

CIPD | **HR-inform** webinars

Equality and diversity



24/7 professional support for businesses, across employment law, HR and health and safety

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Date: 13-12-2021

Run time: Approx 50 mins

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The detail contained within this webinar is based on GB and Northern Ireland employment legislation.

Members in the jurisdictions of Republic of Ireland, Jersey, Guernsey and Isle of Man are asked to please contact the Advice Service to obtain the information relevant to your jurisdiction.

Today we will cover...

- The current protection against discrimination in the workplace
- An analysis of some of the protected characteristics
- The common areas that require your attention
- Recent cases at Tribunal
- Gender and ethnicity pay gap reporting

Let's Begin...

- Discrimination is not always obvious and intentional; it does not require an unscrupulous employer to actively intend to treat people differently, but can from unconscious bias individuals may not even realise they have.
- Your workplace policies can be discriminatory without you being aware of it.

Equality Act 2010

Codes of Practice

- In addition to the Act itself, there are two statutory codes of practice which set out an employer's obligations and considerations in layman's terms:
 - Code of Practice on Employment
 - Code of Practice on Equal Pay
- In December 2018, the government announced they will introduce a Code of Practice on **Sexual Harassment**

Annual Tribunal Statistics

From April 2020 to March 2021:

5,172 sex discrimination claims (down from 6,260 last year)

15,336 age discrimination claims (up from 2,434 last year)

7,430 disability discrimination claims (down from 8,178 last year)

4,175 race discrimination claims (up from 3,967 last year)

733 religious discrimination claims (down from 797 last year)

438 sexual orientation discrimination claims (down from 505 last year)

Scope of the Act



Before
employment i.e.
recruitment
process



During
employment e.g.
training,
promotion



Post-employment
e.g. provision of
references

Types of Discrimination Covered

Direct Discrimination

Indirect Discrimination

Harassment

Victimisation

Protected Characteristics

- Race (colour, nationality, ethnic origin)
- Sex
- Marriage/civil partnership
- Disability
- Age
- Sexual orientation
- Religion or belief
- Pregnancy/maternity
- Gender reassignment

Equal pay

Is not a protected characteristic as such but the Equality Act provides that a person of one sex must be paid the same as a person of the other sex for carrying out equal work.

Race Discrimination

- During the recruitment process, it would be unlawful discrimination to filter application forms based on nationality or name (if the name indicated that the individual is non-British national);
- When checking eligibility to work, it would be unlawful discrimination to require only those you perceive as non-British to provide the necessary documentation to prove their right to work in the UK;
- It would be unlawful to withhold access to training courses to someone because of their race.

Race Discrimination

- Choosing a person from a particular race for promotion over a person from another race solely because of their race would be unlawful discrimination;
- Selecting someone for redundancy on the basis of their race would be unlawful;
- Only allowing open support of British teams in sporting events around the workplace may be discriminatory.

Disability

It is unlawful to treat someone less favourably because of their disability. In order to be protected, the individual must have:

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

This can include, for example:

- Cancer
- Dyslexia
- Anxiety disorder
- Fibromyalgia
- Severe disfigurements

Disability

The protection in relation to disability includes:

- Protection against less favourable treatment;
- The duty to make reasonable adjustments; and
- Discrimination arising from a disability

Reasonable Adjustments

Examples:

- Installing a ramp or other physical changes for wheelchair users;
- Providing information in accessible formats;
- Allocating some of the disabled person's duties to another worker;
- Altering the disabled worker's hours or duties;
- More frequent breaks;
- Allowing the disabled worker to be absent during working hours for assessment or treatment;
- Employing a support worker;
- Or a combination of adjustments

Reasonable Adjustments in Practice

- The first step when considering reasonable adjustments is communication;
- Speak to the employee about what they believe will help them remove the barriers to work that their impairment creates;
- Seek advice from experts e.g. Access To Work or an Occupational Health specialist;
- Ensure colleagues co-operate where necessary

Discrimination Arising From a Disability

This occurs where:

- An employer treats someone unfavourably because of something;
- The something arises from, or in consequence of, their disability;
- The employer cannot objectively justify the treatment i.e. show that the treatment is a proportionate means of achieving a legitimate aim

'Something' may be absence, lateness, productivity, loss of temper, etc.

Age Discrimination and Retirement Ages

- As well as the usual prohibition on treating an employee less favourably because of their age; there are special rules on retirement;
- All contractual retirement ages must be objectively justified;
- This means that the operation of a retirement age must be a proportionate means of achieving a legitimate aim;
- This is a difficult legal test to pass and advice should be taken in all circumstances.
- *Pitcher v University of Oxford; Ewart v University of Oxford (EAT)*

Exemptions from Discrimination Protection

The Act allows employers to act in a discriminatory manner in certain circumstances, for example:

- Where there is an occupational requirement;
- For the purposes of an organised religion;
- Where other laws permit it e.g. National Minimum Wage age bandings

Recent Cases – Indirect associative discrimination

Follows v Nationwide Building Society (ET)

- Follows worked from home 2-3 days a week so she could care for her disabled mother. Her employer wanted to reduce the number of managers and have them in office all the time.
- Follows said she wanted to keep homeworking. She was made redundant and claimed indirect associative discrimination.
- The Equality Act does not provide for indirect associative discrimination, only direct. But the ET followed EU case law to allow a wider interpretation.

Recent Cases – Disability discrimination and dismissal

Brightman v Tiaa Ltd (EAT)

- The claimant was a long serving employee with long-term health conditions due to her disability, which was known to her employer.
- The claimant's disability had caused not only long periods of absences but also a reduction in working hours on a number of occasions.
- She was dismissed for capability due to her ill health. She raised a claim that was unsuccessful at ET.
- On appeal, the EAT found that this was not about an employee being dismissed whilst on long-term sick leave, but rather dismissing an employee who was feared would continue to take long period of sick leave in future, as her condition had recently improved. Therefore the dismissal was unfair.

Topical – Menopause and discrimination

- The impact of the menopause was the subject of a government inquiry by the Women and Equalities Commission, which looked into the current workplace protections and policies that dealt with it, and if more could be done to support those going through it.
- A government taskforce has also been established on this issue, developing the first ever Women's Health Strategy, and the IOSH has developed recommendations for the best way to support employees through this, including reviewing present policies and risk assessments adequately cover the issues, and developing awareness and training for all employees.
- A menopause pledge has also been taken by some employers, including Tesco and Santander, committing them to recognising, addressing and supporting those going through menopause in the workplace.

Topical – Menopause and discrimination

Rooney v Leicestershire City Council (EAT)

- When Rooney, a long serving employee, started to experience menopause symptoms, she had to have several periods of sickness absence.
- She felt that the way this was managed by her employer insensitively and heavy headedly, and she resigned as a result.
- She brought claims for constructive dismissal, disability and sex discrimination.
- In deciding on cases of this nature, the EAT made it clear that the tribunal should not focus on what the claimant can do, but what they cannot, and weigh each against the other.

Topical – Non-binary employees protected

In the case of *Taylor v Jaguar Land Rover*, the employment tribunal has ruled that gender reassignment discrimination includes individuals who identify as gender fluid and non-binary.

- In this case, an employee began to identify as gender fluid/non-binary and claimed they were subjected to harassment and discrimination on the grounds of their gender reassignment.
- The organisation claimed that gender fluidity/non-binary did not fall within the definition of gender reassignment.
- However, the tribunal noted that there is a 'gender spectrum' and the claimant had undergone a process of moving their gender identity away from their birth gender.

Equal Pay

Men and women are legally entitled to receive equal pay for equal work;

- A 'sex equality clause' is automatically implied into all contracts of employment;
- 'Equal pay' covers all terms e.g. pay, holiday, benefits, etc.;
- 'Equal work' includes like work, work rated as equivalent and work of equal value;
- Can make an employment tribunal claim six months after the last day of employment;
- Damages can include the amount of the unequal pay for the previous six years.

Equal Pay

Employers have a 'material factor' defence where they can show the reason for the difference was not because of sex, but because of a material factor;

- Length of service;
- Differences in work;
- Geographical differences;
- Market forces;
- Pay protection.

Employers cannot restrict staff talking about pay where the purpose is to determine if they are being paid unlawfully.

Gender Pay Gap

Mandatory gender pay gap reporting was introduced in 2017, with first reports being published in 2018.

The existence of a gender pay gap does not mean discrimination has occurred, there may be non-discriminatory reasons such as:

- Part-time v full-time workers;
- Lack of a particular gender within the sector;
- Career breaks having an effect on training and promotion opportunities.

Where a gender pay gap is identified, employers can outline steps they will take to reduce or remove the gap.

Ethnicity pay gap

Calls for ethnicity pay gap reporting have been made due to continued inequality between races and ethnicities.

This was included in the conservative party manifesto and the CIPD have called for it to become mandatory.

Guidance relating to voluntary ethnicity pay gap reporting is now available. Employers are in particular called upon to carefully consider how they classify ethnicity to ensure it is a reflective example of the makeup of their organisation.

Should an ethnicity pay gap be voluntarily identified, employers can take steps to address it.

Equal Opportunities

Employers should implement the following to avoid a finding of vicarious liability:



Equal Opportunities
Policy



Training on the
policy



Zero tolerance to
discrimination
including “banter”



Robust discipline
procedures

Summary

- Remember there is plenty of legislation to ensure that you do not discriminate.
- You must not base decisions directly, or indirectly, on the grounds of an individual's protected characteristics.
- You must develop and train all staff in equal opportunities

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THANK YOU

Any questions?



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