6. What equality law means for you as an employer: dismissal, redundancy, retirement and after a worker has left.

Equality Act 2010 Guidance for employers.
Vol. 6 of 7.

Equality and Human Rights Commission

July 2011

Contents

Introduction

This guide is one of a series written by the Equality and Human Rights Commission to explain what you must do to meet the requirements of equality law. These guides will support the introduction of the Equality Act 2010. This Act brings together lots of different equality laws, many of which we have had for a long time. By doing this, the Act makes equality law simpler and easier to understand.

There are seven guides giving advice on your responsibilities under equality law as someone who has other people working for you whether they are employees or in another legal relationship to you. The guides look at the following work situations:

1. When you recruit someone to work for you
2. Working hours and time off
3. Pay and benefits
4. Career development – training, development, promotion and transfer
5. Managing people
6. Dismissal, redundancy, retirement and after someone's left
7. Good practice: equality policies, equality training and monitoring

Other guides and alternative formats

We have also produced:

- A separate series of guides which explain what equality law means for you if you are providing services, carrying out public functions or running an association.
- Different guides for individual people who are working or using services and who want to know their rights to equality.

If you require this guide in an alternative format and/or language please contact the relevant helpline to discuss your needs.

England

Equality and Human Rights Commission Helpline

FREEPOST RRLL-GHUX-CTRX

Arndale House, Arndale Centre, Manchester M4 3AQ

Telephone: 0845 604 6610

Textphone: 0845 604 6620

Fax: 0845 604 6630

Scotland

Equality and Human Rights Commission Helpline

FREEPOST RSAB-YJEJ-EXUJ

The Optima Building, 58 Robertson Street, Glasgow G2 8DU

Telephone: 0845 604 5510

Textphone: 0845 604 5520

Fax: 0845 604 5530

Wales

Equality and Human Rights Commission Helpline

FREEPOST RRLR-UEYB-UYZL

3rd Floor, 3 Callaghan Square, Cardiff CF10 5BT

Telephone: 0845 604 8810

Textphone: 0845 604 8820

Fax: 0845 604 8830

www.equalityhumanrights.com

The legal status of this guidance

This guidance applies to England, Scotland and Wales. It has been aligned with the Codes of Practice on Employment and on Equal Pay. Following this guidance should have the same effect as following the Codes. In other words, if a person or an organisation who has duties under the Equality Act 2010's provisions on employment and other work situations does what this guidance says they must do, it may help them to avoid an adverse decision by a court in proceedings brought under the Equality Act 2010.

This guide is based on equality law as it is at 1 October 2010. Any future changes in the law will be reflected in further editions.

This guide was last updated on 19 July 2011. You should check with the Equality and Human Rights Commission if it has been replaced by a more recent version.

1. What equality law means for you as an employer: dismissal, redundancy, retirement and after a worker has left

What's in this guide

If you are an employer, and you are making a decision, or taking action following a decision, to dismiss a worker or make a worker redundant, or regarding what you do after someone has stopped working for you (for example, if you are asked for a reference), equality law applies to you.

Equality law applies:

- whatever the size of your organisation
- whatever sector you work in
- whether you have one worker or 10 or hundreds or thousands
- whether or not you use any formal processes or forms to help you make decisions (although sometimes the law says you must follow a formal process and that some things have to be done in writing).

This guide tells you how you can avoid all the different types of unlawful discrimination. It recognises that smaller and larger employers may operate with different levels of formality, but makes it clear how equality law applies to everyone, and what this means for the way you (and anyone who already works for you) must do things.

This guide covers the following situations and subjects (we explain any unusual words as we go along):

- Dismissing a worker, whether that is for misconduct or because they can no longer do their job
- Making a worker redundant when their job is no longer needed
- Retiring a worker, provided retirement can be objectively justified
- Dealing with someone who used to work for you, for example if you are asked for a reference

What else is in this guide

This guide also contains the following sections, which are similar in each guide in the series, and contain information you are likely to need to understand what we tell you about making decisions about dismissal, redundancy, retirement and what happens after a worker's left:

- Information about when you are responsible for what other people do, such as your employees.
- Information about making reasonable adjustments to remove barriers for disabled people who work for you or apply for a job with you.Advice on what to do if someone says they've been discriminated against.
- A list of words and key ideas you need to understand this guide – all words highlighted in bold are in this list. They are highlighted the first time they are used in each section. Exceptions to this are where we think it may be particularly useful for you to check a word or phrase.
- Information on where to find more advice and support.

Throughout the text, we give you some ideas on what you can do if you want to follow equality good practice. While good practice may mean doing more than equality law says you must do, many employers find it useful in recruiting talented people to their workforce and managing them well so they want to stay, which can save you money in the long run. Sometimes equality law itself doesn't tell you exactly how to do what it says you must do, and you can use our good practice tips to help you.

Making sure you know what equality law says you must do as an employer

Are you an employer?

This guide calls you an **employer** if you are the person making decisions about what happens in a **work situation**. Most situations are covered, even if you don't give your worker a written **contract of employment** or if they are a **contract worker** rather than an employee. Other types of worker such as **trainees**, **apprentices** and **business partners** are also covered. If you are not sure, check under 'work situation' in the List of words and key ideas. Sometimes, equality law only applies to particular types of worker, such as employees, and we make it clear if this is the case.

Protected characteristics

Make sure you know what is meant by:

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

These are known as **protected characteristics**.

What is unlawful discrimination?

Unlawful discrimination can take a number of different forms:

- You must not treat a person worse than someone else just because of a protected characteristic (this is called direct discrimination).

  For example:

  - An employer selects a woman for redundancy because she is pregnant.
  - An employer uses the excuse of persistent lateness to dismiss a gay man because he is gay; a straight man who has the same pattern of lateness is not dismissed.

- In the case of women who are **pregnant** or on **maternity leave**, the test is not whether the woman is treated worse than someone else, but whether she is treated **unfavourably** from the time she tells you she is pregnant to the end of her maternity leave (equality law calls this the **protected period**) because of her pregnancy or a related illness or because of maternity leave.

- You must not do something to someone in a way that has a worse impact on them and other people who share a particular protected characteristic than it has on people who do not have the same characteristic. Unless you can show that what you have done, or intend to do, is **objectively justified**, this will be **indirect discrimination**. 'Doing something' can include making a decision, or applying a rule or way of doing things.

  For example:

  > An employer has a policy of providing references for former employees which simply state length of service and the number of days they were absent from work regardless of the reason. If the employer cannot objectively justify this approach, it is likely to be indirect discrimination against former employees who were absent because of protected characteristics, as it has a worse impact on them and others who share the same characteristics.

- You must not treat a disabled person **unfavourably** because of something connected to their disability where you cannot show that what you are doing is **objectively justified**. This only applies if you know or could reasonably have been expected to know that the person is a disabled person. This is called **discrimination arising from disability**.

  For example:

  > A small beauty products company employs a receptionist who is in an accident, as a result of which when she returns to work she has a severe facial disfigurement. Clients of the company make remarks about this and suggest she is unsuitable for this outward-facing role. The company considers dismissing her because of the amount of time other staff spend explaining her situation and how this makes them feel. However, when considering the decision, they realise that the dismissal would be for a reason connected to her disability (the attitude of clients and the impact on the other staff). Instead, the company keeps her in post and trains other staff to challenge the negative attitudes displayed by visitors. Whilst the company may have considered whether they could objectively justify dismissing her, instead it decides to retain a valued employee and avoid the prospect of a claim for discrimination arising from disability.

- You must not treat a person worse than someone else because they are **associated with** a person who has a protected characteristic.

  For example:

  > An employer selects a person for redundancy not because they meet the selection criteria, but simply because they have a disabled child and the employer believes they may need time off to care for their child.

- You must not treat a person worse than someone else because you incorrectly think they have a protected characteristic (**perception**).

  For example:

  > An employer makes a member of staff redundant because they incorrectly think they have a progressive condition (in other words, that they are a disabled person). This is almost certainly direct discrimination because of disability based on perception.

- You must not treat a person badly or **victimise** them because they have complained about discrimination or helped someone else complain or done anything to uphold their own or someone else's equality law rights.

  For example:

  > An employee complains of discrimination and a colleague goes to their Employment Tribunal to give them support, although they do not give evidence. The colleague is subsequently selected for redundancy because the employer resents their support for the original employee. This is almost certainly victimisation. This would also apply if the colleague had given evidence in the case.

This also includes dismissing someone or selecting them for redundancy or discriminating against them after they've stopped working for you because they have discussed whether they are paid differently because of a protected characteristic.

For example:

> A woman thinks she is underpaid compared with a male colleague because of her sex. She asks him what he is paid, and he tells her, even though his contract forbids him from disclosing his pay to other staff. The employer takes disciplinary action against the man as a result and dismisses him. This would be treated as victimisation.

If this applies to you, you can read more about this in the Equality and Human Rights Commission guide: *What equality law means for you as an employer: pay and benefits*.

- You must not **harass** a person.

  For example:

  > A shopkeeper propositions one of his shop assistants, she rejects his advances and is then selected for redundancy which she believes would not have happened if she had accepted her boss's advances. This is likely to be harassment.

In addition, to make sure that disabled people have the same access, as far as is reasonable, to everything that is involved in getting and doing a job as a non-disabled person, you must make **reasonable adjustments**.

For example:

> - An employer is considering dismissing an employee who happens to be a disabled person with a visual impairment. It is likely to be a reasonable adjustment for the employer to make sure that the information the person needs about the disciplinary procedure is available to them by checking what format they need the documents to be in.
> - A disabled person has a learning disability and their employer agrees, as a reasonable adjustment, that they can be accompanied to a disciplinary hearing by a support worker as well as by their union representative.

You must make reasonable adjustments to what you do as well as the way that you do it.

For example:

> A disabled person has a spinal condition that causes them severe pain. One day, the person shouts at their employer. This is completely out of character, and is because of the pain they are experiencing. Usually, this would lead to an employee being considered for disciplinary action. However, their employer knows about the person's disability and, as a reasonable adjustment, operates a higher threshold before considering their behaviour to be unacceptable. (They have also encouraged the disabled person to be open with colleagues about their condition so that other staff understand the reason for the difference in treatment). This does not mean that the disabled person can behave as they like; the employer only has to make *reasonable* adjustments, so if their behaviour is unacceptably bad, the employer still has the option of disciplinary action. If this was the case, although the disciplinary action might amount to treating the disabled person unfavourably for something arising from their disability (their short temper), the employer would probably be able to **objectively justify** their approach.

You can read more about making reasonable adjustments to remove barriers for disabled people in Chapter 3.

Situations where equality law is different

Sometimes there are situations where equality law applies differently. This guide refers to these as **exceptions**.

There are several exceptions which relate to dismissal or redundancy and which apply to any employer:

- Age criteria,
- Occupational requirements,
- Obeying another law, and
- National security.

There are two exceptions which relate to dismissal, redundancy or retirement and which apply only to some employers or jobs:

- Having or not having a particular religion or belief, which applies only to **religion or belief organisations**, and
- Having or not having a particular protected characteristic, which applies only to **organised religions** or jobs for the purpose of an organised religion.

This guide only lists the exceptions that apply to dismissal, redundancy or retirement. There are other exceptions, which apply in other situations, for example, when you are recruiting someone to do a job.

As well as these exceptions, equality law allows you to treat a disabled person better – or **more favourably** – than a non-disabled person. This recognises that disabled people face a lot of barriers to participating in work and other activities.

Age criteria

Age is different from other protected characteristics. If you can show that it is **objectively justified**, you can make a decision based on someone's age.

However, it is very unusual to be able to objectively justify direct age discrimination of this kind. Be careful not to use stereotypes about a person's age to make a judgement about their fitness or ability to do a job.

This guide explains when you can make redundancy payments based on someone's age, and the limited circumstances where it may be objectively justifiable to require an employee to retire because they have reached a particular age.

Occupational requirements

If you can show that a particular protected characteristic is central to a particular job, you can insist that only someone who has that particular protected characteristic is suitable for the job. This is known as an 'occupational requirement'. If you have appointed a person using an occupational requirement and they no longer have that particular protected characteristic, equality law allows you to dismiss them without this being unlawful discrimination.

Obeying another law

You can take into account a protected characteristic where not doing this would mean you broke another law. For example, if the law said that a person had to be a particular age to do something and you discovered that they were not that age, you could dismiss them without this being unlawful discrimination.

National security

You can take a person's protected characteristic into account if there is a need to safeguard national security, and the discrimination is proportionate.

Having a particular religion or belief if you are a religion or belief organisation

If you are a **religion or belief organisation**, you may be able to say that a job requires a person doing the job to hold a particular religion or belief if, having regard to the nature or context of the job, this is an occupational requirement and it is **objectively justified**. You could then dismiss the person if they no longer held that religion or belief without this being unlawful discrimination.

For example:

> A Humanist organisation which promotes humanist philosophy and principles would probably be able to apply an occupational requirement for its chief executive to be a Humanist. If the chief executive stopped being a Humanist, the organisation could dismiss them without this being unlawful discrimination.

Having or not having a particular protected characteristic if you are an organised religion or if a job is for the purposes of an organised religion

If :

- a job or role exists for the purposes of an organised religion, such as being a Minister or otherwise promoting or representing the religion, and
- because of the nature or context of the employment, it is necessary to avoid conflict with the strongly held religious convictions of a significant number of the religion's followers or to conform to the doctrines of the religion by applying a requirement to the job or role,

you may be able to dismiss a person because:

- They are male or female (if the requirements of the post change bringing it within the exception).
- They are a **transsexual person**.
- They marry or enter into a civil partnership, including taking into account who they are married to or in a civil partnership with (such as someone who marries a divorced person whose former spouse is still alive).
- They **manifest** a particular sexual orientation, for example, a gay or lesbian person who enters into a relationship with a same-sex partner.

The requirement must be crucial to the job or role, and not merely one of several important factors. The job or role must be closely related to the purposes of the religion, and the application of the requirement must be proportionate.

Good practice tips on using exceptions

If someone disagrees with you and brings an Employment Tribunal claim, you may need to show why you thought an exception applied. When you're making the decision:

- Look at the exceptions to see if they might apply to your situation or organisation.
- If you decide an exception does apply, keep a note of why you decided this.
- Tell people which exception you are using, for example, in any information you give workers about what you are doing.

What's next in this guide

The next part of this guide tells you more about how you can avoid all the different types of unlawful discrimination in the following situations:

- Dismissing a worker, whether that is for misconduct or because they can no longer do their job
- Making a worker redundant when their job is no longer needed
- Retiring a worker, provided retirement can be objectively justified
- Dealing with someone who used to work for you, for example if you are asked for a reference

Avoiding unlawful discrimination when dismissing a worker

First, use the information earlier in this guide to make sure you know what equality law says you must do as an employer.

This section looks at three issues:

- Reasons and procedures
- Making sure you are not discriminating unlawfully in dismissing a disabled person
- Dismissing a disabled person because they can no longer do the job

Fair and unfair dismissal

This guide only tells you about equality law. There are other laws which you need to follow to make sure a dismissal is fair. You can find out more about these from Business Link and Acas, whose contact details are in *Further sources of information and advice*. Following the procedures to make sure a dismissal is fair will also help you avoid unlawful discrimination.

Reasons and procedures

You must avoid unlawful discrimination in the reasons for doing something and the way that you do it.

Make sure that your reasons for dismissing someone do not amount to unlawful discrimination.

Make sure that the disciplinary procedures you follow are not unlawfully discriminating either.

For example:

An employer tells a worker they are going to hold a disciplinary hearing with a view to dismissing them for misconduct. The date and time are set for a day which happens to be a religious holiday for the religion the worker holds. Unless the employer can **objectively justify** insisting on the hearing on that day (which the worker may well be unable to attend), this is likely to be **indirect discrimination** because of religion or belief.

There is more information about avoiding unlawful discrimination in disciplinary procedures in the Equality and Human Rights Commission guide: *What equality law means for you as an employer: managing workers.*

Making sure you are not discriminating unlawfully in dismissing a disabled person

There are extra steps you need to take before you dismiss someone who is a disabled person. This is because you must consider not only whether you are **discriminating directly** or **indirectly** because of a person's disability, but also:

- You must not treat a disabled person **unfavourably** because of something connected to their disability where you cannot show that what you are doing is **objectively justified**. This is known as **discrimination arising from disability**. This only applies if you know or could **reasonably** be expected to know that the person is a disabled person.

- If a worker is a disabled person, you must make **reasonable adjustments** if these are needed to remove barriers the person faces in doing their job. What this means is that you must first consider what adjustments would remove the barriers for the worker and second, if they are reasonable adjustments, you must make them. Would a reasonable adjustment remove the reason you are considering dismissing that worker?

  For example:

  > A disabled person is being considered for disciplinary action which might lead to dismissal because of their persistent lateness. Their employer should find out whether their lateness is connected to their disability. There may be a poor frequency of accessible buses. Or it could be because the person's condition is very painful in the morning so that getting to work on time is difficult for them. If the employer dismisses the worker and cannot **objectively justify** what they have done, this could be discrimination arising from disability. The answer to this may well be for the employer to consider if there are any changes they could make which would be reasonable adjustments. The employer could look at varying their starting time rather than dismissing them. If they continued to be late even with an adjusted start time the employer may of course still wish to consider disciplinary action.

Dismissing a disabled person because they can no longer do the job

You must be particularly careful to avoid unlawful discrimination if the reason why you believe you need to dismiss someone who is a disabled person is because they can no longer do the job, for example, because they have been absent from work.

Although in this situation, the term ‘medical retirement’ may be used, or ‘retirement on ill-health grounds’, what this means in reality is that a person is leaving work because they are considered incapable of doing their job for a reason related to their health, and there are benefits for them in retiring, such as a pension.

If you and your worker genuinely agree that they should leave, then it is unlikely you will face a claim for unlawful discrimination.

If there is no agreement, for example, because your employee does not want to leave, or they see a prospect of returning to work, then you must make sure that you:

- consider if there are reasonable adjustments which would mean they could return to work and continue to work for you (even if not in exactly the same job), and
- make sure you are not treating them unfavourably because of something connected to their disability, such as a need for regular breaks, if you cannot **objectively justify** your approach.

What this means in practice

Before you consider making someone leave because of disability you should have thoroughly explored all other options to make reasonable adjustments to keep them at work.

This includes looking at any changes you could make to your working arrangements, or the physical features of your workplace, or whether you can provide additional equipment.

For example:

> A worker is finding working full-time difficult because of increasing fatigue. The employer considers whether it is reasonable to let them work part-time rather than automatically considering them for early medical retirement.

If the impact of a person’s impairment is becoming more severe for them but this is not impacting on their ability to do their job then this should not be part of a decision about whether they continue to work for you.

However, if an impairment is making it harder for a disabled person to do their job, then the first step you must take is to consider what reasonable adjustments could be put in place to keep them at work.

If you do not look at reasonable adjustments, then requiring someone to stop working for you may be unlawful disability discrimination.

Reasonable adjustments to consider

Reasonable adjustments will vary according to the situation and the person's particular needs. However, things to consider could include:

- A phased return to work if someone has been off for a long while.
- Part-time or flexible hours if someone is finding full-time working difficult.
- Changes to premises, such as installing a ramp, improving signs, or moving someone's desk nearer essential office equipment.
- Provision of additional equipment, such as specific computer software or hardware if this is relevant to their job.
- Additional support (for example, a part-time reader for someone who has a visual impairment to help manage the volume of written information which they have to get through).
- Reassigning some elements of their job to another member of staff or transferring them to another role in your organisation.

You can read more about making reasonable adjustments to remove barriers for disabled people in Chapter 3, including how to work out what is reasonable and how the government-run Access to Work scheme may be able to help.

Taking advice

In appropriate cases, as well as discussing it with the worker themselves, you may wish to consider seeking expert advice on the extent of someone's capabilities and on what might be done to change premises or working arrangements. There are organisations that specialise in working with employers and their staff to help retain disabled workers through working out what adjustments could be made and whether they are reasonable.

However, you should be cautious about relying on medical advice alone to assess someone's situation. A health professional may not be aware that employers have a duty to make reasonable adjustments, what these adjustments might be, or of the relevant working arrangements.

When it may be appropriate for someone to leave

If after consideration of:

- the impact of a person's disability on the job
- any reasonable adjustments
- discussions with the person themselves, and
- (where appropriate) expert advice

it is not possible for someone to continue at work, then it may be appropriate for the person to leave.

Avoiding unlawful discrimination when making redundancy decisions

Making redundancies is one of the most difficult situations any employer can face.

First, use the information earlier in this guide to make sure you know what equality law says you must do as an employer.

This section looks how you can make sure you are not discriminating unlawfully in selecting people for redundancy, and in particular:

- Redundancy procedures and criteria
- Which jobs are in the selection pool?
- Deciding on the matrix factors and how you score against them
    - Length of service
    - Absence record and working hours
    - Training and qualifications
- Avoiding unlawful discrimination against disabled people
- Maternity leave and suitable alternative employment
- Age and redundancy payments

Redundancy procedures and criteria

Making sure a redundancy dismissal is fair

This guide only tells you about equality law. There are other laws which you need to follow to make sure a redundancy dismissal is fair. You can find out more about these from Business Link and Acas, whose contact details are in *Further sources of information and advice*. Following the procedures to make sure a redundancy dismissal is fair will also help you avoid unlawful discrimination.

Make sure that the redundancy procedures you follow and the criteria you use do not unlawfully discriminate either. Remember that in the case of disabled people, failing to make reasonable adjustments, including adjustments to redundancy criteria and procedures, is a form of unlawful discrimination.

This applies whether you are seeking volunteers for redundancy or making compulsory redundancies.

However, it is possible to make redundancy payments based on age and there is more information about this on page 26.

Which jobs are in the selection pool?

Which jobs do you need to select from? In other words, what is the pool from which you will be making your selection?

Are you, for instance, stopping a particular service or production line or closing a geographical location?

If you are not selecting everyone in a particular category of workers, such as everyone in a particular place or doing a particular job which will no longer be needed, you must make sure that your pool selection does not discriminate unlawfully.

For example:

An organisation is facing budget cuts and decides to reduce the size of its marketing team. There are four people in the team (one man and three women) and the employer decides to put just the two people who work part-time, who are both women, into the pool for redundancy, believing that their earnings are less important to them than to those people who work full-time, who are more likely to be 'breadwinners'. Because women are more likely to work part-time, this approach will be indirectly discriminatory (having a worse impact on the two part-timers who are women and on other women than it does on men) unless the employer can **objectively justify** what they have done. An approach which would be less likely to discriminate unlawfully would be to put everyone in the marketing department into the pool.

Deciding on the matrix factors and how you score against them

Once you have decided on your pool, you still need to make sure that you think through the consequences of using particular criteria for selection for redundancy from the chosen pool. If you don't do this, you might still end up discriminating unlawfully.

Good practice tips for avoiding unlawful discrimination

- Use a selection matrix containing a number of separate selection criteria rather than just one selection criterion, to reduce the risk of any possible discriminatory impact.
- Consult your recognised trade union if you have one.
- Make sure that you – or anyone who scores employees against the criteria – have been trained on how to avoid unlawful discrimination.

We look at the following criteria in more detail, because they are criteria where you may be more at risk of discriminating unlawfully. In each case, whether there is unlawful discrimination will depend on there being a link between the impact of the criterion and the protected characteristic of the person being made redundant:

- Length of service
- Absence record and working hours
- Training and qualifications

Length of service

It is possible to use a length of service criterion for selecting people for redundancy but only in certain circumstances:

- A criterion like this needs to be used cautiously because it could indirectly discriminate.

  For example:

  > If there are people in the pool who would end up being selected in greater numbers because a length of service criterion has been applied, such as:
  >
  > - younger people who will not have built up as long an employment record
  > - women, who often have more interrupted careers, or
  > - disabled people, whose disability may have interrupted their career

  for then using this criterion might be discriminatory.

- Length of service should only be one of the factors you consider when selecting people for redundancy.
- As one of several selection criteria, it will probably be lawful (in the sense that it is likely to be objectively justified direct age discrimination) if you are using it with the aim of, for example:
  - respecting loyalty and protecting older workers who may find it more difficult to re-enter employment, or
  - retaining experience
- and you can show:
  - that length of service is a **proportionate** way of achieving your aim

- why your aim could not be achieved in another way that doesn't disadvantage the selected workers to the same extent.

Depending on the size and nature of the pool for redundancy selection, you should use additional criteria based on other factors to make sure that you are selecting in a way that does not discriminate.

Absence record and working hours

If you use workers' absence record or working hours to select people for redundancy, you must be careful to avoid direct or indirect discrimination.

For example:

- If a woman is selected because of her absence on maternity leave or because of pregnancy-related illness, this will almost always be direct discrimination because of pregnancy or maternity.
- If someone is selected because they have taken time off or because they work flexibly to care for a disabled relative, this risks being direct discrimination **by association** because of disability.
- If a disabled person is selected because they have needed time off or because they work flexibly for a reason connected to their disability, this risks being **discrimination arising from disability** unless the employer can **objectively justify** using this criterion.
- If a transsexual person is selected because they have used their right to take leave for treatment related to their gender reassignment, this may well be direct discrimination because of gender reassignment.

This means you need to consider which absences you will include if you are using attendance record as one of your criteria. Use only those which could apply to everyone regardless of their protected characteristics. This has implications for how absence is recorded, which is explained in the Equality and Human Rights Commission guide: *What equality law means for you as an employer: working hours and time off*.

Training and qualifications

The appropriateness of using qualifications to select people for redundancy will vary according to the situation. If you have two individuals working in similar roles, but one has an additional relevant qualification which adds to their ability to do the job, deciding to make the less well-qualified person redundant is unlikely to discriminate unlawfully.

You can also say that a person must have a particular qualification if that qualification is an essential requirement for the job that cannot be met by experience or further training.

However, if you use qualifications which are not especially relevant or define the qualifications too narrowly without thinking through the consequences, you may find you are unlawfully discriminating if the use of those qualifications would have a worse impact on people who share a protected characteristic and you cannot objectively justify this. For example, choosing to make redundant just those employees with a qualification from a non-British university.

Avoiding unlawful discrimination against disabled people

There are particular requirements when you are considering a redundancy situation to make sure that disabled people are not being placed at a disadvantage for reasons relating to their disability. Where necessary, you must make **reasonable adjustments** to the criteria and process.

If an employee in the pool is a disabled person, and you knew or could reasonably have been expected to have known this, you must not treat them unfavourably because of something connected to their disability unless you can show that what you are doing is **objectively justified**.

For example:

> An employer knows that one of their employees is a disabled person. They select employees from the pool on the basis of absence over the past two years. The disabled person has taken a lot of time off work in relation to their disability (the time off being 'something connected with the disability'). If the employer cannot objectively justify this decision, it is likely to be discrimination arising from disability. A better approach would be for the employer to exclude disability-related absence from the absence which is used to score employees against that criterion (this would probably also be a reasonable adjustment, which we look at next).

In addition, if an employee in the pool is a disabled person, you must make 'reasonable adjustments' if these are needed to remove barriers the person faces which a non-disabled person would not face. What this means is that you must first consider what adjustments would remove the barriers for the worker and second, if they are reasonable adjustments, you must make them.

For example:

> A manufacturer is making some employees redundant. One of the criteria for redundancy is whether someone can operate every machine on the employer's production line. A disabled person cannot operate one of the machines because of the nature of their impairment. The employer decides it is a reasonable adjustment to the criterion to adjust the employee's mark so as to ignore the absence of that machine, so they score the same as a worker who has operated that machine to a satisfactory standard.

Remember, you only need to make changes to the criteria if the employee needs these to overcome a **substantial disadvantage**. You should look at each of the criteria in turn and how the disabled person is scored against them, making adjustments to each of them where necessary. You are only required to do what is reasonable.

You also need to ensure that any disabled person being considered for redundancy or who wishes to apply for voluntary redundancy does not face a disadvantage in obtaining information, being made aware of the procedure or receiving communications about the redundancy.

For example:

> A worker has a learning disability and the employer is offering voluntary redundancy. The employer provides the worker with the information in Easy Read formats and makes sure that someone suitable spends time explaining the options to the worker.

You can read more about making reasonable adjustments to remove barriers for disabled people in Chapter 3, including how to work out what is reasonable.

Maternity leave and suitable alternative employment

Where during a redundancy exercise alternative jobs are available in your organisation or with an associated employer, you should make sure these are offered to potentially redundant employees using criteria which do not unlawfully discriminate.

The situation is different if any of the potentially redundant employees is a woman on maternity leave.

In this situation, she does not have to go through selection against the criteria for filling a vacant post.

Instead, you must offer her any suitable available job with you, your successor (if your organisation is being taken over or passed onto another organisation), or any associated employer.

The offer must be of a new contract to come into effect as soon as the previous contract ends and must be such that:

- the work is suitable and appropriate for her to do, and
- the capacity, place of employment and other terms and conditions are not substantially less favourable than under the previous contract.

For example:

> A company decides to combine its head office and regional teams and create a 'centre of excellence' in the location where the head office already is. A new organisation structure is drawn up which involves some head count reductions. The company intends that all employees should have the opportunity to apply for posts in the new structure. Those unsuccessful at interview will be made redundant. At the time this is implemented, one of the existing members of the head office team is on ordinary maternity leave. As such, she has a prior right to be offered a suitable available vacancy in the new organisation without having to go through the competitive interview process.

Age and redundancy payments

Even though they are on the face of it indirect discrimination because of age (since younger employees are likely to lose out, since they will find it harder to build up the longer service), you are allowed to make enhanced redundancy payments based on length of service without having to objectively justify this, so long as they are calculated in the same way as statutory redundancy payments.

For example:

- An employer operates a redundancy scheme which provides enhanced redundancy payments based on employees' actual weekly pay, instead of the (lower) maximum set out in the statutory redundancy scheme. Equality law allows this.
- Using the statutory redundancy scheme formula and the scheme's maximum weekly wage, another employer calculates every employee's redundancy entitlement, then applies a multiple of two to the total. Equality law allows this too.

If you have your own contractual redundancy scheme that uses age or length of service in a different way, in other words, is not related to the statutory redundancy scheme, this may be unlawful discrimination unless you can **objectively justify** what you are doing.

If you think this may apply to you, then you need to take further advice. You can find more about where to get further information and advice later in this guide.

Managing retirement

On the 6 April 2011, there was a change to the law relating to retirement. The effect of this change is that in most cases workers can now retire when they are ready, rather than when their employer decides. It is direct age discrimination to require or persuade a worker to retire because of their age unless you can **objectively justify** doing so.

If an employer has served a retirement notice on an employee before 6 April 2011, the old rules will apply. These are set out below. This is important because, under the old rules, it was not age discrimination to force an employee to retire if you followed the correct procedures. Under the transitional arrangements, the old rules will continue to apply if you gave an employee 6–12 months' notification before 6 April 2011and they had already reached 65 (or any higher Normal Retirement Age), or would reach this age before 1 October 2011 – unless you are operating a lower Normal Retirement Age which can be objectively justified.

Retirement age is not necessarily the same as pension age – the age when a person becomes entitled to their pension. Equality law does not affect the age at which someone gets the state retirement pension. Neither does equality law affect the age at which a person can receive any **occupational pension**, which is decided by the rules of the pension scheme. Some workers may continue working beyond the age when they become entitled to a pension.

This part of the guidance first looks at the position from 6 April 2011.

- What is a legitimate aim?
- Is setting a retirement age proportionate?
- Discriminatory retirement because of other protected characteristics
- Good practice in managing an older workforce

The guide then looks at the old retirement rules:

- Retirement age and the importance of procedure
- Giving your employee notice that you want them to retire
- What happened after notifying the employee
- What happened if the procedures were not followed
- Normal and Default Retirement Ages
- The transitional retirement rules

The position from 6 April 2011

It is direct age discrimination to require or persuade a worker to retire because of their age unless you can **objectively justify** doing so. It is important to avoid making general assumptions about an individual person's capability and job performance at any particular age. This applies whether you are setting a general retirement age for all workers in a particular job (often known as a 'Normal Retirement Age') or choosing to retire an individual at a particular age.

In removing the general default retirement age, the government said that no one should be deprived of the opportunity to work simply because they have reached a particular age. In most circumstances, it will not be objectively justifiable for you to set your own retirement age instead. To objectively justify doing so, you would need to be able to produce convincing evidence to show, in relation to the particular job:

1. that you are trying to achieve a **legitimate aim**
2. that the policy of setting a retirement age is a **proportionate** way of achieving that aim, and the actual age chosen for retirement is also proportionate.

Proving that a retirement decision is a proportionate means of achieving a legitimate aim might be difficult to demonstrate in many situations.

What is a legitimate aim?

This depends on the nature of your business and the jobs involved. Legitimate aims for having a retirement age might include:

- maintaining health and safety standards. For this to be a legitimate aim, there needs to be a real health and safety concern, based on a proper assessment of risk, and not an imagined one. The risk must relate to a specific activity and must also be at a higher level than the level of risk which normally exists in everyday life.
- in limited circumstances, providing sufficient opportunities for promotion, thereby encouraging staff to stay. This will only be a legitimate aim if there is evidence of a genuine problem caused by promotion opportunities for workers (of any age group) being blocked by older workers not retiring – for example, in small organisations genuinely operating on a fixed budget. If sufficient promotion opportunities for a specific type of post already arise from normal staff turnover, this would not be a legitimate aim.
- facilitating workforce planning (that is, ensuring you have the personnel in place to meet your future business objectives), so that there are realistic expectations as to when certain vacancies will arise. This is only likely to be a legitimate aim in a small minority of organisations. You would have to be able to demonstrate that, given the nature of your organisation, you cannot properly achieve your business aims without advance information about future vacancies.

Is setting a retirement age proportionate?

Even if you can establish a legitimate aim, you would need to show that it is proportionate

- to set a retirement age at all
- to set it at the particular age you have chosen.

First, you should be able to demonstrate that there are no less discriminatory alternatives to having a compulsory retirement age. For instance, even where an employer can demonstrate a legitimate aim of workforce planning in relation to distribution of workers in different jobs and promotion paths, in organisations where there is a reasonably high turnover of staff imposing a retirement age will not be a proportionate means of achieving this aim. Workers come and go for all kinds of reasons and it is likely to be disproportionate to attribute workforce planning difficulties or promotion blockages to lack of a retirement age, except in limited circumstances. For example, in very small organisations with a majority of long-serving workers, there may occasionally be situations where promotion blockages genuinely need to be resolved in order to retain specialist staff for particular jobs.

In considering whether a retirement policy is objectively justified, you cannot rely on assumptions and generalisations: you need to be able to produce evidence. Remember that the means of achieving your aim will not be proportionate if the same aim can be achieved in a less discriminatory way.

A bus company imposes a retirement age of 72 on their bus drivers. They have a legitimate aim, that of ensuring the health and safety of passengers. However, the retirement age may not be proportionate if regular medical and performance tests for individual drivers would provide a less discriminatory way of avoiding the risk of sudden incapacity. To show that it is proportionate to have a compulsory retirement age, the employer would need evidence that this approach is the least discriminatory way of dealing effectively with the health and safety risks they have identified.

Second, even if you are confident that having a retirement age for certain jobs in the organisation is a proportionate approach, you must then carefully select the age of retirement to make sure that it discriminates to the least degree possible.

A sports authority decides that the referees it employs must retire at the age of 48 in order to ensure they are of high quality and maintain performance standards. Although this aim is legitimate, the imposition of a retirement age is unlikely to be proportionate. This is because quality can be tested on an individual basis by annual fitness tests and ongoing performance assessments which all referees have to undergo in any event. The authority has no evidence that performance or fitness drops off at 48. Even if having a retirement age were

an appropriate means of achieving the authority's aim, in these circumstances choosing the age of 48 is unlikely to be proportionate.

Acas has produced guidance for employers, 'Working without the default retirement age' (available at www.acas.org.uk/CHttpHandler.ashx?id=2976&p=0). It discusses issues surrounding planning ahead and performance management of older workers.

Discriminatory retirement because of other protected characteristics

Even if you are able to justify setting a retirement age so that it does not amount to age discrimination, you must still avoid discriminating against people because of other protected characteristics. For example, you must not allow men to work longer than women or select someone for retirement because they have a disability.

The information elsewhere in this guide tells you more about unlawful discrimination and how to avoid it.

Good practice in managing an older workforce

Managing performance

You need to be careful not to make assumptions that workers' performance will deteriorate as they get older. Research shows that older workers' productivity does not usually decline at least up to the age of 70 where the same level of training is provided as for younger workers.

If you do have evidence for concerns about the performance of an older worker, you should treat them in the same way that you would treat any younger worker whose performance was giving you concern. It is discriminatory to fail to address performance concerns because you are making assumptions that older workers will be leaving soon. It is also discriminatory to be harder on older workers than others, for example because you would like to encourage them to leave or because you are making assumptions about their capacity to improve. Any performance management system you have should be fair for all your workers.

With physically demanding jobs, it is especially important to have good health and safety procedures and safeguards in place to protect workers of all ages. For older manual workers with jobs that are physically demanding, it may be a good idea to have periodic medical checks to address any health and safety concerns about their ability to continue in that role. If a manual worker is having difficulties performing their job, it may be possible to offer them a transfer to a less physically demanding role – possibly a non-manual job. Where there are no suitable alternative roles, you should use your normal procedures for addressing concerns about a worker's capability.

Developmental and training needs and future plans

You should not make assumptions about workers' developmental or training needs based on their age. In particular, do not assume that older workers would resist training in new areas. You should discuss older workers' needs and aspirations with them just as you would with other workers. As with workers of all ages, it is good practice to ask them what form of training they would prefer, eg one-to-one on the job, in a group session or self-taught on computer.

It is also good practice to have a formal time, eg in an annual appraisal, when each worker can discuss their future plans and aspirations. Older workers should not be excluded from this opportunity. You can initiate a discussion about a worker's future plans provided you raise this in a neutral way and do not treat anyone less favourably because of their reply. These days, many workers of all ages would like the chance to work flexibly or reduce hours. Having a flexible working policy that applies to everyone is good practice and avoids the risk of discrimination.

But it would be discriminatory for you to assume that an older worker wants to reduce their hours, or for you to pressurise an older worker into working shorter hours. It is also important that older workers are able to explore options with you in conversation without being pressurised subsequently to reduce hours just because they mentioned it as a possibility.

Sickness

A worked aged 65 or over who is absent through short or long-term sickness should be treated in the same way as any younger worker. If a worker is on long-term sickness absence, you should consult with them and obtain informed medical advice as to when they might be able to return, or any adjustments to the workplace which would enable them to return earlier.

Insured benefits

You are allowed to stop offering group insured benefits, eg private medical cover or life assurance, to workers who have reached the age of 65 (or any older state pension age) even if they carry on working for you – provided this does not breach their contract of employment.

The old retirement rules

This section of the guidance is only relevant for employers who have given a valid notice of retirement to an employee before 6 April 2011, as the old rules will continue to apply in this situation. You do not need to refer to this section otherwise.

Retirement age and the importance of procedure

While the old rules still applied, if you:

- had a Normal Retirement Age of 65 or over, or
- used the Default Retirement Age of 65, or
- had a Normal Retirement Age of below 65 which you had objectively justified,

and you followed the correct retirement procedure, then it was likely that the dismissal would be fair and you would have avoided age discrimination.

If you did not follow the correct procedure, then it is likely that the dismissal of the worker would be unlawful discrimination because of age, as well as unfair dismissal under other employment laws.

Workers to whom these rules applied were:

- employees
- people in Crown employment, and
- certain Parliamentary staff.

If someone was not a worker in these categories, but was in another work situation, a retirement policy that meant they had to leave work just because they had reached a particular age, whatever that age was, would have to be **objectively justified**. This included partners in a firm, office holders, police constables or **contract workers**.

For example:

> Business partners who set up a limited liability partnership together have fixed a retirement age of 70. This has to be objectively justified for it to be lawful.

Under the old rules, you did not have to set a retirement age. You could, if you chose, reach an individual agreement with each employee about the point at which they would stop working for you.

Giving your employee notice that you want them to retire

Under the old rules, you had to follow the procedure set out in the law. This procedure was the same whatever retirement age your organisation used.

You had to give between six and twelve months' notice to your employee before their 'planned retirement date'. The planned retirement date was when your employee reached whatever age had been set for retirement.

You had to write and tell your employee:

- the planned retirement date
- their right to request to work beyond the planned retirement date

- your right to refuse this request.

What happened after notifying the employee

If your employee agreed that they should leave on the retirement date, then that was what would happen.

If your employee wished to continue working, they had to ask to do so in writing three to six months before the intended retirement date provided you had informed them of their retirement date in writing.

- The employee's request had to be made in writing and state that it was made under Schedule 6, Paragraph 5 of the Employment Equality (Age) Regulations 2006.
- It had to say whether they wanted to carry on working indefinitely or for a stated period.
- The employee could also say why they did not want to retire, although they did not have to do this.

If you agreed their request at once:

- You had to tell the employee this in writing as soon as you had reached a decision.
- If you had agreed that the employee could continue working indefinitely, they would then continue working beyond the original retirement date (until they decided to stop or you decided they should leave, which you would then handle using appropriate procedures), and the rest of this process would not be necessary.
- If you had agreed that they could continue to work for a fixed period, you had to set a new intended date of retirement and were required to repeat the procedure in relation to the new date (if the contract was extended by at least six months).

If you did not agree to their request at once, you had to hold a meeting to consider the request before you made a decision. The employee had the right to be accompanied by a colleague at any meeting to discuss their retirement.

If you agreed to their request after the meeting, you should have told them in writing as soon as you had reached a decision (see the three previous bullet points above). If you did not agree to their request, you still had to tell them in writing as soon as you had reached a decision. You did not have to give any reasons, though it would be good practice to do so. Their employment would continue until the intended retirement date – or the day after you had informed them of your decision if this was later.

They could appeal against your decision. You had to hold a meeting as soon as possible to consider the appeal (although this could be after they had left if this had all happened very close to the retirement date). The employee had the right to be accompanied by a colleague.

What happened if the procedures were not followed

If you gave less than six months' notice of the date of retirement or the employee's right to request to continue working, you would have to pay compensation of up to eight weeks' pay if they took a claim to the Employment Tribunal in relation to the dismissal.

However, you may still have been able to rely on the exception for retirement to avoid liability for age discrimination. You would be expected to give the employee as much written notice as possible (and a minimum of 14 days) of the intended retirement date and of the right to request to continue to work. You should then have complied with all other aspects of the proper procedures to show that the reason for dismissal was genuinely retirement.

For example:

> Because of inaccurate records, an employer who used a retirement age of 65 only became aware that an employee was approaching her 65th birthday three months beforehand. The employer immediately issued her with written notice of intended retirement on her 65th birthday and informed her of the right to request to continue working. She did not pursue the request. Because the employer gave three months' notice and followed the correct procedure, this might qualify as a retirement dismissal. But as less than six months' notice was given, they would be liable for compensation of up to eight week's pay. The employer's safest course of action would have been to give six months' notice from the date the error was discovered, even though this would have taken the employee past their 65th birthday.

In some cases a dismissal may possibly have qualified as a retirement in equality law but still have been an unfair dismissal under other employment law. This is because the unfair dismissal rules were complicated, both as to in what circumstances a dismissal may or may not be considered a dismissal for retirement, and also as to what made a retirement dismissal fair or unfair.

Normal and Default Retirement Ages

A 'Normal Retirement Age' was the age at which workers in the same kind of job within an organisation were usually made to retire. It might not be the same as the retirement age set out in the workers' contract of employment, if in practice you required them to retire at a different age.

As long as this age (the Normal Retirement Age for all employees in the same kind of job) was 65 or above, you did not have to give any reasons for requiring an employee to retire when they reached that age.

If there was no Normal Retirement Age in your organisation or your employees' contracts, but you still wanted to be able to require retirement at a particular age, you could use the

Default Retirement age of 65 that was provided in equality law. This allowed you to require employees to retire at the age of 65 or above, again without giving a reason.

If you set a Normal Retirement Age lower than 65, you had to be able to provide an '**objective justification**' for this early retirement policy.

For example:

> An airline had a normal retirement age of 55 for its cabin attendants. The airline had to be able to objectively justify the retirement age of 55 for it to be lawful.

The transitional retirement rules

As explained above, under the old rules, it was not age discrimination to force an employee to retire if you followed the correct procedures. But this will no longer apply after certain dates.

The old rules will continue to apply only if you gave the employee 6–12 months' notification before 6 April 2011, and they had already reached 65 (or any higher Normal Retirement Age), or would reach this age before 1 October 2011 – unless you are operating a lower Normal Retirement Age which can be objectively justified. For more information about the transitional provisions, please see the Acas website: http://www.acas.org.uk/index.aspx?articleid=3203

After someone has left a job

Sometimes your responsibilities as an employer continue after someone has stopped working for you and you must still not discriminate unlawfully against them or **victimise** them.

For example:

> When a worker is dismissed, they are told they can come in the next week to clear their desk and collect their belongings. That night, the worker sends an email to their employer saying they believe they were dismissed because they are black. The employer is upset about the allegation of race discrimination and tells the employee that they cannot after all come in to collect their belongings. This is likely to be victimisation.

Avoiding unlawful discrimination when giving references

Giving references more generally

This guide only tells you about equality law. There are other laws which you need to follow when doing references, for example, laws relating to negligence or defamation. You can find out more about these from Business Link and Acas, whose contact details in *Further sources of information and advice*.

The most likely area where you will have contact with someone who used to work for you is if they (or their prospective new employer) ask you to give them a reference.

You must not:

- refuse to give a reference at all, or
- give a bad reference

because of a protected characteristic or if refusing to give a reference would count as **victimisation**.

For example:

A worker's former employer refuses to give them a reference because they supported someone else's claim for sexual harassment. This would almost certainly be victimisation.

It does not matter how long ago the person worked for you, as long as the worker could show that any unlawful discrimination arises out of and is closely connected to the previous employment relationship.

If someone is still working for you when they ask for a reference in order to change jobs, this is still part of their employment, and you must not unlawfully discriminate against them, just as in every other work situation.

Must I supply someone with a reference?

In general, there is no legal requirement for you to provide someone with a reference, provided your policy on providing references (or not providing them) is applied without unlawfully discriminating against anyone. However, if someone's employment contract says that references will be provided then you must provide one.

Be aware that in sectors where workers are subject to special rules (such as finance) and cannot get a job without a reference, the courts have said that there is an implied term in the contract that employers will provide one.

If you do give references, they must not include comments about the person's characteristic (or in the case of disability, comments about something connected with the person's disability) that might be unlawfully discriminatory.

The same rules apply to telephone and other verbal references.

Good practice tip on giving references

- If you express an opinion in a reference (as opposed to stating a fact) make sure it is not unlawfully discriminatory.
- Don't supply sensitive data, for example, on sickness absence, unless permission to do this has been given in writing explicitly by the worker. However, be aware that simply giving information about someone's total number of days' absence in a specific period does not breach the Data Protection Act 1998.

You should not refer to absence which is not sickness absence if it is related to a protected characteristic and telling the person's new employer about it would breach their confidentiality – for example, maternity leave, disability leave or gender reassignment leave, all of which this guide suggests you should record separately from sickness absence.

A worker can give you explicit permission to disclose information if they wish you to – for example, they may want their new employer to know the reason for a period of absence. But you must not do this without permission.

Can I give someone a bad reference if they have a poor work record?

If, regardless of someone's protected characteristics, the reference would have been bad, then you are of course entitled to do this and you should resist attempts to make you change it.

However, if you have given someone an undeserved bad reference in circumstances which make this **unlawful discrimination**, they are entitled to ask you to change what you have said. If you do not do this, they may be able to bring an Employment Tribunal case against you.

Confidentiality

- Be aware that the person you are writing about may read what you have written, and make sure it is factually correct and not unlawfully discriminatory. The worker may see it because the person's new employer gives them a copy. Even if you have provided a reference 'in confidence', the new employer may decide that they should give it to the worker to comply with **data protection** rules. Usually, they will contact you to ask whether you object to the reference being disclosed, but even if you do object, they can still give your reference to the worker if they believe the worker's interest in seeing what has been written outweighs your interest in having it treated confidentially.

- If someone does not get a job, or has a job offer withdrawn, and they believe that this is because you provided a discriminatory reference, they can ask to see a copy using the **questions procedure**. You can read more about what this means – in Chapter 4 *What to do if someone says they've been discriminated against*.

2. When you are responsible for what other people do

As an **employer** or in another **work situation**, it is not just how you personally behave that matters.

If another person who is:

- employed by you, or
- carrying out your instructions to do something (who the law calls your agent)

does something that is **unlawful discrimination**, **harassment** or **victimisation**, you can be held legally responsible for what they have done.

This part of the guide explains:

- When you can be held legally responsible for someone else's unlawful discrimination, harassment or victimisation
- How you can reduce the risk that you will be held legally responsible
- How you can make sure your employees and agents know how equality law applies to what they are doing
- When your employees or agents may be personally liable
- What happens if a person instructs someone else to do something that is against equality law
- What happens if a person helps someone else to do something that is against equality law
- What happens if you try to stop equality law applying to a situation

When you can be held legally responsible for someone else's unlawful discrimination, harassment or victimisation

As an employer, you are legally responsible for acts of discrimination, harassment and victimisation carried out by your **employees** in the course of their employment.

You are also legally responsible as the 'principal' for the acts of your **agents** done with your authority. Your agent is someone you have instructed to do something on your behalf, but who is not an employee, even if you do not have a formal contract with them.

As long as:

- your employee was acting in the course of their employment – in other words, while they were doing their job, or
- your agent was acting within the general scope of your authority – in other words, while they were carrying out your instructions

it does not matter whether or not you:

- knew about or
- approved of

what your employee or agent did.

For example:

- A shopkeeper goes abroad for three months and leaves an employee in charge of the shop. This employee harasses a colleague with a learning disability, by constantly criticising how they do their work. The colleague leaves the job as a result of this unwanted conduct. This could amount to harassment related to disability and the shopkeeper could be responsible for the actions of their employee.
- An employer engages a head-hunter to work in-house to recruit a team of senior management. The head-hunter weeds out applications from women of child bearing age. This is almost certainly unlawful sex discrimination. Both the employer and the head-hunter (who is the employer's agent) would be legally responsible for the discrimination, except that the employer can show that they told the head-hunter to comply with equality law. This means that the authority given to the head-hunter as agent did not extend to acting in a discriminatory way, the agent acted outside the scope of the employer's authority and only the agent is liable for the discrimination.

However, you will not be held legally responsible if you can show that:

- you took **all reasonable steps** to stop an employee acting unlawfully.
- an agent acted outside the scope of your authority (in other words, that they did something so different from what you asked them to do that they could no longer be thought of as acting on your behalf).

How you can reduce the risk that you will be held legally responsible

You can reduce the risk that you will be held legally responsible for the behaviour of the people who work for you if you tell them how to behave so that they avoid unlawful discrimination, harassment or victimisation.

This does not just apply to situations where you and your staff are dealing face-to-face with other people in a work situation, but also to how you plan what happens.

When you or your employees or agents are planning what happens to people in a work situation, you need to make sure that your decisions, rules or ways of doing things are not:

- **Direct discrimination**, or
- **Indirect discrimination** that you cannot **objectively justify**, or
- **Discrimination arising from disability** that you cannot **objectively justify**, or
- **Harassment**

and that you have made **reasonable adjustments** for any disabled people who are working for you or applying for a job with you or in another work situation you are in charge of.

So it is important to make sure that your employees and agents know how equality law applies to what they are doing.

How you can make sure your employees and agents know how equality law applies to what they are doing

Tell your employees and agents what equality law says about how they must and must not behave while they are working for you.

Below are some examples of reasonable steps you can take to prevent unlawful discrimination or harassment happening in your workplace:

- telling your employees and agents when they start working for you – and checking from time to time that they remember what you told them, for example, by seeing if/how it has made a difference to how they behave. This could be a very simple checklist you talk them through, or you could give them this guide, or you could arrange for them to have **equality training**
- writing down the standards of behaviour you expect in an **equality policy**
- including a requirement about behaving in line with equality law in every worker's **terms of employment** or other contract, and making it clear that breaches of equality law will be treated as disciplinary matters or breaches of contract.

You can read more about equality training and equality policies in the Equality and Human Rights Commission guide: *Good equality practice for employers: equality policies, equality training and monitoring*.

Using written terms of employment for employees

Employment law says you must, as an employer, give every employee a written statement of the main terms of their employment. So you could include a sentence in these written terms that tells the person working for you they must meet the requirements of equality law, making it clear that a failure to do so will be a disciplinary offence.

Obviously, if you do this, it is important that you also tell the employee what it means. You could use an equality policy to do this, or you could just discuss it with them, or you could give them this guide to read. But it is important that they are clear on what equality law says they must and must not do, or you may be held legally responsible for what they do.

Remember, if the employee is a disabled person, it may be a reasonable adjustment to give them the information in a way that they can understand.

If you receive a complaint claiming unlawful discrimination by one of your employees or someone else in a work situation you are in charge of, you can use the written terms to show that you have taken a reasonable step to prevent unlawful discrimination and harassment occurring. You may need to consider if other steps would also be reasonable, such as providing training.

If someone does complain, you should investigate what has taken place and, if appropriate, you may need to discipline the person who has unlawfully discriminated against or harassed someone else, give them an informal or formal warning, or provide training; the action you take will obviously vary according to the nature of the breach and how serious it was.

If you do find that an employee has unlawfully discriminated against someone else in a work situation, then look again at what you are telling your staff to make sure they know what equality law means for how they behave towards the people they are working with.

You can read more about what to do if someone says they've been discriminated against in Chapter 4.

Good practice tip for how you and your staff should behave

Ideally, you want anyone who works for you to treat everyone they come across with dignity and respect. This will help you provide a good working environment (not just without discriminating but more generally) and can make your workers more productive.

If your staff do unlawfully discriminate against their fellow workers or others in a work situation, your reputation may suffer even if the person on the receiving end does not bring a legal case against you.

When your employees or agents may be personally liable

Your employee or agent may be personally responsible for their own acts of discrimination, harassment or victimisation carried out during their employment or while acting with your authority. This applies where either:

- you are also liable as their employer or principal, or
- you would be responsible but you show that:
  - you took **all reasonable steps** to prevent your employee discriminating against, harassing or victimising someone, or
  - that your agent acted outside the scope of your authority.

  For example:

  > A factory worker racially harasses their colleague. The employer would be liable for the worker's actions, but is able to show that they took all reasonable steps to stop the harassment. The colleague can still claim compensation against the factory worker in an Employment Tribunal.

But there is an exception to this. An employee or agent will *not* be responsible if their employer or principal has told them that there is nothing wrong with what they are doing and the employee or agent **reasonably** believes this to be true.

It is a criminal offence, punishable by a fine, for an employer or principal to make a false statement which an employee or agent relies upon to carry out an unlawful act.

What happens if a person instructs someone else to do something that is against equality law

An employer or principal must not instruct, cause or induce their employee or agent to discriminate against, harass or victimise another person, or to attempt to do so.

‘Causing’ or ‘inducing’ someone to do something can include situations where someone is made to do something or persuaded to do it, even if they were not directly instructed to do it.

Both:

- the person who receives the instruction or is caused or induced to discriminate against, harass or victimise, and
- the person who is on the receiving end of the discrimination, harassment or victimisation

have a claim against the person giving the instructions if they suffer loss or harm as a result of the instructing or causing or inducing of the discrimination, harassment or victimisation.

This applies whether or not the instruction is actually carried out.

What happens if a person helps someone else to do something that is against equality law

A person must not help someone else carry out an act which the person helping knows is unlawful under equality law.

However, if the person helping has been told by the person they help that the act is lawful and he or she **reasonably** believes this to be true, he or she will not be legally responsible.

It is a criminal offence, punishable by a fine, to make a false statement which another person relies on to help to carry out an unlawful act.

What happens if you try to stop equality law applying to a situation

You cannot stop equality law applying to a situation if it does in fact apply. For example, there is no point in making a statement in a contract of employment that equality law does not apply. The statement will not have any legal effect. That is, it will not be possible to enforce or rely on a term in a contract that tries to do this. This is the case even if the other person has stated they have understood the term and/or they have agreed to it.

For example:

- A worker's contract includes a term saying that they cannot bring a claim in an Employment Tribunal. Their employer sexually harasses them. The term in their contract does not stop them bringing a claim for sexual harassment in the Employment Tribunal.
- A business partner's partnership agreement contains a term that says 'equality law does not apply to this agreement'. The partner develops a visual impairment and needs reasonable adjustments to remove barriers to their continuing to do their job. The other partners instead ask them to resign from the partnership. The partner can still bring a claim in the Employment Tribunal for a failure to make reasonable adjustments and unlawful disability discrimination.
- An applicant for a job is told 'equality law does not apply to this business, it is too small'. She still agrees to go to work there. When she becomes pregnant, she is dismissed. She can still bring a claim in the Employment Tribunal for pregnancy discrimination.

3. The duty to make reasonable adjustments to remove barriers for disabled people

Equality law recognises that bringing about equality for disabled people may mean changing the way in which employment is structured, the removal of physical barriers and/or providing extra support for a disabled worker.

This is the **duty to make reasonable adjustments**.

The duty to make reasonable adjustments aims to make sure that a disabled person has the same access to everything that is involved in getting and doing a job as a non-disabled person, as far as is reasonable.

When the duty arises, you are under a positive and proactive duty to take steps to remove or reduce or prevent the obstacles a disabled worker or job applicant faces.

Many of the adjustments you can make will not be particularly expensive, and you are not required to do more than what is reasonable for you to do. What is reasonable for you to do depends, among other factors, on the size and nature of your organisation.

If, however, you do nothing, and a disabled person can show that there were barriers you should have identified and reasonable adjustments you could have made, they can bring a claim against you in the Employment Tribunal, and you may be ordered to pay them compensation as well as make the reasonable adjustments.

In particular, the need to make adjustments for an individual worker or job applicant:

- must not be a reason not to appoint someone to a job or promote them if they are the best person for the job with the adjustments in place
- must not be a reason to dismiss a worker
- must be considered in relation to every aspect of a person's job

provided the adjustments are reasonable for you to make.

Many factors will be involved in deciding what adjustments to make and they will depend on individual circumstances. Different people will need different changes, even if they appear to have similar impairments.

You only have to make adjustments where you are aware – or should reasonably be aware – that an employee or applicant has a disability.

It is advisable for you to discuss the adjustments with the disabled person, otherwise the changes may not be effective.

The rest of this section looks at the detail of the duty and gives examples of the sorts of adjustments you could make. It looks at:

- Which disabled people does the duty apply to?
- Finding out if someone is a disabled person
- The three requirements of the duty
- Are disabled people at a substantial disadvantage?
- Changes to policies and the way your organisation usually does things
- Dealing with physical barriers
- Providing extra equipment or aids
- Making sure an adjustment is effective
- Who pays for reasonable adjustments?
- What is meant by ‘reasonable’
- Reasonable adjustments in practice
- Specific situations
    - Employment services
    - Occupational pensions
- Questions about health or disability

Which disabled people does the duty apply to?

The duty applies to any disabled person who:

- works for you, or
- applies for a job with you, or
- tells you they are thinking of applying for a job with you.

It applies to all stages and aspects of employment. So, for example, where the duty arises you must make reasonable adjustments to disciplinary or dismissal procedures and decisions. It does not matter if the worker was a disabled person when they began working for you, or if they have become a disabled person while working for you.

The duty may also apply after employment has ended.

The duty also applies in relation to **employment services**, with some differences which are explained later in this chapter.

Reasonable adjustments may also be required in relation to occupational pension schemes. This is explained later in this chapter.

Finding out if someone is a disabled person

You only have to make these changes where you know or could reasonably be expected to know that a worker or job applicant is a disabled person. This means doing everything you can reasonably be expected to do to find out.

For example:

> An employee's performance has recently got worse and they have started being late for work. Previously they had a very good record of punctuality and performance. Rather than just telling them they must improve, their employer talks to them in private. This allows the employer to check whether the change in performance could be for a disability-related reason. The employee says that they are experiencing a recurrence of depression and are not sleeping well which is making them late. Together, they agree to change the employee's hours slightly while they are in this situation and that the employee can ask for help whenever they are finding it difficult to start or complete a task. These are reasonable adjustments.

This does not, however, mean asking intrusive questions or ones that violate someone's dignity. Think about privacy and confidentiality in what you ask and how you ask.

Be aware that there are restrictions on when you can ask health- or disability-related questions before shortlisting someone or making a job offer. This is to make sure that job applicants are not discriminated against because of issues related to health or disability. The exceptions to the restriction are set out at the end of this part of this guide.

You can ask questions to find out if a job applicant needs reasonable adjustments for the recruitment process. But you must use their answers only for working out the adjustments they need and whether these are reasonable.

If the adjustments are reasonable, and you used the fact that the person needed them as a reason not to take them further into the recruitment process, this would be unlawful discrimination.

If a job applicant does not ask for adjustments in advance but turns out to need them, you must still make them, although what is reasonable in these circumstances may be different from what would be reasonable with more notice. You must not hold the fact that you have to make last minute adjustments against the applicant.

For example:

> A job applicant does not tell an employer in advance that they use a wheelchair and the employer does not know about this. On arriving for the interview the applicant discovers that the room is not accessible. Although the employer could not have been expected to make the necessary changes in advance, it would be a reasonable adjustment to hold the interview in an alternative, accessible room if one was available without too much disruption or cost. Alternatively, it might be a reasonable adjustment to reschedule the interview if this was practicable.

There is more information about what this means in the Equality and Human Rights Commission guide*: What equality law means for you as an employer: when you recruit someone to work for you*.

Good practice tip: be prepared for making reasonable adjustments

Equality law says that you must make reasonable adjustments if you know that a worker or job applicant is a disabled person, that they need adjustments and that those adjustments are reasonable.

You don't have to put reasonable adjustments in place just in case a disabled person applies for a job, or just in case one of your existing workers becomes a disabled person.

But you may want to be prepared:

- Think in advance about what the core tasks of a particular job are and what adjustments might be possible (before starting a recruitment or promotion exercise, for example).
- Ask job applicants if they need reasonable adjustments to take part in the recruitment process. Do bear in mind the restriction on asking health- or disability-related questions and make it clear to applicants that the only reason you are asking is to make sure that you remove any barriers during the recruitment process, so far as is reasonable (or if one of the other exceptions applies).
- Put in place a process for working out reasonable adjustments in the event of an existing employee becoming disabled or a disabled person starting work with the organisation, before being faced with an individual situation.
- Make sure you know in advance what support is available to disabled people from Access to Work.
- If you are making renovations or alterations to your building, thinking about how you can make the new parts of your building more accessible for disabled people will help you if you later employ a disabled person and will allow you to attract more potential employees.

As well as avoiding a possible Employment Tribunal claim, being open to making reasonable adjustments will mean you have a wider choice of workers. A disabled applicant may be the best person for the job. Or you may be able to avoid losing the skills of someone who already works for you who has become a disabled person just by making a few changes.

The three requirements of the duty

The duty contains three requirements that apply in situations where a disabled person would otherwise be placed at a **substantial disadvantage** compared with people who are not disabled.

- The first requirement involves changing the way things are done (equality law calls this a **provision**, **criterion** or **practice**).

  For example:

  > An employer has a policy that designated car parking spaces are only offered to senior managers. A worker who is not a manager, but has a mobility impairment and needs to park very close to the office, is given a designated car parking space. This is likely to be a reasonable adjustment to the employer's car parking policy.

- The second requirement involves making changes to overcome barriers created by the **physical features** of your workplace.

  For example:

  > Clear glass doors at the end of a corridor in a particular workplace present a hazard for a visually impaired worker. Adding stick-on signs or other indicators to the doors so that they become more visible is likely to be a reasonable adjustment for the employer to make.

- The third requirement involves providing extra equipment (which equality law calls an **auxiliary aid**) or getting someone to do something to assist the disabled person (which equality law calls an **auxiliary service**).

  For example:

  > An employer provides specialist software for a member of staff who develops a visual impairment and whose job involves using a computer.

Each of these requirements is looked at in more detail later in this part of the guide.

Are disabled people at a substantial disadvantage?

The question you need to ask yourself is whether:

- the way you do things
- any physical feature of your workplace
- the absence of an auxiliary aid or service

puts a disabled worker or job applicant at a substantial disadvantage compared with a person who is not disabled.

Anything that is more than minor or trivial is a substantial disadvantage.

If a substantial disadvantage does exist, then you must make reasonable adjustments.

The aim of the adjustments you make is to remove or reduce the substantial disadvantage.

But you only have to make adjustments that are reasonable for you to make. There is more information about how to work out what is reasonable a bit later in this part of the guide.

Changes to policies and the way your organisation usually does things

The first requirement involves changing the way things are done (equality law calls this a **provision**, **criterion** or **practice**).

This means looking at whether you need to change some written or unwritten policies, and/or some of the ways you usually do things, to remove or reduce barriers that would place a disabled person at a substantial disadvantage, for example, by preventing them from being able to work for you or applying for a job with you or stopping them being fully involved at work.

This includes your processes for deciding who is offered employment, criteria for promotion or training, benefits, working conditions and contractual arrangements.

For example:

- Supervisors in an organisation are usually employed on a full-time basis. The employer agrees to a disabled person whose impairment causes severe fatigue working on a part-time or job share basis. By doing this, the employer is making a reasonable adjustment.
- The design of a particular workplace makes it difficult for a disabled person with a hearing impairment to hear, because the main office is open plan and has hard flooring, so there is a lot of background noise. Their employer agrees that staff meetings should be held in a quieter place that allows that person to fully participate in the meeting. By doing this, the employer is making a reasonable adjustment.

Dealing with physical barriers

The second requirement involves making changes to overcome barriers created by the **physical features** of your workplace.

This means you may need to make some changes to your building or premises for a disabled person who works for you, or applies for a job with you.

Exactly what kind of change you make will depend on the kind of barriers your premises present. You will need to consider the whole of your premises. You may have to make more than one change.

Physical features include: steps, stairways, kerbs, exterior surfaces and paving, parking areas, building entrances and exits (including emergency escape routes), internal and external doors, gates, toilet and washing facilities, public facilities (such as telephones, counters or service desks), lighting and ventilation, lifts and escalators, floor coverings, signs, furniture, and temporary or movable items (such as equipment and display racks). Physical features also include the sheer scale of premises (for example, the size of a building). This is not an exhaustive list.

- These could be something to do with the structure of the actual building itself like steps, changes of level, emergency exits or narrow doorways.
- Or it could be something about the way the building or premises have been fitted out, things like heavy doors, inaccessible toilets or inappropriate lighting.
- It could even be the way things are arranged inside the premises such as fixtures and fittings like shelf heights in storage areas or fixed seating in canteens.

For example:

> An employer has recruited a worker who is a wheelchair user and who would have difficulty negotiating her way around the office. In consultation with the new worker, the employer rearranges the layout of furniture in the office. The employer has made reasonable adjustments.

Providing extra equipment or aids

The third requirement of the duty involves providing extra equipment – which equality law calls **auxiliary aids** – and **auxiliary services**, where someone else is used to assist the disabled person, such as a reader, a sign language interpreter or a support worker.

An auxiliary aid or service may make it easier for a disabled person to do their job or to participate in an interview or selection process. So you should consider whether it is reasonable to provide this.

The kind of equipment or aid or service will depend very much on the individual disabled person and the job they are or will be doing or what is involved in the recruitment process. The disabled person themselves may have experience of what they need, or you may be able to get expert advice from some of the organisations listed in *Further sources of information and advice.*

Making sure an adjustment is effective

It may be that several adjustments are required in order to remove or reduce a range of disadvantages and sometimes these will not be obvious to you. So you should work, as much as possible, with the disabled person to identify the kind of disadvantages or problems that they face and also the potential solutions in terms of adjustments.

But even if the disabled person does not know what to suggest, you must still consider what adjustments may be needed.

For example:

> A disabled employee has been absent from work as a result of depression. Neither the employee nor their doctor is able to suggest any adjustments that could be made. Nevertheless the employer should still consider whether any adjustments, such as working from home for a time or changing working hours or offering more day-to-day support, would be reasonable.

You may be able to get expert advice from some of the organisations listed in *Further sources of information and advice.*

Who pays for reasonable adjustments?

If something is a reasonable adjustment, you must pay for it as the employer or prospective employer. The cost of an adjustment can be taken into account in deciding if it is reasonable or not.

However, there is a government scheme called Access to Work which can help a person whose health or disability affects their work by giving them advice and support. Access to Work can help with extra costs which would not be reasonable for an employer or prospective employer to pay.

For example, Access to Work might pay towards the cost of getting to work if the disabled person cannot use public transport, or for assistance with communication at job interviews.

A person may be able to get advice and support from Access to Work if they are:

- in a paid job, or
- unemployed and about to start a job, or
- unemployed and about to start a Work Trial, or
- self-employed

and

- their disability or health condition stops them from being able to do parts of their job.

Make sure your worker or job applicant knows about Access to Work. Although the advice and support are given to the worker or job applicant themselves, you will obviously benefit too. Information about Access to Work is in *Further sources of information and advice.*

What is meant by 'reasonable'

You only have to do what is reasonable.

Various factors influence whether a particular adjustment is considered reasonable and the responsibility for making the decision about reasonableness rests with you as the employer.

When deciding whether an adjustment is reasonable you can consider:

- how effective the change will be in avoiding the disadvantage the disabled person would otherwise experience
- its practicality
- the cost
- your organisation's resources and size
- the availability of financial support.

Your overall aim should be, as far as possible, to remove or reduce any disadvantage faced by a disabled worker or job applicant.

Issues to consider:

- You can treat disabled people better or 'more favourably' than non-disabled people and sometimes this may be part of the solution.
- The adjustment must be effective in helping to remove or reduce any disadvantage the disabled person is facing. If it doesn't have any impact then there is no point.
- In reality it may take several different adjustments to deal with that disadvantage but each change must contribute towards this.
- You can consider whether an adjustment is practical. The easier an adjustment is, the more likely it is to be reasonable. However, just because something is difficult doesn't mean it can't also be reasonable. You need to balance this against other factors.
- If an adjustment costs little or nothing and is not disruptive, it would be reasonable unless some other factor (such as impracticality or lack of effectiveness) made it unreasonable.
- Your size and resources are another factor. If an adjustment costs a significant amount, it is more likely to be reasonable for you to make it if you have substantial financial resources. Your resources must be looked at across your whole organisation, not just for the branch or section where the disabled person is or would be working. This is an issue which you have to balance against the other factors.
- In changing policies, criteria or practices, you do not have to change the basic nature of the job, where this would go beyond what is reasonable.

- What is reasonable in one situation may be different from what is reasonable in another situation, such as where someone is already working for you and faces losing their job without an adjustment, or where someone is a job applicant. Where someone is already working for you, or about to start a long-term job with you, you would probably be expected to make more permanent changes (and, if necessary, spend more money) than you would to make adjustments for someone who is attending a job interview for an hour.

- If you are a larger rather than a smaller employer you are also more likely to have to make certain adjustments such as redeployment or flexible working patterns which may be easier for an organisation with more staff.

- If advice or support is available, for example, from Access to Work or from another organisation (sometimes charities will help with costs of adjustments), then this is more likely to make the adjustment reasonable.

- If making a particular adjustment would increase the risks to the health and safety of anybody, including the disabled person concerned, then you can consider this when making a decision about whether that particular adjustment or solution is reasonable. But your decision must be based on a proper assessment of the potential health and safety risks.

If, having taken all of the relevant issues into account, you decide that an adjustment is reasonable then you must make it happen.

If there is a disagreement about whether an adjustment is reasonable or not, in the end, only an Employment Tribunal can decide this.

Providing information in an alternative format

Equality law says that where providing information is involved, the steps which it is reasonable for the employer to take include steps to make sure that the information is provided in an accessible format.

For example:

- A job applicant asks for information about the job to be read onto an audio CD and sent to them. This is likely to be a reasonable adjustment that the employer must make.

Reasonable adjustments in practice

Examples of steps it might be reasonable for you to have to take include:

- Making adjustments to premises.

  For example:

  > An employer makes structural or other physical changes such as widening a doorway, providing a ramp or moving furniture for a wheelchair user; relocates light switches, door handles, or shelves for someone who has difficulty in reaching; or provides appropriate contrast in decor to help the safe mobility of a visually impaired person.

- Allocating some of the disabled person's duties to another person.

  For example:

  > An employer reallocates minor or subsidiary duties to another employee as a disabled person has difficulty doing them because of their disability. For example, the job involves occasionally going onto the open roof of a building but the employer transfers this work away from an employee whose disability involves severe vertigo.

- Transferring the person to fill an existing vacancy.

  For example:

  > An employer should consider whether a suitable alternative post is available for a worker who becomes disabled (or whose disability worsens), where no reasonable adjustment would enable the worker to continue doing the current job. This might also involve retraining or other reasonable adjustments such as equipment for the new post or a transfer to a position on a higher grade.

- Altering the person's hours of working or training.

  For example:

  > An employer allows a disabled person to work flexible hours to enable them to have additional breaks to overcome fatigue arising from their disability. It could also include permitting part-time working, or different working hours to avoid the need to travel in the rush hour if this is a problem related to an impairment. A phased return to work with a gradual build-up of hours might also be appropriate in some circumstances.

- Assigning the person to a different place of work or training.

  For example:

  > An employer relocates the work station of a newly disabled employee (who now uses a wheelchair) from an inaccessible third floor office to an accessible one on the ground floor. If the employer operates from more than one workplace, it may be reasonable to move the employee's place of work to other premises of the same employer if the first building is inaccessible and the other premises are not.

- Allowing the person to be absent during working or training hours for rehabilitation, assessment or treatment.

  For example:

  > An employer allows a disabled person who has recently developed a condition to have more time off work than would be allowed to non-disabled workers to enable them to have rehabilitation. A similar adjustment would be appropriate if a disability worsens or if a disabled person needs occasional treatment anyway.

- Giving, or arranging for, training or mentoring (whether for the disabled person or any other person). This could be training in particular pieces of equipment which the disabled person uses, or an alteration to the standard employee training to make sure it is accessible for the disabled employee.

  For example:

  - All workers are trained in the use of a particular machine but an employer provides slightly different or longer training for an employee with restricted hand or arm movements, or training in additional software for a visually impaired person so that they can use a computer with speech output.
  - An employer provides training for employees on conducting meetings in a way that enables a Deaf staff member to participate effectively.
  - A disabled person returns to work after a six-month period of absence due to a stroke. Their employer pays for them to see a work mentor, and allows time off to see the mentor, to help with their loss of confidence following the onset of their disability.

- Acquiring or modifying equipment.

  For example:

  An employer might have to provide special equipment (such as an adapted keyboard for someone with arthritis or a large screen for a visually impaired person), an adapted telephone for someone with a hearing impairment, or other modified equipment for disabled workers (such as longer handles on a machine).

You do not have to provide or modify equipment for personal purposes unconnected with a worker's job, such as providing a wheelchair if a person needs one in any event but does not have one. This is because the disadvantages do not flow from things you have control over.

- Modifying instructions or reference manuals.

  For example:

  > The format of instructions and manuals might need to be modified for some disabled people (such as being produced in Braille or on audio CD) and instructions for people with learning disabilities might need to be conveyed orally with individual demonstration or in Easy Read.

- Modifying procedures for testing or assessment.

  For example:

  > A person with restricted manual dexterity would be disadvantaged by a written test, so the employer gives that person an oral test instead.

- Providing a reader or interpreter.

  For example:

  > An employer arranges for a colleague to read hard copy post to a person with a visual impairment at particular times during the working day. Alternatively, the employer might hire a reader.

- Providing supervision or other support.

  For example:

  > An employer provides a support worker or arranges help from a colleague, in appropriate circumstances, for someone whose disability leads to uncertainty or lack of confidence.

- Allowing a disabled worker to take a period of disability leave.

  For example:

  > A worker who has cancer needs to undergo treatment and rehabilitation. Their employer allows a period of disability leave and permits them to return to their job at the end of this period.

- Participating in supported employment schemes, such as **Work step**.

  For example:

  > A person applies for a job as an office assistant after several years of not working because of depression. They have been participating in a supported employment scheme where they saw the job advertised. As a reasonable adjustment the person asks the employer to let them make private phone calls during the working day to a support worker at the scheme.

- Employing a support worker to assist a disabled worker.

  For example:

  > An adviser with a visual impairment is sometimes required to make home visits to clients. The employer employs a support worker to assist them on these visits.

- Modifying disciplinary or grievance procedures.

  For example:

  > A person with a learning disability is allowed to take a friend (who does not work with them) to act as an advocate at a meeting with the person's employer about a grievance. The employer also makes sure that the meeting is conducted in a way that does not disadvantage or patronise the disabled person.

- Adjusting redundancy selection criteria.

  For example:

  > A person with an autoimmune disease has taken several short periods of absence during the year because of the condition. When their employer is taking the absences into account as a criterion for selecting people for redundancy, they discount these periods of disability-related absence.

- Modifying performance-related pay arrangements.

  For example:

  > A disabled person who is paid purely on their output needs frequent short additional breaks during their working day – something their employer agrees to as a reasonable adjustment. It is likely to be a reasonable adjustment for their employer to pay them at an agreed rate (e.g. their average hourly rate) for these breaks.

It may sometimes be necessary for an employer to take a combination of steps.

For example:

> A woman who is blind is given a new job with her employer in an unfamiliar part of the building. The employer
>
> - arranges facilities for her assistance dog in the new area
> - arranges for her new instructions to be in Braille, and
> - provides disability equality training to all staff.

In some situations, a reasonable adjustment will not work without the co-operation of other workers. Your other staff may therefore have an important role in helping make sure that a reasonable adjustment is carried out in practice. You must make sure that this happens. It is unlikely to be a valid ‘defence’ to a claim under equality law for a failure to make reasonable adjustments to argue that an adjustment was unreasonable because your other staff were obstructive or unhelpful when you tried to make an adjustment happen. You would at least need to be able to show that you took all reasonable steps to try and resolve the problem of the attitude of your other staff.

For example:

> An employer makes sure that a worker with autism has a structured working day as a reasonable adjustment. As part of the reasonable adjustment, it is the responsibility of the employer to make sure that other workers co-operate with this arrangement.

If the worker does not agree to your involving other workers, you must not breach their confidentiality by telling the other workers about the disabled person's situation.

If a worker is reluctant for other staff to know, and you believe that a reasonable adjustment requires the co-operation of the worker's colleagues, explain that you cannot make the adjustment unless they are prepared for some information to be shared. It does not have to be detailed information about their condition, just enough to explain to other staff what they need to do.

Specific situations

Employment services

An employment service provider must not unlawfully discriminate against people who are using or want to use its services. There is more information about what this means in the list of words and key ideas.

In addition, an employment service provider has a duty to make reasonable adjustments, except when providing a **vocational service**.

For employment service providers, unlike for employers, the duty is 'anticipatory'. If you are an employment service provider, this means you cannot wait until a disabled person wants to use your services, but must think in advance (and on an ongoing basis) about what disabled people with a range of impairments might reasonably need, such as people who have a visual impairment, a hearing impairment, a mobility impairment, or a learning disability.

For example:

> An employment agency makes sure its website is accessible to disabled people and that it can provide information about job opportunities in a range of alternative formats. It also makes sure its staff are trained to assist disabled people who approach it to find out about job opportunities.

Occupational pensions

Occupational pension schemes must not unlawfully discriminate against people. There is more information about what this means in the Equality and Human Rights Commission guide: *What equality law means for you as an employer: pay and benefits*.

In addition, an occupational pension scheme must make reasonable adjustments to any provision, criterion or practice in relation to the scheme which puts a disabled person at a substantial disadvantage in comparison with people who are not disabled.

For example:

> The rules of an employer's final salary scheme provide that the maximum pension receivable is based on the member's salary in the last year of work. Having worked full-time for 20 years, a worker develops a condition which leads them to reduce their working hours two years before their pension age. The scheme's rules put them at a disadvantage as a result of their disability, because their pension will only be calculated on their part-time salary. The trustees decide to convert the worker's part-time salary to its full-time equivalent and make a corresponding reduction in the period of their part-time employment which counts as pensionable. In this way, their full-time earnings will be taken into account. This is likely to be a reasonable adjustment to make.

Questions about health or disability

Except in very restricted circumstances or for very restricted purposes, you are not allowed to ask any job applicant about their health or any disability until the person has been:

- offered a job either outright or on conditions, or
- included in a pool of successful candidates to be offered a job when a position becomes available (for example, if an employer is opening a new workplace or expects to have multiple vacancies for the same role but doesn't want to recruit separately for each one).

This includes asking such a question as part of the application process or during an interview. Questions relating to previous sickness absence count as questions that relate to health or disability.

No-one else can ask these questions on your behalf either. So you cannot refer an applicant to an **occupational health practitioner** or ask an applicant to fill in a questionnaire provided by an occupational health practitioner before the offer of a job is made (or before inclusion in a pool of successful applicants) except in very limited circumstances, which are explained next.

The point of stopping employers asking questions about health or disability is to make sure that all job applicants are looked at properly to see if they can do the job in question, and not ruled out just because of issues related to or arising from their health or disability, such as sickness absence, which may well say nothing about whether they can do the job now.

You can ask questions once you have made a job offer or included someone in a group of successful candidates. At that stage, you could make sure that someone's health or disability would not prevent them from doing the job. But you must consider whether there are reasonable adjustments that would enable them to do the job.

What happens if I ask questions about health or disability?

A job applicant can bring a claim against you if:

- you asked health- or disability-related questions of a kind that are not allowed, and
- they believe there has been unlawful discrimination as a result of the information that they gave (or failed to give) when answering such questions.

The Equality and Human Rights Commission can take legal action against you if you ask job applicants any health- or disability-related questions that are not allowed by equality law. This includes sending them a questionnaire about their health for them to fill in before you have offered them a job.

When you are allowed to ask questions about health or disability

You can ask questions about health or disability when:

- You are asking the questions to find out if any applicant needs reasonable adjustments for the recruitment process, such as for an assessment or an interview.

  For example:

  > An application form states: 'Please contact us if you need the application form in an alternative format or if you need any adjustments for the interview'. This is allowed.

- You are asking the questions to find out if a person (whether they are a disabled person or not) can take part in an assessment as part of the recruitment process, including questions about reasonable adjustments for this purpose.

  For example:

  > An employer is recruiting play workers for an outdoor activity centre and wants to hold a practical test for applicants as part of the recruitment process. It asks a question about health in order to ensure that applicants who are not able to undertake the test (for example. because they are pregnant or have an injury) are not required to take the test. This is allowed.

- You are asking the questions for **monitoring** purposes to check the **diversity** of applicants.

- You want to make sure that an applicant who is a disabled person can benefit from any measures aimed at improving disabled people's employment rates. For example, the **guaranteed interview scheme**. Make it clear to job applicants that this is why you are asking the question.

- You are asking the question because having a specific impairment is an **occupational requirement** for a particular job.

  For example:

  > An employer wants to recruit a Deafblind project worker who has personal experience of Deafblindness. This is an occupational requirement of the job and the job advert states this. The employer can ask on the application form or at interview about the applicant's disability.

- Where the questions relate to a requirement to vet applicants for the purposes of **national security**.

- Where the question relates to a person's ability to carry out a function that is intrinsic (or absolutely fundamental) to that job. Where a health- or disability-related question would mean you would know if a person can carry out that function with reasonable adjustments in place, then you can ask the question.

  For example:

  > A construction company is recruiting scaffolders. The company can ask about health or disability on the application form or at interview if the questions relate specifically to an applicant's ability to climb ladders and scaffolding to a

significant height. The ability to climb ladders and scaffolding is intrinsic or fundamental to the job.

In practice, even if a function is intrinsic to the job, you should ask a question about a disabled person's ability to do the job with reasonable adjustments in place. There will therefore be very few situations where a question about a person's health or disability needs to be asked.

Most of the time, whether on an application form or during an interview, you can ask a question about whether someone has the relevant skills, qualities or experience to do the job, not about their health or about any disability they may have.

For example:

An employer is recruiting a person as a cycle courier. They ask applicants to send in a CV setting out their relevant experience and a covering letter saying why they would be suitable for the job. The employer will score candidates on their experience of and enthusiasm for cycling. It is not necessary to ask applicants questions about health or disability. If the employer considers a health check is necessary, for example, for insurance purposes, this can be carried out once an applicant has been offered the job, and the job offer can be made conditional on the health check.

4. What to do if someone says they've been discriminated against

If a **worker** says that you or your **employee** or **agent** have **unlawfully discriminated** against them in a work situation, your responsibility is to deal with the complaint in a way that finds out if there has been unlawful discrimination and, if there has been, to put the situation right.

This guide focuses on the equality law aspects of dealing with a complaint from a worker. If a worker makes a complaint (which is often called 'bringing a grievance') about something else at work, which is not related to a **protected characteristic**, then you can get advice from the Arbitration and Conciliation Service (Acas) about how to deal with this. Contact details for Acas are in *Further sources of information and advice.*

A worker may:

- complain to you
- make a claim in the Employment Tribunal.

These are not alternatives, since the person complaining still has a right to make a claim in the Employment Tribunal even if they first complained to you.

This part of this guide covers:

- If a worker complains to you
    - Dealing with the complaint informally
    - If a worker makes a formal complaint
    - Getting more information about involving other people in sorting the situation out (this is often called alternative dispute resolution)
- What you can do if you find that there has been unlawful discrimination
- What you can do if you find that there wasn't any unlawful discrimination
- Monitoring the outcome
- The questions procedure, which someone can use to find out more information from you if they think they may have been unlawfully discriminated against, harassed or victimised

- Key points about discrimination cases in a work situation
  - Where claims are brought
  - Time limits for bringing a claim
  - The standard and burden of proof
  - What the Employment Tribunal can order you to do
- More information about defending an Employment Tribunal case

Good practice tips for avoiding and sorting out claims about discrimination at work

A worker who believes they have experienced unlawful discrimination has a right to make an Employment Tribunal claim.

Defending an Employment Tribunal claim can be lengthy, expensive and draining, and it can have a damaging impact on the reputation of your organisation.

It is likely to be in everyone's interest to try to put things right before a claim is made to an Employment Tribunal.

If you have good procedures for sorting out complaints about discrimination, you may be able to avoid the person feeling it is necessary to bring a claim against you.

An important factor will be for your workers to be sure that complaints about unlawful discrimination will be taken seriously, even if they are raised less formally, outside your formal grievance procedures, and that something will happen to put the situation right if someone has discriminated unlawfully.

Tell your workers what the options are for bringing unlawful discrimination to your attention, and how to use your procedures, including:

- discussing the situation informally with you or a manager, and
- using your formal grievance procedures.

Make it clear what will happen if, after investigating, you find out that someone has discriminated unlawfully against someone else:

- that if necessary you will take any disciplinary action you decide is appropriate
- that if necessary you will change the way you do things so the same thing does not happen again, then do this.

Also:

- consider **equality training** for yourself and/or people working for you
- think about having an **equality policy**.

If a worker complains to you

You have two ways of sorting out the situation:

- trying to deal with the complaint informally
- using your grievance procedures.

You may also want to use other people to help you sort the situation out through something like conciliation or mediation. This is often called ‘alternative dispute resolution’ and this guide tells you where you can find out more about it.

Make sure that in the way you respond to a complaint, you do not unlawfully discriminate against anyone.

For example:

An employer takes what a disabled person who has a learning disability says less seriously than what the person they say has unlawfully discriminated against them says. If the employer’s attitude is because of the disabled person’s learning disability, this is likely to be unlawful discrimination.

If anyone involved in a complaint is a disabled person who needs **reasonable adjustments** to remove barriers they would otherwise face in taking part in the complaints process, you must make these. You can read more about reasonable adjustments in Chapter 3.

Dealing with the complaint informally

It may be that you can look into the complaint and decide what to do without it being necessary for your worker to make a formal complaint.

If the complaint is about the way you or your organisation does something, think about getting it changed.

If it is about how the person's manager or colleagues are behaving towards them, it may help to speak informally to the person or people involved before getting into formal procedures.

This will only be possible if the person who has complained agrees that you should speak to the other person informally.

Make sure you tell the worker what the result of their informal complaint is, otherwise they may make a formal complaint or bring an Employment Tribunal claim.

If a worker makes a formal complaint

If a worker makes a formal complaint, this is often referred to as a 'grievance'.

You can find out about investigating and handling grievances (whether they relate to discrimination or to other workplace issues) from Acas. Contact details for Acas are in *Further sources of information and advice.*

If your worker is not happy about the outcome of a grievance procedure, then they have a right to appeal.

Alternative dispute resolution

If you want to get help in sorting out a complaint about discrimination, you could see if the person complaining will agree to what is usually called 'alternative dispute resolution' or ADR. ADR involves finding a way of sorting out the complaint without a formal tribunal hearing. ADR techniques include mediation and conciliation.

In complaints relating to work situations, this can happen:

- as part of an informal process
- when your formal grievance procedures are being used, or
- before an Employment Tribunal claim has been brought or finally decided.

There are different organisations who may be able to help with this:

- Trade Unions
- Acas
- ADRnow, an information service run by the Advice Services Alliance (ASA).

Details of how to contact these organisations are in *Further sources of information and advice.*

What you can do if you find that there has been unlawful discrimination

The action you take will depend on the specific details of the case and its seriousness. You should take into consideration any underlying circumstances and the outcome of previous similar cases. Actions you take could be:

- Some form of alternative dispute resolution (which is explained above).
- **Equality training** for the person who discriminated.
- Appropriate disciplinary action (you can find out more about disciplinary procedures from Acas).

What you can do if you find that there wasn't any unlawful discrimination

If your investigation and any appeal find that there was no unlawful discrimination, then you need to find a way for everyone to continue to work together.

You may be able to do this yourself, or it may be helpful to bring in help from outside as with alternative dispute resolution (which is explained above).

Monitoring the outcome

Whether you decide that there had been unlawful discrimination or not, make sure that you do not treat the person who complained badly. For example, forcing the person who complained to transfer to another part of your organisation (if it is big enough) may be **victimisation**. However, if they ask to be transferred, you should do this if you are sure this is what they really want, and it is not a sign that you have not dealt with their complaint properly.

Monitor the situation to ensure that the unlawful discrimination (if you found there was discrimination) has stopped and that there is no victimisation of the person who complained or anyone who helped them.

If your worker is not satisfied with what has happened, they may decide to bring a claim in the Employment Tribunal.

The questions procedure

If someone thinks they may have been unlawfully discriminated against, harassed or victimised against equality law, then they can obtain information from you to help them decide if they have a valid claim or not.

There is a set form to help them do this which you can see at: www.equalities.gov.uk, but their questions will still count even if they do not use the form, so long as they use the same questions.

If you receive questions from someone, you are not legally required to reply to the request, or to answer the questions, but it may harm your case if you do not.

The questions and the answers can form part of the evidence in a case brought under the Equality Act 2010.

Someone can send you the questions before a claim is made to the Employment Tribunal, or at the same time, or after the claim has been sent.

If it is before, then you must receive the questions within three months of what the person complaining says happened that was unlawful discrimination. If a claim has already been made to the Employment Tribunal, then you must receive the questions:

- within 28 days of the claim being sent to the Employment Tribunal if the claim involves disability discrimination (including a failure to make **reasonable adjustments**) or
- within 21 days of the claim being sent to the Employment Tribunal in all other cases.

If you do not respond to the questionnaire within eight weeks of its being sent to you, the Employment Tribunal can take that into account when making its decision. The Employment Tribunal can also take into account answers which are evasive or unclear.

- There is an exception to this. The Employment Tribunal cannot take the failure to answer into account if a person or organisation states that to give an answer could prejudice criminal proceedings and this is reasonable. Most of the time, breaking equality law only leads to a claim in a civil tribunal or court. Occasionally, breaking equality law can be punished by the criminal courts. In that situation, the person or organisation may be able to refuse to answer the questions, if in answering they might incriminate themselves and it is reasonable for them not to answer. If you think this might apply to you, you should get more advice on what to do.

If someone who is working for you sends you questions, you must not treat them badly because they have done this. If you did, it would almost certainly be **victimisation**.

Key points about discrimination cases in a work situation

The key points this guide explains are:

- Where claims are brought
- Time limits for bringing a claim
- The standard and burden of proof
- What the Employment Tribunal can order you to do
- Settling a claim

Where claims are brought

An Employment Tribunal can decide a complaint involving unlawful discrimination in a **work situation**.

Employment Tribunals can also decide cases about:

- Collective agreements, which can cover any terms of employment, such as pay or other benefits or working conditions.
- Equal pay and occupational pensions cases, which you can read more about in the Equality and Human Rights Commission guide: *What equality law means for you as an employer: pay and benefits*.

- Requirements an employer places on someone to discriminate against people as part of their job, for example, if someone works in a shop, telling them not to serve customers with a particular protected characteristic.

If the complaint is about a health- or disability-related enquiry during recruitment, the Employment Tribunal cannot hear a case just because an enquiry was made. Only the Equality and Human Rights Commission can take up this sort of case.

But a job applicant who believes they were discriminated against because of disability, or for a reason connected with their disability, can bring a claim in the Employment Tribunal.

For example:

> A job applicant who is a disabled person is asked questions about their health and disability during their interview. They do not get the job. They believe this is because of the answers they gave to the questions. They can bring a claim in the Employment Tribunal. However, only the Equality and Human Rights Commission could take up the wider case (in the County Court in England or Wales, and the Sheriff Court in Scotland) to challenge the employer just for asking the questions if no individual was personally affected.

An Employment Tribunal can only hear a case from a member of the armed forces if their **service complaint** has been decided.

Time limits for bringing a claim

A person must bring their claim within three months (less one day) of the claimed unlawful discrimination taking place.

There are two situations where this is slightly different:

- in equal pay cases, different time limits apply – see the Equality and Human Rights Commission guide: *What equality law means for you as an employer: pay and benefits*, and
- for cases involving the armed forces, the time limit is six months (less one day).

If a person brings a claim after this, it is up to the Employment Tribunal to decide whether it is fair to everyone concerned, including both the employer and the employee, to allow a claim to be brought later than this.

When a claim concerns behaviour over a length of time, the time limit starts when the behaviour has ended.

For example:

> An employer operates a mortgage scheme for married couples only. Someone who is a civil partner would be able to make a claim for unlawful discrimination because of sexual orientation to a tribunal at any time while the scheme continues to operate in favour of married couples or within three months of the scheme ceasing to operate in favour of married couples.

If the person is complaining about a failure to do something, for example, a failure to make **reasonable adjustments**, then the three months begins when the decision was made not to do it. If there is no solid evidence of a decision, then the decision is assumed to have been made either:

- when the person who failed to do the thing does something else which shows they don't intend to do it, or
- at the end of the time when they might reasonably have been expected to do the thing.

For example:

> A wheelchair-user asks their employer to install a ramp to enable them to get over the kerb between the car park and the office entrance more easily. The employer indicates that it will do so but no work at all is carried out. After a period in which it would have been reasonable for the employer to commission the work, even though the employer has not made a positive decision not to install a ramp, it may be treated as having made that decision. A court can hear a claim if it is brought outside this time limit if the court thinks that it would be 'just and equitable' (fair to both sides) for it to do this.

The standard and burden of proof

The standard of proof in discrimination cases is the usual one in civil (non-criminal) cases. Each side must try to prove the facts of their case are true on the balance of probabilities, in other words, that it is more likely than not in the view of the tribunal that their version of events is true.

If someone is claiming unlawful discrimination, harassment or victimisation against you, then the burden of proof begins with them. They must prove enough facts from which the tribunal can decide, without any other explanation, that the discrimination, harassment or victimisation has taken place.