. The Regulations came into force from 1 July 2000. Before this time an employer was able to treat an employee less favourably just because they were not a full-time employee. Again, the Regulations state that less favourable treatment will not be unlawful if an employer can objectively justify their actions. They state that less favourable treatment would be justified if it was necessary and appropriate in order for the employer to achieve a legitimate business objective. These regulations were amended in 2002 by the Part-time Workers (Prevention of Less Favourable Treatment) Regulations 2000 (Amendment) Regulations 2002. These regulations made changes mainly relating to the role of the comparator and on pensions.

If a part-time or fixed-term worker feels that they have been discriminated against they are able to make a complaint to the Employment Tribunal. Such a claim should be made within three months of them having encountered ‘less favourable treatment’.

MAKING A DISCRIMINATION CLAIM TO THE EMPLOYMENT TRIBUNAL

Any job applicant or employee who feels that he has been discriminated against is able to make a complaint to the Employment Tribunal. The courts do not deal with discrimination cases and claims are made to the tribunal in the manner outlined in Chapter 10.

Complaints of sex, race or disability discrimination must be made within three months of the alleged discriminatory act. This time limit also applies to complaints involving sexual orientation, religion or belief and age discrimination. Where there are a continuing set of discriminatory acts, the three-month time limit begins to run from the date of the most recent act. There is no time limit relating to a claim brought under the Equal Treatment Directive.

Discrimination is not often easy to prove. Evidence of discrimination is not always readily available. It is unlikely that employers will admit to have discriminated in the selection or treatment of
their workforce. In some situations employers may not believe that their actions amounted to discrimination. In *Khanna v Ministry of Defence* (1981) it was stated that ‘it is highly improbable that a person who has discriminated is going to admit the fact, quite possibly even to himself’.

### Burden of proof

The Sex Discrimination (Indirect Discrimination and Burden of Proof) Regulations 2001 and the Race Relations Act 1976 (Amendment) Regulations 2003 outline the way in which the burden of proof operates in sex and race discrimination tribunal claims. Similar rules exist in relation to disability, sexual orientation, religion or belief and age discrimination claims. The claimant (job applicant/employee) must establish the facts of their claim. They may produce any available evidence to support their claim. This could include documents and witness statements from colleagues.

Once the claimant has established the facts the burden then shifts to the employer to show (on the balance of probabilities) that they did not discriminate or that they had some justification for their actions. If the employer is unable to do this the tribunal will find that they have unlawfully discriminated against the claimant. An award will then be made in favour of the claimant.

### Questionnaire procedure

This procedure is designed to help the person making the complaint to find out more about the reasoning behind the employer’s actions. There are standard questionnaires designed for differing types of discrimination claim. A questionnaire must be sent to the employer within three months of the alleged discriminatory act.

If the complainant has already lodged a tribunal claim, he will then have 21 days from that date to send the questionnaire to the employer. If the claim relates to disability discrimination he will then have 28 days from that date to send the questionnaire to the employer. Employers do not have to answer questionnaires. They may not return it at all or may answer some but not all of the questions.

However, any failure to answer, or providing any evasive or inaccurate answers, may be taken into account in tribunal proceedings. As the tribunal is able to draw adverse inferences from any failure to assist, it is in an employer’s interests to complete the questionnaire as fully as possible.

### Remedies and awards

After hearing all of the evidence, the tribunal will make its decision. If it finds in favour of the complainant stating that discrimination did occur, it can then make an award.

The tribunal may:

- make a declaration of the rights of the complainant and the employer;
- make a recommendation that the employer do something, for example provide the complainant with a reference; or
- make an award of compensation with no statutory limit and including an award for injury to feelings.

### Declarations

A declaration may be made alongside an award for compensation. The tribunal declares the rights of the complainant and the employer. This remedy is often used to prevent further acts of discrimination.
Recommendations
In issuing a recommendation the tribunal orders the employer to do something.

**Example**
Possible recommendations include:
- the employer making a full written apology to the employee;
- the employer removing discriminatory documents, advertisements;
- the employer removing adverse notes from any employee file and noting that the employee has been discriminated against in the past.

If an employer refuses to comply with a tribunal recommendation and can show no justification for his inaction, the tribunal may increase any compensatory award. The tribunal cannot recommend that a person who was discriminated against during the recruitment and selection process be offered a job when other vacancies become available. Any such vacancies would still have to be advertised in the normal way.

Compensation
This is the most common award. The tribunal can award damages based on, for example, loss of wages or future wages and injury to feelings. Any expenses such as counselling or medical bills incurred as a result of the discrimination may also be reimbursed.

Until November 1993 there was a ceiling on tribunal awards which meant that often the amounts awarded were relatively low compared to the discrimination suffered. However, following the case of *Marshall v Southampton & South West Area Health Authority (No. 2)* (1993), there is now no limit on the amount of compensation that can be awarded. The ceiling was removed by the Discrimination and Equal Pay (Remedies) Regulations 1993 and the Race Relations (Remedies) Act 1994.

Following this, tribunals have made substantial compensatory awards. In *Ministry of Defence v Cannock* (1994) armed service women who were forced to leave the service when they became pregnant were awarded damages of over £300,000. In *Armitage v Johnson* (1997) the EAT awarded a prison officer £28,000 – £21,000 of the award being for injury to feelings. It has been said that some awards in relation to injury to feelings have become excessive. The Court of Appeal set down guidelines as to how compensation for injury to feelings should be assessed in *Chief Constable of West Yorkshire v Vento (No. 2)* (2002). Here it was stated that awards of between £15,000 and £25,000 should be given only in the most serious cases, such as where there has been a lengthy campaign of discriminatory harassment. Awards of between £5,000 and £15,000 should be given in serious cases, which do not merit an award in the highest band. In less serious cases where the act of discrimination is an isolated or one off occurrence it was said that awards of between £500 and £5,000 should be made. In the recent case of *Da’Bell v NSPCC* (2010) the EAT held that the three bands for injury to feelings (as originally set out in *Vento*) should be increased in line with inflation. They stated that the limit on the top band should increase to £30,000, the middle band to £18,000 and the lower band to £6,000.

Other examples of large compensation payouts include the following cases. In *Miles v Gilbank & anor* (2006) Ms Miles was awarded £25,000 for injury to feelings after she endured a sustained campaign of bullying at work. Having told her manager that she was pregnant, she was subjected to a campaign of serious harassment. In *Browne v Greater London Magistrates Courts Authority* (2005) an Employment Tribunal awarded £206,415 to a disabled employee.
what next for discrimination law? future reform

who resigned after 3 years of trying to get her employer to make reasonable adjustments to her workplace.

Many high-profile compensation payouts result from claims from those working in large investment banks in the City of London, often referred to as ‘London’s square mile’. In 2006 Deutsche Bank Group was ordered to pay Helen Green, a former employee, over £1 million following her successful claim for sex discrimination. She had suffered a long period of harassment and bullying at work. In 2003 Steven Horkulak, a broker at the firm Cantor Fitzgerald, won £1 million damages after bullying and harassment caused him to resign from his job. In 2009 top city lawyer Gill Switalski was awarded £13.4 million in compensation following her claim for sex discrimination and harassment. Allowing discrimination to exist within their work environment can prove to be a very costly mistake for employers.


Indirect discrimination

The rules on indirect discrimination are slightly different. In the case of indirect race discrimination, if it can be shown that the act of indirect discrimination was unintentional, no damages can be awarded. In relation to indirect sex discrimination, a new section was inserted into the Sex Discrimination Act 1975 in 1996. This states that no compensatory award should be made in cases of indirect discrimination where the employer did not intend to discriminate unless the tribunal deems that it would be ‘just and equitable’ to do so.

The use of equal opportunities policies

All employers should formulate and use an equal opportunities policy. The policy should deal with all forms of equality issues and provide details on complaints procedures, training courses and queries. Often this awareness of equal opportunities issues can prevent acts of discrimination from occurring. All employees should be provided with information on any such policy.

The Equality and Human Rights Commission publishes a vast amount of guidance on how to draft and implement such policies. This is available on the Commission’s website.

What next for discrimination law? future reform

There have been several recent developments in the field of discrimination law. Perhaps the most significant change in recent years has been the launch of the Equality and Human Rights Commission. The role of the Commission is discussed in Chapter 1. The Commission took over the work of the Equal Opportunities Commission, Commission for Racial Equality and the Disability Rights Commission.

A further important development is the Equality Bill that has now received Royal Assent. The Bill was introduced into the House of Commons on 24 April 2009. It received its third reading in the House of Commons in March 2010. The new legislation is a quite lengthy and complex document and so, even though the government has stated that it is likely to become law in late 2010, it is unlikely that all sections of the new Act will be brought into force at the same time.
Summary checklist

In summary, the Bill states that the existing discrimination legislation will be consolidated into a single Equality Act. If legislated in its present form the Bill:

- defines discrimination as ‘less favourable treatment’;
- standardises the definition of ‘indirect discrimination’, meaning that the test will be based on there being a particular disadvantage arising from the application of a ‘provision, criterion or practice’;
- provides for dual discrimination claims in relation to direct discrimination;
- provides for a general exception where, e.g., being of a particular sex is a requirement for the work and the person to whom it is applied does not meet it;
- standardises the law on harassment;
- provides for positive action;
- creates a single equality duty.

The EHRC has recently issued two draft codes of practice. In January 2010 it launched a consultation on codes of practice on ‘employment’ and ‘equal pay’. At the time of writing the consultation is still open. Information on the Equality Act 2010 is available on the EHRC website. The website companion to this text details relevant updates on the new legislation.

SUMMARY CHECKLIST

- Discrimination on the grounds of sex, race and disability are the most widespread.
- The Equality and Human Rights Commission plays a significant role in the enforcement of anti-discrimination law.
- The main anti-discrimination regulations cover sexual orientation, religion/belief and age.
- European law has had a major impact in the area of sex discrimination, mainly through the implementation of the Equal Treatment Directive and the Amsterdam Treaty.
- The law recognises three forms of discrimination: direct, indirect and victimisation.
- Direct discrimination occurs when a person is treated less favourably because of, e.g., his sex, marital status, race or disability.
- Indirect discrimination occurs where an employer imposes a provision, criterion or practice which on the face of it applies to all people but which actually discriminates against a group of people. In relation to indirect racial discrimination claims based on colour/nationality, this occurs when an employer imposes a requirement or condition.
- Victimisation occurs where a person is treated less favourably because of his current or previous involvement in any complaint.
- Sex discrimination can be based on sex or marital status.
- It is unlawful for a person to discriminate against another on the basis of colour, race, nationality, ethnic or national origin.
- A person is only protected by the Race Relations Act 1976 if he is from a particular racial group.
The employer’s motive is irrelevant.

Discrimination may take place in the arrangements made for the purpose of deciding who should be employed, on the terms on which a person is offered a job, when refusing to employ a person because of his sex/marital status or race, by refusing access to opportunities at work or when dismissing a person or subjecting him to any other detriment.

There can be no defence to a claim of direct discrimination.

In claims of indirect discrimination, an employer may be able to show that his actions were justified – they were a proportionate means of achieving a legitimate aim.

In relation to recruitment, transfers and training, an employer may be able to favour a person from a particular sex/race because there is a genuine occupational qualification.

The legislation also recognises other discriminatory acts, such as the use of discriminatory job advertisements.

Employers may be vicariously liable for the discriminatory actions of their employees.

It is generally unlawful to positively discriminate.

Sexual and racial harassment can amount to direct discrimination.

It is unlawful to discriminate on the grounds of sexual orientation.

Under the Disability Discrimination Act 1995 an employer has a duty to make ‘reasonable adjustments’ to the work premises.

The DDA 1995 recognises four forms of discrimination: direct, failure to make reasonable adjustments, disability-related discrimination and victimisation.

The DDA 2005 widened the definition of what will be classed as a disability.

It is unlawful to discriminate on the grounds of religion or belief.

It is unlawful to discriminate on the grounds of age.

It is unlawful to discriminate on the grounds of trade-union involvement or non-involvement.

It is unlawful, subject to certain excepted categories, to discriminate against a person with a criminal conviction if that conviction is ‘spent’.

Regulations prohibit discrimination against part-time employees or those on fixed-term contracts.

Discrimination claims are made to the Employment Tribunal.

Claims must be made within three months.

The tribunal may make a declaration, recommendation or award compensation.

The Equality Act received Royal Assent in 2010.

**SELF-TEST QUESTIONS**

1. What is ‘direct’ discrimination?
2. What is ‘indirect’ discrimination?
3. What is ‘victimisation’?
4. What are the stages at which discrimination may take place?
5. In what ways might an employer defend a discrimination claim?
106 Case scenarios

6 What are the rules governing ‘genuine occupational qualifications’?

7 What impact have the Equal Treatment Directive and the Amsterdam Treaty made on national discrimination law?

8 Under the Disability Discrimination Act 1995 what is the employer’s ‘duty to make reasonable adjustments’?

9 When might a conviction be regarded as being ‘spent’?

10 Summarise the content of the Employment Equality (Age) Regulations 2006.

11 What remedies/awards may be made by the Employment Tribunal?

CASE SCENARIOS

A Helen, Annie and Danny work at a local school. Helen teaches maths, Annie teaches music and Danny is the deputy headmaster. Helen has been teaching for ten years and is keen to be promoted. She recently attended a promotion interview but the job was given to her colleague Adrian. Adrian has fewer qualifications than Helen and he has only been teaching for five years. Helen asked her line manager why she did not get the job and he said that the interview panel had thought it ‘better to put a man into a top job’.

Annie recently gave evidence in the Employment Tribunal for her colleague Susan. Susan was bringing a claim under the Employment Equality (Sexual Orientation) Regulations 2003 because she felt that she had been discriminated against because she is a lesbian. Annie recently applied to go on a training course but her line manager refused her request. He told her that it was ‘payback time’ for her involvement in Susan’s claim.

Danny is 54 years old. He is aware that a vacancy is due to arise for a headmaster at a neighbouring school. Yesterday he telephoned the school to ask about the vacancy. The current headmaster told him that he was too old to apply and that they were ‘really looking for someone a bit younger, someone around 40 years old’, and ‘definitely not someone over the hill’.

Advise Helen, Annie and Danny on any claims that they may have using anti-discrimination law. Would their employer/prospective employer have any defence to any claim made?

B John manages a large community theatre group. He is staging a performance of Othello and has placed an advertisement in his local newspaper asking for applications for the lead role from ‘black actors only’. He also advertises for ‘strong and healthy stage-hands’. Adam is a white actor with over ten years of acting experience. He sees the advertisement asking for an actor to play Othello and attends the casting interview. John refuses to watch him act and asks him to leave, saying, ‘Didn’t you read the advert, mate?’ Adam claims that he has been discriminated against because he is white.

Karl is interested in the theatre and sees the advert for stagehands. He is disabled but is able to lift and carry light loads. He attends for interview and John tells him that he cannot make any special arrangements for disabled workers.

Advise Adam and Karl of any potential claims that they may have using anti-discrimination law. What would be the position if the group were staging Romeo and Juliet and the advertisement asked for ‘white actors only’? Would Adam have any claim if he was rejected only on the basis that he was black? Would John have any defence to any claims made?
Further reading


Acas: Religion or Belief and the Workplace, 2004.


Visit www.mylawchamber.co.uk/nairts to access study support resources including interactive multiple choice questions, practice exam questions with guidance, weblinks, glossary flashcards and legal updates.