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STANDING UP FOR YOU

Summary of the law
on sex discrimination

Our pledge to you

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We have more experience of winning personal injury and employment claims than any other firm – and we use that experience solely for the injured and mistreated.

Thompsons will stand up for you by:

Staying true to our principles – regardless of how difficult our job is made by government, employers or the insurance industry

Remaining committed to the trade union movement, working closely with them and with professional associations for the benefit of working people everywhere

Thompsons pledge that we will:

Work solely for the injured or mistreated

Refuse to represent insurance companies and employers

Invest our specialist expertise in each and every case

Fight for the maximum compensation in the shortest possible time

standing up for you

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The Spirit of Brotherhood
by Bernard Meadows

About this booklet

This booklet sets out the basic employment rights to which workers are entitled under the sex discrimination provisions of the Equality Act 2010. These apply in England, Wales and Scotland (except where indicated) only.

- Protection and liability.
- Discrimination.
- Harassment.
- Victimisation.
- Tribunal claims.
- Remedies.
- Marriage.
- Gender reassignment.

What does the Equality Act cover?

The Act covers all forms of discrimination in the workplace including; selection for a job, training, promotion, work practices, dismissal or any other disadvantage such as sexual harassment because of sex.

Although this booklet refers to women in the examples, it should be noted that the law applies equally to men and women.

Who is protected by the Act?

It covers all forms of employment and applies to apprentices, those working under a contract of employment and the self employed working under a contract personally to do the work.

Ex-employees can also make a claim against a former employer if they are complaining about something that was closely connected to their employment.

Who is liable?

The employer is generally liable for acts of discrimination, harassment and victimisation in the workplace. However, individual employees may also be liable if for example, they have subjected a colleague to harassment related to sex.



When can sex discrimination arise?

Sex discrimination can arise in relation to:

- The arrangements made for deciding who should be offered employment such as shortlisting and interviews.
- The terms upon which employment is offered.
- Refusing or deliberately omitting to offer employment.
- The ways in which access to opportunities for promotion, transfer, training or other benefits, facilities or services are offered.
- Dismissal or any other detriment.

What is the public sector equality duty?

Public bodies such as local government, the NHS and those carrying out public functions are under a duty to consider equality when making day-to-day decisions both in terms of service delivery and employment. This consists of a general duty and specific duties.

The general duty has three aims and requires public bodies to have due regard to the need to:

- Eliminate unlawful discrimination, harassment and victimisation and other conduct prohibited by the Act.
- Advance equality of opportunity between people from different groups.
- Foster good relations between people from different groups.

The specific duties are designed to help public bodies comply with the general duty. Broadly, these required specified public bodies to publish information on how the general duty is being met and to prepare and publish one or more equality objectives.

The specific duties for devolved public authorities are different in England, Wales and Scotland. Trade unions should therefore check that the employer is complying accordingly.

What is positive action?

The Act allows employers to treat someone with a protected characteristic more favourably during the process of recruitment and promotion.

If they think that the person with a protected characteristic has a reasonable chance of being disadvantaged because of that characteristic (or there are fewer people with a particular protected characteristic employed), they can choose that person over someone who does not have the protected characteristic provided that:

- The person is as qualified as the other candidate.
- The employer does not have a recruitment or promotion policy of treating people of the underrepresented group more favourably.
- The more favourable treatment is a proportionate means of achieving a legitimate aim (the legitimate aim being encouraging participation and overcoming disadvantage).

These provisions are voluntary. An employee cannot bring a claim because the employer did not apply positive action during the recruitment or promotion process, although they may still be able to bring a claim if they were discriminated against during it.



What does the Act outlaw?

Direct sex discrimination

Direct sex discrimination occurs when an employer treats a woman less favourably than a man, because of sex or vice versa.

In order to determine whether someone is directly discriminated against, a comparison has to be made with someone of a different sex but whose circumstances are the same or not materially different.

The definition is wide enough to cover those who are also discriminated against because they are perceived to be of a particular sex or because they are associated with someone of a particular sex.

The following situations and examples could give rise to a claim for direct discrimination:

- In an interview for a job the employer only asks female applicants about their domestic circumstances.
- A man with inferior qualifications and/or less experience than a woman is appointed to the job or the promotion for which they both applied.
- A woman is told that she would not be considered for a job because it is "dirty work" or because there is "a lack of decent toilet facilities".
- A woman is not encouraged to meet clients or invited to social events to meet them. Instead, a mainly male group is selected.

Indirect sex discrimination

Indirect discrimination arises when an employer applies a provision, criterion or practice (PCP) which puts people of one sex at a particular disadvantage compared to those of another sex and which the employer cannot justify. For example, a requirement to work full time might be more of a bar for women than men.

Employers can only defend indirect discrimination if they can show that it was "a proportionate means of achieving a legitimate aim".

Harassment

There are three types of unlawful harassment under the Act.

The first is when an individual is subjected to unwanted conduct related to sex that has the purpose or effect of violating their dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment. Individuals who are not the butt of unwanted conduct but who feel that their dignity has been violated, or that an offensive environment has been created, are also protected by the legislation.

The second is when someone engages in unwanted verbal, non-verbal or physical conduct of a sexual nature that has the purpose or effect of violating a person's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment.

The third is when someone treats a woman less favourably because she rejected any unwanted conduct. "Conduct" is only regarded as harassment when all the circumstances are taken into account (including the perception of the woman at the receiving end of it) and if it is reasonable to conclude that it could have had that effect.

Examples of sexual harassment include the following:

- Physical harassment.
- Unwanted sexual comments or personal comments about a woman's appearance.
- Non-verbal harassment such as unwanted gestures or displays of pornographic pictures.

The victim does not have to demonstrate any financial or other specific loss, such as a threat of dismissal. It is enough that her working environment has become intimidating, hostile or offensive.

The government repealed the provision whereby employers could be found liable for harassment by third parties in October 2013. However, it may still be possible to bring a claim under the general provisions on harassment.

Victimisation

Some women may be deterred from exercising their rights under the Act, or from supporting others who wish to exercise their rights, in case they are victimised by their employer:

The Act guards against this by making it unlawful for an employer to victimise an individual because, in good faith, they:

- Brought proceedings under the Act or previous discrimination legislation.
- Gave evidence or provided information in connection with proceedings that someone else has brought.
- Did anything else such as raising a grievance or giving evidence in someone else's grievance.
- Made allegations of a breach of the Act or previous discrimination legislation.

The above examples amount to 'protected acts' under the Act.

The person complaining of victimisation has to have acted in good faith when doing a protected act. A false allegation will not amount to a protected act.

Are there any exceptions?

There are two exceptions when the Act does not provide protection against discrimination:

- Occupational requirement (OR).
- Religious requirement.

Occupational requirement (OR)

The Act does not apply when the employer can show that there is an occupational requirement to do with the nature or context of the work which means they need to recruit someone of a certain sex, as long as they can show it is a proportionate means of achieving a legitimate aim.

The occupational requirement applies only to direct discrimination in recruitment, promotion, transfer and training and not to the way in which an employer affords access to benefits, facilities or services.

Examples of when the occupational requirement may apply include reasons of decency or privacy, for instance where the job involves physical contact or people may be undressing (say, in a changing room). Or the job may involve providing personal services such as rape counsellors.

Religious requirement

Discrimination because of sex is also lawful in relation to employment for the purposes of an organised religion. Organised religion is not defined in the Act but case law has established that it should be applied very narrowly.

In order to satisfy the religious requirement, the employer will have to show that it is directed to comply with the doctrines of the religion, or avoids conflict with the strongly held religious convictions of the religion's followers by favouring a person of a specific sex.

Is it easy to prove a claim?

Proving sex discrimination is not straightforward. A woman complaining of discrimination has to prove, on the balance of probabilities, that her employer discriminated against her because of her sex. This means that the Tribunal does not have to be certain, but they have to think it more likely than not, that her treatment was on those grounds.

Once an employee has established facts from which a Tribunal could conclude that there had been discrimination, then the burden may shift to the employer to show that they did not discriminate against her. This is known as the reversal of the burden of proof.

Not surprisingly, it is rare to find overt evidence of direct discrimination. Few employers are prepared to admit that they have discriminated against someone and those who are aware of the law may have taken steps to appear to have acted lawfully.

Whether or not discrimination can be proved will often depend on what inferences a Tribunal can draw from the primary facts. However, there will usually need to be some factual basis upon which the Tribunal can make its finding. It therefore helps if the claimant can produce any relevant letters or documents. In cases of sexual harassment, it is useful if the employee makes a note of the key incidents and the dates on which they took place.

How do claimants gather information from their employer?

Workers can currently request information from their employer about their complaint. There are standard forms for asking and answering questions (the questionnaire procedure), as well as guidance which explains how the procedure works.

A questionnaire can be sent to the employer any time before a claim is lodged at the Tribunal or within 28 days of a Tribunal claim being lodged. If the employer fails to answer the questions within eight weeks, a Tribunal may use this fact to draw an inference of unlawful discrimination. However, the government has said it will remove this provision in Spring 2014. It is important in most cases for claimants to submit a written grievance in order to comply with the ACAS code of practice on disciplinary and grievance.

What time limits apply?

Claims must be brought within three months less one day of the act of discrimination that the person is complaining about. In exceptional circumstances, the three month time limit may be extended if a Tribunal believes that it is just and equitable to do so.

Where the discrimination has occurred over a long period of time, this may amount to a continuing act extending over a period. A claim must then be brought within three months less one day of the last act in the series of acts.

What remedies are available?

There are three remedies available to a Tribunal:

- Declaration.
- Compensation.
- Recommendations.

Declaration

A declaration is a statement of the rights at the end of a claim, for instance that a worker has been subject to direct discrimination.

Compensation

Compensation can be awarded for injury to feelings and financial losses, if there are any. This can vary from case to case and will depend on the individual circumstances. There is no statutory limit to the amount of compensation, which can include, loss of earnings (past and future), loss of pension, interest and any other outlays associated with the discrimination.

The amount of compensation for injury to feelings can vary enormously. The person's age and vulnerability may be considered, and also the severity of the discrimination.

Aggravated damages (not applicable in Scotland) can also be awarded if the Tribunal is satisfied that the employer has behaved in a high-handed, malicious or insulting way which has aggravated the injury to the claimant's feelings.

Claimants can also ask for compensation for personal injury if they have been seriously affected by the discrimination, particularly in harassment cases which can lead to illness and depression. If so, claimants need to produce a medical report to support their claim.

Recommendations

The Tribunal can make recommendations for the purpose of preventing or reducing the effect of the discrimination on the claimant or any other person even though they were not a party to the claim.

Examples of recommendations Tribunals can make include requiring an employer to:

- Introduce an equal opportunities policy.
- Ensure their harassment policy is more effectively implemented.
- Set up a review panel to deal with equal opportunities and harassment/grievance procedures.
- Re-train staff.
- Make public the selection criteria used for the transfer or promotion of staff.

A Tribunal cannot recommend that a person be given a job in a case where an employee successfully claimed they were discriminated against in a promotion exercise, for example. If the employer fails to comply with a recommendation, then the Tribunal may order the compensation to be increased.

The government announced in May 2013 that it will repeal this provision but has not, as yet indicated when this will happen.

Discrimination because of marriage

Anyone who is married is also protected under the Act. Marriage covers any formal union of a man and a woman legally recognised in the UK as a marriage. Single people, those who are unmarried, divorced or in a cohabiting relationship are not protected.



Unlike other discrimination legislation, there is no protection from direct discrimination by association or perception or harassment for those who are married.

Discrimination because of gender reassignment

It is unlawful for an employer to discriminate against another person because of the protected characteristic of gender reassignment.

This includes less favourable treatment due to an employee's absence for gender reassignment treatment, or because they are either submitted to, or rejected, harassment related to gender reassignment.

The Act covers people who propose to undergo, are undergoing or have undergone a process to reassign their sex. The 'process' is defined as the personal process involving a change in attributes traditionally assigned to a particular sex and is not dependent on undergoing a medical process.

The definition is wide enough to cover transsexuals but is not intended to cover transvestites. However, a worker who is perceived to be undergoing or proposing to undergo gender reassignment will be protected.

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