

People Guides

AVOIDING DISCRIMINATION

Our goal is to have engaged and helpful colleagues who will deliver ever improving customer service.



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INTRODUCTION

This guide is intended to help managers understand where and how issues of discrimination may arise. It's not expected that anyone would read the guide from cover to cover, rather to read the relevant section as required – most likely when a manager suspects that an issue may be developing or where they're unsure about a particular situation. It's not a substitute for HR advice, especially in complex or ambiguous scenarios or where discrimination or harassment is insidious.

CATEGORIES OF PEOPLE PROTECTED

The laws prohibiting discrimination on grounds of gender, transgender, sexual orientation, race, religion or belief, disability and age all make it unlawful for an employer to discriminate against:

- Job applicants: throughout the process of recruitment and selection. This includes the arrangements for determining who is appointed, the terms of the job description and the person specification, advertising, short-listing, selection, the terms and conditions of employment offered, requirements to provide references, proof of qualifications and evidence of the right to work in the UK and any pre-employment medical examinations;
- Colleagues: including the terms and conditions on which they're employed, any benefits offered, opportunities for promotion and training, termination of employment and the right not to be subjected to any detriment;
- Ex-colleagues: it's unlawful to discriminate against an ex-colleague by, for example, the provision of a discriminatory reference;
- Contract, casual, agency and home-workers: including the terms on which the work is offered, general treatment, access to facilities or benefits, termination and the right not to be subjected to any detriment;
- Self-employed people where the contract requires them to carry out the work personally: including the terms on which the work is offered, general treatment, access to facilities or benefits, termination and the right not to be subjected to any detriment.

TYPES OF DISCRIMINATION

There are four main types of discrimination:

Direct

Treating a person less favourably than another on grounds of sex, marital status, civil partnership status, gender reassignment, pregnancy and maternity leave, race, sexual orientation, religion, belief, disability or age. Direct discrimination can never be justified except in very limited circumstances specified in the legislation, e.g. where being a woman is a genuine and necessary requirement for the job in question.

Indirect

Occurring where a provision, criterion or practice is applied equally to everyone, but where the application of the provision results in a disadvantage to people from a particular group (e.g. a racial group) and where an individual suffers some sort of detriment as a result. Indirect discrimination is unlawful unless the provision, criterion or practice can be objectively justified, i.e. shown to be a proportionate means of achieving a legitimate aim. For example, if an employer who operated a food outlet insisted that male colleagues must be clean-shaven, this would indirectly discriminate against Sikh men, who are required by their religion to wear beards, but in this example the requirement would be likely to be objectively justifiable on the

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grounds of hygiene. The concept of indirect discrimination does not occur in the Disability Discrimination Act 1996, nor in the legislation relating to part-time workers and fixed-term colleagues.

Victimisation

Occurring where a person is treated less favourably or suffers a detriment because they have brought proceedings under one of the anti-discrimination laws, given evidence in a tribunal, complained internally of discrimination or assisted someone else in their complaint. An example could be a refusal to consider someone for promotion because they had previously made an allegation of sex discrimination.

Harassment

Where unwanted conduct occurs which has the purpose or effect of violating a person's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for that person. The question of whether or not behaviour constitutes harassment depends largely on the perception of the person on the receiving end. It doesn't matter what the harasser thinks or intended by their behaviour, or even what colleagues think. Nor is it necessary for the particular behaviour to be targeted at the individual who finds it offensive. A common excuse for harassment is that it was just 'banter', but one person's idea of a joke may be seen as offensive and intimidating by another. Complaints of harassment may be based on a single, serious incident or (as is more common) a series of incidents of unacceptable behaviour, particularly if they continue after the individual has made it clear that the behaviour is unwanted or offensive.

It's also discriminatory:

- To publish an 'advert' (in any form or media) that indicates an intention to discriminate or that contains any criteria that may be indirectly discriminatory (unless the criteria are justified);
- To instruct others to discriminate, e.g. instructing staff not to help passengers wearing ethnic dress;
- To pressurise others to discriminate, e.g. telling a recruitment agency that if they send any disabled candidates along for interview, they won't get any more business.

LIABILITY FOR ACTS OF DISCRIMINATION

The employer is liable for acts of discrimination carried out by their employees 'in the course of employment', whether or not the employer knew or approved of the act in question. The phrase 'in the course of employment' clearly includes any discriminatory behaviour that takes place in the workplace, but can also be interpreted more widely to include many work-related social events, for example an employer's annual Christmas party or even an organised trip to the pub after work in honour of someone who is leaving the organisation.

Additionally, a manager can be held personally liable, not only for his own discriminatory actions but for those of other staff if he has consciously encouraged a discriminatory atmosphere. In these cases an employment tribunal may make a financial award not just against the employer but also against a named individual.

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In order to prevent claims managers should:

- Role model good behaviours;
- Understand their teams well enough to know when discrimination or harassment is occurring;
- Train staff in diversity issues;
- Deal quickly and sensitively with complaints;
- Deal firmly with proven issues.

KINDS OF DISCRIMINATION

There are many kinds of discrimination and the following are some of the areas that most commonly arise:

Sex Discrimination

Discrimination is unlawful on the following grounds:

Gender

There is a code of practice that supports the SDA: the Equal Opportunities Commission's (EOC) Code of Practice: Sex Discrimination. The code is not legally binding, but courts and employment tribunals view it as good practice and take its provisions into account when assessing whether an employer committed an act of discrimination.

Marital Status and Civil Partnership Status

The Sex Discrimination Act 1975 makes discrimination on the grounds of being married unlawful. It also outlaws discrimination against someone who has entered into a civil partnership with a same-sex partner under the provisions of the Civil Partnership Act 2004.

Gender Reassignment

Colleagues are protected against all forms of discrimination and harassment on the grounds that they intend to undergo, are in the process of undergoing, or have undergone, a sex change. Harassment of the colleague is likely to be a particular risk in this sensitive area.

The Gender Recognition Act 2004 allows transsexual people who have undergone gender reassignment to apply for a Gender Recognition Certificate (GRC). When a full gender recognition certificate has been issued, the person is considered in the eyes of the law to be of the acquired gender and they will be treated as such in all respects.

There are special laws protecting the privacy of someone who has a gender recognition certificate: a person may commit a criminal offence if s/he discloses information about the gender history of someone with a gender recognition certificate without that person's consent.

Pregnancy and Maternity Discrimination

Discrimination on the grounds of pregnancy or the taking of maternity leave includes unfavourable treatment on the grounds of the effects of pregnancy or maternity leave, for example any temporary lack of capability during pregnancy and the potential inconvenience to the employer as a result of the colleague's absence on maternity leave. Colleagues are protected from the beginning of their pregnancy through to the date they return to work following maternity leave, a period that is known as the 'protected period'.

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Equal Pay

Men and women are entitled to receive equal pay for equal work. This covers all contractual terms and not just those relating to pay.

Men, as well as women, can bring claims for equal pay, although women generally bring the vast majority of claims. This section is therefore written to reflect women's situation. To bring a claim, the woman must compare her pay or other terms with an actual male comparator. Comparisons may be made with a predecessor or successor of the opposite sex.

The equality criteria apply where a woman is in the 'same employment' as a man doing:

- like work, i.e. the same or broadly similar work;
- work that has been given an equivalent rating through a job evaluation scheme;
- work that is of equal value to a man's work in terms of demands such as effort, skill and decision-making.

The difference in pay must relate to sex. In order to defend a claim for equal pay, the employer must therefore demonstrate, if challenged, that any difference is not due to sex but to some genuine material factor(s) such as:

- differences in levels of skill, experience and training between the woman and her comparator;
- red-circling - where the colleague's salary is temporarily protected for a special reason;
- market forces - where there is a need to be competitive to recruit or retain particular types of skill or experience.

Race Discrimination

The Race Relations Act 1976 (RRA) makes discrimination unlawful on the grounds of:

- race- e.g. African, Indian
- colour- e.g. black, white
- nationality- e.g. citizen of the USA, France, UK
- ethnic origin- e.g. Romany gypsies, Jews, Sikhs
- national origin- e.g. English, Scottish.

Disability Discrimination

The definition of disability within the meaning of the Disability Discrimination Act (DDA) is: 'A **physical or mental impairment** that has a **substantial** and **long-term** adverse effect on his or her ability to carry out **normal day-to-day activities**'.

These key words may be defined as follows:

- Physical: is not defined, but is taken to mean the loss or malfunction of part of the body.
- Mental impairment: is defined as resulting from a mental illness or disorder, e.g. schizophrenia, depression or learning difficulties.
- Substantial: means more than minor or trivial, and takes into account the time needed to do an activity or how difficult it's for that person to do it.
- Long-term: the impairment is long-term if it has lasted or is likely to last for 12 months or more or is for the remainder of the person's life where the condition is terminal.

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- Normal day-to-day activities: these include activities that involve or affect mobility, manual dexterity, physical co-ordination, continence, ability to lift, move or carry everyday objects, speech, hearing or eyesight, ability to concentrate, learn or understand, memory and perception of danger.

Protection against discrimination extends to a very wide range of impairments, illnesses and other conditions, both physical and mental.

A mental illness does not need to be clinically recognised in order for it to amount to a disability.

Progressive conditions such as muscular dystrophy and Parkinson's disease are covered from the point of diagnosis, provided the individual has some adverse effect at that point in time and provided it's likely that the effects of the condition will become substantial in the future. Someone who has been diagnosed with cancer, HIV or multiple sclerosis, however, is deemed disabled from the point of diagnosis irrespective of whether the condition has any adverse effect on them at that point in time and regardless of the future prognosis.

Recurring conditions and conditions that fluctuate (i.e. where the effects of the condition vary from minor to substantial) are also covered by the DDA i.e. the person is protected against discriminatory treatment irrespective of whether the condition is, at the time in question, occurring or having a substantial effect.

Conditions that are controlled by medication (such as epilepsy or diabetes) are within the scope of the DDA, provided the effect of the condition would be substantial if the person did not take the medication. The same principle applies to aids, e.g. a hearing aid or a prosthetic limb, but not to eyesight, the test of which is how well the individual can see when wearing spectacles or contact lenses.

Anyone registered as blind or partially sighted is automatically deemed disabled.

Colleagues are protected against discrimination on the grounds of a past disability, for example a refusal to employ someone just because he or she once had cancer is unlawful.

A severe disfigurement (e.g. substantial facial scarring) qualifies as a disability under the DDA, thus affording protection against discrimination and harassment.

The DDA does define some conditions that are not covered:

- addiction to alcohol, nicotine or recreational drugs (although the damage or ill-health resulting from long-term abuse, for example alcohol-addiction-related depression, would be covered);
- a tendency to start fires, steal or physically or sexually assault someone;
- exhibitionism and voyeurism;
- hay fever.

Reasonable Adjustments

The DDA requires that employers make reasonable adjustments to accommodate the needs of any colleague who has a disability. This duty covers adjustments to any provision, criterion or practice that the employer applies, and to physical features of premises whenever any provision or feature places a disabled person at a substantial disadvantage.

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It also requires employers to make adjustments to the 'arrangements' relating to recruitment, for example for a job interview, or the type of selection testing that is carried out.

Examples of reasonable adjustments that might be considered are:

- making adjustments to the premises, for example putting a ramp in place to assist wheelchair users;
- making repairs to an uneven ground;
- adjusting lighting;
- changing furniture such as desks and chairs;
- allocating some of the colleague's duties to another person;
- transferring the colleague to a different job if one exists (there is no obligation to create a new job);
- amending hours of work, for example allowing flexible working so that the person does not have to travel in the rush hour;
- altering training or providing additional training;
- agreeing a different place of work, such as home or an alternative, more easily accessible location;
- making special arrangements for training or mentoring;
- acquiring or modifying equipment;
- modifying instructions or reference manuals;
- modifying procedures for testing or assessment;
- allowing time off for treatment, assessment or rehabilitation;
- providing a reader or interpreter;
- providing extra coaching, mentoring or supervision.

Adjustments are only expected if they're reasonable. The adjustment in question must be practical to make and not cost-prohibitive. For example, if a disabled person required alternative software that was not compatible with the organisation's technology platform, the prospect of changing the organisation's complete computer system would be not only impractical but also prohibitively expensive. Additionally, an employer's sick pay scheme does not have to be adjusted so as to allow the claimant to receive full pay indefinitely when absent for a disability related reason. This would not be reasonable for the employer, due largely to the prohibitive costs that would be involved. Grants are, however, available for some adjustments.

The key point is that an employer must show that they have considered what reasonable adjustments could be made for the disabled person, and not simply dismissed the idea of employing a disabled person or continuing the person's employment.

It's important to understand that the responsibility for assessing the colleague's condition, its effects and the range of adjustments that might be made lies firmly with the employer, i.e. the employer must be proactive in seeking to make adjustments to support the disabled colleague. The employer must obtain a proper assessment of the colleague's condition and prognosis, the effects of the condition on the colleague's ability to perform his or her job duties, the effect of the physical features of the workplace and the steps that the employer could potentially take to reduce or remove the disadvantages that the colleague is experiencing. A proper assessment is therefore a necessary pre-condition to the fulfilment of the duty to make reasonable adjustments.

Sexual Orientation Discrimination

Protection applies to everyone equally: i.e. to gay and lesbian people, heterosexuals and bisexual people. Discrimination on the grounds of a mistaken perception of someone's sexual orientation is also covered.

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It's also unlawful to discriminate against a person on the grounds of someone else's sexual orientation, for example teasing someone because he or she has a son who is gay would constitute unlawful harassment.

The definition does not extend to sexual practices and preferences (e.g. sado-masochism and paedophilia).

Under the Civil Partnership Act 2004, gay and lesbian people are able to make a legal commitment to each other by registering a civil partnership. Those who have done so have the same legal rights and benefits as married people in all respects. For employers, this means that they must afford the same employment perks and benefits to colleagues with civil partners as to colleagues who are married. Examples include pension rights, life insurance and perks afforded to colleagues' married partners (e.g. discounts on goods, travel concessions, etc).

Where employment benefits are granted to colleagues who have unmarried (as well as married) partners, the employer must afford the same benefits to colleagues with same-sex partners.

Religion or Belief Discrimination

This covers 'any religion, religious belief, or similar philosophical belief' but not any philosophical or political belief unless that belief is similar to a religious belief. A 'religion or belief' may include:

- collective worship;
- clear belief system;
- a profound belief affecting one's way of life or view of the world.

The very broad definition of 'religion or belief' means that minority, fringe and cult religions would be covered. The phrase 'religious belief' means that the manifestations of a person's religion, i.e. their religious practices, would also be covered. Religious practices range, for example, from the celebration of certain religious festivals, to rules on the way food is prepared, to customs relating to dress and jewellery. Discrimination on the grounds of a mistaken perception of someone's religion or belief is also covered.

Wherever possible, time away from work in order to pray or comply with other religious obligations should be accommodated by timing breaks accordingly and if necessary, changing shifts. Should a colleague need to change his shift, his line manager must approve this in advance.

In addition, where religious festivals fall during working time, preference for leave should be given to colleagues of that religion. This does not mean however, that leave that has already been authorised will be cancelled nor that leave slots will be specially created. Details of differing religious festivals can usually be found in diaries.

Managers will make every effort to comply with such requests and permission will only be refused where operational needs would otherwise be compromised. Where a manager feels he must refuse a request, the decision must be fully explained to the colleague.

It's also unlawful to discriminate against a person on the grounds of someone else's religion, for example making derogatory remarks about a particular religion could be particularly offensive to a colleague who is married to someone who upholds that religion.

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The phrase 'similar philosophical belief' would appear to mean that any genuinely held philosophical belief that is similar to a religious belief and that deeply affects the person's way of life or view of the world could count as regards protection.

'Belief' means more than just mere opinions or deeply held feelings - there must be a holding of spiritual or philosophical convictions that have an identifiable, formal content. In this context the following have been held to be 'beliefs': Druidism, Pacifism and Veganism (amongst others).

Age Discrimination

Discrimination and harassment on grounds of age is prohibited in recruitment, employment, termination of employment and post-employment. There is no minimum or maximum age for individuals to be protected, although employers may seek to justify both direct and indirect age discrimination in certain defined circumstances.

The Employment Equality (Age) Regulations (2006) include the following provisions:

- Age is banned as a criterion in recruitment, selection and promotion, unless objectively justified;
- Colleagues are entitled to equality of treatment in terms and conditions of employment, irrespective of their age;
- The use of length of service as a criterion for pay increases and enhanced employment-related benefits is permitted provided certain conditions are met (even though this will often be indirectly discriminatory against younger colleagues on age grounds). The main conditions are that either the length of service criterion is of five years or less, or it reasonably appears to the employer that the length of service criterion fulfils a business need such as reflecting or rewarding greater experience, encouraging loyalty or increasing or maintaining colleagues' motivation;
- It's unlawful to operate a pay policy based on age;
- There is a default retirement age of 65. This is not a mandatory retirement age, but rather a provision that permits employers to set a contractual retirement age for their colleagues at or above age 65. It also means that compulsory retirement before age 65 is not permitted, unless a lower age can be objectively justified in the circumstances, i.e. the employer can show that an earlier retirement age is a proportionate means of achieving a legitimate aim. This provision affects only compulsory retirement, and not any voluntary early retirement scheme operated by the employer;
- Colleagues have a right to request to continue working beyond any retirement date notified by the employer and employers are obliged to consider any such requests seriously through a 'duty to consider procedure'. This procedure applies each time an employer wishes to retire a colleague (unless the retirement is by mutual consent);
- The duty to consider procedure obliges the employer (on receipt of a valid request from a colleague to continue working beyond his/her notified retirement date) to hold a meeting with the colleague to discuss the request, notify the colleague of their decision in writing, allow a right of appeal against any refusal, hold an appeal hearing (if the colleague does appeal) and communicate the final decision in writing. There is, however, no need for the employer to provide a reason for a refusal, or to justify it;
- Employers must give colleagues approaching retirement age between 6 and 12 months' written notice of their intended retirement date and of their right to make a request to continue working longer. A retirement age contained in a colleague's contract of employment or policy handbook is not sufficient to meet this requirement;
- It's discriminatory and (unless justified) unlawful to deny insurance benefits to older workers, on the sole ground that these might cost substantially more than the provision of the same benefits for younger workers;

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- There is no upper age limit on making unfair dismissal complaints and redundancy pay claims to tribunal (although retirement has, correspondingly, become a potentially fair reason for dismissal);
- It's automatically unfair to dismiss a colleague on ostensible grounds of retirement if the employer has failed to comply with the duty to consider procedure or failed to notify the colleague of his or her retirement date at least 14 days before that date;
- The formula for calculating statutory redundancy pay (and the basic award for unfair dismissal) does not exclude service under the age of 18 or over the age of 65;
- Harassment on the grounds of age is a discrete form of unlawful discrimination;
- The Regulations do not affect when a colleague may draw an occupational or state pension. One exception to the general principle that age must not be used as a criterion in employment decisions is in external recruitment where it's lawful for an employer to refuse employment to a job applicant on the grounds that he or she has reached, has exceeded or is within six months of the organisation's retirement date. Such an individual is not eligible to bring a claim for age discrimination on the grounds of his rejection for the post in question.

Employers may try to justify decisions that are age discriminatory if they can show that the action taken or the criterion applied was a proportionate means of achieving a specified legitimate business aim. Thus both direct and indirect age discrimination are, in theory, open to justification.

"Legitimate aims' may be:

- the health and safety of an individual - although this will not allow employers to make generalised assumptions about older workers, e.g. that no-one over 55 is capable of heavy physical work;
- economic factors such as business needs and efficiency;
- extensive training requirements for a particular post, e.g. in respect of a job applicant who is close to retirement age.

Employers should review all their policies, procedures and practices in order to ensure that no age discrimination takes place. Actions to consider are:

In Recruitment

- Abolish age limits in recruitment, unless there are exceptional circumstances justifying an age criterion in the particular case;
- Make sure that no age limits are stated nor implied in any job advertisements, for example 'young, energetic graduate required';
- Review application forms to remove any requirements for applicants to disclose their age or date of birth;
- Brief managers who conduct recruitment interviews not to ask questions about an applicant's age at job interviews;
- Scrutinise job criteria, e.g. whether it's really necessary to require someone to have a minimum or maximum number of years' experience in order to qualify for appointment into a particular post (as any requirement for a minimum or maximum number of years' experience will discriminate indirectly against younger and older candidates respectively);
- Review graduate recruitment policies to eliminate ageism and facilitate recruitment of graduates of all ages.

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During Employment

- Extend equal opportunities and harassment policies to include age;
- Provide awareness training to all staff in age discrimination, in particular harassment, and make sure colleagues understand that matters such as ageist jokes, calling someone a name based on age and age-related banter may lead to tribunal claims if offence is caused to any individual colleague;
- Review pay and benefits policies with reference to length of service criteria in order to establish whether they are justified, i.e. whether they are in place for the purpose of achieving a legitimate aim and are appropriate and necessary as a means of achieving that aim;
- Review any insurance benefits provided to colleagues to make sure that older workers are not treated less favourably than comparable younger workers (or vice versa), whether in the level of benefit provided or as regards any monetary contribution the colleagues are required to make towards the benefit;
- Review promotion policies to ensure that colleagues are selected on grounds of individual merit and that age plays no part in promotion decisions;
- Amend any training policies and practices to ensure they afford equal opportunities to workers of all ages;
- Plan to manage the performance of older workers whose capabilities may change throughout their working lives - logically a greater number of older workers will mean more workers with disabilities.

At Termination

- Review retirement policies to see if they require people to retire before age 65, and if so change them, or else review them to make absolutely certain that, when viewed objectively, an earlier retirement age is a proportionate means to achieve a legitimate aim;
- Set in place a system under which management can be alerted to the impending retirement dates of colleagues at least six months in advance;
- Devise a policy and procedure to deal effectively and fairly with requests to continue working beyond retirement age;
- Review redundancy selection criteria to ensure that age plays no part in selection;
- Review any contractual redundancy pay schemes and if they award more benefit to older or longer-serving colleagues, change them and ensure they are in proportion to the statutory redundancy pay scheme.

OTHER PROTECTED GROUPS

Part-Time Workers

The Part-time Workers (Prevention of Less Favourable Treatment) Regulations 2000 prohibit discrimination against part-timers where the reason for the less favourable treatment is the colleague's part-time status. Unfavourable treatment is, however, open to objective justification by the employer. The Regulations apply to contractual terms, including pay, and non-contractual benefits such as access to promotion and training.

To make a complaint under the Regulations, a part-time worker must compare his or her treatment with that of a full-time worker who is performing the same or similar work under the same type of contract. The comparator must also work at the same establishment as the part-time worker (but can be someone working at a different establishment if there is no full-time

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comparator at the same establishment). There is no provision for a comparison to be made with a hypothetical worker.

Fixed-Term Employees

The Fixed-term Employees (Prevention of Less Favourable Treatment) Regulations 2002 prohibit discrimination against colleagues engaged on fixed-term contracts where the reason for the less favourable treatment is the colleague's temporary status. Unfavourable treatment is, however, open to objective justification by the employer. The Regulations apply to contractual terms, including pay, and non-contractual benefits such as access to permanent employment, promotion and training.

To make a complaint under the Regulations, a fixed-term colleague must compare his or her treatment with that of a permanent colleague who is performing the same or similar work and is working or based at the same establishment. There is no provision for a comparison to be made with a hypothetical colleague.

Any comparison drawn must take into account the total pay and benefits packages of the fixed-term colleague and his or her comparator, rather than being based on an item-by-item comparison. This contrasts with comparisons under the Equal Pay Act 1970 where the claimant may compare each of his or her terms of employment with the equivalent term in the comparator's contract.

Unlike the Part-Time Workers Regulations and the other anti-discrimination statutes, the Fixed-Term Employees Regulations apply (as the title would suggest) only to employees, and not to other workers. Agency workers, casuals and contractors are therefore not protected. The Regulations also contain restrictions on the renewal of fixed-term contracts in the form of a cut-off date after the colleague has gained four years' continuity of service. This means that once a fixed-term colleague has gained four or more years' continuous service and has had their contract renewed at least once, they are automatically entitled to have their contract converted to permanent status, unless the employer can justify continuing the employment on a fixed-term basis.

Trade Union Members

Colleagues have a range of rights in respect of trade union membership and activities as follows:

- the right to choose to belong, or not to belong, to a trade union;
- the right to take part in trade union activities, duties and training at an appropriate time;
- the right not to be refused employment on account of union membership or non-membership (past or present);
- the right not to suffer any detriment during employment on any grounds related to trade union membership or activities;
- the right not to be dismissed or selected for redundancy on the grounds of trade union membership or activities.

Whistleblowers

The Public Interest Disclosure Act 1998 introduced protection against discrimination for colleagues who 'blow the whistle' on account of alleged wrongdoing on the part of their employer. The Act applies not only to colleagues, but to all workers, i.e. anyone who performs work personally for an organisation. Protection extends to those who make a 'protected disclosure' (which means a disclosure made in good faith to one of a prescribed list of people) on the grounds of an allegation of:

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- a criminal offence;
- a failure to comply with any legal obligation;
- a miscarriage of justice;
- a risk to the health or safety of any individual;
- damage to the environment;
- the likelihood of deliberate concealment of information relating to any of the above.

Ex-Offenders

Colleagues and job applicants who have in the past been convicted of a criminal offence are permitted under the Rehabilitation of Offenders Act 1974 to regard their conviction as 'spent' after a defined period of time. This means that the person is entitled to treat the conviction as if it never happened and in most cases decline to disclose it to a prospective employer.

Employers will be acting unlawfully if they refuse to employ a job applicant (or dismiss an existing colleague) on the grounds that the person has a spent conviction. However, there is a list of jobs that are exempt from this provision and for which the applicant must disclose any conviction, whether spent or unspent.

The length of time it takes for a conviction to become spent varies according to the type of conviction and the length of time that has passed since it occurred. Where the person's sentence was for 30 months or more, however, it can never become spent.

HR Shared Services are able to advise.

HARASSMENT AND BULLYING

Harassment on grounds of sex, trans-sexual status, race, religion, belief, sexual orientation or disability will be unlawful under the relevant anti-discrimination statute. The Sex Discrimination Act now contains definitions of two types of harassment - gender-based harassment and sexual harassment. Bullying that does not relate to an individual's sex, race, etc will not be capable of amounting to unlawful discrimination, but may nevertheless give rise to legal action against the employer.

Bullying is a sustained form of psychological abuse that aims to make a person feel worthless. It usually takes the form of a gradual wearing down of a person's self-esteem through constant criticism or demeaning behaviour. It can be hard to recognise, as its effects may be attributed to some other reason, such as stress. Bullying often afflicts those in a minority group who may become 'easy prey' to the bully.

There is a fine line between an assertive management style and bullying. Strong performance management can sometimes turn into bullying. Any form of threatening behaviour by a manager to 'get things done' that undermines someone's dignity is unacceptable.

Bullying undermines the statutory rights of a colleague to be provided with a safe place of work and to be treated with dignity and respect. If not addressed it may lead to the colleague's resignation and a claim of constructive unfair dismissal and / or breach of contract based on the assertion that there has been a breach of the duty of trust and confidence. It may also lead to a claim against the individual bully, or against the employer, under the Protection from Harassment Act 1997. An employer can be held vicariously liable under the Protection from Harassment Act for bullying perpetrated by its employees provided the conduct complained of had a sufficiently close connection with the victim's employment.

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Harassment may also constitute a criminal offence under the Protection from Harassment Act 1997, and individuals can be prosecuted for such behaviour.

COMPLAINTS TO EMPLOYMENT TRIBUNALS

Any colleague who believes he has suffered discrimination may complain to an employment tribunal. There is no minimum service requirement and no need for the colleague to resign in order to bring a claim. The complaint must normally be lodged within three months of the act of discrimination, or of the last of a series of acts. In the first instance colleagues should raise an internal grievance with their employers (in writing). If no grievance is lodged, the tribunal may reduce any award made (in a successful case) by up to 25%. The colleague and the employer must both abide by the 2009 ACAS code in order to prevent an increase / decrease of any award.

In the case of a claim for equal pay, the claim may be brought at any time during employment or within a limit of six months from the end of the colleague's contract. If a tribunal upholds a complaint it can:

- make a declaration, i.e. making a statement in the public domain that discrimination has taken place in the organisation and the employer must take steps to prevent a reoccurrence;
- award compensation; and / or
- make a recommendation that the employer takes action to prevent or reduce the effect of discrimination against the complainant.

Compensation for unlawful discrimination is unlimited and often includes a substantial element for injury to feelings, especially in cases of harassment. For equal pay claims, the successful applicant can be awarded up to six years' back-dated pay (more in certain circumstances). The amount awarded may take into account compensation for other contractual terms, including denial of access to or inferior benefits under an occupational pension scheme.

REVISION HISTORY

Date	Revision Description	Revised By
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01.10.09	MAG issue for East Midlands	Vickie Blackhurst
01.03.10	MAG Issue for Humberside	Vickie Blackhurst

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