TUC Guide to Equality Law 2011

Written by

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Acknowledgement

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Foreword

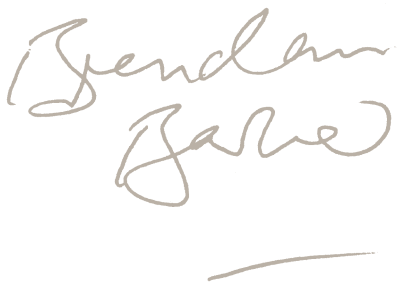
Equality law has developed at a rapid pace in the last decade, with laws on sexual orientation, religion or belief and age discrimination taking effect and positive duties being placed on public authorities to take equality into account in all that they do. The Equality Act 2010 – a landmark piece of legislation for which the TUC had long campaigned – has given us a unified legal framework and introduced some important new measures to advance equality. It is important that trade unionists understand and know how to use this Act, as well as related rights in other employment legislation, to help working parents and carers, and that is what this guide is aimed at achieving.

Trade unions represent an increasingly diverse membership and they will use the law as well as their collective strength to tackle discrimination and fight for equality in the workplace. Trade unions regularly represent in tribunals individuals who have suffered discrimination (for example, the tens of thousands of claims that have been lodged in the fight for equal pay), but they will also use the law to help achieve resolution of problems in the workplace and as an aid to negotiating policies to prevent discrimination and achieve equality without recourse to costly and stressful legal battles.

As the TUC Equality Audit 2009 found, improvements in equality law and family -friendly rights made it easier for trade unions to press employers to adopt good equal opportunities practice. And it raised the bar in terms of what was achievable, with family-friendly policies in unionised workplaces continuing to exceed the statutory floor, despite the significant improvements in the minimum legal rights for parents and carers.

The TUC Equality Audit 2011, which focused on trade unions' efforts to ensure equality and fair representation within their structures and services to members, showed that unions recognise their own obligations under the Equality Act 2010 and the need for action to meet them.

In these difficult economic times, trade unions must do their utmost to ensure that the progress made on equality and building good relations between different groups is not reversed. Familiarity with the law and understanding the core rights is part of that. I recommend this guide to you.



Brendan Barber

TUC General Secretary

The law in context

The Equality and Human Rights Commission's (EHRC) triennial review of equality 'How Fair is Britain?' highlighted the fact that, despite significant advances over recent decades (for example, with the employment and pay gap between men and women narrowing and the proportion of disabled people in employment growing), certain work-related inequalities still persist.

These include:

- People with mental health problems face significant difficulties accessing work, for example only 23 per cent of people with depression are in employment.
- Strong occupational segregation by race and gender persists, for example, one in four Pakistani men is a taxi driver; one in three women is in a managerial job while more than three-quarters of administrative jobs are done by women.
- The gender pay gap widens significantly as a result of motherhood, with mothers with mid-level qualifications facing a 25 per cent loss in lifetime earnings and those with no qualifications a 58 per cent loss.
- Lesbian, gay or bisexual adults are twice as likely to report harassment, discrimination or other unfair treatment at work compared to other employees.

Legislation developed to try to address these kinds of inequalities. It became more sophisticated as awareness and understanding of the problems that particular groups faced grew. Understanding how the law may help in tackling inequality is important, which is how this guide aims to help trade unionists, though it is only part of the solution.

UK equality law

Equality law in Britain has come a long way since the first-ever race relations legislation was passed in 1965 to tackle the then practice of banning black and minority ethnic (BME) people from using public services or entering public places. By October 2010 there were no fewer than nine discrete pieces of discrimination legislation and more than 100 statutory instruments in force, covering discrimination on grounds of age, disability, race, religion or belief, sex (including gender reassignment, marital or civil partnership status, pregnancy and maternity) and sexual orientation. However, discrimination law had grown in a piecemeal fashion over more than four decades, in response to different social and legislative pressures, and it had become fragmented, complex and marked by inconsistency.

That changed with the coming into force in October 2010 of the Equality Act 2010. The Act consolidated the separate discrimination laws into a single Act and streamlined many of the legal definitions applying to the different equality groups. In addition, in some areas it broadened and improved the level of protection. The Act was the result of many years of campaigning by organisations like the TUC, trade unions and equality and human rights NGOs. It was passed by the last Labour government but was brought into force by the coalition government.

Most of the Act's provisions came into force on 1 October 2010 (at which time the old discrimination laws were repealed). Many of the remaining provisions were due to take effect in stages between 2010 and 2013. The coalition government has chosen not to commence some parts of the Act, including a duty on public bodies to consider the need to tackle socio-economic disadvantage when making strategic decisions and a provision allowing individuals to bring discrimination claims because of a combination of two protected characteristics. It is also due to consult on whether to repeal the new provision protecting employees from harassment by third parties like customers or service users.

This guide also covers the main family-friendly rights. These rights are covered by legislation separate to the Equality Act 2010 but they interact with provisions in the Act (for example, the right not to be discriminated against because of pregnancy or maternity or because of sex) to achieve greater equality at work, particularly for women and those with caring responsibilities.

Family-friendly rights improved significantly between 1998 and 2011, with increases in maternity leave and pay and the introduction of rights to paternity leave and pay, adoption leave and pay, parental leave, emergency time off for dependents, additional paternity leave and pay, and a right to request flexible working. The coalition government plans to further develop these rights to meet its objective of encouraging more shared parenting as set out in its Modern Workplaces consultation, published in May 2011.

Case law

Employees who have suffered unlawful discrimination at work can enforce their rights by pursuing a claim to the employment tribunal. More detail on what this involves is given in Part Three. Appeals against employment tribunal decisions are heard by the Employment Appeal Tribunal (EAT). Appeals against EAT decisions go to the Court of Appeal and appeals from that court are heard by the Supreme Court.

Decisions made by the EAT or higher courts are binding on tribunals or courts lower than them. This means the decisions should be followed in similar cases in the future. These 'precedent' decisions form an important part of the law and are generally referred to as case law. Employment tribunals seeking guidance on the interpretation or application of the law will look to precedents set by the EAT, Court of Appeal or Supreme Court. The higher the court, the more weight the precedent carries.

Case law from the previous discrimination legislation is still relevant when considering cases under the Equality Act 2010, particularly where the same or similar wording is used and the provisions implement the requirements of the EU discrimination directives.

EU law

Most UK discrimination and family-friendly laws are underpinned by EU law. All UK law must be consistent with EU law, and where there is a conflict EU law will override UK law. EU law has several different sources, some of which are set out below.

Treaty articles

The UK is a party to several European treaties. Some of the terms in these treaties – that is, those that give clear, precise and unconditional rights to individuals – can be directly relied on in UK courts and tribunals, for example, Article 157 of the Treaty on the Functioning of the European Union (TFEU), which requires the 'principle of equal pay for male and female workers for equal work or work of equal value' to be applied.

Directives

A directive is a particular kind of EU law. As a member of the European Union, the UK government must make sure that all EU directives are incorporated in UK national legislation and enforced. If a directive sets out a clear, precise and unconditional right and the right is not correctly integrated into UK law, employees in the public sector may be able to pursue claims against their employer for breach of that directive.

The main EU directives relevant to equality in the workplace are:

- **Gender Recast Directive no 2006/54** – covers sex discrimination, including pregnancy and maternity discrimination, in employment. It is a consolidated version of earlier directives (the Equal Pay Directive no 75/117 and the Equal Treatment Directive no 75/207 as amended by the Equal Treatment (Amendment) Directive no. 2002/73).
- **Pregnant Workers Directive no 92/85** – provides for maternity leave and covers the employment conditions for pregnant workers, those on maternity leave or those who are breastfeeding at work (it is based on health and safety articles in the TFEU).
- **Parental Leave Directive no 96/34** – covers rights to time off for family reasons, and a revised version (Directive no 2010/18), providing for longer parental leave and a right to request flexible working, is due for implementation in Member States by March 2012.
- **Race Directive no 2000/43** – covers equal treatment regardless of racial or ethnic origins in employment, social security and healthcare, education and the provision of goods and services.
- **Framework Employment Equality Directive no 2000/78** – covers equal treatment on grounds of age, disability, religion or belief, and sexual orientation in employment.

The Court of Justice of the European Union

Where there is a potential conflict between national law and EU law, a court may refer the matter to the Court of Justice of the European Union (CJEU) for further guidance. The CJEU will give its interpretation of what EU law requires and it will be for the national court to apply it to the case. As EU law overrides UK law, CJEU guidance must be followed by UK courts and tribunals in subsequent cases.

Human rights

The Human Rights Act (HRA) 1998 came into force on 2 October 2000. The Act incorporates into UK law the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950. This means that the UK must interpret national law in line with the rights listed in the Convention.

The following gives a brief summary of the Convention rights that are most relevant to discrimination law and trade unions:

- **Respect for private and family life, home and correspondence** (Article 8). This may be relevant when arguing for equality for lesbian, gay, bisexual and transgender (LGB&T) people.
- **Freedom of thought, conscience and religion** (Article 9). Reference is often made to this in religion or belief discrimination cases.
- **Freedom of expression** (Article 10). This may be relevant in cases involving religion or belief discrimination or harassment cases.
- **Freedom of association** (Article 11). This includes the right to form or join a trade union.
- **Prohibition of discrimination** (Article 14). This prohibits discrimination in the enjoyment of the Convention rights on grounds such as[1] sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status. This article can be relied upon only when an employee is exercising another Convention right.

Articles 8, 10 and 11 are qualified rights, which means restrictions can be placed on them where they are prescribed by law and considered necessary in a democratic society, including to protect the rights and freedoms of others. The right to manifest one's religion is also a qualified right, though the right to hold a particular religious belief is an absolute right.

Employees of public authorities may directly pursue claims for a breach of a Convention right against their employer in an appropriate court or tribunal. Employees who work for a private sector employer cannot directly enforce their rights but they can rely on Convention rights where it would assist a tribunal or court to determine another claim like a sexual orientation discrimination claim (for example, Articles 8 and 14 may assist) or a religion or belief discrimination claim (for example, Articles 9, 10 and 14 may assist).

[1] 'such as' means these are just examples of grounds of discrimination that are prohibited; other grounds, such as sexual orientation, may also be covered although not listed.

PART ONE
THE EQUALITY ACT 2010

The purpose of the Equality Act 2010 is to:

- consolidate existing discrimination law into a single Act, harmonising definitions where appropriate
- strengthen the law to support progress on equality by extending protection from discrimination to new areas and introducing new measures.

The Act covers discrimination in employment and vocational training, the provision of goods and services, public functions, education, premises and associations.

The Act replaces the following legislation:

- Equal Pay Act 1970
- Sex Discrimination Act 1975
- Race Relations Act 1976
- Disability Discrimination Act 1995
- Employment Equality (Religion or Belief) Regulations 2003
- Employment Equality (Sexual Orientation) Regulations 2003
- Employment Equality (Age) Regulations 2006
- Part 2, Equality Act 2006
- Equality Act (Sexual Orientation) Regulations 2007.

Of the previous discrimination laws, only the Equality Act 2006, insofar as it relates to the constitution and operation of the Equality and Human Rights Commission (EHRC) and the application of the Disability Discrimination Act 1995 (Northern Ireland) remain in force.

In general, the Act applies to 'workers', which means it gives rights not to be discriminated against to people such as contract workers and office holders, as well as employees. However, some parts, such as the equal pay provisions, have a narrower application applying to employees and office holders only.

1 Protected characteristics

The Equality Act 2010 prohibits discrimination because of the following characteristics:

- age
- disability
- gender reassignment
- marriage and civil partnership
- pregnancy and maternity
- race
- religion or belief
- sex
- sexual orientation.

There is nothing in the above list that was not already protected under the previous legislation.

Age

A reference to the protected characteristic of age is a reference to a particular age or a range of ages. So, for example, an employer who says "I'm dismissing you because you're 65" is discriminating against someone because they have reached a particular age. On the other hand, an employer who says, "no applicant over 50 years old will be considered for this job" is discriminating against people in a particular age range.

Disability

A person is considered to have a disability if they have a physical or mental impairment and the impairment has a substantial and long-term adverse effect on their ability to carry out normal day-to-day activities. Each element of this definition must be satisfied in order for someone to be disabled within the meaning of the Act.

In May 2011, the Office for Disability Issues (ODI) statutory 'Guidance on matters to be taken into account in determining questions relating to the definition of disability' took effect. This guidance is intended to assist employment tribunals and courts adjudicating on whether someone is disabled for the purposes of the Act. It will be a useful reference for trade unionists, too, when representing members who they think may be disabled and qualify for a range of protections under the Act.

What are physical and mental impairments?

Conditions such as arthritis, sciatica, irritable bowel syndrome, diabetes and heart disease are examples of physical impairments. Mental impairments are often a little more difficult to identify. However, examples of mental impairments may include depression and anxiety as well as conditions such as Asperger's syndrome, learning difficulties and autism. It is up to the individual to present medical evidence (often a consultant's report and medical records) to prove that they have the physical or mental impairment in question.

What if someone has an impairment but the cause is unknown?

Sometimes an individual will be unwell but unaware of the reason for their condition and unable to obtain a firm medical diagnosis. However, they may still be able to show they have a physical or mental impairment and qualify as a disabled person under the Act. As the ODI guidance says: "What it is most important to consider is the effect of an impairment not its cause." For example, an individual who suffers with chronic back pain, even though doctors are unable to identify the medical cause for the symptoms, may still be considered disabled under the Act.

What does 'long term' mean?

The effect of an impairment is long term if it:

- has lasted for 12 months
- is likely to last for at least 12 months, or
- is likely to last for the rest of the life of the affected person.

Again, whether or not something can be said to be long term is often a matter for medical evidence.

Are recurring conditions covered?

Yes. The Act says that if an impairment stops having a substantial adverse effect on a person's ability to carry out normal day-to-day activities but it is likely to recur then it is to be treated as continuing to have that effect. For example, a person who suffers with epilepsy experiences substantial adverse effects for a period of time but then goes through a period of remission. If the epilepsy is likely to recur then they are to be treated as disabled under the Act. Note that the ODI guidance says that 'likely' should be taken to mean that it could well happen, rather than it is more probable than not that it will happen.

What does 'substantial adverse effect' mean?

According to the Act 'substantial' means 'more than minor or trivial'. Whether an impairment has a substantial adverse effect on normal day-to-day activities is ultimately something that an employment tribunal would decide. An individual would have to give evidence to show how they were affected by the impairment. For example, the time taken to do things should be considered and if someone is able to carry out tasks like dressing themselves, walking and writing but only very slowly because of an impairment then it should be considered to have a substantial adverse effect.

How are progressive conditions treated?

If an individual has a progressive condition that is likely to end up as having a substantial adverse effect on their ability to carry out normal day-to-day activities then it will be treated as a disability under the Act from the point at which it has some effect on their ability to carry out normal day-to-day activities. For example, an individual is suffering with the early stages of muscular dystrophy (muscle weakness/wasting). He finds it more difficult to walk and needs to use his hands to help himself stand up. He will be considered as disabled from this point onwards as, although this does not amount to a substantial adverse effect on his ability to carry out normal day-to-day activities, the impairment is likely to worsen and become substantial in the future.

What normal day-to-day activities must be affected?

There is no prescribed list of normal day-to-day activities that must be affected by the mental or physical impairment. Instead, it will be for the individual to show that their normal day-to-day activities are adversely affected. Examples of normal day-to-day activities are given in the ODI guidance. They include: difficulty walking other than at a slow pace or with unsteady or jerky movements; difficulty pressing buttons on keyboards; difficulty picking up objects of moderate weight with one hand; difficulty hearing someone at a sound level that is normal for everyday conversations in a moderately noisy environment; significant difficulty taking part in normal social interaction or forming social relationships; and difficulty adapting after a reasonable period to minor changes in work routine.

The guidance also explains that 'normal day-to-day activities' is not intended to include activities that are normal only for a particular person or small group of people to do. This means that some specialist work tasks would not be covered. For example, a removal person regularly lifts unusually heavy and awkward objects like items of furniture. He develops a back problem that makes it difficult for him to do this but he can still lift moderately heavy objects. He would probably not be considered disabled under the Act as it is not a normal day-to-day activity to lift such large items of furniture. By contrast, a colleague develops repetitive strain injury (RSI), which means she cannot lift a saucepan full of water and cannot type without experiencing severe pain. As typing and lifting saucepans of water is something that many people do regularly, she would be considered disabled.

What if someone is receiving medical treatment that removes or lessens their symptoms?

The impairment will be treated as having a substantial adverse effect on their ability to carry out normal day-to-day activities if it would be likely to have that effect if they were not receiving the medical treatment. So, for example, an individual suffers with chronic diabetes. He takes insulin at regular intervals, which controls the condition. However, he must be assessed as if he were not taking the insulin when considering whether he is disabled. The exception to the above is where an individual wears prescription glasses or contact lenses – the effect of their visual impairment has to be assessed with their glasses on or their contact lenses in.

Are there any conditions that are automatically accepted as a disability without an individual having to prove that it has a substantial and long-term adverse effect on their ability to carry out normal day-to-day activities?

Yes. People with cancer, multiple sclerosis and HIV infection are deemed to be disabled, as are those who are blind, severely sight impaired, sight impaired or partially sighted. Severe disfigurements are also considered as having a substantial adverse effect on someone's ability to carry out normal day-to-day activities, unless they are self inflicted such as tattoos or body piercings.

Are any conditions automatically excluded from the definition of disability?

Yes, these include:

- addiction to alcohol, nicotine or any other substance (although addictions arising out of the result of medically prescribed drugs are not excluded)
- a tendency to set fires
- a tendency to steal
- a tendency to physical or sexual abuse of others
- exhibitionism
- voyeurism
- seasonal allergic rhinitis, for example hay fever.

What if someone used to have a disability but is now recovered?

They will still qualify for protection as the Act protects those who used to have a disability as well as those who currently have one.

Gender reassignment

A person has the protected characteristic of gender reassignment if the person is proposing to undergo, is undergoing or has undergone a process (or part of a process) for the purpose of reassigning the person's sex by changing physiological or other attributes of sex. There is no need for this process to be a medical procedure. For example, someone who is born physically female but starts to live as a man and finds that he successfully passes as a man and does not wish to go through a medical procedure for gender reassignment would be protected under the Act.

Marriage and civil partnership

To have the protected characteristic of marriage or civil partnership, an individual must be married or a civil partner. People who cohabit, are single, engaged, widowed or divorced do not qualify for protection from discrimination because of their relationship status.

Pregnancy and maternity

The Act provides that a person discriminates against a woman if, in the protected period in relation to a pregnancy of hers, he treats her unfavourably:

- because of her pregnancy
- because of an illness suffered by her as a result of it
- because she is on compulsory maternity leave
- because she is exercising or seeking to exercise or has exercised or sought to exercise the right to ordinary or additional maternity leave.

The 'protected period' in relation to a woman's pregnancy begins when the pregnancy begins, and ends:

- if she has the right to ordinary and additional maternity leave, at the end of the additional maternity leave period or (if earlier) when she returns to work after the pregnancy
- if she does not have the right to ordinary or additional maternity leave, at the end of the two-week compulsory maternity period that begins with the end of the pregnancy.

Race

The Act states that race includes:

- colour – for example black or white
- nationality – for example British, Columbian or Slovakian
- ethnic or national origins – for example Roma or Irish traveller background.

This is a non-exhaustive list so other factors could be included. There is also provision in the Act enabling

'caste' to be added to the definition of race and the government is considering evidence on whether this should be done.

Religion or belief

The protected characteristic of religion or belief includes any religion or philosophical belief and includes a lack of religion or philosophical belief. It is ultimately for a tribunal or court to decide what qualifies as a religion or belief under the Act. However, in accordance with the European Convention on Human Rights, in order to have the protected characteristic of 'religion' there must be a clear structure and belief system.

What religions are likely to be covered?

Christianity, Hinduism, Islam, Judaism and Sikhism are examples of generally accepted religions. Denominations within these religions are also likely to be covered by the protected characteristic of religion or belief, such as Anglican, Baptist, Catholic, Methodist and Seventh-Day Adventist within Christianity. As the lack of religion is explicitly stated to be included within this protected characteristic, atheists and agnostics are protected from discrimination because of their lack of religion.

What is a 'belief?'

The criteria for determining a 'philosophical belief' are stated in the Explanatory Notes to the Act, namely that the belief must:

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

The EHRC's statutory Code of Practice on Employment, which interprets the Act, gives as an example a woman who believes in the racial superiority of a particular racial group and states that it would not be a belief for the purposes of the Act since it is not compatible with human dignity and conflicts with the fundamental rights of others. However, a committed environmentalist may qualify for protection from belief discrimination.[2]

Sex

A reference to the protected characteristic of sex is a reference to a man or a woman. A reference to persons who share the protected characteristic of sex is a reference to men or women.

Sexual orientation

Sexual orientation means a person's sexual orientation towards:

- persons of the same sex – that is, lesbians and gay men
- persons of the opposite sex – that is, heterosexuals
- persons of either sex – that is, bisexuals.

[2] Grainger Plc v Nicholson UKEAT/0219/09/ZT

2 Prohibited conduct

Direct discrimination

The Equality Act states that a person (A) directly discriminates against another person (B) if 'because of' a protected characteristic they treat them less favourably than they treat or would treat others. For example, if a woman was turned down for a job as a labourer on a construction site because the manager thought women were not physically strong enough for such work that would be direct sex discrimination.

What does 'because of' mean?

Some say 'because of' suggests that there has to be a conscious motive to discriminate on the part of the discriminator. This was not the case in our previous discrimination laws, which used the words 'on grounds of'. However, the Explanatory Notes to the Act say that the change in wording does not alter the legal meaning and that change is just intended to make the law more accessible to the average person. In addition, the EU discrimination directives use the words 'on grounds of' and, as UK courts and tribunals have a duty to interpret UK law in line with EU law, the old approach should continue despite the change in wording.

Can there be direct discrimination if both A and B have the same protected characteristic?

Yes. For example, a female owner of a small business refuses to employ a young woman who has just got married because she thinks she may get pregnant in the near future. The reason for the less-favourable treatment is the job applicant's sex so it is direct sex discrimination regardless of the fact that it is a woman discriminating against another woman.

What constitutes less favourable treatment?

Less favourable treatment generally requires there to be some sort of disadvantage for the employee, which could include, for example, a dismissal or demotion, a failure to give a pay rise or a failure to promote. The EHRC's statutory Code of Practice says that 'the worker does not have to experience actual disadvantage (economic or otherwise) for the treatment to be less favourable. It is enough that the worker can reasonably say that they would have preferred not to be treated differently from the way the employer treated or would have treated another person.' For example, a female worker is moved to an isolated office away from the main work area where all of her, mainly male, colleagues are based, partly because the manager thinks she may prefer not to be around the 'banter' of her male colleagues. But the female worker feels that she has been sent to Coventry. This would be less-favourable treatment.

Need for a comparator

The definition of direct discrimination provides that A discriminates against B if, because of a protected characteristic, A treats B less favourably than A treats or would treat others. Therefore, a comparison has to be made between B and someone in a similar position who does not have the protected characteristic. The comparator can be either a real person or a hypothetical person but there must be no material difference between the circumstances relating to each case.

So, for example, two female applicants, one black and one white, apply for the same management job. They are both in their thirties, heterosexual, not disabled and have the same qualifications but the white applicant has less practical experience in a managerial role. She is nonetheless appointed. The black worker could argue direct race discrimination based on colour relying on the white applicant as a comparator as the comparator's circumstances are not materially different to her own. If there was no actual white person in a similar situation, the black applicant could draw on examples of how

different white people had been treated in other similar situations to help construct a hypothetical comparator to show that a white applicant would have been treated more favourably.

In a claim of direct disability discrimination, the comparator must be someone who has the same abilities or skills as the disabled person but who does not have the disability. So, for example, if a candidate was dyslexic and was not appointed to a job because they made spelling mistakes in a written test, the comparison would be with a non-dyslexic person who made the same spelling mistakes. If they also would not have been appointed to the job then there would be no direct disability discrimination.

The exception is pregnancy and maternity discrimination, where no comparison is required. A woman would just have to show that she was treated unfavourably because of her pregnancy or maternity.

Associative discrimination

As the definition of direct discrimination refers to less favourable treatment because of 'a' protected characteristic (that is, it does not say because of the victim's protected characteristic), it is possible for a direct discrimination claim to be brought by someone who has experienced less-favourable treatment because they associate with someone who has a protected characteristic even though they do not have that characteristic themselves. So, for example, if a woman who needs time off to care for her disabled son is treated less favourably than a parent of a non-disabled child in a similar situation this could be direct discrimination because of disability.[3] Associative discrimination does not apply to the protected characteristics of pregnancy and maternity and marriage or civil partnership.

Perception discrimination

The definition of direct discrimination also covers discrimination based on perception. So, for example, a local shop refuses to employ someone because their address suggests that they are part of an Irish traveller community even though they are not. They could claim direct discrimination because of race. Again, it should be noted that perception discrimination does not apply to the protected characteristics of pregnancy and maternity or marriage or civil partnership.

Is there a defence to direct discrimination?

No. If less-favourable treatment because of a protected characteristic is found then an employer cannot defend or justify their actions. For example, if an employer did not appoint a pregnant woman to a job because she was pregnant, they could not then try and justify this decision by saying they did not give her the job because the business could not afford the disruption of having her on maternity leave. Or a company that supplied mainly Hindu-owned businesses could not justify not appointing a non-Hindu person to a sales position because their clients would prefer to deal with a Hindu person as this would be direct discrimination because of religion or belief.

The exception is direct age discrimination. The Act provides that if the protected characteristic is age, A does not discriminate against B if A can show A's treatment of B is 'a proportionate means of achieving a legitimate aim'. For example, an employer may have a minimum age of 18 for a job involving dangerous machinery, the aim is to protect young people and setting a minimum age is considered a proportionate way of doing that. More information about the 'proportionate means of achieving a legitimate aim' defence is given in the section on indirect discrimination.

Exceptions to what constitutes direct discrimination

- **More favourable treatment of a disabled person** It is not direct discrimination to treat a disabled person more favourably than a non-disabled person.
- **Pregnancy and childbirth** It is not direct discrimination to give special treatment to a woman in connection with her pregnancy or childbirth.

Indirect discrimination

Indirect discrimination is defined in the Act as follows:

(1) A person A discriminates against another B if A applies to B a provision, criterion or practice that is discriminatory in relation to a relevant protected characteristic of B's.

(2) For the purposes of subsection (1), a provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of B's if:

[3] Coleman v Attridge Law C-303/06 ECJ

(a) A applies, or would apply, it to persons with whom B does not share the characteristic

(b) it puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it

(c) it puts or would put B at that disadvantage

(d) A cannot show it to be a proportionate means of achieving a legitimate aim.

Indirect discrimination claims can be brought in relation to the following protected characteristics:

- age
- disability
- gender reassignment
- marriage and civil partnership
- race
- religion or belief
- sex
- sexual orientation.

The above list excludes the protected characteristic of pregnancy and maternity. However, indirect discrimination in relation to pregnancy and maternity could still arguably be brought as an indirect sex discrimination claim. It is also worth noting that disability and gender reassignment are given protection from indirect discrimination for the first time under the Act. In relation to the protected characteristic of disability, a reference to persons who share a protected characteristic is a reference to persons who have the same disability, so indirect disability discrimination is where persons who have the same disability (rather than all disabled people) are put at a disadvantage when compared to others who do not have it.

Examples of indirect discrimination

John is Jewish and keeps the Sabbath (which is from sunset on Friday to sunset on Saturday). His employer requires all staff to work until 10pm on a Friday evening. The requirement to work until 10pm on a Friday evening indirectly discriminates against employees who are Jewish and keep the Sabbath and, in particular, John. This may be indirect discrimination in relation to the protected characteristic of religion or belief.

Lydia is a single parent with two small children. Her employer introduces a new shift system that requires all employees to work some late shifts and alternate weekends. The new shift system is likely to place single parents with small children, the vast majority of whom are women, at a disadvantage, because it is difficult to find suitable alternative childcare outside standard working hours. So Lydia, who is put at this disadvantage, could claim indirect sex discrimination.

Jemima suffers with repetitive strain injury (RSI). Her employer introduces a new form of keyboard that she cannot use because of her RSI. Other employees who also suffer with RSI find themselves in a similar situation. Jemima could claim indirect disability discrimination.

What is a provision, criterion or practice?

There is no definition of provision, criterion or practice in the Act. However, the expression could refer to any of the employer's rules, policies, workplace practices or procedures, terms and conditions and so on. The provision, criterion or practice could be an existing one or something the employer intends to introduce that would apply to B and put B at a disadvantage.

What does 'disadvantage' mean?

Disadvantage is not defined in the Act. However, the EHRC Code of Practice states that disadvantage could include "denial of an opportunity or choice, deterrence, rejection or exclusion… A disadvantage does not have to be quantifiable and the worker does not have to experience actual loss (economic or otherwise). It is enough that the worker can reasonably say that they would have preferred to be treated differently."

How do you show disadvantage to a particular group?

Evidence must be produced to show that those who share B's characteristic would be similarly disadvantaged by the employer's provision, criterion or practice. This may be witness, documentary or statistical evidence.

Must the worker be actually put at a disadvantage?

Yes. The worker seeking to bring the claim must show that they have been or would be personally disadvantaged by the provision, criterion or practice. For example, an employer posts a job advertisement that stipulates that the successful applicant must be prepared to work until 10pm on a Friday night. John wants to

apply for the job as he has relevant experience and is highly qualified and believes that he has a good prospect of getting the job. However, he does not apply for the job as he keeps the Sabbath. He could claim indirect religion or belief discrimination because he would be put at a disadvantage by the requirement to work late on Fridays. However, if John were not qualified to do the job and had no intention of applying for it, he could not bring a claim as the requirement would not have affected him.

Need for a comparator

The above definition of indirect discrimination requires a comparison to be made between those who share the relevant protected characteristic with B and those who do not. In order for a valid comparison to be made, there must be no material difference between the circumstances relating to the two groups. Generally, those considered for the comparative exercise ('the pool') will be those workers to whom the provision, criterion or practice applies or would apply. Sometimes, a formal statistical comparison will be undertaken. One established way of doing this is to look within the pool at the proportion of workers disadvantaged by the provision, criterion or practice who share the protected characteristic compared with the proportion of workers who are disadvantaged by it who do not have the protected characteristic.

Taking the example of a change to a shift system, the pool would be the group of workers who are going to be required to work according to the new shift system. The trade union could gather evidence of the proportion of women within that group who are going to be put at a particular disadvantage as a result of the new shifts compared to the proportion of men.

Is there a defence to indirect discrimination?

Yes. There is a defence to indirect discrimination where the employer can show that the provision, criterion or practice is a 'proportionate means of achieving a legitimate aim'. This is known as 'objective justification'.

There is no prescriptive list as to what could constitute a legitimate aim. Financial considerations alone are unlikely to constitute legitimate aims.[4] The health, welfare and safety of individuals, on the other hand, may qualify as legitimate aims provided that risks are clearly specified and supported by evidence.

'Proportionate' refers to what is appropriate and necessary to achieve the legitimate aim. Generally, if there were an alternative way of achieving the same aim without having such a discriminatory effect, then a policy or practice is unlikely to be considered proportionate. For example, if an employer could organise the workforce so that there was sufficient cover for late evenings (for example, there may be students in the workforce who would prefer to work late shifts), then it would not be appropriate or necessary for him to require all employees to work late shifts, given that such a policy is likely to place employees who are mothers with young children at a disadvantage.

Discrimination arising from disability

The Act provides that a person A discriminates against a disabled person B if:

(a) A treats B unfavourably because of something arising in consequence of B's disability, and

(b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.

What constitutes 'something arising in consequence of B's disability'?

This refers to anything arising out of B's disability. For example, Bob has MS and one year he has three incidents of sickness absence of more than seven days' duration because of relapses. The company ultimately dismisses him because of the frequency and level of his absence. But as Bob's absence was related to his disability he could claim discrimination arising from disability. Trade unions should seek to negotiate disability leave policies with employers and get disability-related absence recorded separately from other absence to avoid the risk of such discrimination.

What if the employer did not know about the disability?

The Act provides that the protection against discrimination arising from disability does not apply if A did not know and could not reasonably have been expected to know that B had the disability. While it is up to the individual whether or not they inform their employer about their impairment, they need to know that the protection from discrimination arising from disability (and also the reasonable adjustment duty) will not be triggered unless their employer knows.

[4] *Cross v British Airways plc* [2005] IRLR 423 EAT

If a disabled worker has informed their employer they should keep records of any correspondence that shows they have done so.

Is there a defence to a claim of discrimination arising from disability?

Yes, if an employer can show that the treatment was a proportionate means of achieving a legitimate aim. For more information on this, see the section on indirect discrimination above.

Harassment

Individuals often use the word 'harassment' to describe situations where they feel that they are being bullied or unjustifiably 'picked on'. However, the Act has three strict definitions of harassment. Individuals must fall within one or more of these definitions if they wish to pursue a claim of unlawful harassment under the Act.

The first definition of harassment states that a person A harasses another B if A engages in unwanted conduct related to a relevant protected characteristic and the conduct has the purpose or effect of:

- violating B's dignity, or
- creating an intimidating, hostile, degrading, humiliating or offensive environment for B.

The unwanted conduct must be related to one of the following protected characteristics: age, disability, gender reassignment, race, religion or belief, sex, or sexual orientation.

What sort of conduct could constitute harassment?

It could take many forms, for example, abusive language, name-calling, jokes, banter, mimicry, gestures, assault, offensive emails, displays of pictures or posters and so on.

Do I have to raise a grievance with my employer to show that the treatment is unwanted?

Raising grievances, complaints and/or objections early on is advisable as it shows that the treatment is indeed unwanted, but it is not necessary. The EHRC Code of Practice says that 'unwanted' means the same as 'unwelcome' or 'uninvited'. A serious one-off incident where someone is subject to abusive language or name-calling related to one of the protected characteristics could amount to harassment without someone having to have expressed an objection to the treatment.

Associative harassment

The definition refers to unwanted conduct related to 'a' relevant characteristic, not to 'B's' characteristic. As such, it is possible for A to harass B within this definition because of an association with somebody else who has a protected characteristic. For example, Aisha is a Muslim and works for a company where the majority of staff are Muslims. She starts dating a Christian and experiences daily taunts and abuse related to her new partner's religion. This could constitute unlawful religion or belief harassment even though the issue is not Aisha's religion or belief but that of her partner.

Perception harassment

Within the above definition it is also possible for A to harass B because of a perceived protected characteristic. So, for example, A harasses B because A thinks B is gay, even though he is not. This could nonetheless be unlawful harassment under the Act. It could similarly be unlawful harassment where, in the above example, A harasses B using homophobic language even when A knows that B is not gay.[5]

Sexual harassment

The second definition of harassment states that A harasses B if A engages in unwanted conduct of a sexual nature and the conduct has the purpose or effect of:

- violating B's dignity, or
- creating an intimidating, hostile, degrading, humiliating or offensive environment for B.

Conduct of a sexual nature includes inappropriate touching, sexualised comments and jokes, or the display or downloading of pornographic images.

The third definition of harassment states that A harasses B if A or another person engages in unwanted conduct of a sexual nature or that is related to gender reassignment or sex; the conduct has the purpose or effect of (i) violating B's dignity or (ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B; and because of B's rejection of or

[5] *English v Thomas Sanderson Ltd* [2008] EWCA Civ 1421

submission to the conduct, A treats B less favourably than A would treat B had B not rejected or submitted to the conduct.

For example, a team leader makes advances to a new member of his team and asks her out after work a couple of times. She continually pushes him away and rejects his invitations. She later finds that everyone else on the team received a small-end-of-year bonus but she did not. She could make a claim of unlawful harassment.

What if someone says they've been harassed but the person who is harassing them says it was 'just a joke'?

In deciding whether the conduct has violated someone's dignity or created an intimidating, hostile, degrading, humiliating or offensive environment for them, the Act says that regard must be had to the perception of the victim. This means significant weight will be given to their perception regardless of what the harasser says about not intending to upset them.

The Act also says consideration must be given to the other circumstances of the case and whether it was reasonable for the conduct to have that effect. This latter provision introduces a degree of objectivity into the assessment and so deals with the possibility of a 'hypersensitive' victim.

Note that the above considerations are not necessary where the harasser intends to harass the victim, that is, where the harassment has the purpose of violating B's dignity or of creating an intimidating, hostile, degrading, humiliating or offensive environment for B.

When is an employer not liable for harassment carried out by one of their employees?

Employers are not liable for their employees' conduct that is unlawful under the Act when they can show they have taken 'all reasonable steps' to prevent employees from acting unlawfully. In the case of harassment, the employer could take reasonable steps by implementing an anti-harassment and bullying policy, putting in place strong procedures to enable reporting and effective handling of cases and training staff on the importance of treating each other with dignity and respect at work.

Harassment by a third party

An employer may be liable if a third party (that is, someone who is not an employee of the employer such as a customer, agency worker or service user) harasses an employee in the course of their employment. So, for example, a client of an accountancy firm refuses to let an employee of foreign origin handle his tax affairs saying that foreign workers cannot be trusted and he trusts only British accountants. Another example could be a service user who abuses a carer of Zambian origin saying that she does not want an African person looking after her.

Previously an employee could bring a claim of third party harassment only under the Sex Discrimination Act 1975. However, under the Equality Act, protection from third party harassment is extended to:

- age
- disability
- gender reassignment
- race
- religion or belief
- sex
- sexual orientation.

'Three strikes' rule

In order for the employer to be liable for harassment of their employees by a third party, they must have known that the employee had been harassed on at least two other occasions by a third party. It does not matter whether the third party is the same or a different person on each occasion. For example, a security guard is regularly racially abused by clients at the site where he is based. He chooses not to tell anyone about it as he does not want to rock the boat and his employer is completely unaware of what is going on. However, one evening, a customer racially abuses him and he decides he has had enough and raises a grievance. He would not be able to bring a claim for third party harassment as the employer did not know about the harassment on the previous occasions.

Employees should be advised to inform their employer in writing of any such acts of third party harassment and to keep records of any such incidents and the reporting of them, otherwise liability will not occur on the third occasion.

Does the employer have any defence in such circumstances?

The employer will have a defence to a claim of third party harassment where they can show that they took 'reasonably practicable' steps to prevent it happening. What is reasonably practicable will be for a tribunal to determine in any given case. However, employers may seek, for example, to display notices and include in paperwork with third parties that they will not tolerate harassment of their employees. Unions should encourage employers to implement anti-harassment policies that include a prohibition on third party harassment and reporting mechanisms for such incidents.

Coalition may abolish third party harassment protection

The coalition government announced in the 2011 Budget that it would be consulting on whether to remove the protection from third party harassment from the Equality Act 2010 as part of its deregulatory agenda.

Victimisation

Victimisation is a term that is frequently used, often to refer to being bullied or singled out for less-favourable treatment, but it has a more restrictive legal definition in the Act.

Under the Act, a person A victimises another person B if A subjects B to a detriment because:

- B does a protected act, or
- A believes that B has done, or may do, a protected act.

A protected act is one of the following:

- bringing proceedings under the Act
- giving evidence or information in connection with proceedings under the Act
- doing any other thing for the purposes of or in connection with the Act
- making an allegation (whether or not express) that A or another person has contravened the Act.

For example, Debbie raises a grievance complaining that her manager has been sexually harassing her. Raising the grievance would be the protected act. If the company subjects her to a detriment because of the grievance, like transferring her to another department against her will, she could complain of victimisation.

The Act also provides that victimisation takes place where A subjects B to a detriment because A believes that B may do a protected act. So, Debbie will be victimised if she is transferred to another department because her manager believes that she is going to raise a grievance, even if she has not actually done so.

What if the protected act was before 1 October 2010?

It is important to note that protected acts also include protected acts under the old legislation. So if, for example, someone raised a grievance on 1 April 2009 under the Race Relations Act 1976, that could still be a protected act for the purposes of victimisation under the Act.

What if allegations of discrimination or harassment have been falsely made? Can an employer take action against an individual then?

The Act states that giving false information, or making a false allegation, is not a protected act if the evidence or information is given, or the allegation is made in bad faith. For example, a man who bears a grudge against his manager because he had previously unsuccessfully applied for the manager's job, knowingly gives false evidence in a colleague's discrimination claim against the manager. He is subsequently dismissed because of this. The dismissal would not be victimisation because his evidence was untrue and had malicious intent.

Pre-employment health questions

The Act states that a person (A) to whom an application for work is made must not ask about the health of the applicant (B):

- before offering the work to B, or
- where A is not in a position to offer work to B, before including B in a pool of applicants from whom A intends (when in a position to do so) to select a person to whom to offer work.

So, in general, an employer must not ask about a job applicant's health before offering them employment (on a conditional or unconditional basis). This ban includes anyone who asks a question on behalf of the employer,

for example assessment centres that carry out interviews on behalf of employers. It also covers situations where an employer asks others, such as referees, about an applicant's health prior to a job offer being made.

This provision is new and was included in the Act to try and redress the disadvantages faced by disabled people who risk not being invited for job interviews once they disclose their disability.

What constitutes asking someone about their health?

Asking about someone's health will include asking whether that person has a disability. It will also include, for example, asking if there is any medical condition that the employer should be aware of and general health questions. Such questions from an employer may be written in application forms, posed as questions in an assessment or, for example, asked verbally at interviews. The EHRC Code of Practice clearly states that 'Questions relating to previous sickness absence are questions that relate to health or disability'.

Trade union representatives should check their employers' recruitment procedures and seek the removal from application forms of any questions relating to health and speak to employers about their recruitment processes to ensure that such information is not being sought in some other way prior to job offers being made.

Are there any exceptions?

Yes. The exceptions to the above are where A asks a question that is necessary:

- to establish whether B needs a reasonable adjustment to the recruitment process
- to establish whether B will be able to carry out a function that is intrinsic to the work concerned, if necessary with reasonable adjustments for a disabled applicant
- to monitor diversity
- to support positive action in employment for disabled people
- to establish whether an applicant has a disability where that disability is a genuine occupational requirement (for example, an employer may require someone who is HIV positive to work as a counsell or to others who are HIV positive)
- for the purposes of national security.

An employer cannot ask questions that go beyond any of the exceptions. For example, in trying to identify whether it needs to make reasonable adjustments to the recruitment process, it should simply ask applicants if a reasonable adjustment is necessary. Similarly, when asking whether an applicant will be able to carry out an intrinsic function of the job, the questioning should specifically address whether they can perform that function and general questions about health should not be asked.

What if an employer breaches the ban on pre-employment health questions?

Enforcement of this part of the Act lies with the EHRC, so it should be informed if an employer persists in asking such questions. However, it should be noted that, while asking about an individual's health will not constitute disability discrimination, an employer's conduct in reliance on information given under the provision may constitute disability discrimination. For example, an employer asks applicants whether reasonable adjustments are required in its recruitment process. A candidate requests a reasonable adjustment in the recruitment process following which everyone but the candidate is recruited. This may give rise to a claim of direct disability discrimination and it will be for the employer to show that the candidate was not recruited for some other, non-discriminatory reason.

What if an employer asks questions about health or sickness absence after a job offer is made?

This would not be unlawful. However, the employer must not act in a discriminatory way after receiving information about a person's disability. For example, after job offers are made an employer sends an occupational health questionnaire to the successful applicants. When completing it, the person reveals that they have suffered from depression. The employer then withdraws the job offer. This could be challenged as disability discrimination as it appears that the only reason why the job offer was withdrawn was because a disability was revealed.

Failure to make reasonable adjustments

Under the Act an employer must consider and, where appropriate, implement changes to the way things are done in the workplace, to remove any physical barriers or provide extra support to employees and applicants with disabilities. This is known as 'the duty to make reasonable adjustments'.

The duty to make reasonable adjustments is a positive duty, which means an employer will be obliged to do more to reduce the disadvantage that disabled employees face than it would be required to do for non-disabled employees. It applies to individuals, so an employer must make adjustments that are appropriate for each individual depending on their particular circumstances (individuals who share the same impairment may have different needs).

What kinds of adjustments will an employer have to consider?

An applicant or employee with a disability will usually have an idea about what aspects of their work or working environment need to be adjusted in order to remove substantial disadvantage, so it is often advisable for employers to begin by discussing with the individual concerned what adjustments are needed. Some of the common adjustments made by employers include:

- altering premises, for example by adding a ramp, widening doorways or adding toilet facilities for people with disabilities
- providing information in accessible formats such as large print, brail, email or audio tape
- transferring the disabled employee to another role within the workplace
- altering the disabled employee's hours or permitting them to work from home
- re-allocating some work to colleagues of the disabled person
- providing additional training for a disabled employee
- providing additional or specialised IT equipment such as voice recognition software
- allowing the disabled employee to take time off for medical treatment
- relaxing workplace rules, for example allowing for more breaks or time away from a computer
- modifying recruitment and selection procedures, for example by allowing more time to complete tests.

What if an employer does not know a worker is disabled?

The duty applies only where the employer knows or ought to know that the applicant or employee was disabled. While it is up to the individual whether and at what point they reveal an impairment to their employer, they need to know that the employer will not have to make reasonable adjustments if they are not aware of the impairment. If they do inform their employer, they should keep any correspondence that shows they have done so.

How does an employer decide whether an adjustment is reasonable?

The Act does not set out what adjustments will be considered 'reasonable' but some of the factors that might be taken into account include:

- whether by taking the particular steps the substantial disadvantage facing the employee would be reduced or removed
- how practical it would be for the employer to make the adjustment;
- the financial and other costs to the employer of making the adjustment and the extent of any disruption caused
- the extent of the employer's financial or other resources
- the availability to the employer of financial or other assistance to help make an adjustment (for example, funding from the government's 'Access to Work' scheme), and
- the type and size of the employer.

I work for a small charity with just 10 employees. Does the duty still apply to my employer?

The duty to make reasonable adjustments applies to all employers regardless of the size of the organisation or number of employees. However, the duty is to make adjustments that are 'reasonable', so what will be reasonable for an employer with a few employees will differ compared to the adjustments that might be considered reasonable for a large, multi-national employer to make.

3 Equal pay

The Act takes the same approach to sex discrimination in pay and other contractual terms (for example, contractual bonuses, annual leave and occupational sick pay) as the Equal Pay Act 1970. It provides that a woman is entitled to equal pay to that of man in the same employment and doing equal work unless the employer can show there is a material factor that explains the difference and that factor does not discriminate on the basis of sex.

The Act implies a sex equality clause in individuals' contracts entitling them to equal pay. So, if a woman shows she is being paid less than a man in the same employment doing equal work and the employer cannot show that this is because of a material factor unrelated to sex, the equality clause takes effect and her pay and contractual terms are levelled up to that of the man's.

Women can also rely upon Article 157 of the Treaty of the Functioning of the European Union when claiming equal pay, which in some circumstances may be more beneficial than the provisions of the Equality Act 2010. For more information on how EU law influences UK law, see the EHRC's statutory Code of Practice on Equal Pay.

Equal pay is one of the most complex areas of equality law, with case law continually developing. If dealing with an equal pay issue, further advice should be sought from a trade union.

What is equal work?

Equal work is:

- **Like work** – where the work of a woman and a man are broadly similar and where any differences in their work are not of practical importance (for example, a female cook preparing lunches for directors and a male chef cooking three meals a day for employees).[6]
- **Work rated as equivalent** – where the woman's job and the man's job are different but are rated as equivalent under a valid job evaluation study (for example, women carers in a local authority are rated as equivalent to men working as street cleaners and gardeners). To be valid, a job evaluation must be appropriate to both jobs, take into account factors connected only with the requirements of the job not the performance of the person doing it, and assesses the component parts of the jobs rather than making a comparison on a 'whole job' basis.
- **Work of equal value** – where the two jobs are different but are considered to be of equal value in terms of the demands made of the individuals doing them (for example, a speech and language therapist and a hospital pharmacist).[7] It will ultimately be for a tribunal to assess whether the jobs are of equal value. The tribunal will look at factors such as the training and skills necessary to do the job, the conditions of work, and the responsibility or level of decision-making.

What does 'in the same employment' mean?

A woman has to identify a man 'in the same employment' as doing equal work. This means a man who is (or was) employed by her employer or an associated employer at the same workplace or at a different workplace where common terms and conditions generally apply (for example, where there is a collective agreement covering both workplaces). An associated employer is one that either controls her employer or is controlled by her employer or where both are controlled by another company. The man could be a predecessor of hers.

Under EU law, comparisons can be made between different employers provided there is a 'single source' capable of rectifying any unlawful pay differences. The EHRC's Equal Pay Code of Practice gives the example of a woman teacher who is employed by a different education authority to a man but where the difference in pay is set by a national scheme that can be remedied by a national negotiating body.

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[6] *Capper Pass Ltd v Allen* [1980] ICR 194 EAT

[7] *Enderby & ors v Frenchay Health Authority and anor* [1993] IRLR 591 ECJ

How does the employer's 'material factor' defence work?

The employer must be able to show that the factor he says is responsible for the pay difference between the woman and the man:

- is significant and relevant, a cause of the difference and the real reason for the difference
- does not involve direct or indirect sex discrimination.

Examples of factors that might be found to be material include: the jobs are being done at different locations and one location attracts higher pay because of the higher cost of living (for example, one attracts London weighting); the man's job involves unsocial hours such as regular night work or rotating shifts and the extra pay is to compensate for that; or a personal factor such as the man having higher qualifications and greater experience relative to the woman.

A factor such as the employer's belief that a man needed to earn more because he was the family breadwinner would be directly discriminatory as it is based on gendered assumptions about male and female roles. A factor that resulted in a group of women being paid less than a group of men doing equal work would be indirectly discriminatory, for example, having long-service-related pay scales is likely to result in women being paid less than men because women will find it harder to acquire long service as they are more likely to have time out of the labour market to care for children.

Note that it is also possible to establish a case of indirect discrimination even if there is no specific factor that can be identified as the source of the pay difference but a job that is predominantly done by women is being paid less than a job that is predominantly done by men.[8]

If the material factor does not account for the whole difference in pay but only part of it, the woman is entitled to have her pay increased to reflect that part of the pay gap that is not explained.[9] For example, an employer says it is necessary to pay a man more because there is a skills shortage but looking at the data on market pay for his job and the woman's job and evidence of recruitment and retention difficulties for both jobs, it is clear that the difference in their salaries is significantly greater than is justified by the need to address the skills shortage.

Can an employer justify using an indirectly discriminatory factor?

Yes. Even if a woman manages to show that women are particularly disadvantaged by a pay practice compared with men, the employer can still succeed in their defence if they can show that the pay arrangements relied on as a material factor were a proportionate means of achieving a legitimate aim. For example, paying a shift premium to compensate for unsocial hours might result in men earning more than women doing equal work because men are more likely to be able to work unsocial hours, but the employer could justify paying the premium because it is necessary to ensure there are enough people willing to provide cover during evenings and weekends and at night.[10]

EHRC's ten top tips for equal pay

The EHRC has produced an equal pay in practice checklist for employers, which trade union representatives should familiarise themselves with too. It has also produced checklists covering different kinds of 'high risk' pay practices such as market forces and pay, performance-related pay, pay protection and starting pay. These are available on its website. The ten top tips for employers are:

1. Make sure you understand equality law and pay.
2. Make sure the pay system is transparent. Transparency means everyone (managers, employees and trade unions) should understand the pay system.
3. Have one pay system for all employees.
4. Keep your pay system simple as this will mean it is easier to understand and more likely to be transparent and objective.
5. Base your pay structure on an analytical job evaluation scheme.
6. Equality impact assess any proposed changes to your pay system.
7. Limit local managerial discretion over all elements of the pay package. You should also monitor the impact of managerial decisions, especially on performance-related pay.

[8] *Enderby & ors v Frenchay Health Authority and anor* [1993] IRLR 591 ECJ

[9] *Enderby & ors v Frenchay Health Authority and anor* [1993] IRLR 591 ECJ

[10] *Blackburn v Chief Constable of West Midlands Police* [2008] ICR 505 CA

8. Check salaries on entry to the organisation and on entry to grades – you may be importing discrimination into your pay system. Your responsibility is to provide equal pay, not match previous salaries.
9. Check rates of progression within and through grades.
10. Carry out regular checks to ensure that the various elements of your pay package still reward what they are intended to reward; for example, market supplements should be paid only if you can demonstrate recruitment and retention difficulties.

What equal pay rights apply to occupational pension schemes?

Equal pay law also covers the terms on which men and women are allowed to join an occupational pension scheme and the terms that apply to them once they are members of the scheme. Equal pay law does not apply to pensionable service before 8 April 1976 for claims relating to the terms of joining the pension scheme and it does not apply to pensionable service before 17 May 1990 for claims relating to the terms under which members already in the scheme are treated. It has been held that excluding part-time workers from an occupational pension scheme is indirectly sex discriminatory and unlawful.[11] Trade unions have represented many part-time workers in legal cases fighting for equal treatment in relation to occupational pensions.

Does time spent on maternity leave count as service in an occupational pension scheme?

Yes, equal pay law automatically includes in every occupational pension scheme a rule that ensures that the scheme treats time when a woman is on maternity leave in the same way as it treats time when she is not.

Why are equal pay audits recommended?

It is often difficult for individual women to identify where they are being paid less than men doing equal work to them because of the lack of transparency around pay in many workplaces, especially in the private sector. Trade unions have campaigned for employers to do equal pay audits for many years. The Equal Pay Code of Practice recommends them as 'the most effective way of establishing whether an organisation is in fact providing equal pay'. An equal pay audit places the onus on the employer to check their pay system for discrimination and to take action. It requires them to: compare the pay of men and women doing equal work (including checks for where work of equal value is being done); identify and explain any differences between men and women doing equal work; and eliminate those pay differences that cannot be explained on non-discriminatory grounds. Public sector employers should consider the need to carry out an equal pay audit as part of complying with the public sector equality duty. Guidance on equal pay audits including a toolkit and other protected characteristics is available on the EHRC website.

Gender pay gap reporting

Section 78 of the Act gives a Secretary of State power to introduce Regulations requiring private sector employers with more than 250 employees to report on gender pay gaps within their organisation.

The Labour government made a commitment to pursue a voluntary approach to gender pay gap reporting and to not use this power before 2013. The coalition government is taking a voluntary approach and developed a broader framework for voluntary gender equality reporting (which was launched in September 2011) that goes beyond pay to include a range of equality indicators (for example, proportion of women in the workforce, proportion returning from maternity leave. Private sector employers with more than 150 employees are encouraged to report one or more of the indicators (details can be found on the Government Equalities Office website and guidance is available on the Acas website).

Gender pay gap/gender equality reporting is different from equal pay audits as it involves employers reporting on headline gender pay gap figures (for example, for the whole workforce, in a job grade or pay band) rather than doing a detailed analysis of where men and women are doing equal work, identifying gender pay gaps between them and taking action to remove gaps that are discriminatory.

[11] *Preston and ors v Wolverhampton Healthcare NHS Trust and ors (no.3)* [2004] ICR 993

What if there has been discrimination because of race, age or one of the other protected characteristics in pay? Can an equal pay claim be brought?

The equal pay part of the Act applies only to situations where there has been sex discrimination in pay or other contractual terms. If there are gaps in pay between people, which appear to be because of race, age or one of the other protected characteristics, an ordinary direct discrimination and/or indirect discrimination claim could be brought under the other parts of the Act. In some ways this is simpler as there is no need to identify an actual comparator doing equal work in the same employment; instead, the worker could argue that someone else would have been paid more if they were of a different race or age etc.

What if a woman cannot find an actual male comparator doing equal work in the same employment?

Unlike the Equal Pay Act 1970, the woman would not be completely barred from challenging her pay. The Act allows a woman who cannot identify an actual male comparator to bring an ordinary direct sex discrimination claim instead. Note that this applies only to cases of direct sex discrimination, whereas often gender pay gaps result from indirect discrimination. However, it could help in situations such as where there is a woman customer services manager in a small firm and no men doing equal work to her and her boss admits he would have paid her more if she were a man.

Pay secrecy clauses

A pay secrecy clause in an individual's contract seeks to prevent employees discussing their pay with each other. According to EHRC research, two per cent of large private sector employers include pay secrecy clauses in their employment contracts and a further 18 per cent said they actively discouraged their employees from talking about pay.

Under the Act, a pay secrecy clause is unenforceable against an employee who has shared information about pay in order to find out if there is any connection between pay and one of the protected characteristics. The Explanatory Notes to the Act make clear that this protection applies where workers have shared information with colleagues or more widely – with a trade union official, for example.

What if an employee is disciplined for telling a competitor how much they earn?

It must be remembered that this provision in the Act protects only individuals who are sharing information for the purpose of finding out whether or not there is any discrimination in pay based on one of the protected characteristics. It does not protect, for example, an individual who passes on information to a competitor in order to try and get a better job offer from the competitor.

4 Advancing equality

Positive action

The positive action provisions in the Act allow employers to take steps in order to advance equality for people who may be under-represented in a particular activity, have suffered a disadvantage or have different needs related to one of the protected characteristics.

Is positive action compulsory?

No. Positive action is optional – employers are not under a duty to take positive action but some employers have found that taking positive action has helped them create a more diverse workforce with all the benefits that brings, for example a wider pool of talented people from which to recruit, more creative teams, a workforce that is more responsive to a diverse customer base or service users. Also note that if you are dealing with a public sector employer, it has some onus to consider using positive action as the public sector equality duty requires it to consider the need to advance equality of opportunity in all that it does.

When will an employer be permitted to take positive action?

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

- experience a disadvantage connected to that characteristic, or
- have needs that are different from the needs of persons who do not share that characteristic, or
- have disproportionately low participation in an activity compared to others who do not share that protected characteristic.

the employer may take action that is proportionate to:

- enable or encourage employees to overcome or minimise the disadvantage they experience
- meet the different needs
- improve participation rates.

Examples of positive action might include:

- reserving places on a training course for people with a protected characteristic that is under-represented
- a mentoring scheme to encourage and prepare BME employees to apply for management opportunities
- providing free English language lessons to non-English speaking employees
- targeted advertising or recruitment events such as placing a job advert in an LGBT publication as well as in the national newspapers or holding a women-only recruitment event for a male-dominated occupation such as bus driver.

How do the positive action provisions apply to recruitment and promotion?

Section 159 of the Act allows an employer to take positive action in a 'tie-break' situation. An employer may take positive action by appointing or promoting a woman who is 'as qualified as' a male candidate for a senior management position because women are under-represented at that level. However, the Act does not permit an employer to promote or appoint a female candidate to a role if there is a male candidate who is more qualified to do the job. Note that 'as qualified as' does not mean both candidates have to have exactly the same qualifications, skills and experience but that they are scored equally across the range of attributes needed for the job. The Government Equalities Office has produced guidance on s.159.

If women are under-represented in the workplace, can an employer have a policy that provides for all women applicants to be automatically shortlisted?

No. Any policy that provides for all women to be 'fast-tracked' to interview regardless of whether they meet the essential criteria for the post would be unlawful, even where the employer can demonstrate that women are under-represented in the workplace.

What about an employer who operates a 'two-tick' policy – is that lawful?

Nothing in the Act would prevent an employer from operating a 'two-ticks' policy, which provides for disabled applicants to be automatically shortlisted for interview, because the law permits – indeed, requires – an employer to do more to remove or reduce disadvantage for disabled applicants and employees.

The public sector equality duty

Since 5 April 2011 public sector organisations and some private sector organisations performing public functions must comply with a key aspect of the Equality Act 2010 – the Public Sector Equality Duty (PSED). The TUC has produced a toolkit for trade unions on the PSED, which is available from its website.

This duty replaces the former race, disability and gender equality duties. It applies to the protected characteristics of age, disability, gender, gender reassignment, pregnancy and maternity, race, religion or belief and sexual orientation.

It requires public bodies in carrying out their functions to have due regard to the need to:

- eliminate unlawful discrimination, harassment and victimisation
- advance equality of opportunity between different groups
- foster good relations between different groups.

It requires other bodies that are not in the public sector but that carry out public functions to have due regard to the same requirements in the exercise of those functions.

What does 'due regard' mean?

Having due regard involves thinking consciously about how a public body's existing and proposed policies and decisions impact on equality. It covers how employees are treated; how services are designed and delivered to users; how the services are procured and provided by contractors; and how financial decisions are made. The level of regard a public body has to give to equality will be that which is 'due' in all the circumstances. In other words, the amount of regard must be proportionate to the likely impact of the existing or proposed policy or decision on the protected groups.

What is meant by 'advance equality of opportunity' between different groups?

The Act explains that having due regard for advancing equality between different groups involves:

- removing or minimising disadvantage that people suffer because of a protected characteristic
- taking action to meet the needs of people who share a protected characteristic where these are different from the needs of people who do not share it
- encouraging people from protected groups to participate in public life or in other activities where their participation is disproportionately low.

What is meant by 'foster good relations' between different groups?

The Act describes fostering good relations as tackling prejudice and promoting understanding between people from different groups.

Which organisations are covered by the duty?

Public bodies listed in Schedule 19 of the Act must comply with the PSED. This covers the vast majority of public sector organisations. In addition, any organisation that carries out a public function must also comply with the PSED, but only in relation to its public functions. For instance, if a catering company has a contract with an NHS hospital to supply meals to patients it will be covered by the PSED in the exercise of those functions, but its contract to supply meals to executive members of a football club would not be covered.

What must organisations do to comply with the PSED?

The Act does not explain the approach to be adopted by public authorities when analysing the effect of their existing or proposed policies or their decisions on the protected characteristics. But the following key principles have emerged in decisions of the courts in relation to the previous gender, race and disability equality duties:

- The decision-maker must be aware of the three requirements of the general duty and how they relate to the organisation's public functions.

- The decision-maker must consider the requirements of the duty before or at the time decisions are made, for example before a final decision is taken to agree on or implement a policy. A public body will not be able to comply with the duty after a decision has been taken.
- Public bodies must make sure that the individuals responsible for making decisions consider what information has been gathered and what further information may be needed in order to give proper consideration to the duty.
- Public bodies are responsible for making sure that if others exercise public functions on their behalf those persons are capable of complying with the duty (and actually comply with it). A public body cannot escape responsibility for complying with the duty by outsourcing the public function to another organisation. Where a function has been outsourced, both the public body and the organisation contracted to perform the function must be able to demonstrate compliance with the duty.
- Policy- and decision-makers must regularly review the way(s) in which they comply with the duty.

See the TUC's equality duty toolkit for more information on what 'due regard' requires and a checklist for trade unions when dealing with employers to whom the PSED applies.

Who is responsible for enforcing the duty?

The Equality and Human Rights Commission (EHRC) is responsible for enforcing the PSED. Wherever appropriate, the EHRC will usually try to encourage a public body to comply with the duty before taking any enforcement steps. The EHRC has a number of special statutory powers that it can use to enforce the PSED; for example, it can carry out assessments of a public body's compliance with the PSED and require relevant documents, information and/or oral evidence from a public body to assist with its assessment (it has, for example, used this power to assess HM Treasury's compliance with the former equality duties when carrying out Spending Review 2010). If it believes a public body is not compliant, it can issue a compliance notice ordering a public body to comply with the PSED.

Individuals or organisations like trade unions, NGOs or the EHRC can also apply to the High Court for a judicial review where a public body has failed to comply with the PSED. The courts took a positive approach to enforcement of the former equality duties, allowing individuals and NGOs to seek judicial review where decisions taken by public bodies lacked sufficient regard and often quashing the decision and ordering the public bodies to make it again having due regard to equality.

EHRC has published a series of non-statutory guidance on the PSED, which can be downloaded from its website. It will publish a statutory Code of Practice in due course.

What are the specific duties?

The Equality Act 2010 (Specific Duties) Regulations 2011 require the majority of public bodies to comply with two specific duties, which are intended to help them comply with the PSED. The two specific duties are:

- Publication of information Each public authority must publish information to show that it is complying with the s.149 duty by 31 January 2012 (or by 6 April 2012 if a school) and at least on an annual basis after that. Authorities must include information about its employees who share a protected characteristic (if it has 150 or more employees) and its service users.
- Equality objectives Each public authority must prepare and publish one or more objectives it thinks it should achieve to have due regard to the need to eliminate discrimination and harassment, to advance equality of opportunity or to foster good relations. Any objective must be specific and measurable. Authorities must publish their first objectives no later than 6 April 2012 and at least every four years after that.

These specific duties apply to public authorities listed in Schedules attached to the Equality Act 2010 (Specific Duties) Regulations 2011. The Welsh Ministers have imposed different specific duties on devolved public authorities in Wales (for example, a Welsh local authority, NHS trust or local authority maintained school) and the Scottish Ministers will do the same for Scottish devolved public authorities. The Welsh duties are far more prescriptive and to some extent resemble the specific duties that applied under the race, disability and gender duties. The Scottish draft specific duties are similar. If you are dealing with a devolved public body, check the web pages for EHRC Wales and EHRC Scotland for more information and guidance.

5 Exceptions to equal treatment

The Act contains some exceptions to the principle that an employer must not discriminate on the grounds of an employee's protected characteristic.

Occupational requirements

The first exception applies where being of a particular race, sexual orientation, sex, religion or belief, or not being a transsexual person or someone who is married or a civil partner, is an essential requirement for a particular job.

The Explanatory Notes to the Act provide the following examples of when an employer could apply an occupational requirement:

- where there is a need for authenticity in the work; for example, some acting roles may need to be played by a person of a particular sex or race (a black man for role of Othello, for instance) and, similarly, some modeling roles
- where it is important to maintain privacy and decency; for example, a unisex gym could rely on an occupational requirement to employ a changing room attendant of the same sex as those who will use the room
- where personal services are being provided; for example, a women's refuge has an all-female staff team to provide support to women who have suffered domestic violence.

What must an employer do to apply the exception lawfully?

An employer may apply a requirement for an employee or applicant to have a particular protected characteristic if the employer can show that given the nature or context of the work:

- applying the requirement is a proportionate means of achieving a legitimate aim, and
- the applicant or employee does not meet the requirement or the employer has reasonable grounds for not being satisfied that the applicant or worker meets the requirement.

Employment for the purposes of an organised religion

This exception allows an employer to apply a requirement for a person to be of a particular sex or not to be a transsexual person, or a requirement relating to marriage, civil partnership or sexual orientation, if the employer can show that:

- the employment is for the purposes of an organised religion
- the requirement is applied in order to comply with the doctrines of the religion (known as the 'compliance principle'), or
- because of the nature or context of the employment, the requirement is applied in order to avoid conflicting with the strongly held religious convictions of a significant number of the religion's followers (the 'non-conflict principle'), and
- the applicant or employee does not meet the requirement in question or the employer is not reasonably satisfied that the person meets it.

The exception is intended to cover a very narrow range of employment, including ministers of religion and a small number of lay roles, restricted to those that exist to promote and represent the religion. For example, a requirement that a Catholic priest be a man and unmarried is likely to be lawful but the exception is unlikely to permit a requirement that a church gardener be heterosexual because the job is not for the purposes of an organised religion.

[12] *R. (on the application of Amicus) v Secretary of State for Trade and Industry* [2004] EWHC 860 (Admin)

This exception, which previously appeared in the Employment Equality (Sexual Orientation) Regulations 2003, was challenged by trade unions in a judicial review action and the High Court confirmed in its decision that it is intended to apply to a very narrow range of jobs.[12]

Employers with a religious ethos

The Act further allows an employer with an ethos based on religion or belief to discriminate in relation to work by applying a requirement to be of a particular religion or belief, but only if the employer can show that, having regard to that ethos:

- being of that religion or belief is a requirement for the work, and
- applying the requirement is a proportionate means of achieving a legitimate aim.

For example, a religious organisation, such as a Christian charity, might seek to restrict applicants for the post of head of its organisation to those candidates who can demonstrate adherence to that faith, particularly if, once appointed, the person will be required to fully represent the views of the organisation. However, it is unlikely to be lawful for the employer to apply a similar requirement to posts that do not involve representing the views of the organisation, such as the role of bookkeeper within the charity. Such posts would need to remain open to everyone regardless of their religion or belief.

Benefits based on marital status

Benefits that are restricted on the basis of an employee's marital or civil partnership status, such as survivor benefits in occupational pension schemes, are lawful under the Act. There is a further exception for benefits that are available only to married employees and accrued before the Civil Partnership Act 2004 took effect on 5 December 2005.

In practice, many private sector occupational pension schemes allow members to nominate anyone as a survivor and, after vigorous trade union campaigning, legislation governing various occupational pension schemes in the public sector was amended to allow backdating of accrued survivor benefits to 1988 for civil partners, which is the equivalent for widower's pensions in those schemes.

National minimum wage

The Act contains an exception that allows employers to pay young workers according to the age-related pay bands set out in the National Minimum Wage Regulations 1999 without facing an age discrimination challenge. The NMW sets a lower rate for workers aged 18 to 20, and a lower rate again for those aged 16 and 17. An employer who adopts a pay structure based on these rates will not be acting unlawfully, provided that the rates at which the younger workers are paid are below the adult NMW rate.

Service-related benefits

It could be argued that service-related benefits, such as extra annual leave for each year of service or service-based pay awards, could amount to indirect age discrimination because older workers are more likely to have completed the length of service than younger workers. However, the Act provides an exception for service-related benefits that are based on five years' service or less.

In addition, it could be lawful for an employer to use length of service above five years as the basis for entitlement to a benefit or an increase in a benefit, provided the employer reasonably believes that such a scheme fulfils a business need. This is a weaker standard of justification than the 'proportionate means of a legitimate aim' defence that normally applies to indirect discrimination.

Enhanced redundancy payments

It is not age discrimination to provide an enhanced redundancy payment to an employee that mirrors the statutory redundancy pay scheme. The statutory redundancy scheme provides for 0.5 weeks' pay for each year of service carried out when an employee was aged below 22, 1 week's pay for each year of service between 22 and 40, and 1.5 weeks' pay for each year of service aged 41 or over. The week's pay is subject to a statutory cap (£400 a week from February 2011). Employers may use these age bands in their calculations for enhanced pay and do one of the following:

- remove the statutory scheme's cap on a week's pay and substitute an employee's actual weekly pay for the calculation
- raise the statutory cap on a week's pay so that a higher amount of pay is used on the calculation, and/or

- multiply the appropriate amount for each year of employment set out in the statutory formula by a factor exceeding one, for example multiply by a factor of 2 to provide one week's, two weeks' and three weeks' pay for years of service in each age band.

If an employer has a redundancy pay scheme that includes an age-based formula but it does not follow the statutory payments scheme in one of the above prescribed ways, then it would be lawful only if the employer could objectively justify it as a proportionate means of achieving a legitimate aim, which it may find hard to do.

Statutory authority

In relation to age, disability and religion or belief, it is not a contravention of the Act to do anything that is required under another law.

Nationality discrimination and crown employment

The Act permits the Crown or a prescribed public body to restrict employment or the holding of national office to people of a particular birth, nationality, descent or residence. It also permits direct nationality discrimination and indirect race discrimination on the basis of residency requirements where other laws or Ministerial arrangements or conditions provide for it.

Removal of the Default Retirement Age

Like the Employment Equality (Age) Regulations 2006 before it, the Act included an exception for retirement at or after the age of 65 (the 'Default Retirement Age'). So long as an employer followed the statutory procedure for retirement and considered a request to stay on as set out in the Employment Rights Act 1996, the retirement would be lawful and could not be challenged as age discrimination. However, the coalition Government began phasing out the DRA from 6 April 2011.

Without the DRA, it is possible to challenge retirement dismissals as direct age discrimination. An employer may still operate a fixed retirement age policy but it would have to objectively justify it (direct age discrimination is the only form of direct discrimination that can be justified). This is likely to be a risky approach because there are probably few jobs where it would be justified to have a blanket policy of dismissing people upon reaching a certain age rather than allowing for individual assessments of capability and performance to operate as they would for workers of other ages.

Unfair dismissal law has also been amended so that, without the DRA, retirement is no longer an automatically fair reason for dismissal. A retirement in line with an objectively justified retirement age policy could be a potentially fair reason for dismissal, but only if retirement was the genuine reason for dismissal and it was handled in a procedurally fair way.

Transitional provisions enable employers to continue to use the DRA procedures to retire employees who were aged 65 or over before 6 April 2011 or who reached 65 before 1 October 2011, provided they issued notifications of intention to retire those employees in line with the DRA procedure before 6 April 2011. Any notification must provide at least 6 months' and up to 12 months' notice of the intended date of retirement.

More information on retirement and age discrimination under the Act can be found in the EHRC's Code of Practice on Employment and Acas has produced guidance on 'Working without the Default Retirement Age' and the transitional arrangements. The TUC and CIPD joint guidance on 'Managing age' has also been updated to reflect the removal of the DRA and is available on the TUC website.

PART TWO
RIGHTS FOR WORKING PARENTS AND CARERS

Much of the law relating to family-friendly rights can be found in the Employment Rights Act 1996, the Social Security Contributions and Benefits Act 1992 and in related sets of Regulations such as the Maternity and Parental Leave etc Regulations 1999, Paternity and Adoption Leave Regulations 2002 and the Flexible Working Regulations 2002.

Working parents and carers in the UK currently have rights to:

- maternity leave and pay
- paternity leave and pay
- adoption leave and pay
- unpaid parental leave
- unpaid emergency time off for dependants
- request flexible working.

The above rights apply to people in both same-sex and heterosexual relationships and sit alongside the rights of working parents and carers not to suffer any unlawful discrimination under the Equality Act 2010.

The rights are mostly restricted to employees and some require a certain length of service in order to qualify for them. However, agency workers who are pregnant or new mothers have some rights, for example to a health and safety risk assessment and paid time off for ante-natal care (if they have more than 12 weeks' service with the same hirer). Agency workers who are pregnant or new mothers are also protected under the pregnancy and sex discrimination provisions in the Equality Act 2010.

6 Maternity rights

Pregnancy and work

When should a woman tell her employer about her pregnancy?

A woman is not legally required to tell her employer that she is pregnant until the fifteenth week before the expected week of childbirth (EWC) and it is up to her whether she tells an employer earlier than this date. However, she needs to know that she will not qualify for paid time off for ante-natal appointments and will not gain any legal protection without telling her employer. This is particularly important for women who work at night or in factories or where the work involves tasks that could affect her health or safety or that of her unborn child.

What must an employer do once it knows about the pregnancy?

Once an employer knows about the pregnancy it must carry out a risk assessment to see whether the workplace or the woman's job places her or her unborn child at risk of harm and take steps to make sure they are safe at work. For example, if the job involves lifting and carrying heavy items or operating machinery, an employer should consider transferring her to lighter, less strenuous duties during her pregnancy. A night worker may be suspended from night work for health and safety reasons. Where this occurs her employer should, wherever possible, offer her suitable alternative work on no less favourable terms and conditions. This means offering similar work on comparable pay (and other benefits) but may not include any night time allowances that she is entitled to.[13] If no suitable alternative work is available, the employer must suspend the worker, who is entitled to be paid during the suspension.

What responsibilities do temporary work agencies and hirers of agency workers have?

The hirer of an agency worker must carry out a health and safety risk assessment and make any necessary adjustments to protect the woman and her unborn child. If no adjustments are possible to make the work safe, then they should inform the agency. If the woman has more than 12 weeks' service with the hirer, the agency is required to seek suitable alternative employment (with at least the same pay) or suspend her on pay for the duration of the original assignment.

Can a woman take time off for ante-natal care?

Yes. Provided she is an employee, a woman has a right to paid time off for ante-natal care. Since the Agency Worker Regulations 2010 took effect on 1 October 2011, agency workers have also been entitled to paid time off, but only where they have worked in the same job for the same hirer for 12 weeks or more.

Must a woman do anything before taking time off?

Yes. A woman should obtain her employer's permission before taking time off and, if asked, provide a copy of the appointment card confirming the date and time of her ante-natal appointment. She does not have to provide her employer with written confirmation of her first ante-natal appointment. The right also applies to paid time off to attend ante-natal classes or specialist pregnancy classes where a doctor or midwife considers it would be in a woman's interest or that of her unborn child for her to attend. If requested, she should provide her employer with a confirmation letter from her doctor or midwife.

[13] *British Airways (European Operations at Gatwick) Ltd v Moore and* Anor EAT 185/99

Is a woman who works part-time entitled to paid time off during work hours?

Yes. An employer should not put pressure on part-time employees to attend ante-natal appointments on their non-working days. A woman will not normally be in a position to negotiate with the health service provider and ask for her ante-natal appointments to be on her non-working days.

What if a woman is unable to work because she is sick during her pregnancy?

She is entitled to receive her full entitlement to sick pay, which may be paid either at the rate of Statutory Sick Pay (SSP) or possibly more if her employer operates an occupational sick pay scheme or normally pays more. However, there is no entitlement to sick pay during the four-week period before the expected week of childbirth where the illness is pregnancy-related. An employer can require the woman to start her maternity leave early instead.

One of our members is being disciplined because of sickness absence that is pregnancy related. Can an employer do this?

No. A woman who is disciplined, dismissed or made redundant because of absences due to a pregnancy-related illness could claim pregnancy discrimination. Therefore, it is advisable for employers to record pregnancy-related sickness absence separately from other sickness absence.

Statutory Maternity Leave

Every woman employee who is pregnant is entitled to 52 weeks' maternity leave, which includes three periods of leave:

- The first 26 weeks of maternity leave is known as Ordinary Maternity Leave (OML).
- Compulsory maternity leave starts immediately following the date of childbirth and lasts for two weeks (or four weeks if the woman works in a factory), during which time a woman must not work for her employer. This compulsory period is included within OML.
- A further 26 weeks' leave, known as Additional Maternity Leave (AML).

What must a woman do before taking maternity leave?

Before taking maternity leave, a woman must notify her employer no later than the fifteenth week before the expected week of childbirth that she is pregnant and the date on which she intends her leave to begin. If requested, she should provide her employer with a medical certificate confirming the expected week of childbirth.

When can maternity leave start?

Maternity leave cannot begin earlier than the eleventh week before the expected week of childbirth. However, if a woman is off work because of a pregnancy-related illness in the four weeks before the week of childbirth, her employer can start her maternity leave (and pay) from the first day of her sickness absence.

Can a woman change the start date if she has already given notice to her employer?

Yes. A woman may change the intended start date of her maternity leave provided she gives her employer 28 days' written notice of the change.

Does a woman have to tell her employer before she goes on leave how much leave she will take?

No. A woman need not tell her employer before maternity leave starts whether she wishes to take all her maternity leave. However, it is advisable for her to give some indication to her employer, where possible, as this will make planning her maternity cover easier.

Once a woman has told her employer when she wants her maternity leave to start, the employer must give her written confirmation of the date on which her AML will end, together with the date she is due to return to work if she takes her full 52 weeks' entitlement. This confirmation must be given within 28 days of receiving notification from the woman of her pregnancy and her intended start date for her leave. If a woman does not intend to take her full entitlement she must notify her employer at least eight weeks before she intends to return to work.

What employment rights and terms and conditions apply during maternity leave?

A woman is entitled to all the same rights under her contract of employment during maternity leave as would apply if she were still at work. The only exception is that she will not be entitled to her normal pay, unless her contract allows for that. Annual leave continues to accrue during maternity leave. A woman is entitled to benefit from any pay increase that may be awarded during her absence. Contractual benefits such as gym membership, childcare vouchers, the use of a company car or a mobile phone (unless for business use only) also continue throughout maternity leave. And an employer must continue to pay pension contributions into any occupational pension scheme during OML and any period of AML when SMP or contractual maternity pay is paid.

Will a woman be entitled to a bonus and commission while on maternity leave?

In most cases a woman is entitled to receive profit-related pay or commission that relates to work she did before maternity leave started, even if she is on maternity leave when it is actually paid. On the other hand, if the payment relates to work that she would have done had she not been on maternity leave, it is unlikely that her employer would need to pay it. Entitlement to a bonus will also depend on the type and purpose of the particular bonus scheme in operation. Where, for instance, the bonus relates to work done over a 12-month period during part of which a woman is absent on maternity leave, the law allows her employer to reduce, pro-rata, the bonus payable to her provided that the two-week compulsory maternity leave period is included when calculating the amount.

Should a woman expect to hear from her employer during maternity leave?

Yes. A woman on maternity leave should be kept informed of issues or developments that may affect her including, for example, decisions to restructure, outsource or merge the business, opportunities for promotion, internal job vacancies or a redundancy situation. Contact can be made by telephone, email, letter or in person, provided that the frequency and type of contact is reasonable.

Can a woman do any work during maternity leave?

A woman may work for up to ten days (known as 'Keeping in Touch' or 'KiT' days) during her maternity leave without bringing the leave to an end and stopping her entitlement to SMP. Working KiT days is optional – an employer cannot require a woman to work them. If a woman is interested in working KiT days, she should discuss and agree with her employer before she works them how many she will work and how much she will be paid. The kind of work she will do might also need to be agreed, particularly where the workplace or job could pose a risk to her health and safety. KiT days are often used to allow a woman to attend a training course or conference or participate in meetings as ways of keeping up to date with recent developments.

Can a woman be dismissed if she does not turn up for work on the return date?

If the employer notifies a woman of her return date and she simply fails to show up for work on that date without good reason, her absence may be treated as unauthorised and her employer may decide to start disciplinary action, which could lead to her dismissal. However, a woman is protected by the law where her employer has failed to confirm her return date and takes action against her when she does not turn up for work on the expected date. The law also protects a woman whose employer has given less than 28 days' notice of the expected return date and it is not reasonably practical for her to return on that date, for example, because she has been unable to arrange childcare.

Is a woman entitled to her old job back when she returns from maternity leave?

Different rules apply depending on whether a woman returns after OML or AML. There are also some exceptions to the rules.

- **Ordinary Maternity Leave** A woman returning to work after taking OML is entitled to return to exactly the same job in which she was employed before her maternity leave began, with her seniority, pension and similar rights just as they would have been had she not been on maternity leave. This means she is entitled to be paid at the same rate, unless there has been a salary increase during maternity leave, in which case she is entitled to the higher salary. An employer who refuses to allow a woman to return to work following maternity leave is treated as having

dismissed her. Where the reason for the dismissal relates to her having given birth or taken maternity leave, the dismissal will be automatically unfair and will be pregnancy and maternity discrimination.

- **Additional Maternity Leave** A woman returning to work after AML has the same rights as a woman returning after OML except where, for a reason other than redundancy, it is not reasonably practicable for her employer to allow her to return to her old job. In this case her employer must offer her alternative work that is both suitable and appropriate for her to do (for example, requiring the same skills, of the same status, with similar location). The new job must also be on terms and conditions that are no less favourable than those that applied (or would have applied) to her old job. However, it does not mean that the terms and conditions of a new job must be identical to the old job.

When would it be considered not reasonably practicable to allow a woman to return to her old job?

The law does not set out specific circumstances in which it would not be reasonably practicable to allow a woman to return to her old job – that is for the employer to prove. However, it is unlikely to be acceptable for an employer to refuse a woman her old job back simply because they decided to make her temporary maternity cover permanent in the job.

What if the job is made redundant while a woman is on maternity leave?

If, at any time during a woman's maternity leave, a redundancy situation should arise, the employer must notify her as soon as possible. Where it is no longer practicable for her to return to the same job, for example because it has ceased to exist, she is entitled to be offered any suitable vacancy within the company – even if there are others who might be more suitable for that job. This will include suitable vacancies within an associated or parent company. Any new job must be suitable and appropriate for her to do. The terms and conditions of the new job should not be substantially less favourable than those that would have applied to her old job. She will also be entitled to work in the new job for four weeks on a trial basis and, if the job is not suitable, to reject it and claim her redundancy pay. The four-week trial period begins when she returns from maternity leave.

An employer could face tribunal claims for unfair dismissal and discrimination if it dismisses as redundant a woman on maternity leave without having offered her suitable alternative work (where vacancies exist) or where the offers made involve substantially less favourable terms and conditions compared with those of her old job.

What if a woman chooses to come back on different terms and conditions?

A woman gives up her right to return to the same job if she agrees to come back to a different job, for example by accepting a secondment to a location that is better suited to her childcare arrangements.

What other pregnancy and maternity rights are there?

The law protects a woman from suffering a detriment or being dismissed because she has taken (or has sought to take) maternity leave. For example, an employer who denies a woman the opportunity of promotion because she is about to start maternity leave will be acting unlawfully. A woman who believes she has suffered detriment or been dismissed for such reasons may pursue tribunal claims for unfair dismissal and pregnancy and maternity discrimination.

Maternity pay

Maternity pay is the amount paid by an employer to an employee who is absent from work on maternity leave. Statutory Maternity Pay (SMP) is the legal minimum amount that the employer must pay (the employer can reclaim this amount from the government). Unlike maternity leave, entitlement to SMP depends upon a woman's average weekly earnings and how long she has worked for her employer.

To qualify for SMP a woman must:

- have worked for the same employer for at least 26 weeks by the end of the fifteenth week before the expected week of childbirth
- be earning on average an amount equivalent to the 'lower earnings limit'. This is the amount that must be earned before National Insurance contributions can be made. The lower earnings limit for the 2011/12 tax year is £102 per week.

She will not be entitled to SMP unless she has also:

- told her employer she is pregnant (or given the employer her MATB1 form)
- given her employer 28 days' notice of the date she plans to start maternity leave.

SMP is paid for a total of 39 weeks at two rates:

- for the first six weeks at a rate equivalent to 90 per cent of a woman's average weekly earnings, and
- for the remaining 33 weeks, at a fixed rate set each year by law (£128.73 from April 2011).

Can a pregnant worker with two part-time jobs claim SMP from both employers?

A woman with two jobs may be able to get SMP from both employers if, for each job, she satisfies the qualifying conditions. For instance, a woman who for the past year has been employed two days a week for one employer and three days for another earning more than the lower earnings limit in each job can claim SMP from both employers.

What if there is a change of employer?

If a woman changes her job during pregnancy she is unlikely to have worked long enough for the new employer to qualify for SMP but if her employer decides to sell the business and her employment transfers to the new employer (known as a TUPE transfer) she will be able to claim SMP as though there had been no change. The same applies where her employment is transferred to a 'sister' or an associated company, or where her employer has died and she is re-employed by her employer's personal representatives or trustees. Similarly, a woman teacher whose employment with the local authority is transferred to the governors of a school maintained by that local authority will be entitled to claim SMP from the school.

What if a woman is dismissed because of redundancy during her pregnancy or maternity leave?

If it is before the fifteenth week before the EWC she will lose her entitlement to SMP. If she is dismissed because of redundancy any time after the fifteenth week or during her maternity leave, the employer must still pay her the 39 weeks' SMP she is entitled to.

What if an employer goes bankrupt?

HMRC becomes liable to pay SMP to the woman with effect from the week in which the employer became insolvent.

Can an agency worker claim SMP?

Yes, if she is employed by the agency. The definition of 'employee' is broader for SMP purposes than for other purposes so she may qualify for SMP even if she is not otherwise treated as an employee of the agency and does not qualify for maternity leave. This may be the case if the agency is responsible for paying her and deducts tax and national insurance. She will also have to meet the other qualifying criteria for SMP, i.e. she must satisfy the earnings rule, have notified the agency about her pregnancy and been employed by the agency throughout the entire 26-week period leading up to the qualifying week (this will be the case even if during the 26 weeks she was sent by the agency to a different workplace each day and in some weeks did not work every day or did not actually work at all).

What if a woman does not qualify for SMP?

Women who do not qualify for SMP because they are self-employed, or are employees but have not worked for the same employer for long enough, or because their earnings fall below the lower earnings limit may be able to claim Maternity Allowance (MA). The law requires an employer, within 28 days of receiving notification of a woman's maternity leave start date, to give her the form SMP1 if she is not entitled to SMP. This form will need to be sent to Jobcentre Plus before MA can be paid. MA is paid by Jobcentre Plus for 39 weeks. The amount paid will be the fixed rate (£128.73 a week from April 2011) or 90 per cent of her average weekly earnings, whichever is the lower.

Can a woman with two part-time jobs get twice the MA?

No. Unlike entitlement to SMP, a woman cannot claim MA for two jobs, nor can she claim MA for being self-employed in one job and claim SMP as an employee in the other. However, where a woman does not qualify for SMP her earnings from employment can be added to her earnings from self-employment to help her get the maximum amount of MA (up to the fixed rate).

Contractual maternity pay

Some employers operate maternity pay schemes that are more generous than the statutory scheme. A woman may be entitled to receive a higher rate of pay during maternity leave, for example equivalent to her full salary or half her salary or to maternity pay for more than 39 weeks or to other benefits during her maternity leave absence. Details of workplace schemes can usually be found in the contract of employment or employee handbook. Employers who operate such schemes usually find they have very high return to work rates (over 90 per cent), so the business benefits from retaining women's skills and experience and avoiding high recruitment and turnover costs, which compensates for the additional expense of providing contractual maternity pay.

7 Paternity rights

Can fathers-to-be take time off to attend ante-natal appointments?

No. Fathers-to-be or partners of the pregnant employee do not have a statutory right to time off. However, check your workplace collective agreements and policies as in many cases employers will allow time off or other flexible working arrangements to enable fathers-to-be and partners to attend ante-natal appointments. Note that the coalition government plans to introduce a right to unpaid time off for fathers-to-be/partners to attend ante-natal appointments from 2015.

Statutory Paternity Leave

Statutory Paternity Leave (SPL) is time off work for parents-to-be whose partners are giving birth to or adopting a child. The purpose of SPL is to support the mother (or adopter) to care for the child.

SPL is available to biological fathers, adoptive parents, spouses or partners of the mother including civil partners, provided they are expected to share the main responsibility for raising the child with the mother. It is available to an employee who has worked for their employer for at least 26 weeks by the fifteenth week before the expected week of childbirth (EWC) (or is matched in the case of adoption).

Those eligible for SPL are entitled to a maximum two weeks' leave, which can be taken as two separate weeks (one week at a time) or in a single two-week block. SPL cannot be taken as days of leave.

How does a father-to-be/mother's partner give notice of their intention to take leave?

Notice has to be given to the employer by the fifteenth week before the EWC. It must specify the EWC, the length of leave to be taken and the date on which the leave is due to begin. When choosing the start date, the employee can specify: the day on which the child is born; a set number of days after the child is born; or an actual date that is later than the first day of the EWC. If the employee wants to change their plans, they need to make sure they give their employer 28 days' notice of the change or, if the child is born early and this is not possible, they need to let their employer know the new start date as soon as they can.

Is there a time limit for taking SPL?

SPL has to be taken within eight weeks of the actual date of birth (or eight weeks after the expected date of birth if the baby is born early). The same applies to adoptive parents; leave can start from the date of the child's placement and must be completed within eight weeks of the date of placement.

What rights apply following and during SPL?

An employee is entitled to return to the same job following SPL and is protected from unfair dismissal or any detriment related to their intention to take or their taking paternity leave.

Statutory Paternity Pay

Partners who meet the conditions of entitlement to SPL are likely to be entitled to pay as well. The minimum amount that an employer must pay to eligible employees is known as Statutory Paternity Pay (SPP) and is calculated in the same way as Statutory Maternity Pay (SMP). To be eligible employees must have earnings that are at least equivalent to the lower earnings limit for National Insurance contributions (£102 per week for 2011/12) and have worked for the same employer for 26 continuous weeks into the fifteenth week before EWC and remain working for that employer until the date of childbirth.

SPP is paid either at a fixed rate (£128.73 a week for 2011/12) or at a rate of 90 per cent of weekly earnings, whichever is the lower. Like SMP, SPP is paid by the employer and reclaimed from the government.

Can someone with two employers get SPP from both?

Yes. Partners who work for two employers may be able to get SPP from both employers if they meet the eligibility conditions in respect of each employment.

Is it now possible to claim more than two weeks' paid paternity leave?

Yes. The Additional Paternity Leave Regulations 2010, which apply to parents of children born or placed for adoption on or after 3 April 2011, allow mothers to transfer up to 26 weeks of any unused SML and any unused entitlement to SMP or Maternity Allowance (MA) to their partner.

Additional Paternity Leave and Additional Paternity Pay

Additional Paternity Leave (APL) is a period of time off work that a father or partner of a child's mother or adopter can use to care for the child once the mother or adopter has returned to work.

To qualify for APL employees must be:

- the father of the child, or
- the spouse, partner or civil partner of the mother, or
- the spouse, civil partner or partner of the adopter.

In addition they must:

- expect to share the main responsibility for bringing up the child with the mother or adopter, and
- have at least 26 weeks' continuous service with their employer before the fifteenth week of the EWC.

APL can be taken for up to 26 weeks. It can be taken only once the mother or adopter has returned to work. It cannot be taken earlier than 20 weeks from the date the child is born or placed for adoption and no later than one year after the child's birth or adoption.

Is APL paid?

Yes, it can be. The paid period of maternity or adoption leave is 39 weeks so, if the mother or adopter has returned to work early and transferred some maternity or adoption leave to the father or her partner, then the father or partner can claim any unused SMP, Statutory Adoption Pay (SAP – see chapter 8) or MA too (provided there is at least two weeks remaining).

As the Additional Paternity Pay (APL) cannot begin until 20 weeks after the birth or adoption, the maximum that a father or partner could claim is 19 weeks.

This pay is known as Additional Statutory Paternity Pay (ASPP). It is paid at the same fixed rate as applies for SMP, SAP or MA (that is, £128.73 a week for 2011/12) and to qualify for it the father must have earned above the lower earnings limit (£102 a week for 2011/12) in the eight weeks before the fifteenth week before the EWC or adoption placement. Check your workplace agreement and employers' policies as they may provide for some contractual pay for people taking APL.

Would it be direct sex discrimination for an employer to offer contractual pay to women on maternity leave but not to men who are on APL?

The Equality Act 2010 provides that where special treatment is afforded to a woman in connection with pregnancy or childbirth then that would not be direct sex discrimination. However, it may be unlawful under EU law. The Court of Justice of the European Union (CJEU) ruled in a Spanish case concerning a scheme that permitted women and men to use a family-related right but men were treated less favourably when they did so, that this was sex discrimination.[14]

How does someone notify their employer of their intention to take APL and how is the pay claimed?

A father or mother's partner must give their employer at least eight weeks' written notice of the date they intend to start APL. The letter to the employer should contain the following information:

- the baby's EWC and, following the birth, the baby's date of birth
- the start and end dates for the leave
- a signed declaration from the employee that states that the leave is for the purpose of caring for the child and that the employee is the father or the partner of the mother who shares the main responsibility for bringing up the child
- a signed declaration from the mother that includes her name and address and National Insurance number, the date she intends to return to work, confirmation that the employee is the father of the child or her partner who shares the

[14] *Pedro Manuel Roca Álvarez v Sesa Start España ETT SA* (2009) C-104/09 CJEU

main responsibility for bringing up the child, and consent to the employer processing the information given by her.

If a father/mother's partner also wants to claim ASPP, then the employee declaration needs to include their name and confirmation that the information given is correct; the mother's declaration must include confirmation that she has given her employer notice of her return to work, confirmation that she is entitled to SMP, SAP or MA, and the start and end date of her period of SMP, SAP or MA.

To make sure that all the necessary information is given it is probably best for employees to use forms SC7 and SC8 (available from the HMRC website) when applying for APL and ASPP.

On receiving notification of all the above, the employer must, within 28 days, write to the employee confirming the dates on which APL and ASPP will begin and end. They might also ask for a copy of the child's birth certificate to be provided and the name and address of the mother's employer. The individual should provide this information, but only if asked.

Can I do any work for my employer during the APL period?

Like employees on maternity or adoption leave, partners on APL can work for up to 10 'Keeping in Touch' days during the APL period. They will need to agree separately with their employer the rate of pay for the days actually worked.

Does an employee have a right return to the same job after taking APL?

Yes. Employees who take up to 26 weeks' APL are entitled to return to the same job on the same terms and conditions of employment that would have applied had they not been on leave. Employees who take 26 weeks' APL combined with more than four weeks' parental leave are entitled to return to the same job unless it is not reasonably practicable for the employer to allow them to return to their old job. If this is the case they must be offered a job that is both suitable and appropriate for them to do, on terms and conditions that are no less favourable than their original job.

What if the job is made redundant while someone is absent on APL?

Like women on maternity leave, they are entitled to be offered a suitable alternative job with the employer, an associated employer or a successor employer. Employees who are selected for redundancy, dismissed or treated unfairly because they are seeking to exercise their right to take, are taking or have taken APL are protected from unfair treatment including dismissal, which would be automatically unfair.

What if an employee wishes to change or cancel their plans to take APL?

Employees wishing to change the start date or cancel APL must give their employer six weeks' written notice of the change (starting from either the original date or the new date, whichever is earlier). For example, a partner who had originally intended to start APL on 1 June but now wants to stop work on 15 May must notify their employer of the change at least six weeks before 15 May, that is by 24 April. If it is not possible to give six weeks' notice they should give notice as soon as they can. An employee who wishes to return to work earlier or later than they originally intended would also have to give six weeks' notice in a similar way.

What happens if an employee cannot give six weeks' notice of a change of plan?

There will sometimes be occasions when a partner cannot give adequate notice, for example, because the mother has fallen sick at the end of her maternity leave and is unable to return to work or because the couple has separated and he no longer shares the main responsibility for bringing up the child. If less than six weeks' notice is given, the employer can insist that the employee takes up to six weeks' leave, starting on the date specified in the original notice letter. But the employer can do so only if it would not be reasonably practicable for them to accommodate the change of plan.

What happens if the mother (or co-adopter) dies?

Should the child's mother or co-adopter die before the child's first birthday (or within the first year of placement), partners can take any of the unused maternity or adoption leave and pay and the leave can start earlier than the twentieth week following childbirth.

Coalition government plans for flexible parental leave

In 2011 the coalition government announced plans to replace the current system of APL with a more flexible system of shared parental leave from 2015. It proposes reducing the designated period of maternity leave to 18 weeks and making the rest of the 52 weeks' maternity leave parental leave, which either parent can take. It would be more flexible than APL because parents could take the leave at the same time as each other rather than the mother having to return to work before the father can use any of the leave.

It is also proposed that, if the employer agrees, parents would not have to take the parental leave as a continuous block but could take separate blocks of leave (for example, a period just after the birth and another period later in the first year) or take it as days of leave (for instance, two days a week to allow a period of part-time work before returning to work full time).

The plans also include an additional month of parental leave that would be just for fathers to use. This is intended to encourage more equal parenting; however, the leave will be paid at the statutory flat rate (£128.73 a week in 2011/12) so, in practice, it is anticipated that very few fathers would use it.

For more information about these proposals see the Modern Workplaces consultation on the BIS website.

The TUC generally supported the principle of more equal parenting and more flexible parental leave but expressed concern about reducing the designated maternity leave period to 18 weeks, arguing instead for 26 weeks. See the TUC website for the consultation response.

8 Other rights for parents and carers

Rights for adoptive parents

Adoptive parents have similar entitlements to time off work and pay when adopting a child as other parents. Statutory Adoption Leave (SAL) is similar to Statutory Maternity Leave (SML). It is available to employees who are adopting a child and who have 26 weeks' continuous service with their employer before the week in which they were notified that they were matched with a child. It is available for 52 weeks.

Statutory Adoption Pay (SAP) is similar to Statutory Maternity Pay (SMP). It is available for 39 weeks, provided the employee meets the 26 weeks' service criteria and has average earnings above the lower earnings limit (£102 a week for 2011/12).

Only one co-adopter is entitled to take SAL and claim SAP. However, the other may be able to take Statutory Paternity Leave (SPL) and claim Statutory Paternity Pay (SPP) at the time of the adoption and Additional Paternity Leave (APL) and Additional Statutory Paternity Pay (ASPP) once their partner has returned to work, provided they meet the qualifying criteria for these forms of leave and pay.

Employers must not subject employees adopting a child to a detriment or dismiss them for a reason relating to adoption leave. Employees who are adoptive parents may also be entitled to take parental leave and time off for dependents, and request flexible working.

Some important differences

Whereas maternity leave may not be taken earlier than the eleventh week before the expected week of childbirth, statutory adoption leave cannot be taken earlier than 14 days before the date the child is due to be placed with the adoptive parents.

A co-adopter must tell their employer within seven days of the receiving confirmation of the placement date for adoption that they wish to take SAL and 28 days' notice must be given to the employer of any change to (or cancellation of) the start date. If they are unable to give the correct notice, they should tell the employer as soon as reasonably practicable.

Whereas SMP is 90 per cent of a woman's average weekly earnings for the first six weeks, SAP is paid at the fixed rate of £128.73 a week (unless the adopter's average earnings are less than this) throughout the 39-week paid period of leave.

Parental leave

Parental leave is a right to take unpaid time off work to look after a child under five, a child with a disability under 18 or a child who was adopted within the past five years who is under 18.

To be entitled to parental leave a parent must:

- be an employee
- have 12 months' continuous service with the same employer
- be the parent named on the birth or adoption certificate or otherwise have (or expect to have) parental responsibility for the child.

Qualifying parents can each take 13 weeks' leave for each child or up to 18 weeks' leave if the child is disabled. Unless a collective or relevant workforce agreement provides otherwise, a maximum of four weeks' leave may be taken for each child in any year up to the child's fifth birthday and leave must be taken in multiples of one week (except if the child is disabled and entitled to Disability Living Allowance).

Does parental leave need to be taken for a specified reason?

The purpose of parental leave is to care for the child and generally look after their welfare, but the child need not require special care, be disabled or unwell. For example, sometimes a period of parental leave is added on to maternity leave so a parent can still be at home with the child beyond their first birthday.

What are the notice requirements for parental leave?

Eligible employees wishing to take parental leave must give their employer 21 days' notice of when they want their leave to start and end.

Can a request for parental leave be refused?

A request for parental leave cannot to be refused. However, it can be postponed by the employer for up to six months if the employer can show that it would cause significant disruption to the business. Parental leave cannot be postponed where the request is from a father to take leave immediately following childbirth or from a parent to take leave on the placement of a child for adoption. To postpone leave, an employer must write to the employee within seven days of receiving notice from the employee of their intention to take parental leave. The letter should set out the reasons for postponing the leave and confirm the new start and end dates. An employer cannot postpone leave to a period beyond the child's fifth birthday.

What are my rights during parental leave?

The employment contract continues during parental leave, which means that entitlement to statutory rights (such as the right not to be unfairly dismissed) remain unaffected. Pension rights and the employee's seniority are also protected and an employee has a right to return to work to the same job from a period of parental leave of four weeks or less. An employee is also entitled to benefit from any pay increases or improvements to other terms and conditions introduced (or taking effect) during their absence.

What if an employee is selected for redundancy while on parental leave?

Should a genuine redundancy situation arise while an employee is absent on parental leave, they must be consulted at the earliest opportunity and kept informed of how the redundancy situation may affect them. If an employee is selected for redundancy while on parental leave, they must be considered for any alternative work that may be available. An employer who selects an employee for redundancy because they are on parental leave (or for related reasons) will be acting unlawfully.

What about collective or workforce agreements on parental leave?

The Maternity and Parental Leave etc Regulations 1999 set out a default scheme for taking parental leave, which includes: the requirement for 21 days' notice; the circumstances when leave can be postponed; the requirement that leave must be taken in blocks of one week; and the prohibition on more than four weeks' leave being taken each year. This default scheme does not apply if there is a collective or workforce agreement in place governing parental leave (what is a relevant workforce agreement is set out in the Regulations).

Many collective agreements on parental leave allow for the leave to be taken on a more flexible basis, for example, allowing leave to be taken in blocks of less than one week or increasing the upper age limit of the child (this is particularly useful as it allows parents to use the leave during school holidays, for example). Sometimes collective agreements also make provision for payment during parental leave.

Forthcoming changes to parental leave

Following successful negotiations by trade unions and employers at EU level (the 'social partners'), agreement was reached to revise the parental leave agreement that formed the basis of the Parental Leave Directive 1996.

The amended Parental Leave Directive 2010, which was subsequently adopted, has to be implemented by 8 March 2012 and requires member states to provide four months of parental leave rather than three months. It is likely to require changes to the default scheme for taking the leave as the annual limit of four weeks' leave will have to be adjusted otherwise parents will not be able to take the new full entitlement of 18 weeks' leave before a child's fifth birthday. Alternatively, the upper age limit could be raised.

The coalition government has also consulted on whether to adopt an increased upper age limit (possibly as high as 18) and may allow the leave to be taken more flexibly than in blocks of one week as the default scheme requires. See the Modern Workplaces consultation for more information.

Time off for dependants

All employees have the right to take time off during working hours to deal with emergencies or other unforeseen matters that may arise which affect their dependants. There is no legal right to be paid but some employers may provide paid time off as part of the terms and conditions of employment.

A dependant might be someone living with the employee such as a spouse, partner, civil partner, child or parent, or someone who depends on an employee for care, such as an elderly neighbour.

Leave can be taken for a variety of reasons, examples of which include:

- to deal with a breakdown in childcare arrangements
- to put longer-term care arrangements in place for children or elderly relatives
- if a dependant falls ill or is taken into hospital
- in order to arrange or attend a funeral
- to assist someone in emotional distress
- to help a dependant who is injured or assaulted
- to deal with a problem or accident at school involving the employee's child.

How long is a reasonable time off?

The law does not specify how much time will be considered reasonable. An employee should be permitted to take as much time off as is necessary in order to deal with the immediate crisis. For example, a parent may need emergency time off to take a sick child to hospital but once the parent is told that the child suffers from an underlying medical condition that is likely to involve frequent hospital visits, arguably the situation is no longer an 'emergency' or 'unforeseen'.[15] An employee must tell the employer as soon as possible the reason for the absence and how long they expect to be absent from work.

What if an employee is dismissed for taking emergency leave?

An employer who dismisses an employee because they took, or sought to take, emergency leave will be acting unlawfully. The law also protects employees who are subjected to detrimental treatment by their employer for taking emergency time off. Examples of detrimental treatment might include: cutting (or threatening to cut) an employee's wages for taking emergency leave; forcing an employee to take annual leave to deal with emergencies; insisting on overtime working to make up for time lost; or withholding a bonus because they have taken time off.

[15] *Qua v John Ford Morrison Solicitors* [2003] UK/EAT IRLR 184

9 Flexible working

Flexible working is used to describe a range of working arrangements that are different from standard full-time hours and more suited to parents and carers. Examples of flexible working include: part-time hours; job shares; term-time only working; working from home; staggered start and finish times; flexi-time; and compressed hours.

Who is eligible for flexible working?

Employees who have continuously worked for their employer for 26 weeks and have not applied to work flexibly during the past 12 months have a legal right to request a flexible working pattern, provided:

- they have (or will have) parental responsibility for a child under 17 years of age or a disabled child under 18 (for whom Disability Living Allowance is paid)
- they are the parent, guardian, special guardian, foster parent or private foster-carer or an employee who has a residence order for a child; or the spouse partner or civil partner of the employee with a residence order
- they are a carer who cares (or will care) for an adult who is their spouse, partner or civil partner or other relative; or cares for someone who is not a relative but lives at the same address, for example an elderly neighbour in the same apartment block.

Remember that many unions have negotiated policies with employers that go beyond the statutory minimum to open up flexible working opportunities for all employees.

How does someone ask for flexible working using the statutory right to request?

The application must be made in writing (by letter or email) and the application must be dated and state whether any previous application has been made and, if so, when. It should state that it is made 'under the statutory right to request flexible working' and set out which of the categories set out above apply, for example: 'I am the mother of a disabled child aged seven and I receive DLA for him/her.' It should also set out the proposed flexible working arrangements and the date on which the employee would like them to start. If possible, the employee should also point out how they think the new working pattern might affect their colleagues or the employer's business and how it could be accommodated.

Before making an application an employee might want to discuss the proposal with colleagues and with trade union representatives to get information about whether similar requests have been accepted or what flexible working arrangements apply elsewhere in the organisation and how they have been accommodated. This could help in making their case.

How long does the application process take?

Employees should bear in mind that the whole process of applying to work flexibly could take up to 14 weeks or longer to complete. It is advisable for employees to make an application well in advance of the date they would like the flexible working pattern to start.

What should an employer do once they receive an application?

Employers must seriously consider all statutory flexible working requests and approach each application by asking 'How might the business accommodate this request?' rather than looking for ways to refuse the requested work pattern.

The law requires an employer who has received an application for flexible working to:

- hold a meeting with the employee to discuss their request within 28 days of receiving it (unless they agree to the request, in which case they must write to the employee to confirm the new working pattern and start date)
- advise the employee in writing of their decision within 14 days of the meeting

- state reasons for rejecting an application and notify the employee of the appeal procedure
- hold an appeal meeting within 14 days of the employee's notice of appeal (which the employee must submit within 14 days of the original meeting)
- allow the employee to be accompanied to the flexible working meeting and any appeal meeting by another worker employed by the same employer (who could be a trade union representative).

What if an application for flexible working is refused?

An employer can refuse a flexible working request only on certain grounds, which are set out in the law. These are:

- there are planned structural changes to the business within which the working pattern could not be accommodated
- the flexible working pattern would, if implemented, have a detrimental impact on quality
- the employer's inability to recruit additional staff
- the flexible working pattern would have a detrimental impact on performance
- the employer is unable to reorganise work among existing staff
- the flexible working pattern would have a detrimental effect on ability to meet customer demand
- insufficient work during the periods the employee proposes to work
- the burden of additional costs.

What if an employer fails to follow the procedure?

An employee whose employer fails to follow the statutory procedure (for example by failing to hold a meeting) or rejects a request on grounds other than those set out above, may pursue a claim to an employment tribunal. If the complaint is upheld, the tribunal may order the employer to reconsider the application and award up to eight weeks' pay as compensation (subject to the statutory upper limit set out in s.227 Employment Rights Act 1996, which is £400 a week from February 2011). However, a tribunal has no power to compel the employer to implement the flexible working arrangement requested.

In addition, note that so long as an employer has correctly followed the procedure and given one of the eight business reasons when rejecting a request, there is no opportunity for a tribunal to scrutinise the employer's decision to establish whether the business really could not accommodate the request.

Can a rejection of a request be challenged as discrimination?

It may be possible for the employee to challenge a rejection as discrimination. This is often the case when the person who has made the request is a woman with young children. Women still tend to have primary caring responsibilities so a refusal to allow flexible working is likely to put them at a particular disadvantage and could amount to indirect sex discrimination. The employer rejecting such a request should be asked to explain how their insistence on standard, full-time hours is a proportionate means of achieving a legitimate aim (could they have accommodated the flexible working?).

A universal right to request flexible working

The coalition government agreement has a commitment to extend the right to request flexible working beyond parents and carers to all employees. In its Modern Workplaces consultation, it has proposed to introduce a new universal right (probably from 2014) but has also suggested that the statutory procedure should be replaced by a statutory Code of Practice. An employer would have a duty to consider a request 'reasonably', with the Code giving guidance on 'reasonableness'. The TUC has opposed any dilution of the procedural requirements.

PART THREE
COMPLIANCE AND ENFORCEMENT

In most cases it is sensible to try to resolve a problem or issue at work, either informally or using a workplace grievance procedure, before submitting a tribunal claim. Resolving problems informally will be quicker and in all likelihood less stressful than a formal grievance and/or an employment tribunal claim.

However, discrimination is a serious matter and so an informal discussion may not be sufficient or appropriate. A discussion with a manager may also not be appropriate where it is the manager him- or herself involved in the discrimination. In cases where informal resolution is not appropriate, or where attempts at informal resolution have failed, the next stage should be consideration of a grievance.

10 Workplace procedures

Grievances

A grievance is a formal complaint, usually made in writing. Before submitting a tribunal claim it is almost always sensible to raise a grievance. Employers are legally required to have a workplace grievance procedure in place and to provide employees with details of this.

How do union representatives help with workplace disputes?

Union representatives can help members facing problems at work, including discrimination, in many different ways. At the outset a union representative can advise, based on their experience and knowledge of the employer's organization, on the best way to deal with an issue, for example whether to seek to resolve it informally or alternatively by way of a grievance. A union representative can either take up an issue with management on behalf of a member or support the member in doing this him- or herself. Union representatives can also assist through every stage of a grievance, and have a role in grievance procedures that is recognised and protected in law. They can provide help and support and even witness evidence or representation should the matter get as far as a tribunal claim.

What does a grievance procedure involve?

Most employers have grievance procedures, which should comply with the statutory *Acas Code of Practice 1 on Disciplinary and Grievance Procedures* ('the Acas Code'). The Code sets out practical guidance for grievance situations at work and a basic grievance procedure for employers and employees to follow. It also sets out a procedure and relevant principles for employers when dealing with disciplinary matters.

It is in an employer's interests for its grievance procedure as a minimum to conform with the Acas Code, not least because of the potential for an uplift of compensation where an employer has failed to follow it.

Who normally deals with grievances?

Usually one person within the employer's organisation will hear and make a decision on an employee's grievance, though sometimes this is done by a panel. The decision-maker(s) is generally a senior employee, manager or director. One of the principles in the Acas Code is that any appeal against a grievance decision should, wherever possible, be dealt with by a manager who has not previously been involved in the case. In fact, it is best practice for both the initial decision-maker and the appeal decision-maker to not have been previously involved in the case. Also the appeal decision-maker should be more senior than the initial decision-maker, or at least not more junior and/or from an unrelated part of the employer's organisation.

What are the stages in a grievance procedure?

The typical steps in a grievance procedure, in accordance with the Acas Code, are as follows:

1. The employee gives the employer details of the grievance in writing.

2. The employer then conducts any necessary investigations. This often includes interviewing other employees or examining documents or other evidence.

3. The employer holds at least one meeting with the employee to discuss the grievance.

4. The employer makes a decision. This often involves the employer deciding whether or not to uphold the grievance and identifying any appropriate action that will be taken as a result.

5. If the employee is not satisfied with the employer's decision then the employee should have the right to appeal. If the employee does appeal then the appeal decision-maker conducts a similar process again (any appropriate further investigation or interviews, at least one meeting with the employee and a written decision).

The Acas Code is available from the Acas website and is essential reading for any employee going through a grievance procedure as well as any representative accompanying them.

What are the consequences of failing to comply with the Acas Code?

One of the reasons that the Acas Code is so important is that tribunals are entitled to take into account failure to follow it by either an employer or an employee when deciding how much compensation to award. The tribunal has the power to reduce any compensation awarded to a claimant by up to 25 per cent where it considers that the claimant has unreasonably failed to comply with the Acas Code, principally by not raising a grievance before making a claim. Similarly, if the claimant has raised a grievance and the tribunal considers that the employer has unreasonably failed to comply with its obligations under the Acas Code the tribunal can increase the compensation awarded to the employee by up to 25 per cent.

What are a worker's rights to be accompanied?

Workers have a legal right to be accompanied by a companion at a grievance meeting dealing with a complaint about a duty that the employer owes to the worker. This right also applies to disciplinary hearings. The companion can be a fellow worker or a union representative or official. If a worker's chosen union representative is not an employed official of the union then he or she must have been certified by the union as competent to accompany the worker. The worker's companion is not permitted to answer questions on the worker's behalf but can address the meeting to put the worker's case, respond on behalf of the worker to any views expressed at the meeting and confer with the worker during the meeting.

Does a companion have a right to time off?

Union representatives have a legal right to reasonable paid time off to carry out union activities and to accompany workers to grievance or disciplinary hearings. See Trade Union Representation in the Workplace: A Guide to Managing Time Off, Training and Facilities, which is available from the Acas website.

What about equality representatives?

Some trade unions have made provision in their rulebooks for trained workplace or branch equality representatives with specialist knowledge of equality issues. The TUC has trained hundreds of such representatives, as have some trade unions. However, equality representatives do not have statutory recognition and are not entitled to paid time off to carry out their duties, despite strong campaigning by the TUC for such statutory rights to be introduced through the Equality Act 2010.

Some unions have managed to negotiate agreements with employers that provide for paid time off for equality representatives, recognising the benefits of partnership working on equality and the preventative role such representatives can play in identifying potential discrimination and getting issues dealt with promptly and before they escalate. The Acas guidance on union representation also recommends giving them paid time off as 'good practice' so they can perform their role effectively.

11 Taking a claim to tribunal

Before considering taking a discrimination or equal pay claim to an employment tribunal, workers should seek advice from their trade union. Discrimination and equal pay claims are complex and less likely to succeed where an individual has not sought advice when preparing their claim and/or does not have representation during their claim.

How do you lodge a claim at an employment tribunal?

A claim to an employment tribunal must be made on an ET1 form. The latest version of this form can be downloaded from the Employment Tribunal Service website. The ET1 can be submitted online using the same website. The time limit for making a discrimination claim is that the ET1 must be submitted to the tribunal within three months of the act of discrimination complained of. For example, for an act of discrimination occurring on 15 April the claim must be submitted to the tribunal by 14 July. The time limit for equal pay claims is six months from the end of the employment to which the claim relates or at any time during that employment.

How are statutory discrimination question forms used?

There are statutory question forms that can be used by claimants or potential claimants to obtain information from an employer to help them establish whether or not they have been discriminated against. If an employer fails to respond to the questions or gives evasive responses then this could be held against them by a tribunal. There is a standard question form for discrimination claims and another one for equal pay claims for claimants to use. There are also standard answer forms for employers to use. The forms are set out in the Equality Act 2010 (obtaining information) Order 2010, which is a statutory instrument under SI number 2010/2194 available on the government website www.legislation.gov.uk.

What are the time limits for serving a question form?

A question form can be sent to an employer at any time before a discrimination or equal pay claim is submitted or within a 28-day period beginning with the day a claim is submitted to tribunal. In either case, the employer should reply within eight weeks of receiving the form.

It can be hard to prove discrimination as employers will not admit that race, disability, sex etc. are the reasons for their action. Does the law help with this?

The Equality Act 2010 provides for a reversal of the burden of proof in discrimination cases, recognising how difficult it can be to prove that discrimination has occurred. This means tribunals adopt a two-stage approach when hearing a case.

The first stage is to decide whether the claimant has proven, on the balance of probabilities, a *prima facie* (meaning 'on the face of it') case of discrimination. If it believes that from looking at the facts and in the absence of any other explanation there is a *prima facie* case of discrimination, the burden of proof shifts on to the employer.

In the second stage it is up to the employer to prove that no discrimination has taken place. When deciding whether a claimant's case has passed the first stage and the burden of proof has shifted to the employer, as well as considering the facts presented to it, tribunals may look at whether the employer has breached a statutory Equality and Human Rights Commission (EHRC) Code of Practice and whether it has failed to properly respond to a statutory discrimination question form that was served on it.

What happens if a tribunal finds in favour of a claimant?

Where a discrimination claim succeeds, tribunals have the power to do any or all of the following:

- make a declaration of the rights of the claimant and the respondent in relation to the matters complained of in the claim
- order the respondent to pay compensation to the claimant
- make a recommendation either aimed at reducing the adverse effect of the discrimination on the claimant or for the benefit of other employees in the employer's workforce who may be at risk of similar discrimination.

How is compensation for discrimination calculated?

The calculation of compensation for discrimination is based on the loss that the claimant has suffered. There is no limit on the compensation that a tribunal can award unlike, for example, unfair dismissal where the award cannot exceed a certain cap. The tribunal's aim is to make a financial award that will put the claimant into the position they would have been in had the discrimination not taken place. It will look at actual and potential future loss of earnings.

Tribunals also have the power to award compensation for non-financial loss in discrimination cases, whereas in most other types of employment tribunal claim they cannot. The award for non-financial loss in discrimination claims is referred to in the Equality Act 2010 as 'injury to feelings'. The amount that the tribunal awards will be based on the impression that the tribunal forms of the extent of the upset or hurt caused by the discrimination. Any relevant medical condition or particular vulnerability or sensitivity of the claimant will generally be taken into account. This means that if the effect of the discrimination on the claimant is greater than might otherwise be expected the respondent is still required to compensate the claimant in full.

In a case called *Vento*,[16] the Court of Appeal set down bands for injury to feelings awards in discrimination cases, which have subsequently been increased to take account of inflation. They are now as follows:

- **The top band: £18,000–£30,000** This is for the most serious cases, for example where the claimant has been the victim of a prolonged period of harassment that has had a profound impact.
- **The middle band: £6,000–£18,000** This is for cases that, although serious, do not justify an award in the top band.
- **The bottom band: £600–£6,000** This for less serious cases, such as a one-off incident or an isolated event. Although, strictly speaking, there is no minimum, case law including Vento suggests that an award under £600 would not be a proper recognition of the injury to feelings caused by discrimination.

What can tribunal recommendations cover?

Prior to the Equality Act 2010, tribunals had a power to make recommendations but only when they would benefit the person bringing the case. Recommendations were rarely made because in the majority of discrimination cases the claimant had left the employment of the employer so any action by the employer to address the problem would not benefit them. However, the tribunals' power has been broadened in the Act so that recommendations can now be made for the benefit of the wider workforce. Examples of recommendations that might benefit the wider workforce include that the employer introduces (or more effectively enforces) a relevant policy, for example on bullying and harassment or equal opportunities, or provides staff with relevant training.

How are recommendations enforced?

Unfortunately, a recommendation cannot be directly enforced. However, if an employer fails to comply with a recommendation that relates to an individual claimant and the tribunal considers that the employer does not have a reasonable excuse for this, the tribunal can increase the compensation awarded to the claimant. In addition, past failures by an employer to comply with a recommendation (without a reasonable excuse) can be used as evidence in support of similar discrimination claims.

[16] *Vento v Chief Constable of West Yorkshire Police [2002]* EWCA Civ 1871

Appealing employment tribunal decisions

Parties who are not satisfied with either the tribunal's decision or the way in which the case was dealt with by the tribunal can appeal. Appeals against tribunal decisions are handled by the Employment Appeal Tribunal (EAT).

Generally, an appeal can be made only on a point of law and not against a tribunal's finding of fact or simply on the basis that a party disagrees with the result. For an appeal to succeed it would have to be shown that: a tribunal wrongly applied a principle of law (including misunderstanding the relevant legislation); its reasoning was inadequate; or it had come to a conclusion that was perverse because there was no evidence whatsoever to support it. However, the perversity test, which is the basis upon which findings of fact can be challenged, is a very demanding one and usually a difficult ground of appeal to succeed with.

EAT decisions can be appealed to the Court of Appeal and Court of Appeal decisions can be appealed to the Supreme Court. Again, the basis of these appeals is that the EAT or Court of Appeal has misunderstood the law or wrongly applied it to the facts of the case. Decisions of the EAT and higher courts are binding, which means they must be followed in similar cases by tribunals or courts lower than them.

12 The Equality and Human Rights Commission

The Equality and Human Rights Commission (EHRC) took over from the Equal Opportunities Commission, the Commission for Racial Equality and the Disability Rights Commission in October 2007. It is a publicly funded statutory body with a role to protect, enforce and promote equality and good relations across the areas of age, disability, gender, race, religion and belief, sexual orientation and gender reassignment. It is also tasked with protecting and promoting understanding of human rights.

The EHRC's main compliance and enforcement powers under the Equality Act 2006 are:

- to issue statutory Codes of Practice to accompany the Equality Act 2010 (for example the Employment Code of Practice, Equal Pay Code of Practice)
- to conduct inquiries into any matter relating to equality, good relations or human rights (for example its inquiries into sex discrimination in the finance sector, disability-related harassment, employment in the meat and poultry processing sector)
- to conduct investigations into whether or not a person has carried out an unlawful act where it suspects a person has committed such an act
- to issue an unlawful act notice or to enter into an agreement with a person to stop an unlawful act or to produce an action plan to prevent such an act from happening
- to apply to court for an injunction to stop an unlawful act from happening where it suspects a person is likely to commit such an act
- to assist an individual in legal proceedings that relate to the Equality Act 2010 or EU equality law, including providing legal advice and/or representation
- to take judicial review or independently intervene in legal proceedings taken by other parties that relate to equality, good relations or human rights
- to carry out an assessment of whether or not an organisation has complied with the public sector equality duty (for example the assessment of HM Treasury's compliance when carrying out the Spending Review 2010)
- to issue a compliance notice requiring that an organisation complies with the public sector equality duty where it thinks it has failed to comply.

Note that when carrying out inquiries, investigations or assessments of compliance with the public sector equality duty the EHRC can require an organisation to provide it with information, documents or oral evidence.

The EHRC also undertakes information and education activities including publishing non-statutory guidance, advice or other information, undertaking research and providing training and education.

What kind of legal claims will the EHRC support?

In terms of providing legal assistance, the EHRC is most likely to support cases that fit with the priorities set out in its legal strategy. For 2010–12, these are: to reinforce, expand and strengthen equality rights for all of the protected grounds under equality legislation; to protect and promote human rights; to secure effective compliance with statutory equality duties; and to promote good relations and combat prejudice.

According to the EHRC's legal strategy 2010–12, the criteria it will use to assess whether or not it will support a case include whether the case would:

- have a significant positive impact on the application of the law or policies or practices of an organisation, institution or sector
- address significant disadvantage in respect of one or more of the protected characteristics

- clarify an important point of equality law
- strengthen or extend protections and rights under equality law
- be cost effective, taking into account the case's prospects of success.

Its legal strategy also specifically mentions the need to develop and expand the legal protection against discrimination on the grounds of sexual orientation, religion or belief, age and gender identity, as well as challenging multiple discrimination.

What about support for actions to enforce the public sector equality duty?

In relation to the public sector equality duty, the EHRC's priorities include securing compliance with the duty by public authorities whose functions have a significant impact on members of protected groups and using evidence of non-compliance with the equality duty to support actions in relation to allegations of discrimination by public bodies.

Why are the EHRC's Codes of Practice so important?

The statutory Codes of Practice prepared by the EHRC set out clearly and precisely what the Equality Act 2010 means. They provide a detailed analysis of the legislation, along with an explanation of principles from discrimination case law that, although decided under the predecessor legislation to the Act, largely remains relevant. The statutory Codes are the authoritative guidance on how to interpret the Act and what they say can be taken into consideration by tribunals and courts and an inference of discrimination could be drawn from an organisation's failure to comply with them.

The Codes of Practice on Employment, Equal Pay, Services, Public Functions and Associations came into force on 6 April 2011. The Code on Higher and Further Education will be laid before Parliament in September 2011 and the Code for Schools is due to be laid before Parliament in April 2012. The EHRC is also producing a statutory Code of Practice for the public sector equality duty, which will be consulted upon and laid before Parliament in due course.

Further guidance and resources

TUC www.tuc.org.uk

The TUC has published a range of guidance for trade unions on equality. These can be obtained from TUC Publications on 020 7467 1294. The text of many is also available on the TUC website.

- *TUC Equality Duty Toolkit*. 2001
- *Representing and Supporting Members with Mental Health Problems*. 2008
- Sickness absence and disability discrimination
- *Disability at Work: A trade union guide to the law and good practice*. Revised 2011
- *Cancer in the Workplace: A guide for union representatives*. May 2010. This is also a course and e-learning facility in partnership with Macmillan Cancer Support.
- *Recording Women's Voices: The equal pay story*. 2007. Printed pack of resources plus DVDs
- *Tackling Racism in the Workplace: A negotiator's guide*
- *LGBT Equality in the Workplace: A TUC guide for union negotiators on lesbian, gay, bisexual and trans issues*. 2010
- *Dyslexia in the Workplace: A guide for unions*. Second edition 2008
- TUC-CIPD guidance on Managing Age
- *TUC Equality Audit 2009*
- *TUC Equality Audit 2011*

EHRC www.equalityhumanrights.com

The EHRC website contains a wealth of research and guidance on equality and human rights. The following are recommended:

- Non-statutory guidance to the Equality Act for employees
- Non-statutory guidance to the public sector equality duty
- Statutory Code of Practice on Employment
- Statutory Code of Practice on Equal Pay
- Statutory Code of Practice on Public Sector Equality Duty
- Equal Pay Audit Toolkit
- A quick-start guide to equality impact assessments
- Using the equality duties to make fair financial decisions
- Triennial review of equality 'How Fair is Britain'.

Acas www.acas.gov.uk

Acas provides information and guidance on employment relations. It also has guides on equality. The following are recommended:

- Statutory Code of Practice on Disciplinary and Grievance Procedures
- Trade Union Representation in the Workplace: A guide to managing time off, training and facilities
- Working without the Default Retirement Age.

Government Equalities Office www.homeoffice.gov.uk/equalities/

The GEO website provides the latest information on government policy on equality and updates to the Equality Act 2010, including links to the Act itself, related regulations and the Explanatory Notes. The following guidance is also available:

- Employers: A quick-start guide to positive action in recruitment and promotion
- Individuals: A quick-start guide to your rights.

Office for Disability Issues www.odi.dwp.gov.uk/equalityact

- Guidance on matters to be taken into account in determining questions relating to the definition of disability.

Employment Tribunal Service www.employmenttribunals.gov.uk

Forms and information on how to take an employment tribunal claim.

Trade unions

Check your own trade union's website for advice and guidance. Many trade unions have produced guides on the Equality Act 2010, family-friendly rights and the public sector equality duty.

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£10 for TUC member unions; £15 others
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