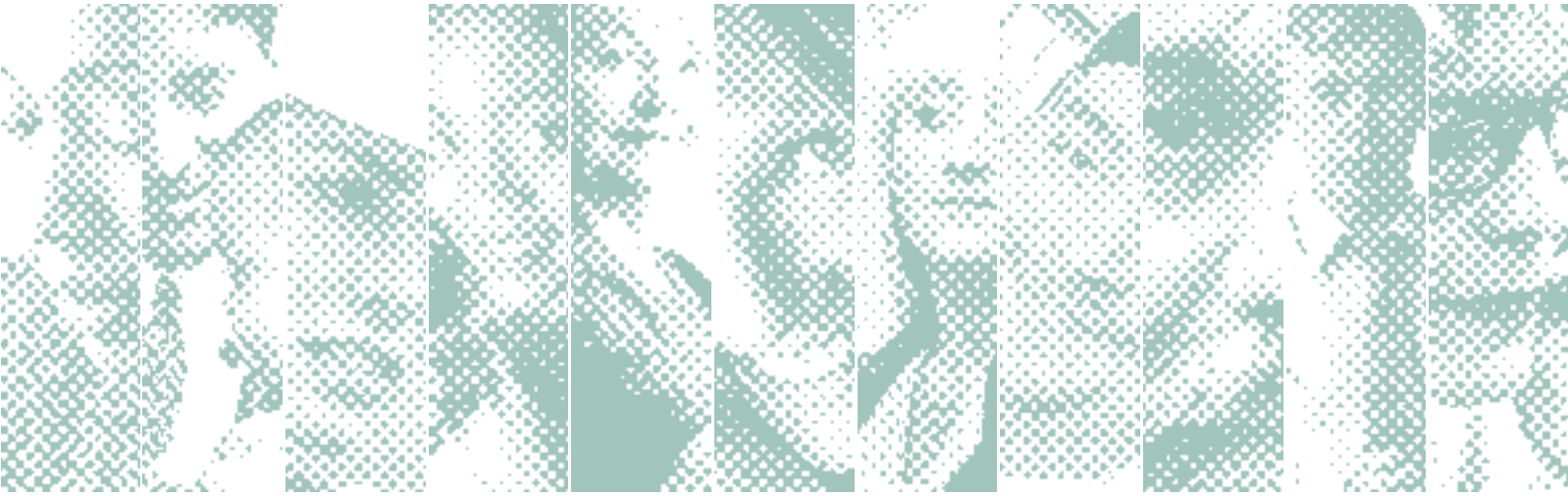
TUC

GUIDE TO

EQUALITY LAW



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THOMPSONS SOLICITORS

The commitment of trade unions to give legal and campaigning support to those suffering discrimination at work and in other aspects of life remains crucial to achieving a fairer and more inclusive society. We still have a long way to go. For example, attitudinal research shows that nearly half the British population still think that homosexuality is 'always' or 'mostly' wrong. A quarter describe themselves as 'very' or 'a little' prejudiced against people from other races. Employment tribunal statistics show that the numbers of discrimination cases are still increasing.

I am therefore delighted that the TUC is publishing this Guide. It will assist trade unionists in continuing to use their knowledge of the law in combination with their organising and negotiating abilities. In doing so they are aiming to achieve justice for their members and to keep public policy focused sharply on the achievement of real equality at work. Our key role in this field was well illustrated by the ground-breaking high court legal action taken by seven trade unions to help ensure that lesbian and gay workers get equal pension rights and are not discriminated against by religious organisations.

We are also very aware that trade unions are subject to equality law as employers, membership organisations and service providers, and have taken steps in recent years to ensure that they are meeting their own legal obligations. In 2001, following the Stephen Lawrence Inquiry Report, the TUC updated its own rules to clarify that promoting equality in all its activities is a key objective of the TUC, and that no union can affiliate without also making a clear commitment to the same effect. These changes are backed up by a regular programme of equality auditing of trade unions, reporting to TUC Congress every two years.

On the campaigning front, there is still much for us to concentrate upon in the coming years. The TUC is disappointed that the Government has so far failed to recognise adequately that workers should not be sacked simply because they have attained a set retirement age and that equal pay legislation urgently needs strengthening.

Any proposed 'levelling-down' of pension or redundancy rights and service-related pay and benefits as a result of age equality legislation will also be strongly opposed by trade unions. Making the most of new duties on public authorities to promote disability and gender equality will be a key goal. Moves towards a Single Equality Act to harmonise levels of protection upwards across all equality grounds are very welcome. We will continue to campaign for this objective throughout the progress of legislation on the new Commission for Equality and Human Rights.

My personal thanks to Thompsons solicitors for the preparation of the text of the Guide and to the European Commission for their financial support. We shall be closely monitoring the feedback on the Guide from the TUC Equality Committees and from other trade unionists and advice workers. In the meantime, I commend the TUC Guide to Equality Law to you as a practical and clear explanation of workplace rights.

Acknowledgments

The TUC Guide to Equality Law was written by Nicola Dandridge, Head of Equality at Thompsons Solicitors, and Alison Clarke, employment lawyer and freelance journalist.

Readers should not rely on this guide as a full statement of the law and should always seek expert advice before proceeding with any claim.

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CONTENTS

LIST OF ABBREVIATIONS

AAL – Additional adoption leave

ACAS – Advisory, Conciliation and Arbitration Service

AML – Additional maternity leave

CRE – Commission for Racial Equality

DDA – Disability Discrimination Act

DRC – Disability Rights Commission

DTI – Department of Trade and Industry

ET – Employment Tribunal

EAT – Employment Appeal Tribunal

ECJ – European Court of Justice

EOC – Equal Opportunities Commission

GOQ – Genuine occupational qualification

GOR – Genuine occupational requirement

HSE – Health and Safety Executive

IRLR – Industrial Relations Law Reports

ICR – Industrial Cases Reports

JES – Job evaluation scheme

NICs – National Insurance contributions

OAL – Ordinary adoption leave

OML – Ordinary maternity leave

RRA – Race Relations Act

SDA – Sex Discrimination Act

SMP – Statutory maternity pay

INTRODUCTION

Everyone should have the same rights at work. Yet women are still paid on average 19% less than men and part-time workers are paid 41% less than full-timers. Disabled people are twice as likely to be unemployed as non-disabled people. Pakistani and Bangladeshi people are three times more likely to be unemployed than white people, and according to a TUC survey 43% of gay and lesbian trade union members reported that they had experienced discrimination at work.

In order to address these and other inequalities a succession of governments has introduced legislation. However, it has been done on a piecemeal basis. As a result the discrimination law is fragmented and confusing.

This publication provides a straightforward account of this complex area of law, as it applies to the workplace. Each strand of discrimination law is dealt with in a separate chapter containing an overview of the relevant legislation and an explanation of the different types of discrimination. In addition, each chapter addresses frequently asked questions as to how the law applies in practice.

The publication covers England, Wales, Scotland and Northern Ireland. The law is broadly the same throughout all these jurisdictions, though the Scottish Parliament does independently exercise devolved rights to encourage equal opportunities.

In Northern Ireland, the discrimination laws and regulations are differently categorised but are the same in substance. There is however no specific equivalent to the public sector duty to promote race equality in Northern Ireland because of the general equality duty under the Northern Ireland Act 1998. Northern Ireland in addition has separate and specific regulations on religious discrimination, which are explained in chapter ten.

Also included is a brief guide to bringing a tribunal claim, although the emphasis throughout is on resolving disputes in the workplace through a trade union. The new regulations on dispute resolution, introduced in October 2004 (except for Northern Ireland where they take effect in April 2005), are therefore of particular relevance and these are summarised in chapter one. There is a list of useful organisations which can provide further information on different aspects of the law.

The main aim of this publication is to help trade union representatives – and workers – to find their way through the maze of the law. It will have served its purpose if it gives union representatives and workers the confidence to use the law to promote equality in the workplace and to challenge their employer when unlawful discrimination takes place.

The law is stated as at January 2005.

EQUALITY LAW IN CONTEXT

This chapter explains the context in which discrimination law operates in this country, the relationship between European and domestic law and the relevance of the Human Rights Act.

It then looks at how the law works in practice and explains which claims have to be brought in which court, the time limits that apply and some of the pitfalls to look out for.

UK DISCRIMINATION LAW

Discrimination law in this country is made up of different acts and regulations, each outlawing less favourable treatment on a specific ground: gender, race, disability, sexual orientation, religion, age and, in Northern Ireland, religious or political opinion.

Each strand shares common themes. Underpinning them all is the concept of unlawful direct discrimination – in other words, treating someone differently for an unlawful reason. So although employers are allowed to discriminate between two people on the ground that one of them is better than the other at their job, they are not allowed to discriminate on one of the protected grounds, for example that one of them is black and the other white.

The different strands also all contain concepts of indirect discrimination, with the exception of the Disability Discrimination Act which instead has a duty to make reasonable adjustments, and a duty not to treat a disabled person less favourably.

Indirect discrimination applies in situations where an employer applies a policy or practice which on the face of it is neutral, but in practice operates to the disadvantage of a protected group. For instance, a policy that says that only full time work is allowed will operate to the disadvantage of women who often have child care responsibilities and so need to work part time. A defence of justification is available to employers in indirect discrimination cases.

The different acts and regulations also all outlaw victimisation. These provisions protect workers who are penalised or disadvantaged in some way because they have pursued a tribunal claim, made allegations of discrimination or given evidence in a discrimination case on behalf of someone else.

Under the Race Relations Amendment Act 2000 public authorities have a duty to promote race equality. The Disability Rights Bill contains similar provisions in relation to disability, and the same duty is soon likely to be introduced in relation to gender.

The Equal Pay Act 1970 operates differently. It implies an equality clause into a person's contract of employment if they can show that they are being paid less than a person of the opposite sex in circumstances where both are doing like work, work rated as equivalent or work of equal value.

The Act was introduced to remedy the widespread problem of women being paid less then men. An employer can only defend a claim if he or she can provide a valid explanation for the pay difference.

If someone considers that they have been unlawfully discriminated against at work, they can pursue a claim in an employment tribunal. If the tribunal makes an error of law, then the decision can be appealed to the Employment Appeal Tribunal, from there to the Court of Appeal and finally to the House of Lords. In Northern Ireland appeals go straight from employment tribunals to the Northern Irish Court of Appeal.

Decisions in cases can clarify the law, and in some cases set precedents. Understanding the case law is therefore an important part of understanding the law.

In addition to the law itself, the three equality commissions – the Commission for Racial Equality, the Equal Opportunities Commission and the Disability Rights Commission – have all issued codes of practice. Although the codes do not have the force of law they carry considerable weight as to how the law should be interpreted.

EUROPEAN LAW

European law underpins all the different strands of equality law that apply in the UK. When interpreting UK law, courts and tribunals must ensure that they are complying with European law. A failure to do so can result in an error of law, which can then be appealed all the way to the European Court of Justice.

European equality law can also operate through treaty articles. The treaty article most commonly relied on is Article 141 of the EC Treaty (originally Article 119 of the Treaty of Rome which established the European Economic Community). Article 141 states that men and women should receive equal pay for equal work. The article can be relied on directly by both public and private sector workers in employment tribunals.

Directives require member states to introduce certain measures into their domestic systems to implement the aims of the directive, within a certain time limit. In addition, employees can require a court or tribunal to interpret the law in a way that is consistent with European directives, and in some circumstances public sector workers can rely directly on the terms of the directives against their employers.

The main directives of relevance in the discrimination context include the following:

1 **The Equal Pay Directive 1975** – this requires member states to introduce measures to enable all employees to pursue claims for equal pay for work of equal value.

2 **The Equal Treatment Directive 1976** – this prohibits discrimination on the grounds of gender or marriage.

3 **The Pregnant Workers Directive 1992** – this provides special protection for pregnant women and outlaws less favourable treatment on the grounds of pregnancy or maternity.

4 **The Race Directive 2000** – this prohibits direct and indirect discrimination on grounds of ethnic or racial origin.

5 **The Employment Directive 2000** – this regulates direct and indirect discrimination in relation to religion and belief, sexual orientation, age and disability.

As a result of these directives, the UK has had to introduce or amend its domestic legislation to comply with them. Where there is a conflict between domestic and European law, the latter always takes precedence.

THE HUMAN RIGHTS ACT

The European Convention on Human Rights which was adopted in 1950 was finally implemented in the UK by the Human Rights Act 1998 (HRA). This means that claimants can now rely on the HRA in UK courts and tribunals when interpreting other relevant laws. A claim for breach of the HRA can be brought directly in the High Court.

What rights does the HRA give?

The rights guaranteed by the HRA which have most impact on discrimination law are:

1 The right to freedom from torture, inhuman and degrading treatment (article 3).

2 The right to a fair trial (article 6).

3 The right to respect for private and family life (article 8).

4 The right to freedom of thought, conscience and religion (article 9).

5 The right to freedom of expression (article 10).

The Act also guarantees (under article 14) the right to freedom from discrimination on a wide range of grounds such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

But article 14 also requires that 'the enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination'. This means that this article can only be relied on when exercising another right under the Act or the Convention.

In practice, our employment law already complies with, or is reflected in, the provisions of the HRA, and tribunals and courts generally interpret the law in line with it. It is only in exceptional cases that the HRA will create rights for an employee over and above those that already exist under domestic and European law.

PRACTICAL CONSIDERATIONS: ENFORCING A CLAIM

What cases can employment tribunals hear?

Employment tribunals deal with most employment related disputes, including discrimination disputes. The procedures for taking claims to employment tribunals are more or less the same, irrespective of the type of claim that the individual is bringing.

Discrimination disputes that arise outside the employment context, for example in relation to the provision of goods and services, have to be brought through the county courts (or Sheriff Courts in Scotland) and are not covered in this publication.

What time limits apply to discrimination claims?

Subject to the new disputes resolution rules, the normal position regarding time limits in more or less all tribunal claims is that they have to be brought within three months, less one day, of the act of discrimination alleged, although different time limits apply in equal pay claims (see below).

It is not always easy to know when an act of discrimination has happened if it has taken place over a period of time – for instance, in cases of prolonged harassment. In these circumstances, the three-month time limit can run from the last act of harassment or discrimination.

But a distinction should be drawn between an ongoing policy and a one-off act with continuing consequences. So for example if an employer refuses unlawfully to promote a woman, the three months will run from the date of the refusal, even though the refusal has a continuing effect for the woman in terms of pay and status. On the other hand, if the employer has an ongoing policy of not promoting a particular individual, then the discrimination is likely to be treated as continuing.

If an employer makes a decision that seems discriminatory to the worker, which is then confirmed at a later date, it is likely that the three-month time limit will run from the date of the first decision.

In all discrimination cases tribunals may extend the time limit if it is 'just and equitable' to do so. Although tribunals can exercise a fair degree of discretion, there has to be some good reason why the claim was not presented in time.

Subject to the provisions of the statutory disputes procedure (see below), the fact that there is an ongoing internal grievance or appeal is not likely in itself to be deemed a good reason. If someone is trying to resolve a claim internally, then he or she should still lodge the tribunal application and ask for it to be 'stayed', pending the outcome of the internal procedure.

What time limits apply in equal pay claims?

A tribunal claim for equal pay must be lodged with the tribunal within six months of the termination of employment. Sequences of short-term contracts can be aggregated even though there are gaps between them, providing there is an overarching stable employment relationship. This means that the six-month period can run from the end of the last contract.

Extensions of time are allowed if the employer concealed relevant facts from the claimant, or where the claimant was under a disability.

What is involved in submitting a claim?

The procedure for submitting a claim involves filling out a claim form (called an ET1) giving details of the complaint, and lodging it with the relevant employment tribunal.

ET1 forms can be obtained from a trade union, a jobcentre, an ACAS office, the regional or national employment tribunal offices, or directly from the Employment Tribunal Service on 0845 7959775. A claim can also be made online. Because the time limit for lodging applications is tight, and deadlines are strictly observed by tribunals, it is a good idea once the application has been lodged to ring the tribunal office to make sure that it has been received.

What about resolving the dispute internally?

Providing there are no immediate time limit problems, workers should always try to resolve their grievances internally before lodging tribunal claims. A negotiated solution will almost always be more satisfactory and sustainable in the long term.

In addition, new compulsory disputes resolution procedures were introduced in October 2004 (except for Northern Ireland where they will take effect in 2005). As a result, unless an employee (they do not apply to workers) submits a grievance under the procedure and lets 28 days pass to allow the employer to respond, his or her complaint may be inadmissible at the tribunal. Tribunal time limits are usually extended to allow this to happen (see below).

Many employers already have disciplinary and grievance procedures in operation which are better than those set out in the new statutory provisions. In these circumstances an employee is entitled to rely on those procedures and employers should not insist on the statutory minimum.

What do the new disputes resolution procedures entail?

There are separate procedures involved for grievances and disciplinary action. It is the grievance procedure that is most likely to be relevant to discrimination claims.

There are three steps involved in the statutory grievance procedure:

Step one: if the employee decides to go ahead with a formal grievance, he or she has to put the complaint in writing to the employer.

Step two: the employer then has to invite the employee to a meeting once he or she has had a chance to make a considered response. The employee has to take 'all reasonable steps' to attend the meeting, and after it the employer has to tell the employee his or her response and give details of the right of appeal.

Step three: if the meeting has not resolved the grievance and the employee wants to appeal, another meeting has to be set up. After the meeting (which the employee again has to try to attend), the employer has to tell the employee of the outcome.

The employee has the right to be accompanied by a colleague or trade union representative to the step two meeting or the subsequent appeal. If one of the parties cannot attend for a reason that could not have been foreseen (for instance, illness), then the meeting has to be rearranged.

What is the modified procedure?

There is a modified version of this procedure which involves the employee setting out the complaint in writing and the employer replying in writing without meetings taking place. This applies when the employee has left his or her job and the employer was not aware of the grievance at that time.

The modified procedure can also apply if the employer was aware of the grievance, but the procedure had either not started or had not finished by the time the employee left. Both parties have to agree to the modified procedure, otherwise the standard grievance procedure applies.

The requirement to invoke the grievance procedure does not apply if it is not practical for employees to start off the process, once they have left their job.

What happens when there is overlap between the disciplinary and grievance procedures?

If an employee is dismissed, they should appeal under the disciplinary procedure. If, however, they resign and complain that they have been constructively dismissed, they should use the grievance procedure.

If an employee is aggrieved about their employer taking 'relevant disciplinary action' short of dismissal (but more than paid suspension or a warning), they should appeal under the standard disciplinary procedure.

If they think the relevant disciplinary action has nothing to do with their conduct or capability or is discriminatory, they should follow the disciplinary appeal route and also raise a grievance.

If the disciplinary action consists of an oral or written warning or a paid suspension (in which case the disciplinary procedure does not apply), the employee has to follow the grievance procedure in the usual way.

In all other cases, the employee should use the full grievance procedure.

What is the sanction for failing to follow the procedure?

A tribunal may reduce the award to an employee by at least 10 per cent and possibly up to 50 per cent. If the employer fails to follow the procedure, the award can be increased by between 10 and 50 per cent.

What exemptions apply?

The grievance procedure does not apply in the following cases:

1 If the employee is no longer employed and it is not reasonably practical for them to write the step one grievance letter.

2 If the grievance is about an actual dismissal or one that is being contemplated (but not a constructive dismissal).

The requirement to follow the statutory procedure also does not apply if:

1 A party has reasonable grounds to believe that following the procedure would result in a significant threat to themselves or someone else, or to their property.

2 A party has been subjected to harassment and has reasonable grounds to believe that following the procedure would result in further harassment.

3 It is not practical to follow the procedures within a reasonable period.

Unfortunately, the scope of these exemptions is not clear, and the best advice therefore is not to rely on them, but to follow the procedures instead.

How do the procedures affect time limits?

When a statutory grievance procedure applies, an employee must lodge their step one grievance within the usual time limit and then wait 28 days for the employer to respond. After 28 days if the grievance has not been resolved the tribunal application can be lodged. The employee will receive an automatic three month extension to the normal tribunal time limit if:

1 They submit a claim form to the tribunal within the normal time limit, but fail to send the step one letter. The claim form will be rejected by the tribunal, and they then have to submit the step one letter within one month of the expiry of the normal time limit and re-submit the tribunal claim form to the tribunal within three months.

OR

2 They send the step one letter within the normal time limit but do not wait 28 days, in which case they have to wait for the end of the 28-day period before they can resubmit the claim.

OR

3 They send the step one letter within the usual time limit.

The rules on time limits for grievances and tribunal applications are both complicated and rigid. It may be that under the new procedures, tribunals may not have the same right to admit late claims even if they consider it just and equitable to do so. There is therefore even more of a need than usual to ensure that tribunal claims are presented on time.

DISCRIMINATION QUESTIONNAIRES

A questionnaire procedure is available for all claims of discrimination. The purpose is to help workers obtain information to assess whether or not they have a legal claim. In practice it is also a good way of obtaining information and evidence for a tribunal claim.

Copies of the equal pay questionnaire are available from the Women and Equality Unit website on **www.womenandequalityunit.gov.uk**. Copies of the Race Relations Act questionnaire can be found on the CRE website **www.cre.gov.uk**. Likewise copies of the Disability Discrimination Act questionnaire can be found on the DRC website (under publications) on **www.drc-gb.org.uk** and sex discrimination questionnaires on the EOC website – **www.eoc.org.uk**.

More details of how to access questionnaires and employment tribunal forms are set out at the back of this publication.

How does the questionnaire procedure work?

The questionnaire should be completed with details of the allegations and a list of questions for the employer. It can be served on the employer at any time within three months of the act of discrimination complained of or within 21 days of lodging a tribunal application. Where the statutory grievance and disciplinary procedures apply and the normal time limit for lodging a claim form has been extended, the time limit for serving the questionnaire is also extended by three months.

The questionnaire can be used to ask employers to explain why they behaved in the way that they did. For instance, if the complaint is about an unsuccessful job application, questions can be asked about the selection criteria used, the selection arrangements adopted and why the successful candidate scored more etc.

Employers should reply to questionnaires within eight weeks. If the employer fails to complete the questionnaire, gives evasive answers, or delays in replying the tribunal can draw whatever inferences it wants from that fact, including the inference that the employer has acted in a discriminatory way.

What is discovery?

Once an individual has lodged a complaint and proceedings have started, the claimant can apply to the tribunal for 'discovery and inspection'. Or sometimes the tribunal will make a ruling of its own accord.

Discovery simply means requiring both parties to disclose all the documents that are relevant to the case. Inspection is the process whereby the parties can obtain the documents.

The parties to a case can also ask for 'further particulars' of the claim form or the defence, which is basically a way of asking for more detail about the basis of the claim or the basis of the defences lodged.

PROVING DISCRIMINATION

It is virtually impossible for a worker who has been discriminated against to provide clear evidence of that discrimination since evidence will often simply not exist. The law recognises this and allows courts and tribunals to determine whether discrimination has taken place by drawing inferences from the surrounding facts. It sets a heavy burden on employers to disprove discrimination once a 'prima facie' case has been made out.

The law on the standards and burden of proof can be summarised as follows:

1 It is up to claimants to prove their case on the balance of probabilities.

2 Because there is often no direct evidence of discrimination, the outcome may well depend on what inferences the tribunal can draw from the facts.

3 This can include the inference that employers have committed a discriminatory act if they give evasive answers in a questionnaire.

4 A finding of less favourable treatment and a finding that there has been different treatment in terms of one of the protected grounds may often indicate that discrimination may have taken place.

5 If the claimant can prove facts from which discrimination could be inferred (for example a black person who has the same qualifications for the job as the successful candidate but who is unsuccessful) the tribunal will look to the employer for an explanation.

6 If the employer cannot provide a proper explanation, or if the explanation is unsatisfactory, then the tribunal must infer discrimination.

In practice therefore the issue for the claimant will be to establish a potential case of discrimination. It will then be up to the employer to provide an explanation which is plausible and convincing, and has nothing to do with discrimination.

LIABILITY FOR DISCRIMINATION

The various discrimination statutes and regulations make employers liable for the discriminatory acts of their employees that are done in the course of their employment, whether or not the employer knows or approves of what has happened. This is known as vicarious liability.

Employers may also be liable for the acts of their agents working on their behalf, such as an employment agency. The employer will be liable in these circumstances where the acts were authorised by them, whether explicitly or not.

Tribunal claims may be brought against the employer as the person or body responsible for the acts of their employee or agent who committed the act of discrimination, and also against the individual employee or agent concerned.

What does 'in the course of employment' mean?

How do the courts decide whether something has been done in the 'course of employment'? In *Jones v Tower Boot Co Ltd*, the Court of Appeal said it was a simple question of fact, which has to be decided on a case-by-case basis.

In this case, the claimant resigned his job after a month because of the physical and verbal assaults to which he was subjected by two other workers. His legs were whipped, metal bolts thrown at him and he was called a series of offensive names.

Although the case outcome may seem obvious given the extent of the discrimination, the employment appeal tribunal (EAT) had found the employer not liable. According to the EAT it was precisely because the acts were so outrageous that they could not be regarded as being in the course of employment.

This decision was overturned by the Court of Appeal on the basis that if the EAT were correct the whole point of anti-discrimination legislation would be undermined. Instead it reinstated the tribunal's decision and held that the employer was liable, because on a natural reading of the words the offenders were carrying out the discrimination at work and during the course of their employment.

Are employers liable for the acts of third parties?

In *MacDonald v Ministry of Defence* and *Pearce v Governing Body of Mayfield Secondary School*, the House of Lords disagreed with the landmark decision of the EAT in *Burton and another v De Vere Hotels Ltd*.

The EAT had decided that a hotel was responsible for the racial discrimination and harassment to which two black waitresses whom they employed were subjected by the after dinner speaker, the 'comedian' Bernard Manning, and members of the audience. Clearly neither Mr Manning nor the audience were employees of the hotel. The EAT said that the hotel had allowed the harassment to occur in a situation that they could have controlled by the application of good employment practices.

The House of Lords in *Macdonald* disagreed with this decision, and said that employers could not be liable for the conduct of third parties in situations where the employer had inadvertently failed to take steps to prevent the abuse from taking place. It was not enough that the hotel had a degree of control over Bernard Manning and the hotel guests.

However, there may be different circumstances in which the employer is regarded as having responsibility for his or her contractors. For instance in the choice of the third party, or if the employer ignores complaints from employees about them, or clearly knows that a third party is likely to harass or abuse his or her employees.

In addition, the new statutory definition of harassment (see chapters two, five, eight and nine) may cover these types of situations in order to provide a degree of protection.

Is an employer liable for 'off duty' conduct?

Other difficulties arise in trying to ascertain whether employers are liable for off duty conduct that happens outside the workplace. For instance, when a woman prison officer was harassed at home by a colleague when he unexpectedly decided to visit, the EAT said that this was not in the 'course of employment' and so the employer was not liable for the sexual harassment that occurred.

But in another case in which a police officer claimed sexual harassment by a colleague as a result of two separate incidents in a pub, the employer was held to be liable. This was because the incidents took place during social gatherings immediately after work, one being an officer's leaving party. The EAT said the claimant was not just socialising off duty with the harasser and both incidents could be defined as an extension of their employment environment.

What defence do employers have in relation to discriminatory acts of their employees or agents?

Employers can avoid vicarious liability for the behaviour of their employees or agents if they can show that they took 'all reasonable steps' to prevent the discrimination from occurring. This is not an easy defence to run.

For instance, the employer may have to show that they have introduced and implemented an equal opportunities policy in their workplace; that they have communicated the policy to all their staff; that they have complied with the codes of practice of the Commissions, that managers and supervisors have received training on all aspects of the policy; and that it is clear to staff that violations of the policy, which should be dealt with promptly, will result in disciplinary action.

It is rare for an employer to succeed in making out this defence. However, if they do then the employee who committed the discriminatory act may still be liable as an individual. It is therefore crucial that claimants who are lodging tribunal claims name both the employer and the individual employee on the tribunal claim form.

REMEDIES IN DISCRIMINATION CASES

If the claimant wins his or her case, the tribunal can make an unlimited award of compensation.

Claimants can ask for:

1 Compensation for injury to feelings.

2 Loss of earnings, less any earnings from a new job up until the date of the hearing.

3 Loss of future earnings.

4 Loss of benefits such as pension, company car, health insurance.

5 Compensation for personal injury.

6 Aggravated damages if the employer has behaved in a high-handed way which has worsened the injury to feelings.

7 Interest.

In 2003-2004, median awards were in the region of £5,500 for sex discrimination claims, £5,600 for disability claims, and £8,500 in race discrimination claims.

In addition, a tribunal can make a recommendation that will reduce or avoid the impact of the discrimination on the employee if they are still working for the employer.

What about equal pay claims?

If the claim is for equal pay, a successful claimant is entitled to equal pay with his or her comparator from the date of the tribunal application. In addition they may claim back pay for up to six years in England, Wales and Northern Ireland, five years in Scotland, together with accrued interest.

COSTS

Costs are not payable in unsuccessful tribunal claims, although they may be awarded by tribunals against someone whom they consider has acted unreasonably in bringing, defending or conducting a case, or where they think the claim or the defence was so unlikely to succeed that it was 'misconceived'.

Costs are often threatened, inappropriately, by employers in order to pressurize claimants into withdrawing or settling cases. Attempts by employers to do this should be resisted.

On the other hand, where employers defend a case unreasonably or raise unnecessary arguments, for example when they insist on disputing that an individual is disabled when it is obvious that they are, then claimants or their representatives should consider making an application for costs against them.

Costs generally tend to relate to legal charges incurred by solicitors and barristers. They can also now include preparation time for trade union officials when they represent workers in tribunal cases without the involvement of lawyers.

REVIEWS AND APPEALS

If a claimant loses a case, he or she can ask the tribunal to review its judgment. This has to be done either at the hearing itself or within 14 days of the judgment being sent to the parties, though the tribunal retains a discretion to extend time if just and equitable. However this can only be done in very limited circumstances, for instance if the tribunal has made an error or if new (and relevant) evidence has become available after the hearing, providing the claimant could not reasonably have known about it at the time of the hearing.

Claimants can also appeal to the EAT within 42 days of the tribunal judgment being sent to the parties if there has been an error of law, or, for instance, where the tribunal did not take into account relevant evidence or the judgment was otherwise perverse. It is not possible for claimants to appeal against unfavourable findings of fact.

RACE

Minority ethnic communities make up about eight per cent of the UK population. Yet many – such as Pakistani, Bangladeshi and Black Caribbean people – are still far more likely to be unemployed, to earn considerably less than white people, and to be disproportionately under-represented in management positions.

These stark facts provide evidence of the extent of race discrimination still operating in our workplaces, even after the introduction of a positive duty on public bodies to promote race equality.

The following chapter provides an overview of the main employment provisions of the Race Relations Act 1976 and the Race Relations Amendment Act 2000.

THE RACE RELATIONS ACT 1976

The Race Relations Act 1976 (RRA) makes it unlawful to discriminate on racial grounds. The Act covers not just employment, but also education and the provision of goods and services. This chapter only deals with discrimination in employment.

The Act applies equally to white people as it does to ethnic minorities.

The Act has been amended frequently, most recently as a result of the Race Relations Act (Amendment) Regulations 2003 (implementing the European Race Directive 2000/43/EC).

As a result, the amended Act now includes different definitions of indirect discrimination and harassment as well as changes to the burden of proof and the general exemptions. These amendments only apply in certain circumstances, as set out below, with the result that the RRA can be complicated to apply.

What is the effect of the 2003 amendments on the RRA?

The RRA applies to anyone discriminated against on the basis of their race, ethnic or national origins, colour or nationality. The 2003 amending regulations, however, apply to discrimination only on the grounds of race or ethnic or national origins, and not colour or nationality.

In practice, the amended RRA is likely to be more favourable than the unamended version, and most discrimination can probably be categorised as being on grounds of race, ethnic and national origins so as to bring it within the scope of the amended Act.

In this chapter, it will be assumed that the amended RRA applies. There are, however, a few areas where the amended Act does not apply and these are set out. Although it is likely that employment tribunals will in general assume that the amended RRA applies, when lodging a tribunal application it is best to claim on the basis of all the protected grounds.

Where does the RRA apply?

Protection under the RRA applies to those working wholly or partly in Great Britain, as well as those who work outside it. People working on board British registered ships are also covered. For those working outside Britain, the employer must have a place of business in Britain and the work that the person is doing must be for the purpose of that business. Also the worker must be ordinarily resident in Britain when he or she applies for the job or at any time during their employment.

The Act applies equally to England, Wales and Scotland. Northern Ireland has almost identical provisions that apply to establishments there.

Who does the Act apply to and when?

The legislation applies to employees and workers (including job applicants), contract and agency workers, office holders, the police, the self-employed and members of the armed forces.

Workers who have left their job can also make a claim of discrimination or victimisation against their old employer, if they are complaining about something that arises out of and was closely connected to that working relationship.

Liability goes much further than just employers and includes partnerships, trade organisations (including trade unions), barristers, qualifications bodies, providers of vocational training, providers of insurance services, trustees and managers of occupational pension schemes and employment agencies. It also now extends to private households where people are engaged to work in the household.

There is no qualifying period of service needed before the RRA provides protection, so a worker is protected from day one of their employment.

What is meant by the term 'racial grounds'?

Racial grounds are defined in the amended Act as race, ethnic or national origins. A person making a claim under the RRA can be a member of more than one racial group.

The unamended RRA applies to colour or nationality as well.

What is meant by 'colour' and 'race'?

Colour has not been defined by the courts as such, nor is guidance given in the CRE Code, but would for example cover less favourable treatment of African Caribbeans who have dark skins compared with those with lighter skins.

The concept of race is even more difficult to define and has barely been mentioned in the reported cases.

What is meant by 'nationality' and 'national origins'?

Nationality includes but is not restricted to citizenship which is usually acquired at birth, but can be acquired by marriage or adoption.

National origins, on the other hand, has a different meaning. Discrimination against someone who was born in India but has a British passport would probably be treated as discrimination on the ground of national origins but not nationality (since their nationality is British).

Likewise there have been tribunal cases dealing with discrimination involving the English and Scottish, where the discrimination is on the ground of 'national origins', namely English or Scottish, but not nationality which for both groups would be the same, namely British.

The term national origins does, however, have to refer to a particular place or country of origin as opposed to being just 'non-British'.

What is meant by 'ethnic origins'?

In the leading case on this point (*Mandla and anor v Lee and ors*), Mr Mandla's son, a Sikh, was refused a place at an independent school because he would not remove his turban in contravention of the school's uniform rules. The House of Lords said ethnic origins could include religious and cultural factors as well as racial ones. Sikhs were, therefore, an ethnic group.

The case also identified the essential characteristics of an ethnic group – a long, shared history and a cultural tradition of its own. Other relevant characteristics might include having a small number of common ancestors, a common language, a common literature, a common religion, and a sense of being a minority within a larger community.

What about religion and ethnic groups?

Religions are not specifically protected under the RRA.

Jews and Sikhs have been accepted by the courts as racial groups, but Muslims and Rastafarians have not been. To deal with this anomaly, tribunals have accepted arguments under the RRA that the discrimination is not due so much to the religion as to a person's ethnic origins of which the religion may be one factor. So a Pakistani Muslim could bring a complaint of race discrimination on the basis that he or she has been discriminated against on the ground of their national origins.

Alternatively it is sometimes possible to make a claim of indirect race discrimination, but obviously this would not work if the basis of the discrimination was religion alone.

The new Employment Equality (Religion or Belief) Regulations 2003 address this serious inconsistency in that they specifically outlaw discrimination on the ground of religion or belief (see chapter nine). However, the regulations currently only cover employment (although the government is proposing to extend them), whereas the RRA also covers education and the provision of goods and services.

DISCRIMINATION

The Act sets out four main forms of unlawful discrimination: direct discrimination, indirect discrimination, harassment and victimisation.

Direct discrimination

Direct discrimination occurs when a person is treated less favourably than someone else on racial grounds. It does not matter whether the 'racial grounds' relate to the actual victim of the discrimination, or someone else.

So for example someone treated less favourably because of the 'racial grounds' of their friends or family would be covered. Equally, it is irrelevant if the reason for the discrimination turns out to be based on an incorrect understanding of the person's race.

The 'racial grounds' do not need to be the sole reason for the treatment, providing that they are an important factor. The motive of the discriminator is irrelevant, and indeed discrimination is often not even conscious.

Who can the comparator be?

To make out a case of direct discrimination, the claimant has to show that he or she has been treated less favourably in comparison with someone else of a different racial group, who can be real or hypothetical. This other person is the comparator.

The comparator also has to be someone who is in the same situation as the claimant for all intents and purposes, except that he or she is not a member of the 'protected class' (to use the terminology of the courts).

Take the example of someone who has been disciplined for being late for work a couple of times, and who is black. The tribunal has to look at the employer's treatment of that worker and compare that to how the employer treated (or would treat) a white person who had also been late for work.

Not surprisingly, there may not be an actual comparator in the same circumstances which means that the tribunals often have to construct a hypothetical one. This is not easy and may involve them looking at a number of other people whose situations are similar, although not identical, in order to decide how they think the employer would have treated a hypothetical comparator of a different race.

In order to avoid getting sidetracked by finding comparators, the House of Lords has said that tribunals can sometimes look first at the question of why the claimant was treated in the way that he or she was. If it can be shown that race played no part in the treatment, then the case will not succeed.

Conversely, if it can be shown that race did have a significant effect, then the treatment will be deemed to be less favourable. The issue of the appropriate comparator then has less significance.

How can direct discrimination be proved?

Employers do not in general advertise their prejudices, so there is rarely any obvious evidence that discrimination has taken place. Courts and tribunals recognise this, and as explained in chapter one, have identified when an inference of unlawful discrimination may be drawn.

It may be more difficult to prove discrimination when an employer behaves in an irrational or unreasonable way. The courts have repeatedly made the point that unreasonable or irrational behaviour is not the same as unlawful discriminatory conduct.

But following the important Court of Appeal decision in *Anya v University of Oxford*, employers now have to produce evidence that they would have behaved in a similarly irrational or unreasonable way to someone who was not of the same racial group. A vague rebuttal from the employer that they would behave in the same way to anyone, whether black or white, is unlikely to be good enough.

Indirect discrimination

Indirect discrimination applies where the employer operates a practice which on the face of it is neutral in relation to race, but in practice works to the disadvantage of a racial group.

To follow the wording of the amended RRA, the employer operates a provision, criterion or practice which puts or would put people of a certain race or ethnic or national origin at a particular disadvantage in comparison with other groups and which cannot be justified.

So to establish a case of indirect discrimination, there has to be evidence showing that the practice in question has a detrimental effect on the particular race in comparison with other races.

This can take the form of evidence about the national characteristics of a particular racial group, which can then be read into the particular situation that the individual faces. Or it may take the form of statistics showing how particular groups are disadvantaged by certain practices.

As with direct discrimination, there does not have to be an intention to discriminate to be caught by the law. But unlike direct discrimination employers can defend indirect discrimination providing they can objectively justify it for good reasons on non-racial grounds.

Take the example of an organisation that advertises a vacancy which is only open to staff at a certain grade. If that grade is dominated by white people, a black employee could bring a claim of indirect discrimination because he or she was prevented by that requirement from applying. The evidence of

disadvantage would be likely to be statistics showing the racial breakdown of the grade in question. As a defence, the employer would have to show that the requirement for that particular grade was objectively justified.

What is the test for objective justification?

The onus is on employers to prove their defence. They have to show that the 'provision, criterion or practice' they have applied in their business is, when looked at objectively, proportionate to the aim that they are trying to achieve.

This involves balancing the interests of the employer against those of the disadvantaged worker. The worker is likely to be in a stronger position when they can show that there were other, non-discriminatory, ways of achieving the employer's objective.

What happens when indirect discrimination is on the ground of colour or nationality?

When the discrimination is solely on grounds of colour or nationality, the unamended RRA applies. Here the definition of indirect discrimination is different. To prove a case the employee has to show:

- that the employer had applied a 'requirement or condition' with which he or she cannot comply
- that it can only be met by a considerably smaller proportion of people from the worker's particular racial group
- that it puts them at a disadvantage because he or she cannot meet it
- that the requirement or condition cannot be justified by the employer

The phrase 'requirement or condition' is narrower than the amended wording 'provision, criterion or practice' but in practice this difference is unlikely to have much impact.

Because the comparison of the two racial groups (referred to as pools) has to involve a like for like comparison, the choice of pool is often far from straightforward (see chapter three on gender). The pool should consist of all the people who could have had access to the benefit being denied, were it not for the requirement or condition that the employer has imposed.

Once the pools have been established, the worker has to show that the proportion of people of their racial group (ie colour or nationality) who can comply with the requirement or condition is considerably smaller than the proportion who can comply from the other racial group.

If the worker can show that the practice does, in fact, disproportionately affect their racial group then the burden is on the employer to convince the tribunal that the requirement or condition is justified.

In a European case concerned with sex discrimination *(Bilka Kaufhaus Gmbh v Weber von Hartz)* the European Court held that employers can justify a discriminatory practice if they can show that:

- it can be justified on grounds other than sex (or race)
- it corresponds to a real need on the part of the organisation
- it is appropriate to meet that need, and
- it is necessary to that end

The requirement for the practice to be 'necessary' to the employer imposes a high threshold. It is likely that the same threshold will be held to apply to the justification defence in the amended RRA.

How does indirect discrimination work in practice?

Take the example of an employer who insists that all staff wear hats as part of their uniform. This requirement is likely to adversely affect more Sikhs than non-Sikh groups who may not be able to wear hats as well as turbans. A worker seeking to argue a case of indirect discrimination would therefore need to be able to produce evidence of the requirement for Sikhs to wear turbans.

The employer, in turn, would have to identify his or her objectives in insisting on the requirement, and would also need to show that it was proportionate. In practice it is hard to see how an employer would be able to justify such a requirement, in that imposing a uniform code that prevented Sikhs from working for him or her is unlikely to be regarded as proportionate.

Harassment

The amended RRA introduced a new statutory definition of racial harassment. Again, this only covers harassment on the grounds of race or ethnic or national origins, and not colour or nationality.

Workers who are harassed on grounds of colour or nationality will not therefore be able to rely on the new definition of harassment. They can, however, rely on the unamended RRA under which harassment is viewed as a form of direct discrimination causing them a 'detriment'.

What is the new definition of harassment?

Unlawful harassment occurs when someone is subjected to unwanted conduct that has the purpose or effect of violating their dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment, and the treatment is on the grounds of race, national or ethnic origin.

Conduct will only be regarded as harassment when all the circumstances are taken into account (including the perception of the person at the receiving end) and if it is reasonable to conclude that it could have had this effect.

But where the harasser's conduct was deliberate and they set out with the purpose of violating the other person's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment, then the harassment will be deemed to have occurred regardless of the perception of the victim and whether or not it is reasonable to consider it as having that effect.

The harassment does not necessarily have to relate to the race of the claimant. For instance, someone could be harassed because of the race or ethnic or national origin of a friend or a relative and still claim that they have been unlawfully harassed.

Nor does race have to be the sole reason for the harassment, just a significant influence and a cause of the conduct. In one case a Pakistani computer engineer was subjected to a long period of serious abuse. The tribunal rejected his claim that he had been treated in that way because of his race, because the evidence suggested that the abuser treated everyone the same way.

Is there a need for a comparator?

Under the amended RRA, there is no need for a victim of harassment to show that he or she has been treated less favourably than anyone else, so avoiding the need to identify a comparator. This is a significant distinction between the old rules and the new ones.

However, tribunals still have to establish that the claimant would have been harassed, were it not for their race or ethnic or national origins. In reality, that may involve a consideration of how someone else of a different race would have been treated.

What type of conduct is covered?

The Act does not define what constitutes a violation of someone's dignity nor what might amount to an intimidating, hostile, degrading, humiliating or offensive environment, but it is likely to cover a wide range of conduct from abusive language to excessive criticism of someone's work.

Whatever it is, it has to be unwanted. In a well known sex discrimination case *(Reed and anor v Stedman)* the EAT said that the act of harassment did not have to be committed and then rejected by the claimant for it to be unwanted, and the claimant did not have to let it be known in advance that the conduct was unacceptable. That being so, a single act was enough to constitute unlawful harassment.

Can harassment also be direct discrimination?

If the circumstances of the harassment do not fit within the new statutory definition, workers can still claim direct discrimination on the basis that they have been subjected to a 'detriment' or disadvantage.

Unlike the new definition of harassment, the direct discrimination route involves a comparison. In other words, the complainant has to prove that the treatment was less favourable than that meted out to someone else, on grounds of race.

If, on the other hand, the harassment does fit within the new definition then the worker cannot also claim direct discrimination arising out of the same facts. If the basis of the harassment is not clear, workers should present their claims on both grounds.

Victimisation

The law provides protection for workers from acts of victimisation by employers as a consequence of the worker having carried out a 'protected act'.

'Protected acts' include:

- bringing proceedings under the RRA
- giving evidence or information in connection with proceedings
- anything else to do with the Act
- making allegations of discrimination

So, for example, it may amount to unlawful victimisation if an employer does not promote someone because they have previously complained of discrimination, or does not offer someone a job who has sued a previous employer for race discrimination.

Once the worker has shown that they have done one or more of these 'protected acts', they then have to show that their employer treated them less favourably than someone else (who can be hypothetical) in the same circumstances. Less favourable treatment can include refusing to employ, promote or train the person, or provide a reference.

However, according to the House of Lords in *Chief Constable of West Yorkshire v Khan*, the employer can take steps in order not to prejudice existing tribunal proceedings. In this case, the Chief Constable refused to provide Mr Khan with a reference for another job because of Mr Khan's ongoing discrimination claim against them. The Chief Constable did this on the basis that it might prejudice his position in the existing race discrimination tribunal claim.

According to the House of Lords the reason that the reference was withheld was not 'by reason that' Mr Khan had brought discrimination proceedings, but rather because the employer temporarily needed to protect his position in the outstanding proceedings. As a result, the House of Lords held that the Chief Constable had acted lawfully.

Unfortunately for employees, this can mean that they may not be able to obtain a reference until the proceedings finish, which may make it difficult to find another job.

THE EXCEPTIONS

There are four basic circumstances when the Act does not provide protection against discrimination:

- the genuine occupational requirement
- positive action
- Sikhs on construction sites
- national security

All these exemptions have to be narrowly construed since they represent exceptions to the fundamental principle of race equality.

What is the genuine occupational requirement in the amended RRA?

The amended RRA provides that an employer can discriminate on grounds of race or ethnic or national origins (but not colour or nationality) if he or she can satisfy the following test for a genuine occupational requirement:

- that the reason for wanting someone of a particular race or ethnic or national origin is a genuine and decisive requirement for that job
- that the requirement is proportionate, and
- that the person either does not meet the requirement for the job, or the employer is not satisfied that they do and it is reasonable in all the circumstances for them to reach that conclusion

These provisions cover discrimination in recruitment, promotion, transfer, training and dismissal.

What is the genuine occupational qualification in the unamended RRA?

Under the unamended RRA, an employer is allowed to discriminate where he or she can show that a person's colour or nationality is a genuine occupational qualification (GOQ) for the job, in which case the employer can discriminate in recruitment and opportunities for promotion or transfer to that particular job, but not in any other circumstances.

There are only four grounds on which race is a genuine occupational qualification under the RRA:

- dramatic performances – the job involves taking part in a play or other dramatic performance and someone of a particular racial group is needed. (As this only applies to skin colour, an employer could not for example claim a GOQ exception to recruit an Irish actor to play an Irish character)
- models – the job involves being an artist's or photographic model
- restaurants – the job involves working in a place where food and drink are being served to the public, such as a waiter in a Chinese or Indian restaurant
- personal services – the job holder provides people of a particular racial group with personal welfare services

The exception will not apply if an employer already has enough staff from the specific racial group who could take on the duties of the job without too much inconvenience.

What is positive action?

Positive action means giving preferential treatment to an individual or group of people to prevent, or compensate for, past disadvantages and is a reasonable thing to do. It is not the same as positive discrimination, which involves treating people more favourably on grounds of race and is unlawful.

The law allows employers to:

- provide training for people of a particular racial group which would fit them for particular work if in the preceding 12 months there were none (or disproportionately few) of them doing that sort of work, or
- run a recruitment campaign to encourage members of a particular racial group to apply for certain kinds of work, as long as there were none (or disproportionately few) doing that particular kind of work in the preceding 12 months

The Act specifically allows employers, trade unions, employers' associations and trade or professional organisations to provide training or encouragement exclusively for workers or members of a particular racial group, to equip them to do particular work or hold particular posts at a particular establishment, where that group is underrepresented.

The CRE's code of practice on racial equality in employment cites the example of an employer with no senior black managers. He or she can offer training to junior black managers, for example in project management or interviewing techniques or by giving opportunities to shadow other managers.

The code warns, however, that anyone making use of the positive action provisions should be careful that the training or encouragement does not automatically lead to recruitment. All candidates have to be assessed and selected for employment solely on the basis of merit.

What protection do Sikhs have?

The Act exempts turban-wearing Sikhs on a construction site from having to wear a safety helmet. If they are injured, any compensation would be restricted to the injury they would have suffered had they been wearing a helmet.

What is the national security exception?

This exception applies where the discriminatory act is done to safeguard national security and it can be justified.

POSITIVE DUTY ON PUBLIC SECTOR EMPLOYERS

Following the Stephen Lawrence inquiry, the RRA was amended by the Race Relations Amendment Act 2000 to introduce a general statutory duty on public authorities to promote race equality.

What is the Race Relations Amendment Act 2000?

The 2000 Act requires public authorities to carry out their duties with due regard for the need to eliminate unlawful racial discrimination and promote equality of opportunity and good relations between different racial groups.

In addition, public bodies have to carry out other specific duties to help them perform this general duty. This involves:

- assessing their functions and policies relevant to race equality
- monitoring their policies in relation to their impact on race
- assessing and consulting on the policies they propose to introduce
- publishing the results
- training their staff on their new duties

As part of these duties, public bodies have to publish a race equality scheme setting out how they will carry out both their specific and general duties.

How do these public sector duties affect employees?

In relation to staff, all public authorities must monitor, by ethnic group, their existing staff as well as applicants for jobs, and staff who apply for promotion or training. Employers must publish the results every year.

In addition, public authorities with at least 150 full time staff have to:

- monitor and analyse by racial group statistics regarding those staff who receive training, are involved in grievances or are the subject of disciplinary procedures, who benefit or suffer detriment from performance appraisals, and staff who leave
- assess the data by reference to grades, management or profession
- ensure that they take action as a consequence

There are no equivalent duties on private sector employers.

The CRE has produced a statutory code of practice, providing public bodies with guidance about how to fulfil these duties. The main impact for trade unions and their members is that employers are forced to address these important issues, provide information and consult with both the unions and their workforce.

If employers comply with their duties to monitor and publish data, they will generate a considerable amount of information as to the existence of any race discrimination in the workplace. This should be of use to trade unions and their members in addressing issues of race discrimination at work.

Complaints about a breach of any of these duties cannot be enforced in an employment tribunal – they are enforced by the CRE or through the High Court.

THE RRA IN PRACTICE IN THE WORKPLACE

What are the rules about job advertisements?

It is unlawful under the Act to publish or cause to be published an advertisement that indicates an intention to discriminate. That means that both the employer placing the advert and the actual publisher may be liable.

It is irrelevant whether the employer intended to discriminate. If that is how an ordinary person would be likely to read the advert, then it would be discriminatory.

Employers are, however, allowed under the legislation to indicate a preference in an advertisement for someone of a particular racial group, if it is to satisfy a genuine occupational requirement (see above).

Only the CRE can bring proceedings for a discriminatory advert, but individuals offended by one can bring it to the CRE's attention.

What rules apply to the recruitment and promotion process?

There are three ways in which it is unlawful for an employer to discriminate at the recruitment or promotion stage:

- in the 'arrangements' made for deciding who should be offered a job or promotion (such as the instructions given to a personnel officer or to an employment agency)
- in any terms of employment (for instance, in relation to pay or holidays)
- by refusing or deliberately omitting to offer someone a job by rejecting an application or by deliberately avoiding consideration of an application

What does the law mean by 'arrangements' for a job?

There is no statutory definition of what constitutes an 'arrangement' in the recruitment process. Although advertising is not included, more or less everything else in the process can be. In other words, the methods used for recruitment, the job description, the wording on the application form, the way the interview is conducted and the criteria used for selection.

In the case of *London Borough of Croydon v Kuttappan*, the EAT said that the concept of 'arrangements' included the following:

- a refusal to consider an application at all
- the exclusion of applicants in a particular area
- telling potential applicants not to apply for the job
- telling an applicant that a job is filled when it is not
- a refusal to interview someone or to provide an unbiased interviewing panel

What rules apply to application forms?

There are no rules as such, but the CRE recommends that employers use a standard application form. This allows employers to obtain the information that they need in order to make an objective assessment of a person's ability to do the job. It also means that all applicants have the opportunity to compete on equal terms.

The CRE also recommends that employers should not demand a higher level of educational qualification than is needed. In a case brought against British Leyland (*Isa and Rashid v BL Cars Ltd*), two Pakistani applicants were refused employment because they could not complete their application forms themselves, as they could not read or write English. BL subsequently admitted that the practice was discriminatory because they did not need to be able to write in order to work as labourers.

What selection criteria should employers use?

In *North West Thames Regional Health Authority v Noone*, the Court of Appeal emphasised the importance of clear selection criteria to avoid discrimination. In this case, Dr Noone obtained qualifications in Sri Lanka. She was interviewed for a post where the qualities considered by the panel were training, qualification, experience and personality. She was not successful despite having better qualifications and more experience than the other candidates.

The Court of Appeal upheld the tribunal's decision that the interview procedure had been 'little more than a sham', the decision made was subjective to the point of being arbitrary and that she had been discriminated against on the grounds of race.

To avoid these situations, the CRE recommends that more than one person should be involved in short-listing candidates and that they should agree on a marking system before the applications are assessed. Employers should provide training and written guidance to make sure that members of the short-listing panel understand the marking system.

What about aptitude and other tests?

The CRE code says that well-designed, properly administered and professionally validated ability tests can be a useful method of predicting candidates' performance in a particular job.

Equally, however, tests that are poorly constructed will not only result in an unsatisfactory selection decision, but may also be a cause of indirect racial discrimination. Of course all candidates must be asked to take the test.

The CRE advises employers to check their selection tests regularly to make sure that candidates are only being tested for requirements that are relevant to the job.

What questions can an employer ask at interview?

Basically employers should ask questions that relate to the requirements of the job, and they should try to ask the same questions of all candidates. However, if an employer asks the same potentially discriminatory question of everyone (such as whether they often spend long periods abroad), a tribunal may still infer discrimination. Employers should avoid questions about hobbies or social activities, unless these are relevant to the job.

Notes should be taken during each interview of all the questions and answers, and records kept of interviewers' marking, panel discussions, and final decisions. If an employer fails to do that, a tribunal may draw an inference of unlawful discrimination.

What if the employer refuses to offer the job or promotion?

It is unlawful for an employer to refuse someone a job or deliberately avoid offering them a job because of their race. There is no legal requirement on an employer, however, to tell applicants why they were unsuccessful but it is good practice to do so. A worker who alleges discrimination may ask for reasons when submitting a questionnaire (see chapter one).

Preventing someone from applying for a job can also amount to a refusal to offer employment. For instance (in *Scott v Norfolk House Hotel*) a West Indian woman who applied in person at the hotel was told the job had been taken. When she telephoned later, she was told it was still available.

What happens when different people within the organisation are responsible for the discrimination?

This situation often arises when a person is treated less favourably over a period of time by different people. For example in the GMB-backed case of *Rihal v London Borough of Ealing*, Mr Rihal was consistently turned down for promotion over a long period of time. The various decisions not to promote him were made by different managers.

The Court of Appeal rejected the argument that each decision by a different manager should be regarded individually, and upheld his race case. They emphasised that it is the employer who has overall responsibility and if the employer is operating a discriminatory arrangement, he or she remains liable even if the managers involved change.

What about performance appraisals?

Once an employer has taken a worker on, it is unlawful for him or her to discriminate on racial grounds in assessing a worker's performance. The CRE code points out that the danger with performance assessments is that they can very easily turn into assessments of the person, as opposed to their skills as a worker. Statistics indicate that ethnic minority staff are often assessed at a lower level compared to white staff.

If the statistics show that ethnic minority staff are consistently scoring lower marks than white staff, the employer may be vulnerable to a claim of race discrimination.

The code recommends therefore that employers should ensure that judgements of performance are precisely that: judgements of actual performance of specific tasks, measured by impartial and objective standards, particularly when performance is linked to pay, bonuses or benefits.

Specifically, the assessment process should provide for the appraisal to be validated by another manager, and give the worker an opportunity to comment on the assessment, discuss any concerns, and to appeal through an independent process, if there is disagreement about the final assessment.

Public sector employers with over 150 staff have to monitor performance appraisals by reference to race. The results of this monitoring should reveal whether or not appraisals are operating in a discriminatory way.

What about instructions to discriminate?

The courts have said that the RRA also provides protection to anyone who is instructed to discriminate against someone else because of their race. For instance, in *Weathersfield Ltd t/a Van and Truck Rentals v Sargent*, a receptionist who resigned after refusing to comply with an instruction from her employer to discriminate against black and Asian customers was protected by the RRA and was also able to claim constructive dismissal.

The legislation also says it is unlawful to 'procure' or 'attempt to procure' an unlawful act, so that even if the act is not carried out, it is still caught by the legislation. Likewise, it is unlawful to pressurise someone to carry out an act that is outlawed by the legislation.

What is the impact of the Asylum and Immigration Act on workers?

Under section 8 of the Asylum and Immigration Act 1996 it is illegal for employers to hire someone who is not allowed to work in this country. The onus is on the employer to investigate an applicant's eligibility for employment in the UK, and they have to ask a prospective employee for one of a number of documents to verify their work status before taking them on.

The problem for employers is to ensure that they comply with the legislation without discriminating against someone on racial grounds under the RRA. The CRE has issued a code of practice on the operation of the Act. Both the CRE and the Home Office recommend that any questions about work permits and immigration status should be asked of all candidates.

The legislation does not apply to British, Irish, Commonwealth or EU citizens.

What other terms does the RRA cover?

The RRA also makes it unlawful to discriminate on grounds of race in the contractual terms and conditions of employment that employers offer to staff. The same applies to opportunities for promotion, transfer or training or to any other benefits, facilities or services, which may be contractual or non-contractual.

Terms and conditions of employment cover a wide spectrum – from pay and hours of work to luncheon vouchers. Likewise, the terms 'benefits, facilities and services' can include failing to pursue an employee's grievance, or failing to carry out an adequate investigation into it.

It is also unlawful for an employer to dismiss someone or make them redundant on racial grounds. It is important, therefore, to check selection criteria in redundancy agreements to make sure they are not discriminatory. Dismissal includes non-renewal of a fixed term contract and constructive dismissal.

Can disciplinary action also be discriminatory?

Subjecting workers to disciplinary action (or threatening them with it) can also amount to discrimination. So if an employer penalises a black worker more often or more harshly than his or her white counterpart, a tribunal may well find this was due to race.

Public sector employers where there are more than 150 full time employees have to monitor disciplinary action by reference to ethnicity. This monitoring data will reveal whether ethnic minority staff are disciplined more often than white staff.

However, if an employer carries out a disciplinary procedure in an unreasonable way against a black or minority ethnic worker, the tribunal will not necessarily conclude this was motivated by race discrimination. The employer might well have behaved just as unreasonably towards a white worker.

Again, though, if the employer cannot provide an explanation for the behaviour, and there is no evidence of other such unreasonable behaviour to non-ethnic minority staff, the tribunal may well draw an inference of discrimination (see chapter one).

Can workers take action against an employer after their employment has terminated?

Once workers have left their employment, they can still bring a claim against their former employer for discrimination. This is most likely to arise in the context of an appeal against dismissal or in relation to a request for a reference.

To come under the protection of the RRA, however, the discrimination or harassment must arise out of and be closely connected to that relationship. This is likely to be the case in relation to most appeals and letters of reference.

Can trade unions get rid of racist members?

Trade unions have powers to exclude or expel racist members for behaviour which is incompatible with membership of a trade union, powers which have recently been extended by the Employment Relations Act 2004.

GENDER

The gender balance in the workplace is changing. Twenty years ago, women accounted for just over 40% of the workforce. In all, approximately 70% of women of working age are in work, compared to 80% of all working age men. Of those in employment, more than two fifths work part time.

But although women make up almost half the workforce, they are often segregated into a narrow range of jobs – such as secretaries, nurses, cooks and cleaners.

And there are also proportionately few women in senior positions. Overall in the UK, only about 30% of all managers are women.

Although the Sex Discrimination Act, introduced in 1975, has had a considerable impact in improving the position of women in the workplace, there is clearly still a long way to go.

The following chapter provides an overview of the main provisions of the Act.

THE SEX DISCRIMINATION ACT

The aim of the Sex Discrimination Act 1975 (SDA) is to outlaw discrimination on the grounds of sex and marital status in employment, education and the provision of goods and services. This publication deals only with the employment provisions.

The Act applies equally to women and men, but because women are more likely to suffer discrimination than men, references in this chapter are to women only.

The SDA applies to all discriminatory behaviour, decisions and treatment in the workplace. It covers everything other than terms of employment. If a woman is discriminated against in her contractual terms of employment or other benefits relating to her contract, then it is the Equal Pay Act that applies (see chapter seven).

The protection against discrimination on the grounds of marital status only applies to protect people who are married and not those who are unmarried.

Where does the SDA apply?

The Act covers anyone who works wholly or partly in Great Britain. It is only if a person works exclusively outside Great Britain that they are excluded.

People working on board British registered ships are also covered, unless they work wholly outside Great Britain. Those working on aircraft and hovercraft registered in the UK and operated by someone with their main place of business in Britain (or who usually lives there) are also covered unless they work wholly outside Britain.

The Act applies equally to England, Wales and Scotland. Northern Ireland has almost identical provisions that apply to establishments there.

Who does the Act apply to and when?

The SDA applies to all employees and workers (including job applicants), apprentices, contract and agency workers, office holders, the police, the self-employed and members of the armed forces.

Liability goes much further than just employers and includes partnerships, trade organisations (including trade unions), barristers, qualifications bodies, providers of vocational training, providers of insurance services, trustees and managers of occupational pension schemes and employment agencies.

Ex-employees can also make a claim of discrimination or victimisation against their former employer, if they are complaining about something that was closely connected to that working relationship.

There is no qualifying period of service required under the Act, so a worker is protected from day one of their employment.

DISCRIMINATION

The Act defines four main forms of unlawful discrimination: direct discrimination, indirect discrimination, harassment and victimisation.

Direct discrimination

Direct sex discrimination arises where an employer treats a woman less favourably because of her sex than a man is or would be treated, or where a married person is treated less favourably than an unmarried person. It is irrelevant whether or not the employer intended to discriminate – the test is whether she would have been subjected to that treatment had it not been for her sex or married status.

There is no defence available to an employer in a case of direct discrimination.

But what amounts to less favourable treatment? Often it will be obvious such as failing to promote someone or dismissing them. But sometimes it will be more subtle, such as encouraging a woman to have an administrative rather than a client facing role because of a stereotypical assumption that clients would prefer to work with a man.

The key issue in direct discrimination is that the woman is being treated less favourably than a man has been or would be. He is referred to as her comparator.

Who should the comparator be?

Unless the discrimination is sex specific (for example, to do with pregnancy), the circumstances of the comparator must be the same or 'not materially different' to the circumstances of the claimant. If there is no man in the same circumstances then the comparator will have to be hypothetical.

What was the reason for the less favourable treatment?

Once the complainant has been able to show that she has been treated less favourably than a man, she then has to show that the reason for the less favourable treatment was because of her gender. Sometimes the test is described as the 'but for' test.

In other words, she has to show that 'but for' her sex, she would not have been treated less favourably than a man. Increasingly, however, tribunals and courts are simply asking the question: what was the reason for her treatment?

The woman does not have to show that her gender was the only reason for her treatment, but it does need to be the main reason. The motive of the employer is irrelevant. Conscious motivation is not necessary to prove direct discrimination.

So, for example, if a woman is not promoted, the issue will be whether a man in the same circumstances, with the same skills, experience and attributes, would have been treated in the same way.

If the employer can show that the reason she was not promoted had nothing to do with her gender and everything to do with, for example, a lack of confidence and that a man with a similar lack of confidence would have been treated the same way, then she will not succeed in her claim.

How do employees prove discrimination?

Proving discrimination is never easy, but that is acknowledged by the tribunals and courts. Many cases have made it clear that direct evidence of discrimination will rarely be available. Instead tribunals may draw inferences of discrimination from the facts (see chapter one).

Indirect discrimination

Indirect discrimination applies to policies and practices that appear to be gender neutral, but which in practice disadvantage one gender more than another. There can also be indirect discrimination on the ground of marital status where a practice disproportionately affects more married people than unmarried.

There is a defence of justification available to employers in cases of indirect discrimination.

Take the example of part-time work. Far more women than men work part time due to childcare responsibilities, so any work practices that treat part-timers less favourably, or which refuse access to part-time work, are likely to indirectly discriminate against women. Unless the employer can justify the practice, it may amount to unlawful indirect discrimination. Similar issues may arise with weekend work, and flexible or rotating shift patterns.

Part-time workers now have additional protection in the Part-time Workers (Prevention of Less Favourable Treatment) Regulations 2000. In brief, these regulations ensure that part-time workers are not treated less favourably than comparable full time workers unless justified. The regulations do not however create a right for women to access part-time work, and to date the impact of the regulations has been limited.

How does a worker prove indirect discrimination?

To prove indirect discrimination, four questions have to be answered:

- Has the employer imposed a provision, criterion or practice?
- Is it to the detriment of a considerably larger proportion of women than men?
- Does it disadvantage the woman?
- Can the employer justify the provision, criterion or practice in terms of a real need on the part of the business which, in itself, must not be discriminatory?

What constitutes a provision, criterion or practice?

The word 'provision' is likely to apply to a term of a contract or collective agreement or rule of an undertaking. 'Criterion or practice' can cover more informal practices.

There is no need to show that the provision, criterion or practice is an absolute bar. So 'desirable' criteria in job specifications may be open to examination as they may be potentially discriminatory.

What is disproportionate impact ?

To succeed in her claim, a woman would have to be able to show that:

- the provision, criterion or practice was to the detriment of a 'considerably larger' proportion of women than men; or
- to the detriment of more married women than single women

This process requires a comparison between the proportion of men affected by the provision in question and the proportion of women affected (known as the 'pools'). It is important that it is not the actual numbers that matter but rather the relative proportions. The proportions can be established by producing evidence, usually statistics, of the impact of the provision on both men and women.

Take for example a policy of weekend working. This is likely to impact more on women than men, because women tend to have primary responsibility for childcare.

A woman claimant would therefore need to show that in her workplace (or nationally) proportionately more women than men had primary responsibility for children.

This could be done by oral evidence from the woman concerned about her workplace, or statistical evidence available in the workplace. Usually, inferences are drawn from the number of part-time workers in the workplace as being indicative of those with responsibility for children.

So for example, the claimant would need to compare the number of women who could only work during the week against the total number of women in the workplace, and the number of men in the workplace who could only work during the week with the total number of men. The proportions are then compared to show disproportionately more women than men are affected.

How are the pools of men and women chosen?

The comparator 'pools' of men and women should consist of all those people to whom the provision, criterion or practice applied. The 'relevant circumstances' of the comparators' pool should be the same or not materially different from the claimant's pool.

In *Price v Civil Service Commission*, a woman aged 36 challenged an age bar rule that job applicants should be under 28. She said that it disadvantaged women who, like her, tended to take time out at that stage of their careers to have children.

The EAT ruled that the pool for comparison therefore consisted of men and women who were qualified to apply for the job, or would be if it were not for the particular criterion (in this case, age) that had been applied.

In other cases the courts have taken account of national statistics or patterns. In *London Underground v Edwards (No 2)*, a case that involved a single mother being required to work a flexible shift system, the Court of Appeal said that the tribunal was entitled to use its general knowledge and expertise to take into account the national figure that 10 times as many women as men are single parents with care of a child.

The pool can also be limited to a local area, as well as extend across the UK, depending on the relevant circumstances of the case.

Was the provision, criterion or practice to the woman's disadvantage?

The woman has to show that she has suffered a disadvantage as a result of the provision in question. This could be, for example, the loss of her job, either through dismissal or because she resigned; or because she had to take a different, lower-paid, job in order to work part time.

How do workers find out the information they need?

Workers will often not have the information about statistics or possible pools to know whether they have a valid case for indirect discrimination. If the employer does not provide it voluntarily, then employees can ask their employer in the form of an SDA questionnaire for the information they need.

Employers do not have to answer these questions, but if they choose not to the tribunal may subsequently draw an inference of unlawful discrimination (see chapter one).

How can the employer justify the provision, criterion or practice?

An employer can defend a case of indirect discrimination if he or she can justify the provision in question. The burden is on the employer to convince the tribunal that the provision, criterion or practice is justified.

In a European case *(Bilka-Kaufhaus GmbH v Weber von Hartz)*, the ECJ held that employers can justify a discriminatory practice if they can show that:

- it can be justified on grounds other than sex
- it corresponds to a real need on the part of the employer
- it is appropriate to meet that need; and
- it is necessary to that end

Case law has established that what is required is a balancing act between the employer's need to impose the provision and its discriminatory effect. Tribunals will also consider whether there was another way of achieving the employer's need.

Basically, the more discriminatory the practice, the more difficult it will be for the employer to justify it.

What arguments are likely to succeed?

When seeking to justify the provision, criterion or practice, employers have to reinforce their arguments with objective evidence. Generalised statements are unlikely to be accepted by the courts. For instance, the European Court of Justice has said that an argument that part-timers are not as integrated into the workforce as full timers is a generalised statement, and does not provide objective justification for their exclusion.

Some of the objective arguments put forward by employers which have proved acceptable are as follows:

- the need for close collaboration
- the need for administrative efficiency
- the need for continuity of customer liaison
- costs and resources (although costs are not, in themselves, a valid objective justification defence)
- health and safety requirements

Harassment

Harassment is not defined as such in the SDA, but as a result of case law it has developed to encompass a particularly widespread and distinctive form of direct discrimination. If the harassment amounts to less favourable treatment on the grounds of sex or marital status then it will be unlawful.

The European Commission's code of practice on protecting the dignity of men and women at work defines sexual harassment as 'unwanted behaviour of a sexual nature, or other conduct based on sex affecting the dignity of men and women at work. This can include unwelcome physical, verbal or non-verbal conduct.'

In the case of *Macdonald* and *Pearce*, the House of Lords made clear that sexual harassment was not in itself unlawful. Instead, it said that to establish a breach of the SDA, the woman has to be able to show that the harassment amounted to less favourable treatment and that a man would not have been treated in the same way in those circumstances.

This means that 'gender specific' abuse may not in itself constitute unlawful discrimination. Instead, as with all instances of less favourable treatment, a woman has to compare herself with a man. However, if the harassment is obviously sexual, for instance sexually suggestive remarks, then it would be easy for a tribunal to draw an inference that a man would not have been treated in the same way.

In some circumstances, exposure to pin-ups or other sexually offensive material in the workplace (which includes the internet) may also amount to sexual harassment.

What is essential is that the treatment is unwanted and unacceptable. The fact that a woman appears to submit to it (perhaps because she is concerned about losing her job) does not mean that the treatment was not unwanted.

Who decides what is and what is not harassment?

The test as to whether the claimant was harassed is essentially a subjective one, although it is for the tribunal to decide whether or not the conduct was objectively capable of amounting to unlawful discrimination. The fact that the harasser did not intend to cause offence is irrelevant. What counts (generally) is the effect it has on the person being harassed.

In the case of *Reed v Stedman*, Ms Stedman resigned because her life was made intolerable by her male manager, who made a series of sexual remarks and innuendos about her.

Her claim of sex discrimination was upheld even though no single incident was in itself enough to constitute harassment. What was important was that the series of events could be looked at as a whole – and as a whole, his behaviour amounted to an unacceptable 'detriment' to her.

Does there have to be more than one incident?

Although the concept of harassment infers a course of unwanted and unacceptable conduct, a one-off incident may constitute sexual harassment if it is sufficiently serious.

In the case of *Insitu Cleaning Co Ltd & anor v Heads*, the employer argued that because the conduct had only taken place on one occasion, it could not be said to be unwanted until it had been rejected.

The employment appeal tribunal disagreed, saying that if sufficiently serious a one-off act could amount to harassment. Otherwise, it said, the law would amount to a licence to harass women, on the basis that men could argue that they were just trying to find out if the conduct would be rejected or not.

Is the employer liable for the harassment of other employees?

Employers are liable for acts of harassment committed by one or more of their employees acting in the course of their employment. An employer will also be liable for harassment by third parties if it can be established that he or she would not have allowed a male employee to be treated in the same way by the third party.

A defence is available to employers if they can show that they took all reasonable steps to prevent the harassment from occurring (see chapter one). The SDA also makes the individual harasser liable whether or not the employer has a 'reasonable steps' defence.

Victimisation

As with the other discrimination legislation, the SDA contains provisions to prevent people from being penalised or deterred from bringing or getting involved with a complaint of discrimination.

People may have a claim under the victimisation provisions of the SDA if they are treated less favourably by their employer for having done one of the following protected acts:

- they brought proceedings under the Act or gave evidence or information in connection with proceedings under the Act; or
- they did anything else under the terms of the Act; or
- they made an allegation of sex discrimination

Individuals will also be protected if employers treat them less favourably because they suspect that the person intends to do any of the above. To be protected, they have to show a causal link between the protected act and the less favourable treatment.

The victimisation provisions do not apply if they relate to an allegation that is false and is not made in good faith.

What is less favourable treatment in a victimisation case?

If someone is claiming victimisation, they have to compare themselves with someone else (either real or hypothetical) to show that they have been treated less favourably than that other person. The comparison is between someone who has done one of the protected acts and someone who has not. Otherwise their circumstances must be the same.

Less favourable treatment can take many forms, such as refusing to employ, promote or train someone, reducing their wages or imposing inferior conditions,

denying certain benefits to them or dismissing them, or providing a bad reference (or none at all).

The individual does not have to show that the employer was consciously aware that he or she was victimising the person.

THE EXCEPTIONS

There are four basic circumstances when the Act does not provide protection against discrimination:

- the genuine occupational qualification (GOQ)
- positive action
- employment for the purposes of religion
- national security

All these exemptions have to be narrowly construed since they represent exceptions to the fundamental principle of sex equality.

When can an employer discriminate under a GOQ?

An employer is allowed to discriminate where a person's sex is a genuine occupational qualification (GOQ) for the job. This will apply where it can be shown that the job has to be done by someone of a particular sex. If that is the case, the law allows them to discriminate in recruitment, opportunities for promotion or transfer to, or training for, that job.

A GOQ may only be claimed in the following circumstances under the SDA:

- **Physiology or authenticity:** for example, a job as a model or an actor.
- **Decency or privacy:** for example, a job which is likely to involve physical contact or where people may be undressing.
- **Living-in:** the jobholder is living, or working, in a private home where there is a high degree of physical contact.
- **Single sex accommodation:** the job-holder has to live-in and there is only sleeping or sanitary provision for one sex.
- **Single sex establishment:** the job has to be done by one particular sex because it is based in an institution providing special care for one sex only.
- **Personal services:** for example, job holders such as rape counsellors, birth control advisers or welfare officers.
- **Outside UK:** the job will involve duties in a country outside the UK, for instance where the law prevents women from doing certain jobs, such as driving.

- **Married couples:** the job is one of two to be held by a married couple.

A GOQ exception will not apply if an employer already has enough staff of the other sex who could take on the duties of the job without too much inconvenience.

What is positive action?

Positive action means giving preferential treatment to an individual or group of people to prevent, or compensate for, past disadvantages and is a reasonable thing to do. It is not the same as positive discrimination, which involves treating people more favourably on grounds of sex and is unlawful.

The SDA states that employers can:

- provide training to people of a particular sex which would fit them for particular work if in the preceding 12 months there were none (or very few) of them doing that sort of work, or
- run a discriminatory recruitment campaign to encourage members of a particular sex to apply for certain kinds of work, as long as there was none (or very few of them) doing that particular kind of work in the preceding 12 months

In addition, the European Court of Justice decided in *Kalanke v Freie Hansestadt Bremen* that member states are allowed to adopt a range of positive action schemes, including flexible quota arrangements, provided that women are not automatically given preferential treatment over men.

It said that employers had to make an objective assessment of all the necessary criteria, but if the final candidates were equally matched and the employer wanted to give a specific advantage to women, he or she could do so, but only in those narrow circumstances.

The new Commission for Equality and Human Rights Bill is likely to include provision for a public sector duty to promote gender equality, similar to the existing provisions in the Race Relations Amendment Act.

Can trade unions take positive action?

The SDA also specifically states that organisations – such as trade unions – can offer training aimed exclusively at members of a particular sex if that would help fit them for a post within the organisation, or to encourage them to apply for those particular jobs where they have been underrepresented in these posts for the last 12 months.

Unions can also lawfully encourage people of a particular sex to become members where that sex is underrepresented.

What is employment for the purposes of religion?

Sex discrimination is lawful in relation to employment for the purposes of an organised religion, where employment is limited to one sex so as to comply with 'the doctrines of the religion or to avoid offending the religious susceptibilities of a significant number of its followers.'

In line with the judicial review challenge in the High Court brought by a number of trade unions about the new sexual orientation regulations (see chapter eight), this exemption is to be given a very narrow construction, limited effectively to employment by religious organisations such as churches or mosques.

What is the national security exception?

This exception applies where the discriminatory act is done to safeguard national security and it can be justified.

PREGNANCY AND MATERNITY

There are specific laws and regulations that protect and give rights to a woman who is pregnant and off work on maternity leave (see chapter six). However, women are often treated unfavourably by reason of their pregnancy or maternity, and need the protection of the SDA.

It is direct discrimination on the ground of gender to treat a woman less favourably because of her pregnancy. This is the case even if she has applied for and been offered a fixed term job which she is unable to do because she goes on maternity leave. If the employer fails to appoint her, this is very likely to amount to direct discrimination.

Likewise, if a woman is disadvantaged because of a pregnancy related illness, that would amount to direct discrimination. That protection continues throughout pregnancy until the woman returns to work after her maternity leave.

During maternity leave most contractual rights are suspended, unless the contract provides otherwise. Women cannot therefore pursue a claim for normal contractual benefits to continue during the whole of the maternity leave period by relying on the SDA or the Equal Pay Act.

However, if a woman is disadvantaged in some other way that has nothing to do with contractual benefits, for example if she is not kept informed of job vacancies or not considered for promotion, then she may be entitled to claim unlawful discrimination.

In *Visa International Service Association v Paul*, a woman succeeded in a direct sex discrimination tribunal case when her employer failed to notify her of a job vacancy because she was on maternity leave.

A woman is automatically unfairly dismissed if she is dismissed for a reason relating to her pregnancy or maternity. This will also amount to direct discrimination.

What about pregnancy-related ill health?

A woman who has to take time off sick for a pregnancy- or maternity-related reason should not suffer any disadvantage during her pregnancy and maternity leave. That means her sickness absence should not be taken into account in relation to any attendance or capability issue or other less favourable treatment. That protection ends when she returns to work after her maternity leave.

If for example a woman suffers from post natal depression after the end of her maternity leave, it is likely that her employer would be able to treat her sickness absence like any other non-pregnancy-related absence due to ill health.

THE SDA IN PRACTICE IN THE WORKPLACE

Recruitment

The SDA contains specific measures to prohibit discrimination by employers during the recruitment process. There are basically three ways in which it is unlawful for employers to discriminate at this stage:

- in the arrangements they make for deciding who should be offered a job (such as the instructions given to an employment agency)
- in the terms and conditions of employment that they offer (for instance, in relation to pay or holidays)
- by refusing or deliberately omitting to offer someone a job (by rejecting an application or by deliberately avoiding consideration of an application)

It may also be indirectly discriminatory for employers to recruit informally such as by word of mouth. If male managers are doing the recruitment it is statistically more likely that they will recruit other male managers. As a result, these practices which lack transparency and objectivity may mean that fewer women than men will be able to comply with them. And the employer is unlikely to be able to justify them.

What are 'arrangements' for deciding who should be offered a job?

There is no statutory definition of what constitutes an 'arrangement' in the recruitment process. Although advertising is not included, more or less everything else in the process can be. The EAT has said that the concept of 'arrangements' may include the following:

- a refusal to consider an application at all
- the exclusion of applicants in a particular area
- telling potential applicants not to apply for the job

- telling an applicant that the job is filled when it is not
- a refusal to interview a person or to provide an unbiased interviewing panel

What are the rules about advertisements?

There is no obligation on an employer to advertise a job, but if he or she decides to do so it is unlawful under the Act to publish an advertisement that indicates an intention to discriminate. Both the employer placing the advert and the actual publisher may be liable unless the publisher reasonably relied on a statement by the advertiser that it was lawful. It is irrelevant whether the employer intended to discriminate.

The law says that the advert should not refer to the gender of the person unless the employer can rely on a 'genuine occupational qualification' or in a situation where positive action is allowed (see above). So employers should not place adverts for 'salesgirls' or 'firemen'.

Both direct and indirect discrimination are covered. Putting adverts in publications read mainly by, say, men may be indirectly discriminatory if it cannot be justified.

Advertisements for staff described as self-employed are also covered by the Act. It is also unlawful for an employment agency to discriminate, and only the EOC can bring proceedings in relation to a discriminatory advert.

What rules apply to job descriptions/ specifications?

There is no legal requirement on employers to provide a written job description or person specification but clearly it is good practice to do so.

Job descriptions should be written in non-discriminatory terms and should exclude requirements that are not central to the job. Certain requirements that are said to be 'desirable' in a job specification may indirectly discriminate against women just as much as actual requirements.

The EOC in its code of practice recommends that employers look at the qualifications and requirements being applied to a job if they seem to inhibit applications from one particular sex (or married people). For instance a requirement to be mobile may discriminate against women. They should only be retained if they can be justified in terms of the requirements of the job. Otherwise, they are likely to be indirectly discriminatory.

What selection criteria should employers use?

Selection criteria should be objective and transparent, and must relate to the job in question. For instance, if an employer decides not to use an appropriate selection criteria for shortlisting purposes in advance and instead just rely on their own value judgements when sifting through application forms, they may be denying suitable candidates the chance of an interview.

In addition, they may be allowing discriminatory stereotypes to affect their views. If an unsuccessful applicant brings a claim, a tribunal is unlikely to be sympathetic to an employer who has no records which show how and why the decision was reached.

Every criterion should be examined to ensure that it does not discriminate indirectly, without justification. So criteria relating to physical strength,or an ability to work flexible hours must all be necessary to do the job.

What questions can an employer ask at interview?

Ideally anyone carrying out an interview should have previously received training to make sure that the questions they ask are relevant, that all candidates are asked the same questions and, most importantly, that they have an understanding of how to score the candidates' answers.

Questions at interview should relate to the requirements of the job. If the employer needs to find out whether someone's personal circumstances will affect performance of the job, he or she should bring this up without asking detailed questions about the person's marital status, children or domestic obligations. Questions about marriage plans or family intentions should not be asked as they are likely to show a bias against women.

So, for instance, in an interview for a job which requires some evening work, an employer can ask a woman whether she would be able to work in the evenings, as long as he or she asks all other candidates the same questions. If the question is only asked of the woman, this may indicate a discriminatory attitude on the part of the employer.

Even where the work involves special hazards for women who might become pregnant (such as working with certain pesticides), employers should still not use application forms or employment interviews to try to identify women who might fall into that category. That information can be obtained during the course of a regular medical examination by a qualified medical adviser, in the same way that a person's health might be checked before appointment.

What are the rules for promotion and transfers?

It is unlawful under the SDA for an employer to discriminate in the way that he or she affords a woman access to opportunities for promotion, transfer, training or any other benefits, facilities or services. The same applies if the employer tries to refuse or deliberately avoid offering the woman access to them.

Women may, however, end up being discriminated against as a result of blatant prejudice ('women don't make good managers'), or more usually because of covert (sometimes even subconscious) assumptions about women. For instance, that they are not ambitious.

In deciding whether to draw an inference of discrimination, a tribunal will look, among other things, at whether there were any formal procedures, whether procedures were followed, whether there was a set of formal criteria, or whether the behaviour of the interviewers indicated a bias in favour of men. For instance, refusing someone promotion on the basis that she would not 'fit in' to a male-dominated culture. The tribunal will also look at statistical patterns which reflect a glass ceiling for women.

In *Watches of Switzerland v Savell*, the EAT ruled that the employer's promotion procedures indirectly discriminated against women because vacancies were not widely advertised, there were no clear guidelines for managers and no written criteria for promotion. As a result, individual managers promoted their own staff who were primarily male.

Are mobility clauses unlawful?

Mobility clauses may be indirectly discriminatory, usually for two reasons. Firstly, more women than men tend to have primary responsibility for children or dependants which means that they are less likely to be able to move the location of their jobs.

Secondly, more women than men tend to be in a relationship with a partner whose earnings are higher. This means that they are less likely to be able to relocate because that would involve disrupting the job of the primary earner in their household.

For both these reasons, mobility clauses may be indirectly discriminatory. Whether they are unlawful will therefore depend on whether or not the employer can justify the need for them.

Is it unlawful for an employer to give instructions to discriminate?

It is unlawful under the SDA for an employer to instruct an employment agency or job centre or any third party to carry out an unlawful, discriminatory act, or to persuade or assist another person to discriminate.

Can employers impose a dress code?

There is nothing to stop employers from introducing a dress code, but if they do they must make sure that men and women are treated equally (although not necessarily identically).

In *Smith v Safeway plc*, the Court of Appeal said that in order to win a sex discrimination case in relation to dress codes the complainant had to show two things:

- that there was a difference of treatment between the sexes; and
- that one sex had been treated less favourably than the other

Employers are therefore free to impose different codes for male and female staff, as long as there is a set of rules that apply equally to each of them. The result has been that employers can exercise discretion, often based on a conventional view of what men and women should look like.

There have been a number of tribunal cases where women have succeeded in showing that a dress code preventing them from wearing trousers is discriminatory.

The issue of dress codes was recently reconsidered in the PCS union case of *DWP v Thompson*, when the employment appeal tribunal said that requiring men to wear a collar and tie to work did not necessarily amount to sex discrimination.

However, it also said that it was a question of fact in each case whether an employer had applied a requirement for smart clothing even-handedly, and therefore whether a requirement for a man to wear a collar and tie was an even-handed application of the dress code.

TRANSGENDER EQUALITY

Transsexual people are those who live as a member of the opposite gender into which they were born. Recently there has been a growing acknowledgement of the need for legal protection for trans workers, leading in 1999 to the Sex Discrimination (Gender Reassignment) Regulations 1999, and more recently to the Gender Recognition Act 2005.

The TUC's guidance, "Transgender Equality" published in 2004, **(www.tuc.org.uk/equality/tuc-8246-f0.cfm)** sets out a clear analysis of the law and the issues that are likely to arise in the workplace for trans workers. It includes a section on good practice and appropriate vocabulary for the use of trade union officials advising trans members.

What protection do the 1999 regulations provide?

The regulations extend the Sex Discrimination Act to provide protection to anyone who intends to undergo, is undergoing, or has undergone gender reassignment, but only as far as employment and vocational training are concerned.

The regulations provide protection to transsexuals against direct (but not indirect) discrimination from the moment they indicate an intention to start the reassignment process.

How do the regulations affect recruitment?

There is no obligation on a transsexual person to disclose their status as a condition of employment. If they choose to disclose, this is not in itself a reason for not offering employment, and non-disclosure or subsequent disclosure are not grounds for dismissal.

The campaigning group, Press for Change, recommends that employers wishing to promote equal opportunities state that they welcome applications from transsexual people.

What exemptions apply?

In most cases, the gender of an employee does not have any relevance to his or her ability to do their job. However some posts are 'exempted' under the Sex Discrimination Act 1975 (see under genuine occupational qualifications in chapter three) and are open only to one sex. The same provisions apply to transsexual people.

In *A v Chief Constable of West Yorkshire Police*, the House of Lords made clear that a transsexual person must, as a matter of sex discrimination law, be recognised in their reassigned gender. The genuine occupational defence will therefore apply to the reassigned gender. This position has now been reinforced by the Gender Recognition Act (see below).

Are trans people protected from harassment under the Act?

Transsexual people are specifically protected under the Act from sexual harassment on the grounds of their gender reassignment.

What time off should be given for medical treatment?

Transsexual people undergoing medical and surgical procedures may require extended time off work. The whole process can take years and employers need to be flexible in order to facilitate the provision of the treatment.

If a transsexual person has to take time off work for treatment for reassignment, he or she has the right to be treated in the same way as anyone else who is absent from work due to sickness or injury or some other reason. If the employer treats them differently, they can claim that they have been treated less favourably and therefore unlawfully under the Act.

What dress code should the employer adopt?

Employers should allow some flexibility in dress codes to accommodate the process of transition from one sex to the other. They should respect the individual's wishes as to when they wish to change to the dress code suitable to the new gender.

What about the use of single sex facilities?

Employers should agree with a transsexual worker when he or she needs to change use of facilities, such as changing rooms and toilets, from one sex to the other. It is not acceptable to expect a post-operative transsexual worker to use facilities that are not those of their post-operative gender.

Employers have more flexibility in relation to a pre-operative transsexual worker. It may, therefore, be lawful for an employer to provide separate toilet facilities during this period.

What changes does the Gender Recognition Act 2005 make?

The Act allows a trans person to acquire a Gender Recognition Certificate. The conditions for obtaining a certificate are that they have lived in their new gender for a minimum of two years, intend to do so permanently and can produce medical evidence to confirm this.

The existence of the certificate will allow a trans person full legal recognition in the new gender, for example to marry in their new gender and to have their birth certificate altered to reflect it.

The Act confers privacy rights. Anyone who learns of a person's trans history in the course of their duties, will be subject to prosecution if they reveal that information to a third party without the consent of the person involved.

The Act applies to England, Wales, Scotland and Northern Ireland.

DISABILITY

Around nine million people in the UK are disabled, one in seven of the adult population. Disabled people are twice as likely to be unemployed as non-disabled people, and those who do find work are disproportionately concentrated in the low paid sectors.

Although there has been legislation outlawing discrimination on the grounds of race and sex for nearly 30 years, there was no such protection for disabled people until the mid 1990s.

Until then, the only relevant law was the Disabled Persons (Employment) Act 1944 which introduced a quota system for employers with 20 or more employees and required that at least three per cent of their workforce should be registered disabled. These provisions were in practice frequently ignored by employers, and the quota system has now been abolished.

The Disability Discrimination Act 1995 (DDA) finally came into force in December 1996, but with a rolling programme of implementation that only ended in October 2004. Although it has some similarities with sex and race discrimination legislation, it is different in its structure and concept.

For instance, unlike sex and race discrimination legislation which provide rights to equal treatment for everyone, protection under the DDA is only afforded to disabled people.

Instead of the concepts of direct and indirect discrimination which can be found in the SDA and RRA, the Act provides for direct discrimination, as well as less favourable treatment for a reason related to the person's disability which may be justified by the employer. And most important of all, if an employer fails to make reasonable adjustments to accommodate someone's disability, this may also amount to unlawful discrimination and cannot be justified.

In 2005, amendments will be made to the DDA through the Disability Rights Bill which will make a number of changes to the Act including introducing for the first time (by December 2006) a positive duty on public sector employers to promote disability equality, similar to the positive duty under the Race Relations Amendment Act 2000.

AN OUTLINE OF THE ACT

What is the aim of the DDA?

The aim of the DDA is to create a level playing field for disabled people by outlawing discrimination and less favourable treatment, and by requiring an employer to make reasonable adjustments to accommodate a person's disability so as to eliminate or reduce the many disadvantages that disabled people face.

What does it prohibit?

The legislation regulates discrimination in employment, in the provision of goods, facilities and services, in education and in public transport.

It is divided into four parts:

- **Part I** – provides key definitions of what is meant by disability and a disabled person
- **Part II** – sets out the ways in which employers can discriminate under the Act
- **Part III** – outlaws discrimination in the provision of goods, facilities and services
- **Parts IV and V** – deal with education and public transport

This chapter deals with the employment provisions in parts I and II only.

Where does it apply?

The DDA only applies to work done in Great Britain – that is, England, Scotland and Wales, although similar provisions apply in Northern Ireland. However, the Act also applies to workers with a base outside Great Britain, as long as some of their work is done here.

The scope of the DDA was extended in October 2004 to cover workers on ships, planes and hovercrafts registered in the UK.

Who does the DDA apply to and when?

The legislation provides protection to workers and employees who are disabled within the meaning of the Act. It covers job applicants or disabled people who are already employed including apprentices and contractors.

It was amended from October 2004 to provide protection from discrimination for workers who have left their employment, if their complaint is closely connected to their previous employment.

There is also now no exemption for small employers, with the result that the DDA applies to all employers, irrespective of the number of people they employ. It also applies to office holders, partnerships, barristers and advocates, the police, the fire service, prison officers and even, in some circumstances, the self-employed. Practical work experience and work placement arrangements have also been brought within the scope of the Act.

The DDA contains provisions outlawing discrimination against disabled people by trade organisations (including trade unions); providers of insurance services; trustees and managers of occupational pension schemes; landlords of premises occupied by employers; and qualifying bodies.

However, volunteers still remain outside the scope of the DDA as do members of the armed forces.

There is no qualifying period before a complaint can be made so a worker is protected from day one of their employment.

MEANING OF DISABILITY

What is the meaning of 'disability' under the Act?

To be protected by the Act, the worker has to show that they fall within its definition of a disabled person. This means they have to show that they have a 'physical or mental impairment which has a substantial and long-term adverse effect on their ability to carry out normal day-to-day activities'.

The code of practice of the Disability Rights Commission (DRC) states that employers should not attempt to make a fine judgement as to whether a particular individual satisfies the definition of disability. Instead they should focus on meeting the needs of each worker and job applicant.

Unfortunately this is not advice that is followed by all employers, and in many cases there are significant disputes as to whether or not a particular worker falls within the definition.

What constitutes a physical impairment?

The Act does not define what constitutes a physical impairment, but the government's guidance on the meaning of disability makes it clear that it should have a broad application, and tribunals have, on the whole, adopted that approach.

Physical impairments include sensory problems such as deafness, blindness and partial sight. In addition anyone certified as blind or partially sighted and is registered as such is now also deemed to have a disability under the Act.

Tribunals have found that the following come within the meaning of physical impairment:

- back pain
- carpal tunnel syndrome
- asthma
- diabetes
- emphysema
- bulimia
- chronic fatigue syndrome (ME)

What constitutes a mental impairment?

Mental impairments include learning difficulties and the effects of a brain injury caused for example by an accident or a stroke. If the mental impairment results from a mental illness, then it must be one that is clinically well-recognised by a respected body such as the World Health Organisation, although this requirement will be removed by the end of 2005 by what is currently known as the Disability Rights Bill.

References in GP records to 'depression' or 'stress' are unlikely to constitute proof of a mental impairment, as they may not amount to a clinically well-recognised illness. In these cases, medical evidence confirming the diagnosis as a clinically well-recognised condition may need to be obtained.

Tribunals have found the following conditions to fall within the definition of mental impairment:

- depression or anxiety
- post-traumatic stress disorder
- schizophrenia
- dyslexia
- autism

The following conditions are expressly excluded from the Act:

- alcoholism (although impairments arising from the disease such as liver damage are covered)
- a tendency to set fires
- a tendency to steal
- a tendency to physical or sexual abuse of other persons
- exhibitionism
- voyeurism
- hay fever

What is meant by a substantial adverse effect?

Again, 'substantial' is not defined, but it is something that is more than minor or trivial. Factors to be taken into account when assessing the effect of an impairment include:

- the time taken by someone with an impairment to carry out normal day-to-day activities compared with someone who does not have the impairment
- the way in which those activities are carried out in comparison with someone who does not have the impairment
- the cumulative effects of the impairment – although individual effects of the impairment may be modest, taken together they may have a substantial effect on day-to-day activities
- the effect of the impairment on the individual's behaviour – a person may not be able to satisfy the definition if he or she can modify their behaviour to carry out normal day-to-day activities
- the effect of the environment – temperature, humidity, time of day – on the person's ability to carry out day-to-day activities

What is important is the degree to which the person is affected by the complaint. For instance, a minor colour deficiency would not amount to a disability whereas a serious colour deficiency could if it had a substantial adverse effect on the person's ability to carry out normal day-to-day activities.

The Act also says that people with a severe disfigurement automatically satisfy the requirement relating to a 'substantial adverse effect'. For instance, those with severe facial scarring are included, although people with tattoos and body-piercings are specifically excluded.

People do not lose their right to protection against discrimination because they have been able to control or correct their disability, for example by medical

treatment or the use of aids. The effect of the treatment or the aids must be disregarded when assessing whether or not someone is disabled.

So someone with a hearing impairment but who uses a hearing aid which corrects the hearing loss is still likely to be protected under the Act. Medical evidence would probably be needed to show what the person's symptoms would have been, had it not been for the aids or treatment. This approach does not extend to the use of glasses or contact lenses.

How long is long-term?

To satisfy the definition in the Act, the disability must:

- have lasted at least 12 months, or
- be likely to last at least 12 months, or
- be likely to last for the rest of the lifetime of the person concerned (if that is less than 12 months)

For people with conditions that have periods of remission, the legislation says that although the impairment may no longer have an adverse effect, it will still be deemed to have that effect if it is 'likely to recur'.

Discrimination may also be on the grounds of a past disability.

What are normal day-to-day activities?

The phrase 'normal day-to-day activities' means those activities that are 'normal' for most people in their everyday lives, such as using a knife and fork, putting on the kettle, cooking etc. It does not refer to activities at work.

However, where the effects of an impairment are made worse by conditions at work, then tribunals may also consider the person's ability to carry out day-to-day activities at work as well as outside it.

The guidance on the meaning of disability contains an exhaustive list of functions that constitute day-to-day activities. The following are likely to have an adverse impact:

- difficulty with mobility, such as climbing stairs or travelling in a car
- difficulty with manual dexterity, such as the inability to handle a knife or fork or to press buttons on a keyboard
- difficulty with physical co-ordination, such as putting food into the mouth with a fork
- inability to control continence, which would include frequent, albeit minor, leakage from the bladder
- difficulty with lifting, carrying or otherwise moving everyday objects such as books, a kettle of water, bags of shopping or a briefcase

- difficulty with speech, hearing or eyesight such as the inability to give clear instructions orally, but not a minor stutter, lisp or speech impediment
- difficulty with memory or an inability to concentrate, learn or understand such as following spoken or written instructions
- inability to assess the risk of physical danger, such as the inability to operate equipment properly

In the case of *O'Neill v Symm & Co Ltd*, the EAT accepted Ms O'Neill's argument that ME (also known as chronic fatigue syndrome) affected her ability to carry out day-to-day activities, because she could not walk far without getting out of breath, she had problems maintaining her balance and had cramps as well as 'pins and needles' which made it painful for her to type or hold a pen.

There is also specific provision in the DDA for progressive conditions that are likely to develop over a period of time, such as muscular dystrophy. These will be treated as having a substantial adverse effect from the moment they have an effect. Under proposals in the new Disability Rights Bill, the three progressive conditions of cancer, HIV and multiple sclerosis will be treated as a disability from the date of diagnosis.

DISCRIMINATION

Under the DDA, there are a number of ways that employers can discriminate unlawfully. First of all, they can directly discriminate against a disabled person. That means treating a disabled person less favourably solely on the ground that they are disabled rather than anything to do with their skills and abilities. As with other discrimination legislation, there can be no justification for direct discrimination. This definition was introduced in October 2004.

Secondly, employers will also discriminate if, for a reason relating to the disabled person's disability, they treat him or her less favourably than others to whom that reason does not apply. Employers can defend a claim if they can show that the treatment was justified, as long as the reason for the less favourable treatment was relevant or material to the circumstances of the case and substantial.

Thirdly, it is now explicitly unlawful to harass a disabled person for a reason relating to their disability. This change was also introduced in October 2004.

The fourth way in which employers can discriminate under the DDA is by failing to make a reasonable adjustment to arrangements or physical features in the workplace that put a disabled person at a disadvantage in comparison with a non-disabled person. Since October 2004, employers can no longer rely on a justification defence to this claim. The duty to adjust constitutes the central plank of the protection provided by the DDA.

Finally, it is unlawful to victimise a person, whether disabled or not, on the grounds that they have given evidence in a DDA case, made allegations of disability discrimination or taken any other steps under the DDA.

Direct discrimination

If someone is treated less favourably than someone else who is not disabled, solely because of their disability, then that amounts to direct discrimination. This will cover situations where someone is treated less favourably because of prejudice or stereotypical assumptions about their condition or abilities.

Who is the comparator in direct discrimination?

To establish direct discrimination, the disabled person has to make a comparison between the way he or she has been treated and the way someone without the disability has been or would be treated. Crucially, the comparator must also be someone who has all the same relevant skills and abilities as the disabled person.

An example given in the DRC code of practice is that of a blind person who is not shortlisted for a job involving computers because the employer wrongly assumes that blind people cannot use them. Such an assumption would not have been made about a non-disabled person with the same skills and abilities relevant to the job. That non-disabled person is the comparator.

Or take the example of someone with schizophrenia who applies for a job and declares a history of mental illness. The employer turns him or her down because of a negative medical report based on stereotypical assumptions about the effects of schizophrenia without consideration of their particular case.

The comparator is someone without the schizophrenia but with an equivalent history of previous ill health, for example a long-term knee injury. What is at issue is the extent to which the comparator would have been treated more favourably. In particular, the extent to which they too would have been rejected without adequate consideration of their individual circumstances.

Less favourable treatment

It is also unlawful to treat a person less favourably than someone else for a reason relating to their disability. The words 'for a reason relating to' cover a much wider range of circumstances than is the case with direct discrimination. In particular, the reasons may relate to the consequences of the disability.

This may cover, for example, an employer who does not shortlist a blind person because the blindness slows down their typing and the employer wants someone with a fast typing speed. Or it may be that

an employer decides to terminate someone's employment because of their poor sickness record. In both these examples, the slow typing speed and the sickness absence are related to the disability in the sense that they are a consequence of it.

There is a defence of justification in less favourable treatment cases, if the employer can show that the reason for the less favourable treatment is material and substantial (see below).

What is the difference between less favourable treatment and direct discrimination?

Less favourable treatment applies where the reason for the treatment relates to the disability. This includes reasons relating to the effects of the disability. With direct discrimination, the reason for the treatment relates solely to the disability itself.

So it is direct discrimination to reject a blind applicant for a job involving computers solely because the employer has a stereotypical idea about the likely effect of the blindness. If however that worker is rejected for the job because he or she is in fact unable to do the work because of the blindness, then the reason for the rejection is because he or she cannot do the job. In other words, for a reason relating to the disability.

There is a defence of justification available to employers for less favourable treatment, but not direct discrimination.

Who is the comparator if the discrimination is for a 'reason relating to the disability'?

The issue of the comparator in less favourable treatment cases was considered by the Court of Appeal in the key case of *Clark v TDG Ltd t/a Novacold*.

In this case, Mr Clark was dismissed following a period of sick leave due to a back injury because he could no longer function in his job. Both the tribunal and the EAT had said that the correct comparator was someone who had been off work for the same amount of time, but for a reason that did not constitute a disability under the Act.

But the Court of Appeal said that the test of 'less favourable treatment' in the DDA did not require a like for like comparison. The comparator had to be someone who, unlike Mr Clark, could carry out the main functions of the job.

This is a much easier hurdle for the claimant to jump than with cases of direct discrimination. In Mr Clark's case, for instance, he just had to find someone who could carry out the main functions of the job and who had not taken a significant amount of time off sick (presumably, the majority of the workforce), and look to see how they had been treated. Clearly he had been treated less favourably as they were still in a job and he was not. The onus then falls on the employer to justify the treatment.

Does the employer need to know about the disability?

The duty not to treat someone less favourably for a reason relating to their disability applies whether or not the employer knows about it.

So if an employer gives a worker a warning because they take a significant amount of time off sick, that may amount to less favourable treatment if the sickness absence was because of a disability, whether or not the employer knew that the employee was disabled.

How can an employer justify less favourable treatment?

Employers can justify less favourable treatment if, but only if, the reason for the treatment is 'material to the circumstances of the case and substantial'.

What would constitute 'material' and 'substantial'?

The courts have said that 'material' must mean:

- important
- essential, or
- relevant to the circumstances of the case

And that 'substantial' must mean something more than minor or trivial.

Generally tribunals have interpreted the 'material and substantial' defence as setting a relatively low threshold for employers, as long as it is based on evidence and not on assumptions or stereotypical ideas.

Consider the example of a man with severe back pain who applies for a job as a carpet fitter. His back condition means that he can do certain aspects of the job but not the essential element which is fitting carpets. The employer's rejection of his application is likely to be justified, in that his inability to do carpet fitting is a substantial reason and is also material to the circumstances.

Employers frequently rely on medical evidence to justify less favourable treatment. Providing the medical report is properly obtained, is from a suitably qualified doctor and does not include any stereotypical assumptions about the disability, then the employer may well be able to rely on that report as the basis for justifying less favourable treatment. This remains the case even if it later emerges that different medical experts would have reached different conclusions.

How does the justification defence fit with the employer's duty to carry out reasonable adjustments?

Employers have a duty to carry out reasonable adjustments to accommodate the effects of a person's disabilities (see later in this chapter). This duty takes precedence over the justification defence. That means that an employer cannot justify less favourable treatment for a reason related to a person's disability, if a reasonable adjustment would have prevented the reason from arising in the first place.

Take the example of someone with repetitive strain injury who can no longer operate a machine. The employer might try to justify a decision to dismiss that person for the simple reason that they can no longer do the work that they were hired to do.

If, however, the employer could make a reasonable adjustment to the machine, or offer alternative work that enabled the disabled person to carry on working, then the employer is unlikely to succeed with a justification defence. Conversely, if there was no reasonable adjustment that could be made, then the dismissal probably would be justified.

In the case of *Nottingham County Council v Meikle*, for instance, the Court of Appeal said that reducing Ms Meikle's sick pay by half amounted to less favourable treatment that could not be justified by the employer. This was because had the employer made reasonable adjustments to her working patterns, Ms Meikle would not have had to take so much sick leave and would not have been put on half pay in the first place.

Can employers justify less favourable treatment on health and safety grounds?

An employer may decide not to employ a disabled person for health and safety reasons, either because of risks to the disabled person or to third parties. They should be careful, however, not to make stereotypical assumptions about health and safety risks as these may amount to unlawful direct discrimination, as well as less favourable treatment.

However, if the employer has carried out all proper investigations into the potential risks and genuinely concluded that it was not reasonable to take those risks, in those circumstances, he or she is likely to be able to justify less favourable treatment. That is, of course, as long as there are no reasonable adjustments that they could make to remove the risk, or reduce it to an acceptable level.

Harassment

Under the DDA, someone is harassed for a reason relating to their disability if he or she is subjected to unwanted conduct that has the purpose or effect of violating their dignity or of creating an intimidating, hostile, degrading, humiliating or offensive environment.

The conduct will only be regarded as harassment where all the circumstances are taken into account, including the perception of the person being harassed, and if it is reasonable to conclude that the harassment could have had that effect.

But where the harasser's conduct was deliberate and they set out with the purpose of violating the other person's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment, then the harassment will be deemed to have occurred regardless of the perception of the person being harassed and whether or not it is reasonable to consider it as having that effect.

Reasonable adjustments

The DDA requires employers to take action to enable disabled people to compete on a level playing field with the able bodied. This is the duty to make reasonable adjustments. This duty lies at the heart of the DDA.

When does the duty arise?

The duty arises when the 'provisions, criteria or practices' or the 'physical features' of the workplace put a disabled job applicant or existing worker at a substantial disadvantage in comparison with a non-disabled person.

The House of Lords in *Archibald v Fife Council* recently confirmed the extent of the duty to adjust. In this case, Ms Archibald became physically incapable of carrying out her job as a road sweeper. She retrained and applied for over 100 office-based jobs with the council, but was unsuccessful in them all.

The council argued that the duty to adjust only applied to the road sweeper's job for which she was employed. That narrow interpretation was roundly rejected by the House of Lords, which said that the duty to adjust applies to all aspects of the employment relationship from beginning to end.

What if the employer does not know of the disability?

Unlike less favourable treatment, the duty to make a reasonable adjustment only applies when the employer knows or reasonably ought to have known of the disability.

So if the employer did not know (because the worker did not tell him or her and there was no reason why the employer should have known), then the employer is not under any obligation to make reasonable adjustments to accommodate any disadvantage that the worker is suffering.

When ought an employer to have known?

There are many circumstances in which the employer 'ought to have known' of the disability even if they did not actually know. In these circumstances the duty will apply.

The DRC's code of practice gives the example of an employee who is depressed and tearful at work. The employer is unaware of her depression and makes no effort to find out why she is crying, and instead gives her a warning. In these

circumstances because the employer was aware of the symptoms, they were under a duty to take steps to find out if there was an underlying disability.

On the other hand, in the case of *Rideout v TC Group*, an applicant for a job had photosensitive epilepsy. She was interviewed in a room with lighting which she felt had put her at a disadvantage. She had mentioned the fact of her disability on her application form, but had not stated that it could be caused by fluorescent lighting and made no specific comment about it at the interview.

The EAT said that, in these circumstances, just mentioning her condition in advance was insufficient to put the employers on notice. A balancing act had to be carried out between the needs of the worker for adjustments to be made and the extent of the obligation on the employer to make adjustments. In this case, the claimant lost her case.

The code of practice makes it clear that if an occupational health doctor engaged by the employer or other agent of the employer knows of the disability, then as a matter of law the employer is deemed to know of the disability.

What adjustments might employers have to make?

The Act sets out the following examples of adjustments that employers may have to make:

- making adjustments to premises
- allocating some of the disabled person's duties to another person
- redeploying the disabled person to fill an existing vacancy
- altering the disabled person's working hours
- assigning the disabled person to a different place of work or place of training
- allowing the person to be absent during working hours for rehabilitation, assessment or treatment
- giving or arranging for training or mentoring (whether for the disabled person or anyone else)
- acquiring or modifying equipment, instructions or manuals
- modifying procedures for testing or assessment
- providing a reader or interpreter
- providing supervision or other support

What is 'reasonable'?

The key question in adjustment cases is what is a 'reasonable' adjustment. The Act sets out the factors which should be taken into account when deciding if an adjustment would be reasonable or not:

- the extent to which taking the step would address the problem – in other words, the effectiveness of the action
- the extent to which it is practical for an employer to take the step
- the financial and other costs of the adjustment and the disruption it would cause to an employer's business
- the extent of the employer's financial and other resources
- the availability of financial or other assistance to an employer with respect to taking the step
- the nature of the employer's activities and the size of its undertaking
- in the case of private households, the extent to which the adjustment would disrupt the household and those who live there

The DRC's code of practice emphasises that adjustments have to be carried out within a reasonable time period, and that more than one adjustment may be required. The issue of adjustments should also be discussed in advance with the disabled person before they are implemented.

Although there is no onus on the employer to suggest what adjustments should be made, conversely the employer cannot leave the question of what adjustments might need to be carried out entirely to the disabled worker. Ultimately it is a duty on the employer, not the worker.

The code of practice gives many useful examples of the sort of adjustments which might be regarded as reasonable. For example, an employer could allow a disabled person to work flexible hours and take additional breaks to overcome fatigue arising from the disability. He or she could also permit part-time working, or starting work later to avoid the rush hour. A phased return to work after a period of sickness absence might also be appropriate.

Another example is the modification of the format of instructions or manuals, for example in Braille or on audiotape. Or someone with learning difficulties might need the information to be conveyed orally with individual demonstration.

Someone with a visual impairment might need a colleague to read mail to them at given times during the day. Alternatively the employer might hire a reader.

VICTIMISATION

How do the victimisation provisions work?

As with the other discrimination legislation, the DDA contains provisions to prevent people from being penalised or deterred from bringing or becoming involved with a complaint of discrimination. Both disabled and non-disabled people are protected.

The DDA says that people will be protected under the victimisation provisions if they are treated less favourably by their employer for having done one of the following protected acts:

- brought a tribunal claim under the Act or given evidence or information in connection with a claim under the Act; or
- made allegations of disability discrimination

It does not matter if the protected act consisted of allegations that in the end turned out to be untrue, or if evidence was given in proceedings which ultimately failed. As long as the acts or allegations were done or made in good faith, the individual remains protected from detriment or less favourable treatment by their employer.

The person will also be protected if employers treat them less favourably because of a suspicion that they intend to do any of the above.

The existence of an ongoing tribunal claim affecting the provision of a reference may not, however, amount to unlawful victimisation in the light of the race case of *Khan* (see chapter three).

THE DDA IN PRACTICE IN THE WORKPLACE

What are the rules about advertisements?

It is unlawful under the DDA to publish a discriminatory advertisement inviting applications for a job, training or other relevant benefit. This means that both the employer placing the advert and the actual publisher may be liable, unless the publisher can show that he or she could not have known that it was unlawful.

It is irrelevant whether or not the employer intended to discriminate. If that is how an ordinary person would be likely to read the advert, then it would be discriminatory.

Only the DRC, and not individuals, can seek a declaration from an employment tribunal that the advertisement is unlawful, but individuals offended by an advert can bring it to the attention of the DRC.

What obligations do employers have at the recruitment stage?

All the duties under the DDA apply at the recruitment stage. That means that an employer must not directly discriminate against a disabled job applicant, nor treat them less favourably unless justified. The duty to carry out reasonable adjustments also applies.

Employers are not however under a general anticipatory duty to ensure that the 'provisions, criteria or practices' that they apply when recruiting, or the premises in which they interview, do not put a disabled job applicant at a disadvantage. The duty to adjust only arises when a disabled applicant actually applies for a job, and it then arises solely in relation to that particular applicant.

In what ways is it unlawful for employers to discriminate at the recruitment stage?

Basically, there are three ways in which it is unlawful for employers to discriminate at this stage:

- in the arrangements they make for deciding who should be offered a job, such as the instructions given to a personnel officer or an employment agency
- in any terms of employment that they offer, for instance in relation to pay or holidays
- by refusing or deliberately omitting to offer a disabled person a job, by rejecting an application or by deliberately avoiding consideration of an application

Before rejecting a disabled job applicant, the employer has to consider what adjustments could be made to accommodate their disability. If they fail to do so and reject the person, then the job applicant may have a case for unlawful discrimination in relation to the arrangements that were made for offering the job.

What rules apply to job descriptions?

There is no legal requirement on an employer to provide a job description or specification, but if he or she does so it should be clear and should not include requirements which are not necessary for the job.

The code of practice says that this principle applies to unnecessary or marginal requirements (including a requirement for qualifications) as well as blanket exclusions. For instance, if an employer refused to employ anyone who had epilepsy as a driver – despite the fact that some people with epilepsy have licences and can get insurance – he or she would probably be discriminating.

The code also says that although employers can stipulate health requirements – for instance that candidates should be in 'good health' – such requirements are potentially discriminatory. Unless they are essential, therefore, employers should avoid them.

The code of practice advises employers to focus on the real needs of the job when drawing up job descriptions. And also to think about reassigning aspects of it if a disabled job applicant can show evidence of the necessary level of competence in relation to the main parts of the job.

What rules apply to application forms?

Under the Act, employers can ask whether an applicant is disabled, and if so whether he or she will need special arrangements to be made for interview. If the employer does not know and could not be expected to know that a disabled person is applying and might be disadvantaged at interview, then there is no obligation on him or her to make an adjustment.

The code advises employers to include a statement on the form that they welcome applications from disabled people as a way of encouraging applicants to tell a potential employer about any disability they may have.

Should employers provide information in alternative formats?

The code of practice says that it may be a reasonable adjustment to provide information about jobs in alternative formats such as Braille, on tape or computer disks. The same principle applies to receiving applications in a different medium, such as an application on tape or made over the telephone.

What selection criteria should employers use?

The usual advice to employers is that they should have a set of criteria that are transparent and are applied equally to all candidates. This advice may need to be adapted in the context of disability discrimination as a disabled person may well have to be treated differently if their disability puts them at a disadvantage. So for example a criterion that a driving licence was required for a particular job might need to be adjusted if a disabled candidate could do the job without driving.

What should happen at the interview stage?

Ideally, employers should already know from the application form whether any of the shortlisted candidates have a disability and therefore need a reasonable adjustment to be made for them at the interview stage. So, for instance, if the interviewee is blind, the employer should think ahead and ensure that someone meets the candidate and takes them to the interview room.

However, if the employer could not reasonably be expected to know what adjustment is needed, the candidate has a duty to point out what he or she requires. In the case of *Rideout v TC Group* Ms Rideout pointed out on her application form that she had photosensitive epilepsy. The employers did not know it could be triggered by fluorescent light. Because they could not have been expected to know what adjustments to make, the appeal tribunal said there was no discrimination.

Employers can ask questions about someone's disability at interview, but only if it is relevant to the person's ability to do the job or the need to make a reasonable adjustment. The code of practice says that, for example, an employer can ask someone whether they may need extra leave because of their condition or whether any changes would need to be made to the workplace.

Does a disabled person have to disclose the fact of their disability?

A disabled person has the right to keep their disability confidential from their employer, and many people choose to do so. However, in some circumstances a question may be specifically asked on an application form about any medical condition.

Although there is no legal obligation to disclose a medical condition, any untrue statement may amount to a disciplinary offence. This would particularly be the case if there were health and safety implications as a result of the failure to disclose.

Can an employer insist on a medical examination?

Offers of employment are often conditional on the candidate passing a medical examination. These would constitute 'arrangements' under the Act and might be applied in a way that disadvantage disabled applicants for jobs. As a result, employers would need to think about the purpose of them and ensure that they are indeed necessary and relevant to the job.

Further, if a disabled person was affected by a requirement to be medically examined then the employer should consider adjustments to the job to accommodate any issue arising from the medical report.

If a candidate is found to be medically unsuited to a job and there are no reasonable adjustments that can be made, then the employer would not be guilty of discrimination by not recruiting the disabled candidate.

However, a decision not to appoint must be based on the particular requirements of the job and the particular effects of the disability, not on a stereotypical assumption about the impact of the disability. The same principle applies whether the assumption is made by the employer or an occupational health doctor instructed by the employer.

The EAT in *Murray v Newham Citizens Advice Bureau* (a recruitment case) made the point that a prospective employer cannot be expected to carry out the same degree of investigation as an employer who has already employed the disabled person.

What about offers of employment?

An employer must not discriminate against a disabled person by refusing to offer them a job, or by deliberately failing to offer them the job unless they can justify it and there are no reasonable adjustments that could be carried out.

For instance, it would be unlawful to make an assumption without good reason that a person's disability would affect their ability to do the job. An assumption of this sort may well amount to direct discrimination which cannot be justified.

The duty to adjust applies to the terms on which a job offer is made. For instance, if a disabled person finds it difficult to travel on public transport during rush hour, the employer should consider making a reasonable adjustment and changing the contracted hours when making an offer of employment. Or they may need to consider removing a mobility clause in a contract if that would cause problems for the disabled person.

This requirement only applies to job-related matters. In *Kenny v Hampshire Constabulary*, the appeal tribunal said the employers were not under a duty to provide a carer to help Mr Kenny, who had cerebral palsy, go to the toilet. They were under a duty to make a physical adjustment to accommodate the presence of the carer, but not to provide the actual carer.

What are the rules concerning discrimination during employment?

Under the Act, it is unlawful for employers to discriminate against a disabled person:

- in the terms and conditions of employment (whether express or implied) that are provided. This would include pay, hours, holidays and any benefits
- in the opportunities for promotion, transfer, training or receiving any other benefit
- by refusing to provide the disabled person with such an opportunity
- by dismissing the disabled person, or subjecting him or her to any other disadvantage

During the course of employment, employers have to bear in mind similar considerations to those they applied during recruitment. For instance, they should ensure that promotion and transfer procedures are clear and applied consistently, that job requirements and qualifications are relevant and necessary, and that reasonable adjustments are carried out.

Likewise, employers should avoid making generalised assumptions when offering training opportunities. The code of practice says that employers who wrongly assume that a disabled person would be unable or unwilling to undertake training may be unlawfully discriminating.

In any event, they would be under a duty to make a reasonable adjustment, for instance to the arrangements for the training, if the disabled person would otherwise be put at a disadvantage. This might for example involve the employer changing the time or location of a training event.

Is it unlawful to reduce or remove pay from a disabled person if they are off work by reason of their disability?

If a disabled person's pay is reduced or ceases altogether due to a disability-related sickness absence, this may amount to less favourable treatment. However, if the employer is operating a standard sick pay scheme, that could amount to justification.

The employer is under a duty to consider whether there are any reasonable adjustments that need to be carried out, for example, to enable the disabled person to return to work and start earning money again. That might include part-time work, or home working. The employer may need to get a medical report to ascertain the nature of the condition and the prognosis, or to assist in an assessment about what adjustments would be appropriate.

In exceptional circumstances, it might also be a reasonable adjustment to extend or increase sick pay, for example to facilitate the worker's return to work.

In the case of *Nottingham County Council v Meikle*, Ms Meikle's pay was reduced by half after an absence of 100 days, in accordance with the rules of the employer's sickness scheme. The Court of Appeal said that this amounted to less favourable treatment because had the employer made reasonable adjustments to her working patterns, she would not have had to take so much sick leave and would not have been put on half pay in the first place.

What about Permanent Health Insurance schemes?

Most PHI schemes require the employee to remain in work to benefit from the scheme. If the person loses that benefit when their employer terminates their employment, that may amount to an unjustified failure to adjust.

The employer may, therefore, be required to make a reasonable adjustment by keeping that person on the payroll. As always however, much will depend on the particular circumstances of the individual case.

What rules apply to pension schemes?

Employers, managers and trustees of occupational pension schemes cannot refuse to let disabled people join a pension scheme, nor can they offer discriminatory terms of membership. They are bound by the same rules as employers and would, for instance, have to be able to justify any treatment that was less favourable to a disabled person by showing that it was 'material and substantial'.

They are also under an obligation to carry out reasonable adjustments. This duty applies to both prospective members and current members of the scheme.

The DRC code of practice gives the example of someone in a final salary scheme where the maximum pension is equivalent to 2/3rd of final salary. It points out that if after, for example, 20 years of full-time service, an employee becomes disabled and has to reduce her working hours for the remainder of her working life, the rules put her at a substantial disadvantage because her pension will be calculated on her final part-time salary. The trustees should therefore address this by averaging out her salary over a period of years.

What does the term dismissal include?

Under recent amendments to the Act, the term 'dismissal' now extends to the non-renewal of fixed term contracts and constructive dismissal. It already applied to compulsory early retirement.

What procedure should an employer follow before dismissing a disabled person?

Before dismissing a disabled person for a reason related to their disability, employers should consult with him or her to find out exactly what the problems are, and the effects of the disability on his or her current or future employment.

They should also consider whether there are any reasonable adjustments that can be carried out to keep the disabled person in post. Medical advice is likely to be necessary to ensure that the employer has an accurate picture of the situation. Dismissal is the last resort.

Employers also need to give thought to the manner in which they dismiss the person. For instance, in one case an employee who was deaf and mute, was given half an hour's notice of his redundancy after 40 years' service. He had difficulty understanding the situation and the appeal tribunal said that the disabled employee had suffered a disadvantage in the way that he had been dismissed.

When can employers justify dismissal?

Employers may be able to justify dismissing someone where the dismissal relates to their disability, for example where they are unable to do their job or have been on long term sick leave. However, they can only justify a dismissal once they have considered all reasonable adjustments. The code of practice states that employers can justify the dismissal of a disabled employee whose condition worsens to the point whereby there are no reasonable adjustments that can be made.

In redundancy situations, employers need to make sure that any procedures for selection do not discriminate against disabled employees, unless they can justify them. In particular, the code states that it may be a reasonable adjustment for an employer to discount disability-related sickness absence when assessing attendance as part of a redundancy selection scheme.

Employers also need to be careful that they do not allow subconscious assumptions to affect the way they apply the selection criteria. In *British Sugar*

plc v Kirker, Mr Kirker complained that the reason for his selection for redundancy was his severe visual impairment.

He pointed to the fact that he had, for example, been assessed at 0 out of 10 for performance, never previously having been criticised for his performance. The tribunal agreed and said that managers had failed to mark Mr Kirker objectively. He was viewed as different from other employees and as having no future with the company, for a reason connected with his disability.

What about post-employment discrimination?

Employers are under a duty not to discriminate against a former worker, for example in relation to a post-termination appeal or a letter of reference. The duty to adjust may also arise post termination, for example in relation to arrangements made for an appeal.

Can employers positively discriminate in favour of disabled people?

There is nothing in the Act to stop employers from treating a disabled person more favourably than someone without a disability. That being so, someone without a disability has no redress against an employer who has discriminated in favour of a disabled person. This is in contrast with the situation under the other discrimination legislation.

What changes will the Disability Rights Act introduce?

When introduced, the new Act will make important changes to the terms of the DDA. It will have particular impact on transport and the provision of goods and services. It will also make certain changes to the employment provisions of the DDA.

Most significantly, the Act will introduce a duty on public authorities to promote disability equality and will prohibit discrimination by public authorities in the exercise of their functions. These provisions will be similar to the terms of the Race Relations Amendment Act 2000.

Under the new Act, people with the progressive conditions of cancer, HIV and MS will be treated as having a disability from the date of diagnosis, without the need to prove that their condition has an impact on their day–to-day activities.

The new Act will also abolish the requirement that mental illnesses have to be 'clinically well-recognised' to come within the scope of the DDA. As the DDA is currently drafted there is no requirement for physical impairments to be clinically well-recognised.

The intention is that the changes will come into effect by December 2005, with the public sector duties in force by December 2006.

RIGHTS FOR WORKING PARENTS

Women have long had maternity rights giving them protection when they are pregnant and on maternity leave. In 1999 parental leave was introduced for both men and women.

Then in April 2003, a number of further rights were introduced for working parents. These included more generous maternity leave and pay, the introduction of paternity and adoption leave and pay, and new rights to work flexibly (to be extended to carers). The scope of the legislation was wide – including not just biological mothers and fathers but also adoptive parents and partners of same sex couples.

This chapter contains a summary of the basic statutory minimum rights to which employees are entitled. As with all statutory minimum rights, employees often have terms in their contracts of employment which are more favourable. In those circumstances it is the contractual terms which apply.

THE ANTENATAL STAGE

What antenatal rights does a woman have?

A woman is entitled not to be 'unreasonably refused' paid time off to attend antenatal appointments during working hours – that is when her contract requires her to be at work. The woman must, however, ask for (and obtain) permission to attend.

The time off includes the time for the appointment as well as travelling and waiting time. If the appointment lasts longer than expected and the woman misses her entire shift, she is entitled to be paid for all the time off.

There is no obligation on the woman to make up for lost time, nor is the employer allowed to rearrange her working schedule to avoid the appointment.

How is her pay calculated?

The woman should be paid at her normal rate. If she is paid a fixed monthly or weekly sum, then that is what she should be paid. Otherwise, the hourly rate is calculated by dividing her week's pay by her normal weekly working hours.

Can an employer refuse to give the time off?

It may be reasonable for an employer to refuse a woman time off if she works part time, and could easily attend the appointment or class on one of her non-working days (as long as that does not involve rearranging her normal working hours).

If the employer unreasonably refuses the request, then the woman can complain to an employment tribunal within three months of the date of the missed appointment. The tribunal can make a declaration that the employer must pay the employee for the time off requested. She can also claim compensation if she is disciplined or subjected to any disadvantage for taking time off, and in addition may also be able to claim unlawful sex discrimination.

Who is entitled to time off?

As with most maternity rights, the woman must be an employee in order to benefit. In other words, she must have a contract of employment (or service). So women who are self-employed or work on a casual basis, may not be entitled to request time off under these procedures.

The position of agency workers is less clear, but following a number of recent court decisions it may be that agency workers are employees. The employer is likely to be the 'end user', in the sense of being the client of the agency. This will particularly be the case where the workers have worked consistently over a period of time for the same end user. However, it all depends on the facts in the individual case.

Women employed on ships are covered as long as the ship is registered to a port in Great Britain, they work on occasions in Great Britain and are normally resident here.

The entitlement applies from day one of employment.

What is covered?

It is not entirely clear what is covered and relaxation and parentcraft classes are a grey area. But if a doctor or midwife has recommended to a woman that she attend, the employer would probably be wise to accept that advice and allow the woman time off.

What about fertility treatment?

Women receiving fertility treatment are not entitled to paid time off for antenatal care because they are not pregnant.

HEALTH AND SAFETY

Assessing the risk

What do employers have to do?

Employers have a duty to make an assessment of the risks of their business to their workers, and anyone else affected by what they do.

This includes, in particular, an assessment of the risks to 'new or expectant' mothers and their babies if there are women in the workplace of childbearing age and the work is such that they could be put at risk. This covers anyone who is pregnant, has given birth within the last six months or who is breastfeeding.

Employers have to do this if they employ a woman of 'childbearing age', whether pregnant or not, and they should do it when the woman starts work. Once a woman has told her employer (in writing) that she is pregnant, then the employer has to do another assessment for that particular individual.

A failure to carry out a risk assessment for a pregnant woman may amount to unlawful sex discrimination, as well as a breach of health and safety laws.

The Health and Safety Executive has produced a guide on the rights of women of childbearing age. This can be found at **http://www.hse.gov.uk/pubns/indg373.pdf** under the heading 'A Guide for new and expectant mothers who work'.

Who is covered?

These health and safety provisions apply to all workers including temporary and casual workers and those working abroad or in private households, apart from the master or crew of a sea-going ship.

However, women working on merchant shipping and fishing vessels are covered by the provisions on alternative employment and suspension from work (see below). The protection also applies to workers who usually work abroad.

Avoiding the risk

What information should employers provide?

When the assessment has been done, employers need to give all female staff of childbearing age information on any risks to their health, and details of what they are going to do to minimise any risks that the assessment uncovered. The employer should keep a written record of any measures he or she has undertaken.

What is required of employers?

If the employer identifies a risk to a new or expectant mother he or she has to take steps to avoid it. Failing that, he or she has to alter the woman's working conditions and/or hours of work so as to remove her from the risk.

If they cannot do that, they have to offer suitable alternative work to the woman failing which they have to suspend her on full pay.

What if a woman refuses the offer of alternative work?

If a woman unreasonably refuses her employer's offer of suitable, alternative work, she loses her entitlement to be paid. What is 'unreasonable' is open to debate, but if the job is similar to the one she had been doing, and the terms and conditions are no less favourable, then it will probably be unreasonable for her to refuse it.

Can employers pay someone sick leave instead of suspending them?

No. If the employer identifies a risk, but cannot offer an alternative job, the woman has the right to be suspended on full pay until her maternity leave starts.

What about working at night?

If a woman has a certificate from a doctor or midwife saying that working at night poses a risk to her health and safety, then her employer must suspend her, unless he or she has suitable alternative work that can be offered.

What remedies are available if the employer does not comply?

If the employer fails to pay his or her employee, or fails to offer suitable alternative work, the woman can complain to a tribunal within three months of that failure and if she is successful, the employer will have to pay the full amount that she is owed and award compensation.

She may also be able to pursue a claim for sex discrimination.

It is automatically unfair to dismiss an employee (and that includes selection for redundancy) rather than offer her alternative employment or suspend her on full pay.

MATERNITY LEAVE

All employees who are pregnant are entitled to 26 weeks' ordinary maternity leave (OML). Usually, women entitled to OML will also be entitled to maternity pay. Women with 26 weeks' service at the 15th week before the week in which the baby is due are also entitled to a further 26 weeks' additional maternity leave (AML), which is unpaid.

Ordinary Maternity Leave

Who is entitled to ordinary maternity leave?

All employees who are pregnant are entitled to OML of 26 weeks, irrespective of how long they have worked for their employer or how many hours they work per week. Women who are self-employed or who are not employees are not covered.

Women employed on ships are also entitled, but only if the ship is registered to a port in Great Britain and the employee works at least part of the time in Great Britain and usually lives here.

Who chooses when the maternity leave starts?

It is up to the woman to choose when to start her leave, as long as it is not before the 11th week before the week in which the baby is due (known as the EWC – expected week of childbirth).

There are two exceptions to this:

- where the baby is born earlier than the EWC, then OML starts from the date of birth
- if the woman is off work with a pregnancy-related sickness during the four-week period prior to the EWC, in which case her sickness absence will automatically trigger her OML

What is compulsory maternity leave?

This is a two-week period that starts with the date of birth and applies to all employees. The onus is on the employer to ensure that the woman takes two weeks' leave once the baby is born. A failure to do so is a criminal offence. Factory workers are prohibited from working for four weeks after the birth.

What notice does a woman have to give before going on OML?

To apply for maternity leave, a woman must tell her employer if possible at least 15 weeks before the week in which the baby is due:

- that she is pregnant
- the date when the baby is due (the employer can ask to see evidence such as a medical certificate, MAT B1 form)
- the date when she intends to start her maternity leave

This notification does not necessarily have to be in writing.

If the woman subsequently decides that she wants to delay the start of her OML, she needs to tell the employer, again not necessarily in writing, 28 days before the original date. If she wants to bring it forward, she needs to tell her employer 28 days before the proposed new start date, if that is practical. The new date cannot be earlier than the 11th week before the EWC, as OML cannot start before that.

If it is not reasonably practical for the woman to give that much notice, perhaps because the baby is premature or because she has just started working for that employer, she has to give notice as soon as she can.

What does the employer have to do?

Once the employee has told the employer when she intends to start OML, the employer must write to her within 28 days, telling her when she is expected to return, based on the assumption that she wants to take her full 26-week entitlement.

If the employer fails to tell the woman when her maternity leave ends, he or she cannot then complain if she does not return on the right date. The woman can, however, complain if she suffers a disadvantage because she comes back late. If she is dismissed as a result, it will be automatically unfair.

Employers no longer have the right to ask a woman to confirm her intention to return 15 weeks after the start of OML.

What happens if the woman fails to give the correct notice?

If a woman fails to comply with any or all of the notification requirements, or gives them late and cannot satisfy the 'not reasonably practical' test, she loses her right to start OML on the intended date.

She does however remain entitled to the usual protection from unfair dismissal and less favourable treatment for a pregnancy or maternity related reason, and may also be able to claim that her treatment amounts to sex discrimination if she is treated less favourably than a man would have been treated.

For these reasons employers often allow women to continue with their OML, despite any technical breaches of the notification requirements.

What happens if the woman is ill?

If a woman is ill during her pregnancy and it has nothing to do with her pregnancy, she is entitled to claim sick leave in the usual way until the date when she chooses to start OML.

If, however, she is off work with an illness which is wholly or partly to do with her pregnancy at any time in the four weeks leading up to the EWC, then OML will be automatically triggered.

What happens if the baby is born prematurely or is stillborn?

Entitlement to OML is unaffected if the baby is born prematurely. If it is stillborn after the 24th week of pregnancy, the woman remains entitled to OML. If it is stillborn before the 24th week, she loses her entitlement to the leave. She may though be entitled to sick leave in the usual way.

What terms and conditions apply during OML?

During OML, a woman is entitled to all the same terms and conditions had she not been away from work, with the exception of pay. Equally, she is bound by any obligations under her contract unless they conflict with her right to take leave.

Payment is defined in the legislation as 'wages or salary'. It follows therefore that a woman is still entitled to receive all benefits that are not wages or salary during her OML such as pension contributions or the use of a company car.

It is not clear whether profit-related pay schemes, bonuses and commissions fall under the heading of wages or salary. During the two week compulsory maternity leave period immediately following the birth of the baby, it is clear that a woman is entitled to a pro rata share of any bonus awarded to staff.

In terms of OML generally, if the payments relate to work done before the woman went on leave, then she will be entitled to them. If not, then she will probably only be entitled to them if they are not regarded as part of her wages or salary.

So, for example, if a bonus is a one-off payment reflecting the company's successful financial performance as a whole, then the woman would probably be entitled to it.

Of course, if her contract offers more favourable terms during OML then she will be entitled to them.

If her employer refuses to pay her these benefits, she can claim unlawful deduction of wages and sex discrimination in an employment tribunal or a breach of contract in the county court (or Sheriff Court in Scotland). If her

employment has terminated, she can also bring the breach of contract claim in a tribunal.

Service-related benefits such as seniority-based annual leave or pension rights accrue during OML.

What are the rules on annual leave during OML?

Paid annual leave (both contractual and statutory under the Working Time Regulations) continues to accrue during OML. Annual leave can be taken either before or after maternity leave, as long as the correct notice has been given and any other statutory or contractual requirements have been complied with.

If annual leave falls to be taken at a specific time, such as with an annual factory closure, and that time coincides with maternity leave, then the woman has the right to take the annual leave at some other time, either before or after the maternity leave.

Additional maternity leave

Who is entitled to additional maternity leave?

Women who have been employed for six months at the 15th week before the EWC are entitled to a further 26 weeks of additional maternity leave (AML), straight after OML.

When does AML start?

AML starts on the day after OML and finishes after a fixed period of 26 weeks. The employer should assume that AML will continue for the full 26 weeks, unless the woman notifies him or her otherwise.

What terms and conditions apply during AML?

Although an employee's contract of employment continues during AML, women are only entitled to a limited number of terms and conditions. These include the benefit of her employer's implied duty of trust and confidence, her right to notice of termination, and the benefit of disciplinary and grievance procedures. Women also still accrue statutory holiday rights. They will not be entitled to contractual holiday rights, unless the contract specifically allows for it.

Most benefits such as pay and bonuses are not therefore payable during AML unless they relate to a period before the maternity leave started. Employers are not required to make pension contributions during unpaid AML, unless the contract or scheme provides otherwise, and the period of AML does not count towards pensionable service.

Rights based on seniority or service do not accrue during AML.

What are the rules for annual leave during AML?

During AML, a woman accrues her entitlement to the statutory four weeks' paid annual leave under the Working Time Regulations, in the same way that it accrues during OML and long term sick leave.

What happens if a woman suffers a disadvantage as a result of pregnancy or maternity leave?

Under the Maternity and Parental Leave Regulations 1999, an employer cannot lawfully subject a woman to less favourable treatment in connection with her pregnancy or maternity leave. If she does suffer any adverse treatment, she has the right to claim compensation from a tribunal within three months of the act complained of. If she is dismissed, the dismissal will be automatically unfair.

RETURNING TO WORK

What notice does a woman have to give?

Women are not required to give any notice to their employer if they intend to return to work after the end of their full maternity leave (26 weeks of OML or 52 weeks including AML), on the basis that the law assumes that that is what they will do. If a woman does not wish to return, she must hand in her notice in the normal way before the end of her maternity leave period.

If a woman wants to return before the end of her full leave period, she has to tell her employer at least 28 days beforehand of the date on which she intends to come back. If she fails to do that, the employer has the right to delay her return until the end of the 28-day notice period. The employer cannot, however, delay her return after the end of her full maternity leave period nor where she has given the appropriate notice that she intends to return early.

What terms and conditions apply on return from OML?

After OML a woman is entitled to return to the same job that she was doing before she left, on terms that are no less favourable. If her employer refuses to allow her to do that, she will be able to make a claim that she has been treated less favourably by reason of pregnancy and maternity leave, sex discrimination and possibly also unfair dismissal.

What terms and conditions apply after AML?

As with OML, someone returning from AML is entitled to return to the job they were doing before they went on leave, on terms that are no less favourable.

There is though an exception that applies if it is not reasonably practical for the employer to allow the woman to return to her old job, for a reason other than redundancy. In these circumstances the employer can offer her an alternative job that is 'suitable' for her and 'appropriate' in the circumstances. It follows that the terms and conditions of the new job must be no less favourable than the old one.

AML does not count towards pension, seniority rights or any other rights that depend on a period of qualifying service. Instead, the woman's rights are 'frozen' at the beginning of the AML period and then revive on her return to work.

It is worth noting that a woman may end up taking a mixture of different types of leave. So for example she might take OML followed by AML and/or parental leave and then maybe OML again. In these circumstances, if the AML (or parental leave) is for more than four weeks, the woman does not have the right to return to the same job after OML, but instead retains the lesser rights of return after AML/parental leave.

What happens if the employer refuses to allow a woman to return?

If an employer refuses to take someone back, this would constitute an automatically unfair dismissal unless the reason was because her job had been made redundant, or that it was not reasonably practical to take her back perhaps because of an internal reorganisation. In these circumstances the usual rules on unfair dismissal would apply.

What rights does a woman have if she is made redundant?

If a woman is made redundant during her maternity leave, her employer must offer her suitable, alternative employment, if it exists, which is appropriate for her to do. She has priority in being offered alternative work over other staff who are not on maternity leave.

The terms and conditions should not be substantially less favourable than her old job. For instance, they should not be of a lower status. The tribunal will also take into account whether the new job poses problems for the woman, such as increased travelling time or greater childcare costs.

STATUTORY MATERNITY PAY

What is Statutory Maternity Pay?

Statutory Maternity Pay (SMP) is the money paid by an employer to a pregnant woman for up to 26 weeks if she satisfies the qualifying conditions, outlined below.

SMP is subject to tax and NI contributions. It can be paid weekly or monthly, or even as a lump sum, though payment by lump sum increases the woman's liability to NI contributions.

Frequently, women are entitled to more favourable contractual terms, in which case the employer can offset SMP against the contractual payments.

Who is entitled to SMP?

To qualify for SMP, a woman has to:

- be pregnant at the 11th week before the EWC
- be in continuous employment for 26 weeks with the same employer, up to and including the 15th week before the EWC
- have average weekly earnings during an eight week reference period ending with the 15th week before the EWC that are high enough to make her eligible to pay class 1 NI contributions
- have given 28 days' notice to her employer as to when he or she is liable to start paying SMP (or less than that if it is not reasonably practical to give 28 days' notice)
- have produced a medical certificate from a doctor or midwife, which gives the date when she is due to give birth
- have stopped work for her employer, for whatever reason

Payment of SMP is not dependent on the woman returning to work after her OML.

How much is SMP?

SMP is paid at a rate of 90% of normal earnings for the first six weeks of OML, followed by a flat rate (which changes every year) for the remaining 20 weeks. The rate is currently £102.80 (£106 from April 2005). If, however, 90% of her earnings are less than £102.80, she is only entitled to that lower amount for 20 weeks.

Normal earnings are calculated by reference to the eight-week reference period prior to the 15th week before the EWC. This will include any backdated pay rise that an employer may have awarded to staff even if the actual payment postdates the eight-week reference period.

What happens if the employer fails to pay?

Liability for payment passes to the Inland Revenue if the employer fails to pay the SMP.

Who is liable to pay SMP for agency staff?

Basically, whoever is responsible for paying the employer's share of class 1 NI contributions is liable to pay SMP. Agency workers may therefore qualify for SMP from the agency, if they receive their pay from the agency, if they have 26 weeks' continuous employment, and if they can be properly categorised as employees as opposed to agency workers.

Under what circumstances does a woman have to pay back SMP?

None. The only money that an employer may be able to recoup is any contractual maternity benefit that he or she provides over and above SMP, providing the contract allows the employer to do that.

What if a woman works during her maternity leave?

If a woman works for her employer during the SMP period, then she loses a week's SMP in relation to any week in which she has worked, irrespective of how many days she worked in that week. Women should therefore ensure that their employer fully compensates them if they ask them to work while entitled to SMP.

However if a woman works for a different employer before the baby is born, her entitlement to SMP is not affected. If she starts work for another employer after the baby is born, she must tell her previous employer within seven days and he or she no longer has to pay her SMP.

Can a woman claim Statutory Sick Pay?

If a woman is entitled to SMP, she cannot claim Statutory Sick Pay (SSP) for the entire 26-week period. If the woman is not entitled to SMP, she still cannot claim SSP, but is disqualified for 18 weeks only.

Who can claim Maternity Allowance?

Maternity Allowance is a benefit payable to women who do not qualify for SMP. To claim the allowance they need to:

- have been employed (or self-employed) for at least 26 weeks in the 66 weeks before the baby is due
- have average weekly earnings over any 13 weeks in the 66 week-period of more than £30 per week

Maternity Allowance is paid for 26 weeks at a flat rate of £102.80 or at 90% of average weekly earnings, whichever is less. It cannot start before the 11th week before the EWC. A claim for Maternity Allowance can be made through a local Jobcentre Plus office.

STATUTORY PATERNITY LEAVE

Paternity leave was introduced in April 2003. It allows a father or partner to take two weeks' paid leave on or around the time of birth of a baby, or adoption of a child, to enable him (or her) to be with the mother and child.

Who is eligible?

Only employees can claim paid paternity leave, and not other workers. Seafarers employed on ships registered under the Merchant Shipping Act 1995 are covered, if the ship is registered to a British port.

Employees can take paternity leave, whether it is for the birth of a child or the adoption of a child.

What are the qualifying conditions?

There are a number of qualifying conditions:

- the purpose of the leave must be to care for the new baby (or a child under 18 just placed for adoption) or help the mother
- the employee must have been continuously employed for 26 weeks ending with the 15th week before the EWC or, in relation to adoption, for 26 weeks ending with the week in which the child's adopter is notified of having been matched
- the person must either be the child's father or the mother's husband or partner, or the husband or partner of the child's adopter
- the person must have responsibility for the upbringing of the child

There are model self-certification forms of entitlement on the Inland Revenue website – **www.inlandrevenue.gov.uk**. These contain a declaration confirming the above conditions.

Who is a partner?

A partner, whether of the same or a different sex, is someone who lives with the mother and child 'in an enduring family relationship', but who is not a relative.

What is the entitlement?

The employee is entitled to either one or two weeks' consecutive leave, which can start from the actual or expected day of the birth or for adoption the date on which the child is placed with the adopter. The leave must be taken within 56 days of the actual or expected date of birth, or the start of the placement.

What notice is required?

The employee has to tell his or her employer the following, in writing if requested, by the 15th week before the EWC:

- the date when the baby is due
- how long he or she expects to be off (one week or two)
- the date on which he or she would like the absence to start

An employee can vary the date by giving 28 days' notice to the employer before the revised date, if practical; if not, then as soon as possible.

In the case of adoption, the notice has to be given no more than seven days after the date on which the adopter is notified of having been matched with a child, if possible. The notice has to specify:

- the date when the adopter was notified of the match
- the expected date of placement

- the length of leave that the employee has chosen
- the date on which he or she wants the leave to start

Again, the employee can vary this date by giving 28 days' notice, if possible.

What terms and conditions apply during paternity leave?

The employee's contract continues throughout the paternity leave period, without any variations apart from the amount he or she is to be paid.

So anyone taking paternity leave has the right to return to the job in which they were employed before they went on leave.

Is there any protection from detriment or dismissal?

Anyone who is disadvantaged, except in respect of pay, during the paternity pay period or who is dismissed for taking paternity leave will have a remedy in an employment tribunal. Any dismissal would be automatically unfair.

STATUTORY PATERNITY PAY

Who is entitled to SPP?

To receive statutory paternity pay (SPP), the employee must satisfy the same criteria as for paternity leave, but in addition must have been earning more than the lower earnings limit for National Insurance in the eight weeks ending with the 15th week before the baby is due (or the week in which the adopter is notified of being matched).

What evidence is needed for SPP?

To claim SPP, the employee has to provide the following information to the employer 28 days before SPP is due to start, or if that is not possible as soon as is reasonably practical thereafter:

- his or her name
- the date the child is expected to be born or for adoption the date the adopter was notified he or she had been matched with a child
- the date from when liability to pay SPP will start
- the length of time chosen (one week or two)
- a written declaration that he or she is the father of the child, or the husband or partner of the child's mother (or is the husband or partner of the child's adopter) and expects to have responsibility for the child's upbringing

What are the rates of pay?

The rates are the same as those for SMP, currently £102.80 (£106 from April 2005).

STATUTORY ADOPTION LEAVE

Statutory adoption leave was introduced in April 2003. It largely mirrors maternity rights, with ordinary adoption leave (OAL) reflecting ordinary maternity leave, and additional adoption leave (AAL) reflecting additional maternity leave.

What is covered?

Adoption leave is only available where a child is actually placed for adoption, and not where the adoption relates to a child already living in the family, as with a step-parent deciding to adopt.

Who is entitled to adoption leave?

Only employees are entitled to adoption leave.

Where only one party is adopting, then he or she is the person who is entitled to take adoption leave. In the event of joint adoption, either party can take leave, but not both. The other partner or spouse who is not taking the adoption leave can, however, take paternity leave and/or parental leave.

What are the qualifying conditions?

The employee must be:

- the child's adopter
- have been continuously employed for at least 26 weeks, ending with the week when he or she was notified of having been matched with a child – this contrasts with ordinary maternity leave, which does not require any qualifying service
- have agreed with the agency the date of placement

When does it start?

OAL can start either on the date the placement is to start, or within the two-week period prior to the placement starting. It lasts for up to 26 weeks.

What notice is required?

The employee has to tell his or her employer (in writing if the employer wishes) within seven days of being notified of a match, or as soon as is reasonably practical if that is not possible:

- the date on which notification was received
- the expected date for the placement
- the date on which OAL is to begin
- how long the leave will last

The start date can be varied if the employee gives the employer 28 days' notice of the change, or if not reasonably practical, then as soon as possible.

Once the employer receives notification of the date of the OAL, he or she must then tell the employee within 28 days of receipt of the notice, the date on

which the entitlement ends. If the employer fails to do that they cannot dismiss or subject the employee to discipline if the employee does not return on the due date.

What evidence is required?

None, unless the employer requests it. If he or she does, then the employee has to produce documents from the adoption agency that show:

- the name and address of the agency
- the date the employee was notified of the match
- the expected date for the placement

What terms and conditions apply during OAL?

As with ordinary maternity leave the employee's contract continues throughout the OAL period, without any variations apart from the amount he or she is paid.

What terms and conditions apply during AAL?

These are the same as with additional maternity leave.

What notice is required for returning to work?

No notice is required if the employee wishes to take their maximum entitlement of leave. If the employee wants to come back early, however, then they have to give the employer 28 days' notice of the date when they wish to return.

If the employee tries to come back early without giving notice, the employer can defer their return until the full notice period is complete, though not if that would take it beyond the end of the AAL period. If the employee comes back to work before the due date, the employer does not have to pay them until the official return date.

None of this applies, however, if the employer fails to give notification of the employee's return date.

What terms and conditions apply after OAL and AAL?

An adopter's rights after a period of OAL and AAL are basically the same as those of a woman returning from OML and AML (see earlier in chapter).

What about redundancy?

If a redundancy situation occurs while the employee is on leave and it is not reasonably practical for the employee to return to the old job, then he or she has to be offered suitable, alternative employment if it is available.

If the employer fails to offer suitable available employment to the employee, then the dismissal is automatically unfair. If the employee unreasonably refuses an offer, the dismissal will probably be fair and the employee will lose the right

to a redundancy payment. If there is no suitable vacancy on offer, the employee may be made redundant.

STATUTORY ADOPTION PAY

Statutory Adoption Pay (SAP) is payable throughout the OAL period. There is no equivalent to the earnings related maternity pay of 90% pay for six weeks. Instead SAP is paid at a flat rate, which is currently £102.80 per week (£106 from April 2005), for the whole period of 26 weeks.

Who is entitled to SAP?

To qualify for statutory adoption pay, the adopter must:

- have 26 weeks' service ending with the week in which he or she was notified of having been matched with a child (continuous employment is calculated as with SMP – see earlier in chapter)
- have average pay of at least the lower earnings limit for National Insurance
- have stopped working for their employer

Anyone receiving statutory paternity pay is not entitled to receive SAP.

What notice does the employee have to give?

The adopter has to give the employer at least 28 days' notice of the date on which SAP is likely to start. If that is not practical, then as soon as possible.

In addition, the adopter has to tell the employer when the child is expected to be placed. If this is the same as the date for the start of SAP, then the employee also has to tell the employer, as soon as is reasonably practical, of the actual date of placement.

Can someone lose their entitlement to SAP?

If the employee works for their employer for any part of a week, then the employer is not liable for SAP for that week.

PARENTAL LEAVE

Parents of children under five have the right to 13 weeks' unpaid leave to care for the child. It is available to both men and women.

Who is entitled?

Only employees with one year's service qualify. This is measured from the date that the leave is due to start.

The right is only available to someone with responsibility for a child. Mothers of a child automatically qualify, as do fathers who are married to the mother or who are registered on the birth certificate or who have parental responsibility.

Adoptive parents have parental responsibility.

The parents of a child do not have to be living with the child to qualify for parental leave. Parental leave is not available to foster parents.

Parental leave can only be taken in order to care for the child.

What is the right?

Parents can take unpaid leave of up to 13 weeks per child (or 18 weeks for children entitled to disability living allowance) in order to care for that child. In the case of multiple births, 13 weeks' leave is available for each child.

The right lasts until the child is five or until 18 if the child is entitled to disability living allowance.

Parental leave is also available for adopted children and runs for a five-year period from the date of the adoption or until the child's 18th birthday, whichever is earlier.

What are the notice requirements?

The regulations allow for collective or workforce agreements to be drawn up, setting out in more detail the entitlement and procedures for parental leave. If however no such agreements exist, then certain default provisions apply.

The default provisions state that employees wishing to take parental leave have to give 21 days' notice of the dates on which they want to start and end their leave. However, if a father wants to take parental leave immediately after the child's birth, the notice only needs to specify the expected week of birth. The leave can then start from the actual birth.

Unless a father is taking leave to coincide with the birth, employers can postpone leave for up to six months if they think that it would unduly disrupt the operation of the business. If they wish to postpone, the employer must give notice to the employee within seven days of the employee's notification.

How long can parental leave last?

The right is for a maximum of 13 weeks. However, if the default provisions apply then an employee cannot take the leave in less than one-week slots, unless the child is in receipt of disability living allowance. Nor can they take more than four weeks in any one year.

What rights do employees have during parental leave?

Rights during parental leave are similar to those during additional maternity leave (AML). Employees absent on parental leave are only entitled to the benefit of the employer's implied obligation of trust and confidence, and to any terms relating to termination, compensation for redundancy and disciplinary and grievance procedures. The statutory entitlement to four weeks' paid annual leave also continues to accrue.

But unlike AML employees do not lose seniority or pension rights while on parental leave.

What rights do employees have on their return from leave?

Subject to any collective agreement which may provide for better terms, the rights on return depend on how long the leave lasted. For periods of four weeks or less, employees must be given their old job back on the same terms and conditions as before.

If the leave was for more than four weeks, the employee is entitled to return to the same job, or if that is not reasonably practicable, to a similar job with the same terms and conditions and status as the old one.

What remedies exist if an employer does not grant leave?

An employee can make a complaint to an employment tribunal, within three months of the date of the act complained of, if the employer refused or unreasonably postponed the leave or prevented or attempted to prevent the employee from taking parental leave. There are also remedies if an employee is penalised in any way as a result of taking or intending to take parental leave.

TIME OFF FOR DEPENDANTS

Unlike parental leave, time off for dependants is designed to allow carers to take a limited amount of time off work, without advance notice, to deal with emergencies. Like parental leave, it is unpaid.

What is the right?

Employees have the right to take time off in an emergency to look after a dependant. There is no need for any qualifying period of service.

The legislation does not state how much time off an employee can take – it should just be 'reasonable'. The Department of Trade and Industry suggests one or two days at the most, though this will depend on the circumstances.

Who is a dependant?

A dependant is defined as a spouse, partner, child, parent or person in the same household as the employee (except someone who is a tenant or lodger). In addition, where the time off is by reason of sickness or injury, a dependant also includes anyone who relies on the employee for help when ill (whether physically or mentally) or injured, or relies on the employee to make arrangements for him or her to be looked after in such circumstances.

What is the entitlement?

The employee is entitled to the unpaid time off during working hours in order to 'take action which is necessary':

- when a dependant falls ill, gives birth or is injured or assaulted
- to make arrangements for a dependant who is ill or injured
- when a dependant dies
- because of the unexpected disruption or termination of arrangements for the care of a dependant
- to deal with an incident which involves a child of the employee and which occurs unexpectedly

The type of illnesses covered by the new right is not defined under the Act – the dependant just has to be ill. The illness does not have to be life-threatening, but the more serious the illness, the more likely it is that 'action will be necessary'.

A recent case decided by the EAT (*Forster v Cartwright Black Solicitors*) has made clear that although employees can take time off following the death of a dependant, that is not the same as the right to take compassionate leave.

The right is only available if the employee tells the employer the reason for the absence as soon as practicable and how long he or she expects to be absent. There is no need for this to be in writing.

The employee can make a claim to the employment tribunal within three months if the employer fails to give him or her time off as required or is penalised in any way for taking time off.

FLEXIBLE WORKING RIGHTS

Under the Sex Discrimination Act 1975, women (and, in limited circumstances, men) may claim a right to part-time or flexible working to care for children and dependants.

In 2003, new rights were introduced which set out the procedure that both men and women can follow to request flexible working to care for children. When dealing with issues of access to flexible work, workers should consider the two sets of rights together, that is under the Sex Discrimination Act 1975 and the Flexible Working Regulations. The procedure under the regulations is set out below. The rights under the Sex Discrimination Act 1975 are set out in chapter three.

What flexible working rights do parents have?

An employee with a child under six (or 18 if disabled) is entitled to ask for a change in their terms and conditions of service in order to care for that child.

The change can relate to the hours they have to work, the times they work, or the location in which they work. The requests can cover work patterns such as compressed hours, flexitime, homework, jobsharing, teleworking, term-time working, shift working, staggered hours, annualised hours or self-rostering.

Who qualifies?

To qualify an employee must have 26 weeks' continuous employment with their current employer. The employee also has to be the mother, father, adopter, guardian or foster parent of the child (or be married to or be the partner of that person) to have the legal right to ask their employer to work flexibly. Partners of same sex couples are included. The employer can, of course, extend the right to employees with less than 26 weeks' service, but that is down to his or her discretion.

How should the application be made?

The application must be made in writing. It must specify the change applied for and the date from which it is requested. The applicant must also 'explain what effect, if any, [he or she] thinks making the change applied for would have on the employer and how, in his [sic] opinion, any such effect might be dealt with.' It may be difficult for the employee to set out the impact of the change on the employer and how this should best be dealt with. But it is crucial to do so, because a failure to satisfy this requirement invalidates the application.

There is a flexible working application form available on the DTI website – **www.dti.gov.uk/er**

Once an employee has made an application, he or she cannot make another one within the following 12 months.

What should happen next?

If the employer agrees to the application, he or she must confirm this in writing and specify the date from which the proposed change will apply. There is no need for a meeting in these circumstances.

If he or she does not agree, the employer has to call a meeting within 28 days of the date of the application to discuss it. If the employee is off sick or on holiday, then the time limit can be extended to 28 days of his or her return to work. The employee has the right to bring a companion to this meeting, and although the companion can discuss issues with the employee they cannot answer questions on the employee's behalf.

After the meeting, the employer has to notify the employee of the decision within 14 days of that meeting, either agreeing to it or setting out the grounds for refusal in writing and explaining, in no more than a couple of paragraphs

(according to the DTI guide), why those grounds apply. There are extensive potential grounds of refusal in the regulations.

The reasons that the employer may give have to constitute a proper explanation as to why the request could not be granted. A simple rejection by reference to one of the prescribed headings will not be good enough.

The employee has the right of appeal by giving notice within 14 days of the date of the refusal. Again, there is an appeal form on the DTI website. That hearing must be held within 14 days of the date on which the notice of appeal is lodged. The employer must notify the employee of his or her decision within 14 days of the date of the appeal hearing. Any of the time limits can be extended by mutual agreement, but the details of the change must be put in writing.

Will the change be temporary or permanent?

Once the change is agreed, it will be permanent – unless both parties expressly agree that the change is for a fixed period of time.

On what grounds can an employer reject the application?

The regulations allow employers a wide number of reasons to reject the application:

- the burden of additional costs
- a detrimental impact on their ability to meet customer demand
- an inability to reorganise the work amongst existing staff, or recruit additional staff
- a detrimental impact on quality or performance
- insufficient work during the hours when the employee intends to work
- planned structural changes

What can an employee do if the application is rejected?

Very little. An employee can complain to a tribunal, within three months of the decision, on any of three grounds:

- a failure to follow procedure
- a failure to provide 'a sound business reason'
- a decision based on 'incorrect facts'

What cannot be challenged is the substance of the employer's decision itself. However much an employee may disagree with the decision, and however blinkered or ill judged it might be, the tribunal has no power to question the employer's business reasons.

How much compensation is an employee entitled to?

Relatively little. For those few employees who find that they are in a position to take their employers to tribunal, compensation is limited to a maximum of eight weeks' pay, currently capped at £270 per week. The maximum compensatory award is therefore £2160.

What about rights under the Sex Discrimination Act?

The new legislation overlaps with the provisions of the Sex Discrimination Act 1975, which allow a worker to claim indirect discrimination on the ground of sex in similar circumstances. The advantage of the flexible work regulations is that they apply expressly to both men and women, whereas indirect sex discrimination claims tend only to be available to women.

There are a number of advantages to making a claim under the SDA. For instance, compensation is unlimited, it applies to workers and not just employees and there is no need for a 26 week service requirement.

Most significantly however, to defend a sex discrimination claim the employer has to objectively justify their decision not to allow part-time or flexible working. This is a much harder test for the employer to establish than that under the flexible working regulations.

Does an employee have to use the regulations before relying on the Sex Discrimination Act?

Although there is no legal requirement, there may be an expectation by tribunals that employees should follow through the procedure set out in the flexible working regulations before launching a sex discrimination claim.

Given that the statutory grievance procedure would apply to claims of indirect sex discrimination for refusal to allow part-time or flexible working, it would make sense to pursue a claim under the flexible working regulations at the same time as lodging a grievance under the 2004 procedures, prior to commencing a sex discrimination case.

The statutory grievance procedure does not apply to the right to request flexible working (see chapter one).

Whether or not employees use the regulations, they must ensure not to overlook the time limits for lodging a grievance under the new disputes resolution procedures, and then for lodging a tribunal application under the Sex Discrimination Act. They should also bear in mind the use of sex discrimination questionnaires in cases of this sort (see chapter one).

PART-TIME WORKERS

What are the part-time working regulations?

The Part-Time Workers (Prevention of Less Favourable Treatment) Regulations 2000 provide some degree of protection to part-time workers. The regulations state that part-timers have the right not to be treated less favourably than a comparable full-timer, and not to be subjected to any detriment or disadvantage by anything that the employer does, or does not do, by reason of their part-time status.

The regulations cover much of the same territory as the indirect sex discrimination provisions of the Sex Discrimination Act 1975. However, they expressly apply to both men and women, and to that extent have a wider application than the Sex Discrimination Act 1975.

For the same reasons as set out above there are many advantages to the Sex Discrimination Act. So when considering the rights of part-timers under these regulations, account should also be taken of the rights afforded by the Sex Discrimination Act.

However the regulations do not assist an employee who wishes to move from full-time to part-time work. They only apply once the employee works part time.

What does less favourable treatment mean?

Treating a part-timer less favourably could include paying them less than full timers, not offering them the same training and development opportunities, or not offering them pro rata entitlements such as holidays or sick pay.

Who is the comparator?

Part-timers have to compare themselves with full-timers who are employed on the same type of contract, and do broadly similar work. They should be based at the same 'establishment', but if there is no one that fits that description at that workplace, then the part-timer can compare herself with a full-timer employed by the same employer elsewhere.

If the part-time worker used to be a full-timer, then she has the right to compare her treatment with the way she was treated as a full-timer.

What constitutes similar work?

In the FBU case of *Mathews and ors v Kent and Medway Towns Fire Authority and ors*, retained (or part-time) firefighters claimed they were being treated less favourably than full-timers.

The Court of Appeal agreed that both groups were employed under the same type of contract, despite the fact that there were differences between them. However they also went on to agree with the tribunal that they did not do the same or broadly similar work.

The employment tribunal had found as a matter of fact that fighting fires was 'the central and most important job function of the retained firefighter', but was no more than 'a major part of the job role of the whole time firefighter' who had a range of other functions to perform. It also said there were material differences in the levels of qualifications and skills between the two groups.

The Court of Appeal agreed and the part-timers were unsuccessful. Leave has now been granted to pursue the case to the House of Lords.

Can less favourable treatment be justified?

The short answer is yes, but only if the less favourable treatment can be justified on objective grounds and its purpose is to achieve a legitimate business objective, and is a necessary and appropriate way of achieving that objective.

EQUAL PAY

Despite thirty years of equal pay legislation, full-time women workers still earn, on average, 19% less than men. The pay gap is even larger for part-time women workers who earn on average 41% less pro rata than male full-timers. Although every European country has a pay gap of some description, the UK gap is one of the worst.

The Equal Pay Act is not straightforward, and despite recent amendments by the Government to streamline procedures for equal value cases, pursuing a remedy under the Equal Pay Act remains a complex and often tortuous process.

What is the relevant legislation?

The relevant UK law on equal pay is contained in:

- The Equal Pay Act 1970 which covers **all** contractual terms, not just those dealing with pay. This contrasts with the Sex Discrimination Act which only covers claims dealing with non-contractual issues, such as allocation of jobs and work, access to promotion, training and transfers as well as discretionary payments such as discretionary bonuses. The Equal Pay Act does not cover equal treatment in occupational and state pensions.
- The Pensions Act 1995 covers occupational pensions and incorporates an equal treatment rule (see below) into every occupational pension scheme. This prohibits direct and indirect discrimination in the terms on which employees are given access to pension schemes, or in the way they are treated under the rules of the scheme.

The relevant EC measures are contained in:

- Article 141 of the EC Treaty (previously Article 119 of the Treaty of Rome) which establishes the principle that women and men should receive equal pay for equal work or work of equal value, and covers both contractual and non-contractual matters relating to pay and remuneration. Article 141 has direct effect in the UK and has priority over domestic law, so it has to apply if it is more advantageous than the Equal Pay Act.
- Equal Pay Directive 1975 which reinforces the need to pay men and women the same for work of equal value, and provides that men and women doing equal work should receive the same remuneration.

European law often has broader application than the UK Equal Pay Act, so claimants should refer to both when making a tribunal application.

How does the Equal Pay Act work?

There are two main stages to an equal pay claim under the Equal Pay Act. Firstly a woman is entitled to equal pay or equal terms and conditions in circumstances where she can show that she is employed on:

- work which is the same or broadly similar, known as 'like work', or
- work which is rated as equivalent under a valid job evaluation scheme, or
- work which is of equal value

with a man in the 'same employment'. Secondly, the employer has the chance to defend the claim by showing that there is a genuine and material explanation for the pay difference. If the employer cannot do so, an equality clause is inserted into the woman's contract so as to ensure that it is no less favourable than his.

In *Hayward v Cammell Laird Shipbuilders Ltd*, the House of Lords ruled that each contractual term must be compared separately. So if the woman has a lower rate of pay, but better sick pay, she may still be entitled to an increase in her basic pay, unless the employer can justify the pay difference.

Although the Equal Pay Act and Article 141 apply equally to men and women, the vast majority of claimants are women. This chapter therefore refers throughout to the claimants as women and the comparators as men.

Who is entitled to claim?

Anybody in employment can claim whatever their age, length of service or gender. In addition, the Act applies to all workers, not just employees, and so covers homeworkers, the self-employed, contract and agency workers and apprentices.

It also applies to civil servants, members of the armed forces and staff employed in the House of Lords and House of Commons, but not to the police (although they can rely on the European directive). A partner in a firm can bring an equal pay claim using another partner or an employee in that firm as a comparator. Ex-employees can also claim, provided it is within six months of the end of their employment.

Because the Act only applies to pay inequality between men and women, claims on any other basis, for example, because of discrimination on the grounds of race, have to be brought under the relevant Act, for example the Race Relations Act.

Where does it apply?

The Equal Pay Act requires that both the claimant and her comparator be employed at an establishment in Great Britain. In Northern Ireland, the Equal Pay (Northern Ireland) Act 1970 applies and is identical to the legislation in Great Britain.

People working on board British registered ships are also covered if the vessel is registered in the UK. Those working on aircraft and hovercraft are also covered if they live most of the time in Great Britain or have their main place of work here.

What is the relationship between the Equal Pay Act and the Sex Discrimination Act?

If a woman claims that a term in her contract is less favourable (whether related to money or not) only the Equal Pay Act applies. The Act does not, however, apply in relation to offers of employment.

If, on the other hand, the less favourable treatment relates to something not regulated by the contract (such as a discretionary payment) only the Sex Discrimination Act applies.

If the complaint is to do with victimisation, applying where a person has been treated less favourably by reason of having brought proceedings, given evidence or information, or done anything else under the Equal Pay Act, the claim must be brought under the sex discrimination legislation.

What does the Equal Pay Act cover?

The Equal Pay Act covers any terms and conditions of employment governed by the contract of employment or collective agreements. This includes basic pay, payment by results, sick pay benefits, redundancy payments (contractual and statutory), unfair dismissal compensation, holiday entitlement, shift and overtime premiums, hours of work, as well as benefits such as company cars and luncheon vouchers.

Pensions are not covered by the Equal Pay Act, but by the Pensions Act 1995.

What does Article 141 cover?

Article 141 is very broadly defined to include a range of payments such as salary, discretionary bonuses, sick pay, maternity pay, payments on dismissal and other statutory benefits, whether contractual or not.

It also covers occupational pension benefits. In *Barber v Guardian Royal Exchange Assurance Group*, the European Court of Justice confirmed that Article 141 covers all types of pension schemes, whether contracted in or out and whether contributory or non-contributory.

With whom can the woman compare herself?

It is up to the claimant to choose her comparator (who must be of the opposite sex), not the tribunal or the employer. But generally she must identify a real comparator and, unlike the Sex Discrimination Act, she cannot compare herself with a hypothetical man.

The woman can also make a comparison with her successor or predecessor as well as someone who is currently employed. It is common practice to identify several possible comparators.

Although there is no limit to the number of comparators who can be named in the application to the tribunal, the courts have warned against claimants casting their nets too wide.

Who can the comparator be employed by?

Under the Equal Pay Act, a woman has to compare herself with a man who has (or has had) the same (or associated) employer as her.

Employers are treated as 'associated' under the Equal Pay Act if one is a company of which the other has direct or indirect control, or both are companies over which a third person has control.

The claimant may choose a comparator from a different establishment or place of work provided that 'common' terms and conditions apply. In *Leverton v Clywd*

County Council a nursery nurse compared herself with a clerical worker employed by the county council but working at a different site. The House of Lords held that if both establishments are covered by the same collective agreement, it is likely that common terms and conditions apply.

But European law is broader, allowing a woman to compare her terms with a man working for a different employer if they are in the 'same establishment or service'.

For example, a woman employed by one Trust within the NHS could compare herself with a man employed by another Trust, if their terms originate from a common source such as a national collective agreement. However, even if there is a common collective agreement, if pay is delegated to the different employers there may be no common source for the pay.

In *Lawrence v Regent Office Care Ltd*, the European Court of Justice held that a comparison could not be made between a local authority employee and an employee of an undertaking that has been contracted out from the public to the private sector on the basis that there was no common source for their pay.

In another case – *Allonby v Accrington & Rossendale College* – the European Court of Justice said that a woman supplied by an agency to a college could not compare herself with a man employed directly by the college, again because there was no common source for their pay.

What does 'like work' mean?

The law says that a woman is employed on like work if she does the same, or broadly similar, work to that of her comparator and there are no differences of any practical importance between the work that they do.

The courts have said that the question of whether two jobs are broadly similar can be answered by a general consideration of the type of work involved and the skills and knowledge required to do them.

It is not necessary to undertake a minute examination of the differences between the two jobs. In particular, the focus should be on what the man and woman actually do in practice, and not what the job description may indicate.

There are no hard and fast rules as to what constitutes a difference of practical importance between the two jobs, but the level of responsibility is often decisive. It is useful, therefore, to prepare a detailed breakdown of the tasks done by the claimant and her comparator. Each case will be decided on its own facts, but generally trivial differences will not rule out an equal pay comparison.

If the woman fails in her like work claim, she may still be able to bring a work rated as equivalent or an equal value claim.

What does 'work rated as equivalent' mean?

The second way open to a woman to claim equal pay under the Act is to show that she is employed on work which has been rated as equivalent to that of a man under a valid job evaluation scheme (JES). Employers are not under a legal obligation to conduct a JES, but once they do the woman is entitled to rely on it to gain equal pay, even if it is never implemented.

Conversely, if there is a valid JES in place, a woman cannot claim equal value with someone who has been graded differently to her under the scheme. Instead if she is comparing her work with someone else whose job has been evaluated, she has to rely on the evaluations made in the JES.

The job evaluation needs to be up to date for a woman to rely on it. Otherwise the employer can argue that it no longer reflects the work that she and her comparator do. Ultimately it is a question of degree whether the changes are significant enough to invalidate the evaluation.

What is a valid JES?

The courts have said that to be valid an evaluation scheme has to be analytical. An analytical JES must observe the following rules:

- the jobs should be broken down into a number of factors (such as skills, responsibility, physical and mental requirements) with points awarded for each factor on a predetermined scale; or
- a number of key jobs with 'fair' wage rates should be valued in terms of the demands made on the workers under a limited number of factors, and the proportion of the total wage is attributed to each factor. The other jobs are then compared factor by factor

Comparisons on a 'whole job' basis (with jobs being assessed in terms of their overall content) are not enough. This is because such comparisons do not analyse why one order of job ranking is fairer than another and the 'whole job' (or non-analytical) approach can reinforce traditional views about the value of women's jobs in comparison to that of men's.

If the JES is discriminatory, then employers cannot rely on it.

What if a woman scores fewer points than her comparator under the JES?

If a woman is graded differently to a man under a valid JES, then she cannot pursue an equal pay claim using that man as a comparator. A valid JES is a full defence.

However, if the woman scores just a few points less than a man, she may still win her equal pay claim. In *Springboard Sunderland Trust v Robson*, the woman scored 410 points compared to the man's 428, putting them both in the same

salary grade. She was regarded as having been evaluated at the same level and therefore entitled to claim that his job had been rated equivalent to hers.

What does 'equal value' mean?

When a woman brings an equal value claim, she is in effect claiming that the demands of her work are such that her job should be treated as being of equal value to the job of her male comparator, even though their two jobs may be completely different.

She can only bring this claim if she is not employed on like work or work rated as equivalent to her comparator. But the House of Lords has said (*Pickstone v Freemans plc*) that a woman employed on like work with one man is not barred from claiming equal value with a different man.

At what point in time should the jobs be compared?

If a woman is still doing the job, the relevant date at which the comparison should be made is the date of her tribunal application, or if she has not lodged an application then the date she lodged a grievance or made the claim. If on the other hand the woman is no longer in the job, the relevant date is her last working day.

Who decides whether a job is of equal value?

Once a claim has been lodged with an employment tribunal, then in straightforward cases the tribunal itself might consider the evidence and decide whether the jobs are of equal value. But in most cases, the tribunal will refer the question to an ACAS appointed independent expert. Often, the employer and employee will also instruct their own experts to consider the issue of equal value.

What defences can employers rely on in equal pay claims?

If a woman can show that she is engaged in like work, work rated as equivalent, or work of equal value, then the tribunal will presume that the difference between her pay and that of the man is because she is a woman. That is, unless the employer can show that the difference has nothing to do with her sex. This is known as the material factor defence.

If there is no evidence of direct or indirect sex discrimination, then the employer only has to show a genuine and material explanation for the difference in pay. As long as the reason is genuine and material it does not matter, for example, that the employer was mistaken in his or her understanding of the situation. This is a relatively easy threshold for employers to establish.

If on the other hand the woman can show direct or indirect sex discrimination, then the employer has to objectively justify the difference in pay or terms and conditions. This means that he or she has to show that the reason for the difference corresponds to a real business need, is appropriate to meet that need and is necessary to that end.

What is direct and indirect discrimination in equal pay cases?

Direct discrimination occurs when, for example, a woman is paid less than a man because she is female, perhaps because her work is not properly valued or taken as seriously because she is a woman.

Indirect discrimination can occur when there is a practice in operation which disproportionately affects the pay of women workers. This might happen where, for example, a company operates a pay system where part-time workers who are predominantly female receive fewer benefits pro rata than a comparator group made up of a more mixed gender group of full time workers.

Alternatively, indirect discrimination can occur when there is a group of workers who are predominantly female and who have less favourable terms than another group of mainly male workers. This was the case in *Enderby v Frenchay Health Authority*, where the predominantly female speech therapists were paid less than other more male-dominated professions in the health service such as clinical psychologists or pharmacists.

Where there is direct or indirect discrimination, the employer has to provide an objective justification of the difference in pay or terms.

What amounts to objective justification in a material factor defence?

Employers have relied on a large range of material factor defences to defend equal pay claims. These might include:

- 'Red circling', when it is acknowledged that the comparator is receiving higher pay but that pay is protected for a limited period of time. This might arise where for example the comparator was previously on a higher paid job and his pay is temporarily protected.
- Market forces, when the employer argues that he or she has to pay one person more than another in order to attract that person to the post. However, in *Ratcliffe v North Yorkshire County Council*, the House of Lords rejected the employer's argument that it needed to reduce the pay of the dinner ladies to compete against private contractors in the open market. The court said that, although the factor was material, it was due to the difference of sex as the labour market for catering staff was almost exclusively female and to take advantage of the lower paid women in the private sector would be discriminatory.
- Geographical differences such as the payment of London weighting.
- Different skill levels and qualifications as long as they are relevant to the job in question.

The European Court of Justice said in *Enderby v Frenchay Health Authority* that where different pay rates came about as a result of separate collective pay bargaining this explanation in itself could not amount to objective justification.

Can service-related benefits be objectively justified?

Service-related benefits are often potentially discriminatory in that they generally favour men who have longer periods of service than women. There are a large number of service-related benefits ranging from holiday entitlement that depends on length of service, to service-related incremental pay.

In the PCS tribunal case of *Crossley v ACAS*, Mrs Crossley's service-related incremental pay was held to be discriminatory and on the facts could not be objectively justified by the employer, ACAS.

However, in the Prospect-backed case of *Cadman v HSE*, the employers successfully argued that service-related benefits were intrinsically justified, and did not require an employer to prove an objective justification every time the benefits adversely affected more women than men. The union appealed that decision to the Court of Appeal which has referred the matter to the European Court of Justice.

Who has the burden of proof?

The burden of proof remains with the claimant throughout but passes to the employer to argue the material factor defence. However, if an employer's pay system is not transparent and statistically men are paid more than women, the burden of proof passes to the employer to show that his or her pay practices are not discriminatory.

What happens if the employer can justify part of the pay differential?

The ECJ said in *Enderby* (see above) that a tribunal can find that only part of the difference in pay is due to discrimination. In that case, the claimant will only succeed in her equal pay claim to the extent that the tribunal finds that her case is proven.

What remedies does a woman have if she wins an equal pay claim?

If a woman is successful in her claim, she is entitled to have an equality clause inserted in her contract from the date of the tribunal application. That means that she is entitled to the same pay or other benefits as her comparator from that date. A successful equal pay claim should result in the women's pay being increased to that of the men, and not the other way round.

In addition, she may be entitled to back pay, with accrued interest. Back pay is normally for a maximum of six years from the date she lodged her claim at the employment tribunal in England, Wales and Northern Ireland, five years in Scotland.

In cases where the employee has been prevented from pursuing an equal pay claim, because the employer concealed relevant facts or where she was under a disability, the six-year period is extended to run from the date when she found out or should have found out the relevant facts, or ceased to be under a disability. In Scotland, in concealment or disability cases there is a maximum back pay period of 20 years.

How can a woman obtain information to support a possible equal pay claim?

Under the Equal Pay Act, workers can now submit a questionnaire to their employer to help them find out whether or not they have a valid equal pay claim. For example, they can use the questionnaire to find out if they are receiving less pay than a male colleague, and if so to ask the employer for an explanation for the pay difference.

Employers are not under a statutory obligation to reply, but a tribunal can draw inferences from a deliberate refusal to answer or from an evasive or equivocal reply. Employers should respond within eight weeks.

Can the employer be asked to disclose confidential information?

Employers are expected to answer the questionnaire as fully as possible. If they are asked to provide information that is confidential to another person, for instance details of a colleague's pay or appraisal review and that colleague does not want it to be disclosed, the employer has to make a judgement as to how much information can be given.

It is likely that in many cases employers can answer detailed questions in general terms whilst still preserving the anonymity and confidence of their workers. In some cases employers may take the view that they cannot disclose specific information. But they should be aware that if the case proceeds to the stage of a tribunal hearing, then a tribunal is likely to order disclosure of relevant information which often includes confidential information such as pay rates.

What is the Equal Opportunities Commission's code of practice?

The Equal Opportunities Commission has produced a code of practice which although not legally binding can be used in evidence before an employment tribunal. The code explains the scope of the equal pay legislation, gives advice on how to raise the issue of equal pay with employers and how to bring an equal pay claim. It can be obtained from the EOC's website on **www.eoc.org.uk/EOCeng/dynpages/publications_full_list.asp**

The code provides detailed advice to employers on equal pay practice and sets out the steps that are needed to carry out a voluntary equal pay review. The review gives employers the chance to examine their pay structures and remuneration packages to ensure that there is no discrimination on the grounds of gender.

Where employers find there is discrimination, the code encourages them to take steps to correct the problem. The code also provides a model equal pay policy.

SEXUAL ORIENTATION

Up until December 2003, workers had only limited protection against discrimination if they were lesbian, gay or bisexual. There had been a few attempts to use the Sex Discrimination Act (SDA) to cover sexual orientation, but they were largely unsuccessful.

At the same time other cases had been brought relying on the European Convention on Human Rights and the Human Rights Act. These were generally more successful but only had limited application because neither give direct rights that can be relied on in employment tribunals.

However, since 1 December 2003, lesbian, gay and bisexual workers have had specific protection from discrimination at work as a result of the implementation of the European Framework Directive. Although the regulations extend to everyone – including heterosexual workers – it is lesbian, gay and bisexual people who are most likely to need to make use of the law.

For instance, a survey by the TUC in 2000 indicated that as many as 43% of lesbian and gay workers had suffered some form of discrimination at work. The two main problems reported were harassment in the workplace and the denial of benefits to partners, in particular pension schemes. The new law provides protection in relation to both these issues.

The regulations only apply in the employment context and do not extend to the provision of goods and services.

AN OUTLINE OF THE REGULATIONS

What do the new regulations say?

It is now unlawful under the Employment Equality (Sexual Orientation) Regulations 2003 to discriminate on grounds of sexual orientation in the workplace.

ACAS has produced a useful guide to the regulations for both employers and employees (see section on useful organisations).

What protection do they offer?

The regulations make it unlawful to:

- Treat people less favourably than others on grounds of sexual orientation or to instruct someone else to behave in this way – **direct discrimination**. This involves comparing how an employer treats one worker compared to another. An exmple would be an employer who decided not to promote a lesbian worker because they were uneasy about how clients might react to her as an out lesbian. There is no defence for direct discrimination, though in limited circumstances employers can make out a case for there being a genuine occupational requirement which justifies the discrimination (see later in chapter).
- Apply a provision, criterion or practice which whether intentionally or not disadvantaged people of a particular sexual orientation, unless it can be justified – **indirect discrimination**. To be able to justify it, an employer would have to show there is a real business need for the treatment, and that there is no other way of achieving what they want to achieve.
- Subject someone to unwanted conduct that violates their dignity or creates an intimidating, hostile, degrading, humiliating or offensive environment – **harassment**. The harassment does not have to be intentional to be caught by the regulations. For instance, it may consist of making jokes or using banter about sexual orientation that someone finds offensive. It may be unlawful harassment even where the person offended is not themselves gay, lesbian or bisexual.
- Treat people less favourably because they made or intend to make a complaint about discrimination on the grounds of sexual orientation, or because they have given or intend to give evidence under the regulations – **victimisation**. The complaint (called the 'protected act') does not have to have been anything as dramatic as lodging a formal grievance or tribunal claim. It can, for instance, be as simple as making a complaint about anti-gay jokes.

Where do the regulations apply?

The regulations apply to those working wholly or partly in Great Britain, as well as those who work outside it as long as the employer has a place of business in Britain and the work is for the purpose of that business. The worker must also be ordinarily resident in Britain when he or she applies for the job or at any time during their employment.

Who is protected?

The regulations provide protection for lesbian, gay, bisexual and heterosexual people at work, as well as those who are thought to be gay, lesbian or heterosexual even if they are not. If a heterosexual employee is discriminated against because he or she is mistakenly thought to be gay, lesbian or bisexual, then they can claim discrimination on grounds of sexual orientation.

In addition, people who are for example harassed at work because they have gay friends or go to gay clubs can also claim they are being discriminated against on the grounds of sexual orientation.

The regulations apply to all workers and not just employees. They apply to contract workers, office holders, the police, members of the armed forces, partners in a business, employment agencies and agency staff.

Liability goes much further than just employers and includes partnerships, trade organisations (including trade unions), barristers, qualifications bodies, providers of vocational training, providers of insurance services, trustees and managers of occupational pension schemes and employment agencies.

Who is not protected?

The regulations do not provide protection for transsexual people. There are specific regulations that provide protection for transsexual workers (see chapter four).

What does the law apply to?

The new legislation provides protection throughout the employment relationship, and applies to both prospective and existing workers, as well as workers who have left their employment when the discrimination arises out of and is closely connected with the employment relationship.

It starts at the recruitment stage and applies to terms and conditions of employment (including benefits such as pensions), pay, promotions, transfers, opportunities for training and dismissal.

After the worker has left their employment, they would for example be protected when something detrimental is said by their former employer in a letter of reference for another job – perhaps because they made a complaint or brought a tribunal claim for sexual orientation discrimination against the former employer.

When does the law apply?

As there is no service requirement under the regulations, workers are protected from the moment they apply for a job and from their first day in the job.

THE EXCEPTIONS

What do the regulations exclude?

There are basically five exceptions to the principle that people should not be discriminated against on grounds of sexual orientation:

- marital status
- the general genuine occupational requirement (GOR)
- the 'organised religion' genuine occupational requirement (GOR)
- national security
- positive action

What is the rule on marital status?

Although the regulations apply to employment benefits such as pensions, they do not cover benefits which depend on being married. The most obvious example is survivors' benefits under pension schemes.

This provision was challenged in 2004 in a High Court judicial review by a group of trade unions in the case of *Amicus and ors v Secretary of State for Trade and Industry*.

However, the Government is intending to introduce legislation through the Civil Partnership Bill to allow same-sex couples to register their partnerships. Once they have registered, couples are entitled to be treated in the same way as married couples in relation to all benefits such as those provided under pension schemes.

The Civil Partnership Bill will allow for a degree of retrospection in relation to service, so that all service after 1988 can be taken into account in assessing entitlement to pensions benefits including benefits for surviving spouses.

What is a genuine occupational requirement?

Employers are allowed to discriminate when a person's sexual orientation is a genuine occupational requirement (GOR) for the job. So if an employer can show that the job has to be done by someone of a particular orientation, he or she can make that a requirement for the job and discriminate against anyone who does not meet it.

But to be able to use the GOR, employers have to go through a three-stage test. They have to show that:

- the reason for wanting someone of a particular orientation is to satisfy some genuine and determining requirement for the job
- the requirement is 'proportionate' – in other words, that the requirement balances the genuine needs of the employer against the potential discrimination to candidates and is appropriate in the particular case
- the person either does not meet the orientation requirement for the job, or the employer is not satisfied that they do and it is reasonable in all the circumstances for them to reach that conclusion

In what circumstances can employers invoke the general GOR?

The law makes it clear that a GOR has to be narrowly applied and it will only be in exceptional cases that an employer is likely to make out a GOR defence.

For example, it might be decided that the chief executive of an organisation set up to promote gay campaigning or gay counselling should themselves be gay.

It would be much less likely that the owner of a lesbian bar or a club could justify the GOR for employing a lesbian worker. Their requirement may well be genuine but it is unlikely to be a 'determining' occupational requirement, nor proportionate. A heterosexual worker can presumably be just as effective behind the bar as a lesbian worker.

How does the GOR apply to 'organised religion'?

When the job in question is working for an 'organised religion' (which is not defined), the employer may be able to rely on a further GOR exception.

There is a different three-stage test:

- that the employment is for the purposes of an organised religion
- that because of the nature of the employment and the context in which it is carried out, the requirement is applied to avoid conflicting with the strongly held religious convictions of a significant number of the religion's followers
- that the person either does not meet the orientation requirement for the job or the employer is not satisfied that they do, and it is reasonable in all the circumstances for them to reach that conclusion

There is no definition of what might constitute a significant number, nor that the convictions of the followers should even be reasonable or proportionate. It is also not clear when it would be regarded as reasonable for an employer to be satisfied that a person was not of the required sexual orientation.

But as a consequence of the trade union High Court challenge in *Amicus and ors v Secretary of State for Trade and Industry* in 2004, it is clear that this exemption has to be construed very narrowly.

So being employed for the purposes of an organised religion means actually working for a religion such as for a church or mosque, and the job itself should require that the person is of a particular sexuality. This exemption would be most unlikely to cover, for example, teachers in faith schools or workers for a faith based voluntary organisations.

In terms of ministers in a church, the test would not just depend on the assessment of an individual employer, but there would also have to be an objective assessment by reference to the actual doctrines of the religion.

What is the national security exception?

This exception applies when the discriminatory act is done to safeguard national security and can be justified. The Government has indicated that there are unlikely to be any circumstances where this exception might be invoked.

What is positive action?

Positive action means giving preferential treatment to an individual or group of people to prevent, or compensate for, past disadvantages and that it is a reasonable thing to do. It is not the same as positive discrimination, which involves treating people more favourably on grounds of sexual orientation and is unlawful.

The regulations state that an employer can:

- provide training to people of a particular sexual orientation which would fit them for particular work, or
- encourage them to take advantage of opportunities for doing particular work

Can trade unions take positive action?

The regulations also specifically state that trade organisations such as trade unions can offer training aimed exclusively at members of a particular sexual orientation that would help fit them for a post within the organisation. They can also encourage members who are of a particular orientation to take advantage of the opportunity to apply for those particular jobs.

This is likely to apply where, for example, certain posts have always been held by heterosexual people and the union is concerned that a culture of heterosexuality may have developed.

Unions can also lawfully encourage people of a particular sexual orientation to become members, for example if membership records indicate a disproportionately low number of gay, lesbian and bisexual members.

Do employers need evidence in order to take positive action?

Unlike sex and race discrimination legislation, employers (and trade unions) do not have to produce statistics to justify taking positive action. In any event, statistics may not be available, or those that do exist may be unreliable.

What they do have to do is produce evidence of under-representation which would reasonably justify positive action. Clearly it may strengthen an employer's position to gather evidence to see if the statistics suggested under-representation in relation to the jobs in question.

Can workers force their employer to take positive action?

There is no specific legal right to require employers to take positive action. Workers cannot therefore pursue a claim for their employer's failure to follow a particular course of action.

THE SEXUAL ORIENTATION REGULATIONS IN THE WORKPLACE

Does an employer have the right to ask if their workers are gay?

The regulations do not require organisations to collect monitoring data on the sexual orientation of their staff. Although monitoring is generally good practice, asking workers about their sexual orientation remains a sensitive issue.

Organisations should therefore only gather information if they have a clear commitment to tackling any discrimination that they uncover. All staff should know what the data will be used for and they should give an absolute guarantee of confidentiality and anonymity.

If an employer tries to force a worker to disclose or discuss his or her sexual orientation, that person might well be able to bring a claim for unlawful discrimination or harassment, as well as a breach of the Human Rights Act.

What amounts to harassment?

Quite often in the workplace what amounts to harmless banter to one person may well be offensive and unacceptable to someone else. What happens in those circumstances to decide whether the conduct amounts to harassment or not?

The regulations are quite specific. They state that the conduct will amount to unlawful harassment where all the circumstances are taken into account, including the perception of the person being harassed, if it is reasonable to conclude that it could have had that effect.

Although the test is essentially an objective one as to what does and does not amount to unacceptable behaviour, particular account has to be taken of the views of the recipient of the harassment.

Given this definition, it helps in proving unlawful harassment if the victim makes clear to the harasser that they find their conduct unacceptable.

Can an employer discriminate against someone who is gay and HIV positive?

Less favourable treatment or harassment on the grounds of being HIV positive or having AIDS may have more impact on gay men than on heterosexual workers.

If it is based on homophobic prejudice, this will amount to unlawful direct discrimination. If, however, it is genuinely because someone is HIV positive or has AIDS, this may amount to indirect discrimination and therefore be unlawful, unless it can be justified.

There are no legitimate reasons for refusing a job to a worker solely because they are HIV positive or have AIDS, so it is most unlikely that any indirect discrimination on that basis could be justified.

Workers who are treated less favourably by reason of having AIDS or being HIV positive are also likely to be protected by the Disability Discrimination Act.

RELIGION AND BELIEF

There is a wide diversity of religions practised in the United Kingdom, although Christianity remains dominant. The 2001 census showed that over 70% of the population defined themselves as Christian, almost 3% as Muslims, just over 1% as Hindus, 0.6% as Sikhs and 0.5% as Jews.

Prior to the introduction of the Employment Equality (Religion or Belief) Regulations on 2 December 2003, there was no specific religious discrimination legislation in the UK with the exception of fair employment legislation in Northern Ireland (see chapter ten).

Workers have in the past sought to rely on the Race Relations Act 1976 (RRA) with only limited success, given that some groups such as Muslims and Rastafarians have been held not to be racial groups for the purposes of the Act (see chapter two).

The Human Rights Act 1998 gave some protection, mainly to public sector workers, in that it enshrined the right to freedom of 'thought, conscience and religion.' And the Employment Act 1989 exempted male Sikhs from wearing protective headgear in certain circumstances (see chapter two).

But protection was very piecemeal. The introduction of the 2003 regulations provided workers in Great Britain for the first time with an effective means of challenging discrimination in employment on the basis of their religious or similar philosophical beliefs.

That protection is likely to be extended to goods, services, facilities and premises when the Bill introducing the Commission for Equality and Human Rights is introduced, probably some time in 2005.

AN OUTLINE OF THE REGULATIONS

What do the regulations say?

The Employment Equality (Religion or Belief) Regulations 2003 prohibit discrimination and harassment on grounds of religion or belief.

The legislation applies to all workers, including contract and agency workers, office holders, the police, barristers and members of the armed forces.

Liability goes much further than just employers and includes partnerships, trade organisations (including trade unions), barristers, qualifications bodies, providers of vocational training, providers of insurance services, trustees and managers of occupational pension schemes and employment agencies.

What do they cover?

The regulations cover not just believers of organised religions, but anyone who holds a religious or 'similar philosophical belief'.

Tribunals will have to consider a number of factors when deciding what constitutes a religion or belief. According to the ACAS Code of Practice on Religion and Belief in the Workplace, these could include looking at whether there is 'collective worship, a clear belief system, or a profound belief affecting the way of life or view of the world'.

The definition is likely to cover fringe cults and not just the main religions. It is also likely to cover atheism, as long as it amounts to a clear belief system covering a view of the world. The ACAS code states that the regulations cover people without religious beliefs.

In some instances it may not be clear whether a person has been discriminated against on the grounds of their religion, for example if they are Muslim, or race, for example, if they are Asian. In those cases it would be sensible to make out a case both under the RRA and the new regulations.

Do the regulations cover political beliefs?

The regulations do not cover political beliefs.

It remains to be seen whether some people will be able to argue that their political beliefs are premised on an ideology and therefore should be covered. There is certainly overlap between the two.

For instance, secularism, communism and pacifism can be defined as a 'similar philosophical belief' but could also be defined as a political belief. What is

certain is that someone with a particular political opinion will not be able to rely on the protection of the regulations.

What protection do the regulations offer?

The regulations say that it is unlawful to:

- Treat people less favourably than others on the grounds of religion or belief, or to instruct someone else to behave in this way – **direct discrimination**. This involves comparing how an employer treats one worker compared to another. An example would be an employer who refused someone a job because they were Muslim. There is no defence available to an employer to a claim of direct discrimination. There are however limited circumstances in which an employer might be able to make out a case for there being a genuine occupational requirement which justified the discrimination (see below).
- Apply a provision, criterion or practice whether intentionally or not which disadvantages people of a particular religion or belief, unless it can be justified – **indirect discrimination**. To be able to justify it an employer would have to show there was a real business need for the practice. So for example it might be indirect discrimination against a Sikh worker if an employer insisted on a policy of no headwear, for no valid reason.
- Subject someone to unwanted conduct that violates their dignity or creates an intimidating, hostile, degrading, humiliating or offensive environment – **harassment**. The harassment does not have to be intentional to be caught by the regulations. For instance it could consist of jokes or banter that someone finds offensive.
- Treat people less favourably because they made or intend to make a complaint about discrimination on the grounds of religion or belief, or because they have given or intend to give evidence under the regulations – **victimisation**. The complaint (called the 'protected act') does not have to have been as dramatic as lodging a tribunal claim. It could, for instance, be as simple as making a complaint about anti-Islamic jokes. It does not matter if the complaint turned out to be unfounded providing that it was made in good faith.

What does the law apply to?

The regulations provide protection throughout the employment relationship, and apply to both prospective and existing workers. They also apply after the employment relationship has ended if the discrimination arises out of and is closely connected with the employment relationship.

They take effect at the recruitment stage and apply to terms and conditions of employment including pay, promotions, transfers, opportunities for training and dismissal and post-termination discrimination such as the conduct of appeals or letters of reference. They also apply to benefits such as pensions.

Where do the regulations apply?

The regulations apply to those working wholly or partly in Great Britain, as well as those who work outside it as long as the employer's place of business is in Britain and the work is for the purpose of that business. The worker must also be ordinarily resident in Britain when he or she applies for the job or at any time during their employment.

The new regulations apply in England, Scotland and Wales. Northern Ireland already has fair employment legislation that covers these grounds (see chapter ten).

Who is protected?

The regulations provide protection against discrimination on the grounds of the worker's religion or belief, but not the religion or belief of the person treating them less favourably.

Take the example of an employer who is a Christian. It is probably lawful under the regulations for the employer to refuse to employ someone because they are not a Christian, but it would be unlawful to refuse to employ someone specifically because that person is a Muslim.

The regulations also protect people who are discriminated against because someone thinks they practice a certain religion or have a certain belief. In other words, they do not have to be a member of that religion or actually hold that belief to be protected by the law.

In addition to that, people who are for example harassed at work because they have friends or family who practice a certain religion or hold a certain belief, can also claim they are being discriminated against on that basis.

When does the law apply?

As there is no service requirement under the regulations, workers are protected from the moment they apply for a job and from their first day in the job.

THE EXCEPTIONS

What do the regulations exclude?

There are five exceptions to the principle that people should not be discriminated against because of their religion or belief:

- genuine occupational requirement (GOR)
- the religious organisations' GOR
- positive action
- protection of Sikhs on construction sites
- national security

What is a genuine occupational requirement?

The regulations allow an exemption for employers in relation to direct and indirect discrimination when recruiting staff and when promoting, transferring, training or dismissing them so long as they satisfy the following test:

- that subscribing to a particular religion or belief is a genuine and decisive requirement for the job
- that it is proportionate to apply that requirement in a particular case
- that the person either does not meet the requirement for the job, or the employer is not satisfied that they do and it is reasonable in all the circumstances for them to reach that conclusion

The exemption does not apply to discrimination in the terms and conditions of employment that are offered to a worker.

The exemption does not require employers to show that their business is based on a particular religion or belief. They just have to show that being of a particular religion or belief is a genuine requirement for the job, for instance a hospital wishing to recruit a chaplain to minister to patients of a particular faith.

All GORs have to be construed narrowly, so this exemption is unlikely to have wide application.

How is the GOR exception applied to religious organisations?

Some organisations such as faith schools are founded on an ethos based on a religion or belief. If an employer can show that is the case, and the onus is on them to do so, the test is very similar to the general GOR. The difference is that subscribing to a particular religion or belief only has to be a genuine, but not also a decisive, requirement for the job.

This exception is likely therefore to be wider than the general GOR described above, but nonetheless like all exemptions will only operate in limited circumstances. It might for example allow faith-based organisations to insist that the workers who actually carry out the roles of caring for people's spiritual needs (or whatever the work of the organisation involves) have that religion or belief.

It is most unlikely, however, to extend to administrative and support staff, or staff whose job does not involve promoting the religion. For instance, reception and maintenance workers in a faith-based care home would probably not be covered.

'Organised religions' can also rely on a GOR exception in very limited circumstances which allows them to discriminate against gay, lesbian and bisexual people. See chapter eight for more details.

What positive action can employers take?

Employers are allowed to take positive action in favour of members of a particular religion or belief where it seems a reasonable thing to do to compensate for past disadvantages that they may have faced.

They can provide training that would fit them for particular work, or encourage them to take advantage of opportunities for doing particular work.

What positive action can trade unions take?

Trade unions can do the same in relation to members of the organisation who hold a particular religion or belief, where it seems reasonable to them that it would compensate for past disadvantages.

If for instance a trade union took the view that members of the Muslim religion had been historically disadvantaged in becoming union officials, then it could organise training for Muslim members to help them become union officials, and encourage them to apply for those jobs when they became vacant.

In addition, the union can encourage people from a particular religion or belief to become members to compensate for past disadvantages.

Do employers and trade unions need evidence to take positive action?

Unlike the Sex Discrimination and Race Relations Acts, employers and trade unions do not have to gather evidence of under-representation to justify taking positive action.

What protection do Sikhs enjoy?

The regulations state that if an employer requires a Sikh to wear a safety helmet while on a construction site, that would amount to indirect discrimination which can never be justified. But the clause only applies to construction sites. If a turbaned Sikh were to try to enforce this provision in other circumstances, he would be unlikely to succeed.

Under the new regulations, it may also be indirectly discriminatory to impose a safety helmet requirement on people who practise other religions which required special head wear. However, employers might well be able to justify it on health and safety grounds.

What is the national security exception?

This exception applies where the discriminatory act is done to safeguard national security and it can be justified.

THE RELIGION AND BELIEF REGULATIONS IN THE WORKPLACE

Do employers have to monitor their staff?

Employers are not required under the regulations to gather information about the religions or beliefs of their staff. However, if they want to improve the facilities offered to staff and ensure that their work practices are not indirectly discriminatory, they may need to have a better understanding of the needs of their staff and that may require asking staff about their religious and other beliefs.

Equally, there is no obligation on staff to provide information about their religion and beliefs to their employer. However, if employers explain why they want the information and how it will be used, staff might be inclined to provide it.

What amounts to harassment?

Quite often in the workplace what amounts to harmless banter to one person may well be offensive and unacceptable to someone else. What happens in those circumstances to decide whether the conduct amounts to harassment or not? The regulations are quite specific. They state that the conduct will amount to unlawful harassment where all the circumstances are taken into account, including the perception of the person being harassed, if it is reasonable to conclude that it could have had that effect.

Although the test is essentially an objective one as to what does and does not amount to unacceptable behaviour, particular account has to be taken of the views of the recipient.

Given this definition, it helps in proving unlawful harassment if the victim makes clear to the harasser that they find their conduct unacceptable.

Can employers impose a dress code?

There are no rules in the regulations about dress codes. However a dress code which impacted on a particular religious group might well amount to indirect discrimination requiring justification if it is to be lawful.

So for example a dress code which required all women to wear dresses or skirts might impact unfavourably on Muslim women who wished to wear trousers (as well as probably amounting to unlawful sex discrimination – see chapter three). It is hard to see how there could be any valid justification in a dress code which prevented Muslim women from wearing trousers.

If the employer could show that the refusal to allow someone to wear a specific article of clothing was necessary for the business on health and safety grounds, then the refusal would be justifiable. Note however the earlier exception about Sikhs on construction sites.

In general, it is good practice for employers to allow staff to wear clothing that reflects their religious convictions.

Do employers have to observe their workers' religious holidays?

If a worker wants to take a day off in observance of a religious holiday or festival, the employer is obliged to agree to this unless there is good reason why the request cannot be granted. This is because a refusal to allow someone to take a day off may well amount to indirect discrimination, if the employer cannot justify the refusal. An employer running a small business may be able to justify a refusal if the worker wants the time off in the middle of a peak period.

This does not mean that a worker can add to their existing holiday entitlement, just that they may be able to require an employer to allow them to take their holiday at certain times of the year to coincide with religious holidays.

Take the example of a Hindu worker who asks to take three days' holiday over Diwali. If the employer refuses the request this is likely to be indirectly discriminatory unless there is a good business reason for the refusal.

It would be good practice (and makes good sense) for an employer to discuss any specific needs that his or her workers may have, both with the individuals concerned as well as any recognised trade unions. In particular it makes sense for employers who have a regular shut down period to think in advance about whether such closures are justified by business need, and whether they can balance their needs with those of their staff.

All organisations big and small should have clear procedures for handling leave requests, which should be applied equally to all staff. For their part, staff should give as much notice as possible of a holiday request and be aware that the employer may not always be able to accommodate it.

Do employers have to provide prayer facilities?

There is no explicit requirement under the regulations to provide facilities, such as a prayer room, for workers who want to practise their religion. However, there again may be issues of indirect discrimination if employees ask for a quiet place in which to pray and the premises can accommodate the request without adversely impacting on the business or other staff.

There may also be issues about the time off that workers take in order to practise their religion. If the time off takes place during the normal tea, coffee and smoking breaks taken by others, then the workers are not being treated any more favourably than anyone else in the workplace and should be allowed this time off to pray.

In any event, under the Working Time Regulations 1998, all workers are entitled to a 20-minute break every six hours.

Do employers have to provide showering facilities?

Some religions observe certain rituals about undressing and showering in front of others. If an employer required staff to change into a uniform before starting work a refusal to make separate changing facilities available would be likely to amount to indirect discrimination. So the employer would need to make arrangements to ensure suitable changing facilities were available, such as the provision of individual cubicles.

What about catering for special dietary requirements?

Many religions require specific dietary requirements. If the employer provides a canteen at work, the menu should reflect the dietary needs of the staff. The same principle applies to work-related meetings and social activities. The requirements of religious staff should therefore be accommodated unless there are good reasons why they cannot be.

If there is no canteen, but staff bring food into work, it would be good practice to provide enough storage space to allow vegetarian food to be stored separately to meat products.

What if the employer is not aware of the religious requirements of staff?

Employers do not escape liability just because they do not know about the religious requirements of staff. Indirect discrimination is an objective matter and if a work practice has a disadvantageous impact on a particular religious group then the employer has to justify the practice whether he or she knew about it or not. So if for example team meetings are fixed for Friday afternoons, this may discriminate against Jewish or Muslim staff for whom Friday afternoons may have a special significance.

The fact that the employer did not know this, or did not know that members of staff were Jewish or Muslim, is not in itself a defence. However, if staff do have religious convictions which affect the way they work, then a tribunal might expect them to have pointed this out to their employer.

The ACAS Code of Practice on Religion and Belief contains useful information about the key features of the main world religions, and how they might impact on the workplace.

RELIGIOUS AND POLITICAL DISCRIMINATION IN NORTHERN IRELAND

When legislation on fair employment was first introduced in Northern Ireland in 1976, it outlawed discrimination on the grounds of 'religious belief or political opinion'.

The background was the existence of long-term and pervasive discrimination on religious/political grounds between the majority and the minority communities in the province. In that context, the type of religious belief referred to was considered to be restricted to catholics and protestants, and the type of political opinion protected was considered to be related to the constitutional status of Northern Ireland.

Subsequent legal developments have established that the terms 'religious belief' and 'political opinion' should have wider application than relating solely to Northern Ireland's particular historic divisions and all religious beliefs and political opinions are included (see below).

The following chapter provides a brief overview of the main provisions of the Fair Employment and Treatment Order 1998 and the Fair Employment and Treatment Order (Amendment) Regulations (Northern Ireland) 2003 in relation to employment matters.

THE FAIR EMPLOYMENT AND TREATMENT ORDER 1998

The Fair Employment and Treatment (Northern Ireland) Order 1998 (FETO) makes it unlawful to discriminate on the grounds of religious belief or political opinion in matters of employment and also in other fields including education and the provision of goods and services. This chapter deals only with discrimination in relation to employment.

What is 'religious belief'?

FETO did not define religious belief except to state that it included the absence of religious belief. The Fair Employment and Treatment Order (Amendment) Regulations (Northern Ireland) 2003 have, however, defined religious belief as 'including any religion or similar philosophical belief'.

This definition is essentially the same as the new 2003 regulations introduced in Great Britain (see chapter nine). The only difference is that in Northern Ireland protection goes beyond the area of employment and training (to which the British legislation is restricted) and extends to education and goods and services.

What is 'political opinion'?

Having originally been thought to be confined to political opinions about the constitutional status of Northern Ireland, it is now clear that the term political opinion includes left/right political opinions and other opinions that relate to the governance of the state or matters of public policy.

A recent test case brought by the National Union of Journalists in Northern Ireland established that trade union activities may be a matter of political opinion and may therefore be protected by the fair employment legislation.

DISCRIMINATION

The order (as amended) sets out four forms of discrimination: direct discrimination, indirect discrimination, victimisation, and harassment. These are essentially the same as those that apply to race discrimination (see chapter two) except for a few differences which are set out below.

What is direct discrimination under FETO?

Direct discrimination occurs when a person is discriminated against because of his or her perceived religion or political opinion. There is no need to show an intention to discriminate.

What is indirect discrimination under FETO?

Indirect discrimination occurs where an apparently neutral provision puts someone of a particular religious belief or political opinion at a disadvantage. For instance, in the context of Northern Ireland, this might be a requirement that someone has to be an ex-member of the security forces. This would place people from a catholic or nationalist background at a disadvantage since

members of those communities have made up a disproportionately small proportion of the security forces.

As with direct discrimination, employers do not have to have intended to discriminate to be caught. Unlike direct discrimination, however, employers can objectively justify indirect discrimination as long as they rely on grounds which do not relate to religious belief and/or political opinion and they can be shown to be a 'proportionate means of achieving a legitimate aim'.

What is harassment under FETO?

The amended order introduced a new statutory definition of harassment on the grounds of religious belief or political opinion.

Unlawful harassment occurs when someone is subjected to unwanted conduct that has the purpose or effect of violating their dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment, and the treatment is on the ground of religious belief or political opinion.

The code of practice of the Equality Commission for Northern Ireland requires employers to promote a 'good and harmonious working environment'. In the particular context of Northern Ireland, this means that the wearing or display of any flags, particular football regalia (such as Celtic or Rangers shirts) or other items which identify community allegiance may fall foul of the requirements of the code and lead to an harassment claim.

In one case a portrait of Her Majesty the Queen was found to be unjustifiable and in breach of good practice.

What is victimisation under FETO?

Employees are also protected against discrimination by way of victimisation. In other words, if an employee is treated less favourably because they have undertaken a 'protected act', they can claim victimisation.

Protected acts under FETO are:

- bringing proceedings under FETO
- giving evidence or information in connection with any proceedings or investigation under FETO
- alleging that another person has contravened FETO
- any other acts under FETO

EXCEPTIONS

There are a number of situations where the order does not provide protection against discrimination:

- employment as a religious minister
- employment in a private household
- genuine occupational requirement – where the essential nature of the job requires a person holding or not holding a particular religious belief or political opinion
- school teachers – applies only in relation to the recruitment (and not the employment) of a teacher
- positive action in the provision of training – for instance by issuing statements encouraging applications from members of particular groups, where the purpose of such measures is to encourage underrepresented groups to apply for posts
- the use of redundancy selection criteria which would adversely impact on a particular group by reference to their religious belief or political opinion, but only if undertaken in pursuit of affirmative action – for instance, not using length of service as a criterion despite previous custom and practice if there would be a disproportionate effect on members of a group who had been historically underrepresented in that workforce
- national security

In addition, the legislation does not protect political views which 'support the use of violence for political ends connected with the affairs of Northern Ireland'. This exception has never been tested at a tribunal or court hearing.

All these exemptions are narrowly construed by tribunals, since they represent exceptions to the fundamental principle of equality.

ENFORCING INDIVIDUAL RIGHTS

In Northern Ireland, there is a separate tribunal system – the fair employment tribunal – that runs in parallel with industrial tribunals. Generally, it can only hear cases alleging religious or political discrimination, although it can also hear unfair dismissal cases and other types of discrimination cases which overlap with a religious or political discrimination claim.

What time limits apply?

A complaint of religious or political discrimination must usually be made to a fair employment tribunal within three months of the date on which the employee became aware of the act of discrimination, or within six months from the date when the act occurred, whichever is the earlier.

However, the tribunal may still hear a complaint outside these time limits if, in the circumstances of the case, it considers it just and equitable to do so.

Can fair employment tribunals award compensation?

If the tribunal finds that religious or political discrimination has taken place, it may award compensation without an upper limit. These are generally on a par with awards made in other areas of discrimination.

Tribunals may also recommend that, within a certain time, employers take steps to address the adverse effects of the discrimination

What is the burden of proof?

Once the applicant has shown that his or her treatment was, on the face of it, discriminatory, the employer then has to prove that the reason for it was not, in fact, unlawful discrimination.

GENERAL EQUALITY DUTY ON PUBLIC BODIES

Under Section 75 of the Northern Ireland Act 1998 a public authority must 'have due regard to the need to promote equality of opportunity' between different protected groups, including persons of different religious belief and political opinions.

This duty requires more than just the elimination of discrimination. Public sector employers also have to take proactive measures to secure equality of opportunity between groups and to enable action to redress inequalities of opportunity.

Section 75 also creates an additional duty to 'have regard to the desirability of promoting good relations between persons of different religious belief, political opinion or racial group'.

The Act requires public bodies to produce an equality scheme, stating how they propose to fulfil these duties. This must be submitted to the Equality Commission for approval. All such schemes must conform to detailed guidelines as to form and content produced by the Commission and must be reviewed by the public body within five years.

Public bodies are also required as part of the overall process to engage in wide-ranging and continuing consultation in the process of developing their equality schemes, and to produce 'equality impact assessments'. These consider how particular policies may promote equality of opportunity and whether they may have an adverse impact on the protected groups.

The Equality Commission is required to keep the effectiveness of the duties imposed by section 75 under review; to offer advice to public authorities in connection with those duties; and to generally facilitate and monitor the operation of the system including preparing guidelines on equality schemes, approving schemes, investigating complaints of failure to comply with an approved scheme, and producing an annual report on the operation of the equality duty.

AGE

The introduction of the European Framework Employment Directive in 2000 requires the UK for the first time to introduce legislation preventing discrimination on the ground of age.

Up until now there has just been a voluntary code of practice that has been largely ignored by employers. But, in line with the requirements of the directive, regulations outlawing age discrimination will be implemented in the UK in October 2006.

Not before time, some might say. A MORI survey in 2001 found ageism to be the most common cause of discrimination at work. It showed that 22% of respondents experienced discrimination in employment, with 38% of them citing age as the cause.

There is also a demographic imperative to the legislative changes. The fall in the birth rate has meant a drop in the number of younger entrants into the labour market. By 2010 only 17 per cent of the workforce will be aged 18-24, while almost 40 per cent will be over 45.

The new legislation will apply to employment and vocational training only. This will mean that it will not cover the provision of goods and services so that discrimination in health care, education and insurance, for instance, will be left untouched.

AN OUTLINE OF THE REGULATIONS

Although the government intended to produce a set of regulations in order to give employers two years to get used to the changes, it has so far failed to do so. This is primarily because of disagreements on some aspects of the regulations and in particular disagreement about mandatory retirement ages.

This chapter is, therefore, an outline of the proposed (rather than the actual) legal framework based on the directive. It is likely that when the regulations are introduced they will differ from the outline set out below.

Where will the regulations apply?

They will apply to those working wholly or partly in Great Britain, as well as those who work outside it. The employer must have a place of business in Britain and the work is for the purpose of that business. And the worker must be ordinarily resident in Britain when he or she applies for the job or at any time during their employment.

The regulations will apply equally to England, Wales, Scotland and Northern Ireland.

What are the regulations likely to cover?

The regulations will prohibit discrimination on the basis of age. They will provide protection throughout the employment relationship, and will apply to both prospective and existing workers. In some circumstances, they will also provide protection after the person has left their job.

Who will the law apply to?

It will apply to all workers, including contract and agency workers, office holders, the police, barristers and members of the armed forces as well as employees.

Liability will go much further than just employers and includes partnerships, trade organisations (including trade unions), barristers, qualifications bodies, providers of vocational training, providers of insurance services, trustees and managers of occupational pension schemes and employment agencies.

When will the law apply?

There will be no service requirement under the regulations, so workers are protected from the moment they apply for a job and from their first day in the job.

DISCRIMINATION

What will constitute direct age discrimination?

If someone makes a decision on the basis of an individual's actual or perceived age, this will amount to direct discrimination. It is still not clear, however, if this definition will include discrimination on the basis of association with someone of a particular age.

This definition does not require a comparator.

Can direct age discrimination be justified?

Unlike other discrimination legislation, the government is proposing a limited defence in exceptional circumstances to direct age discrimination. An employer wanting to adopt an age-based approach would therefore have to show that the reason fits within a list of specific aims. These include:

- health and safety reasons – for example, the protection of younger workers
- facilitation of employment planning – perhaps where a business has a number of people approaching retirement age at the same time
- particular training requirements for a post – for instance, one that requires a long training period
- encouraging or rewarding loyalty
- the need for a reasonable period of employment before retirement. For example an employer with a mandatory retirement age of 65 might not want to appoint someone nearing 65 to a job, if training that person would outweigh any productivity advantages to the employer

However, employers would also have to show that the approach was both appropriate and necessary in those circumstances.

What will constitute indirect age discrimination?

If an employer has a policy or practice that disadvantages a certain category of person because of their age and the person can show that he or she has suffered a disadvantage, that will amount to indirect discrimination.

Employers can justify indirect discrimination so long as they have good, objective reasons for doing so. These reasons do not have to fit into the list of specified aims for justifying direct discrimination.

What about mandatory retirement ages?

The new rules will clearly require employers to take a much more flexible approach to retirement. One of the most contentious issues is that of a mandatory retirement age.

The government is proposing (although this is subject to much debate) a limited defence to the current, widespread use of mandatory retirement ages, but only in exceptional circumstances.

It proposes that if the practice fits a specific aim, such as employment planning, and is both appropriate and necessary for the employer's business, then it should not constitute direct discrimination. It is not yet clear whether these aims will be limited to those set out above.

Will there be a statutory default retirement age?

The UK does not currently have a national mandatory retirement age, although retirement is usually linked to the age at which people receive their state pension. This is currently paid to men at 65 and women at 60, although this difference will be equalised by 2020 so that everyone will receive their pension at 65.

The Government has announced that it will introduce a statutory default retirement age of 65, after which all employers could in principle oblige employees to retire. However, there will also be a consultation on a right for employees to request working beyond that age and have their requests considered. The Government will review the appropriateness of having a statutory default retirement age five years after implementation.

Can employers discriminate in pension and retirement benefits?

The framework directive specifically allows employers to set requirements, such as age, for admission into occupational pension schemes and for entitlement to retirement benefits.

HARASSMENT

The legislation will also incorporate a right not to be harassed. This means subjecting someone to unwanted conduct that violates their dignity or creates an intimidating, hostile, degrading, humiliating or offensive environment. The harassment will not have to be intentional to be caught by the regulations.

As with the other regulations introduced under the employment directive, these are likely to state that the conduct will amount to unlawful harassment where all the circumstances are taken into

account, including the perception of the person being harassed, if it is reasonable to conclude that it could have had that effect.

Although the test will essentially be an objective one as to what does and does not amount to unacceptable behaviour, particular account will have to be taken of the views of the recipient.

EXCEPTIONS

What are the regulations likely to exclude?

There are likely to be two main exceptions to the principle that people should not be discriminated against on grounds of age:

- the genuine occupational requirement (GOR)
- positive action

What is the genuine occupational requirement?

This will only be available in very rare circumstances where an employer needs someone of a particular age and can show that this is a genuine requirement of the job.

The consultation paper gives the example of child actors needed to play the parts of children, but also suggests that in exceptional circumstances this may apply to models of clothes aimed at specific age groups.

What is positive action?

The regulations will most probably allow for some form of positive action, but only where it can be shown that the purpose is to encourage greater representation by a particular age group and will help or compensate for disadvantages faced by that age group.

THE AGE REGULATIONS IN THE WORKPLACE

How will the changes affect recruitment and selection?

The first and most obvious step that employers will have to take is to remove questions about age or date of birth from applications forms.

They will also need to think about wording for adverts, because it is unlikely that they will be able to ask for 'mature' candidates or for example make references to a 'young, dynamic company'. They also need to consider whether only advertising online might discriminate against older workers.

Likewise, they will need to think about the competencies that they require. For instance, they need to consider whether a certain job needs someone with a degree, as this might militate against older workers.

How will the changes affect training and promotion?

Training opportunities must be equally available to everyone. The only exception might be if employers can show that investing in an older worker would not be cost-effective. For instance they might be able to show that by the time the older worker had finished the training he or she would be on the point of retiring.

Graduate training schemes may well come under scrutiny, on the basis that they relate overwhelmingly to young people.

Employers will also need to ensure that their performance management system if they have one is objective and applied consistently to everyone. And they need to be sure that their promotion system is based on skills and ability and not age.

What about non-pay benefits?

Employers who offer benefits that reward length of service such as holiday entitlement may also need to examine the need for them. This is because age related benefits tend to favour older workers as opposed to younger workers and so amount to indirect discrimination requiring justification.

The government has proposed that the new legislation might allow employers to continue to reward people's loyalty in this way, although they will still have to show that there are good business reasons for having them.

Age-related benefits such as life assurance or private medical schemes on the other hand, may not be so straightforward. Just because it would cost an employer more to offer them to everyone may not be a good enough reason to justify different benefits according to age.

How will unfair dismissal be affected?

There is currently an upper age limit of 65 on the right to claim unfair dismissal and redundancy payments. This was confirmed in October 2004 by the Court of Appeal in *Rutherford and anor v Secretary of State for Trade and Industry*, which decided that these provisions did not discriminate indirectly against men.

The method of calculating unfair dismissal compensation will be changed so that the age of the employee can no longer be taken into account in assessing whether it should be calculated on the basis of half a week, one week or one-and-a-half weeks' wages. Instead it is likely to be based on one week's wages regardless of the age of the employee. The cap of 20 years' service will remain.

This upper age limit will be removed under the new age legislation, so that workers will be able to make a claim at any age. A mandatory retirement age, if permitted, would, however, be a fair reason for dismissal, as long as the employer could justify it.

How will redundancy be affected?

The upper age limit for entitlement to a redundancy payment is likely to be one of the following:

- the normal retirement age for the job (if justified)
- any default retirement age
- the end of the individual's employment (if there is no normal retirement age and the government decides against a statutory default retirement age)

In addition, age would cease to be a factor when calculating the payment due and the same formula for calculating the basic award for unfair dismissal will apply – in other words, one week's pay for each year of service, with a cap of 20 years.

Employers will not be able to use age as a criterion for redundancy selection criteria. Nor will they be able to use age to select people for redundancy.

LIST OF CASES

A v Chief Constable of West Yorkshire Police (2004, IRLR 573)

Allonby v Accrington & Rossendale College & ors (2004, IRLR 224)

Amicus and ors v SoS for Trade and Industry (2004, IRLR 430)

Anya v University of Oxford (2001, IRLR 377)

Archibald v Fife Council (2004, IRLR 651)

Barber v Guardian Royal Exchange Assurance Group (1990, IRLR 240)

Bilka Kaufhaus Gmbh v Weber von Hartz (1986, IRLR 395)

Burton and Rhule v De Vere Hotels (1996, IRLR 596)

Cadman v Health and Safety Executive (2004, IRLR 971)

Chief Constable of West Yorkshire v Khan (2001 ICR 1065)

Clark v TDG Ltd t/a Novacold (1999, IRLR 318)

Crossley v Acas (ET 1304744/98)

DWP v Thompson (2004, IRLR 348)

Enderby and ors v Frenchay Health Authority and ors (1993, IRLR 593)

Forster v Cartwright Black Solicitors (2004, IRLR 781)

Hayward v Cammell Laird Shipbuilders Ltd (1988, IRLR 257)

Insitu Cleaning Co Ltd & anor v Heads (1995, IRLR 4)

Isa and Rashid v BL Cars Ltd (ET Nos 27083/80 and 32273/79)

Jones v Tower Boot Co Ltd (1997, IRLR 168)

Kalanke v Freie Hansestadt Bremen (1995, IRLR 660)

Kenny v Hampshire Constabulary (1999, IRLR 76)

Lawrence and ors v Regent Office Care Ltd and ors (1999, IRLR 148)

Leverton v Clywd CC (1989, IRLR 28)

London Borough of Croydon v Kuttappan (18.1.99, EAT no 1292/98)

London Underground v Edwards (No 2) (1998, IRLR 364)

Mandla and anor v Lee and ors (1983 ICR 385, HL)

Mathews and ors v Kent and Medway Towns Fire Authority and ors (2004, IRLR 697)

MacDonald v Ministry of Defence; and Pearce v Governing Body of Mayfield Secondary School (2003 IRLR 512)

Murray v Newham Citizens Advice Bureau (2003, IRLR 340)

North West Thames Regional Health Authority v Noone (1988 ICR 813)

Nottingham County Council v Meikle (2004, IRLR 703)

O'Neill v Symm & Co Ltd (1998, IRLR 233)

Pickstone v Freemans plc (1988, IRLR 357)

Price v Civil Service Commission (1977, IRLR 291)

Ratcliffe v North Yorkshire County Council (1995, IRLR 439)

Reed and anor v Stedman (1999 IRLR 299)

Rideout v TC Group (1998, IRLR 628)

Rihal v London Borough of Ealing (2004, IRLR 642)

Rutherford and anor v Secretary of State for Trade and Industry (2004, IRLR 892)

Scott v Norfolk House Hotel (ET no 19715/82)

Smith v Safeway plc (1996, IRLR 456)

Springboard Sunderland Trust v Robson (1992, IRLR 261)

Visa International Service Association v Paul (2004, IRLR 42)

Watches of Switzerland v Savell (1983, IRLR 141)

Weathersfield Ltd t/a Van and Truck Rentals v Sargent (1999 IRLR 94)

QUESTIONNAIRES AND TRIBUNAL FORMS

EOC link for Sex Discrimination Questionnaire

http://www.eoc.org.uk/cseng/tribunalandcourtprocedures/question_procedure_using_form_sd74.asp
Ring EOC helpline number for advice on filling it in – **0845 601 5901**
Or e-mail the EOC on **info@eoc.org.uk**

CRE link for Race Discrimination Questionnaire

http://www.cre.gov.uk/pdfs/rr65.pdf – for pdf version
http://www.cre.gov.uk/legaladv/rr65.html – for some general guidance
Or e-mail the CRE at **info@cre.gov.uk**

DRC link for Disability Discrimination Questionnaire

http://www.drc-gb.org/publicationsandreports/publicationhtml.asp?id=137&docsect=0&section=0
Ring DRC helpline on **08457 622 633**
Or go to **http://www.drc-gb.org/whatwedo/enquirydiscriminate.asp** to fill in an e-mail enquiry form

ET1 form

Hard copy forms and guidance booklets are available from the Employment Tribunals enquiry line on **0845 7959775**. A claim can also be made online at **www.employmenttribunals.gov.uk**.

CODES OF PRACTICE/GUIDANCE

ACAS

Sexual orientation and the workplace – a guide for employers and employees, 2003

Religion and belief in the workplace – a guide for employers and employees, 2003

Code of practice on discipline and grievance procedures, 2004

CRE

Code of practice on racial equality in employment, 1983

Code of practice on the duty to promote racial equality, 2002 (four non-statutory guides also available)

DRC

Code of practice – employment and occupation, 2004

Guidance on matters to be taken into account in determining questions relating to the definition of disability, 1996

DWP

Code of practice on age diversity at work, 2002 (available on **www.agepositive.gov.uk**)

DTI

Adoptive parents: rights to leave and pay, 2003

Flexible working: the right to request and the duty to consider: guidance for employers and employees, 2003

Maternity rights: a guide for employers and employees, 2003

Parental leave: detailed guidance for employers and employees, 2003

Time off for dependants: detailed guidance for employers and employees, 2003

The law and best practice: a detailed guide for employers and part-timers on the Part-time Workers Regulations, 2000

Working fathers (rights to paternity leave and pay), 2003

EOC

Code of practice on equal pay, 2002

Code of practice for the elimination of discrimination on the grounds of sex and marriage and the promotion of equality of opportunity in employment, 1985

HOME OFFICE

Code of practice for all employers on the avoidance of race discrimination in recruitment practice while seeking to prevent illegal working, 2001

HSE

A guide for new and expectant mothers who work, 2003

The government guide to the sex discrimination (gender reassignment) regulations is available from their publications order line on 0845 602 2260

TUC/UNION PUBLICATIONS

TUC PUBLICATIONS

Challenging racism at work: using the law, August 2000

Dyslexia in the workplace: a guide for unions, November 2004

Equal access: reaching new standards, November 2003

Equality and diversity – new employment rights, TUC training course, March 2004

Equal opportunities audit 2003, August 2003

Equal pay pilot project – final report – phase 2, September 2003

Families need time, September 2004

Migrant workers: a TUC guide, January 2002

Moving on: how Britain's unions are tackling racism, April 2004

Trade unions and disability, August 2001

Transgender equality: advice from the TUC on trans rights in the workplace, 2004

TUC guide to human rights in the workplace, November 2000

TUC guide on resolving employment disputes, September 2004

Your rights at work, November 2003

Know your rights leaflets, available from the TUC Know Your Rights line on **0870 600 4 882**

The following is a selection of recent trade union publications (for contact details of unions see TUC Directory 2005 or **www.tuc.org.uk**). Most publications are available on websites of individual unions, which also carry additional useful material.

AMICUS

Employment rights for working parents (including model policies)

The human rights guide 1998

Racial harassment

CWU

Dignity and respect! dealing with harassment – members' guide

Equality – facts and figures on racial issues

Flexibility (members' guide)

How to deal with harassment – reps guide

FBU

All different all equal

GMB

Race equality audit 2003
Maternity and parental rights FAQs
Tackling harassment

NASUWT

Advice on the DRC Code of Practice on schools
Advice on the Human Rights Act
Islamophobia advice for schools and colleges
Racial harassment of teachers

NATFHE

Conflict and resolution
Challenging age discrimination
Culture, religion & belief
Equality for LGBT staff and students
Implementing the Race Relations Amendment Act

NUT

Do not tolerate intolerance
Guidance for members on religion or belief discrimination
Maternity matters
Our right to stay in work – making reasonable adjustments for disabled teachers
Racism and anti-semitism: issues for teachers and schools
Supporting lesbian, gay, bisexual and transgender students

PCS

Accessible to all: the PCS approach to disabled members
Anti-discrimination toolkit
Guide – equal rights for lesbians, gay men and bisexuals
Minimum standards for racial equality

RMT

Equal opportunity – where we stand

TGWU

Disability rights at work pack
Guide to family rights (maternity, flexible working, etc)
Negotiators guide on race equality
The law and you

UNISON

Bargaining for transgender workers' rights
Negotiating equality for lesbian, gay and bisexual workers
Negotiating guide to parental leave
The law, the race equality duty, and you
Winning equal pay

USDAW

Racial harassment at work – a guide for union representatives
Sexual harassment at work – a leaflet for union members
Flexible working: your right to have a say in the hours you work
The right to request flexible working: briefing for reps
Maternity and parental rights pack
Maternity and parental rights: a guide for Usdaw reps
Working parents and carers: a guide
Representing disabled members

LIST OF USEFUL ORGANISATIONS

Advisory, Conciliation and Arbitration Service (ACAS)

Acas works with employers and employees to improve working life through better employment relations. You can ring its helpline for advice on rights at work.

Head Office:
Brandon House
180 Borough High Street
London
SE1 1LW

Telephone: **020 7210 3613**
www.acas.org.uk
Acas Helpline – **08457 47 47 47**
Textphone users – **08456 06 16 00** (Monday – Friday 08:00 – 18:00)

Age Concern England

ACE is a national voluntary organisation aiming to improve the opportunities and quality of life of people over 50.

Astral House
1268 London Road
SW16 4ER

Telephone: **020 8765 7200**
e-mail: **ace@ace.org.uk**
www.ageconcern.org.uk

Black Information Link

The 1990 Trust's independent community interactive site for black communities.

Suite 12 Winchester House
9 Cranmer Road
London SW9 6EJ

Telephone: **020 7582 1990**
Email: **blink1990@blink.org.uk**
www.blink.org.uk

Commission for Racial Equality (CRE)

The Commission for Racial Equality is a non-governmental body set up under the Race Relations Act 1976 to tackle racial discrimination and promote racial equality.

St Dunstan's House
201-211 Borough High Street
London SE1 1GZ

Telephone: **020 7939 0000**
email **info@cre.gov.uk**
www.cre.gov.uk

Community Legal Service Direct

CLS direct is run by the Legal Services Commission and provides free information, help and advice direct to the public on a range of common issues.

CLS direct helpline: **0845 345 4 345**
www.clsdirect.org.uk

Data Protection

The Office of the Information Commissioner oversees and enforces compliance with both the Data Protection Act 1998 and the Freedom of Information Act 2000. The office also runs a helpline.

Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire SK9 5AF

Telephone: **01625 545 700**
email: **mail@ico.gsi.gov.uk**
www.informationcommissioner.gov.uk/

Data Protection Help Line

Telephone: **01625 545 745**
email: **mail@ico.gsi.gov.uk**

Registration/Notification Line

Telephone: **01625 545 740**
email: **data@notification.demon.co.uk**

Disability Rights Commission

The Disability Rights Commission (DRC) is a statutory, independent body to stop discrimination and promote equality of opportunity for disabled people. It runs an advice helpline for callers.

DRC Helpline
FREEPOST MID02164
Stratford upon Avon
CV37 9BR

Telephone: **08457 622 633**
Textphone: **08457 622 644**
www.drc-gb.org

Discrimination Law Association

The DLA aims to support individuals complaining of discrimination and to raise awareness and encourage debate on discrimination law and practice.

PO Box 6715
Rushden
Northamptonshire, NN10 9WL

Telephone: **01933 228742**
e-mail **info@discrimination-law.org.uk**
www.discrimination-law.org.uk

Employment Tribunals Service

The ETS is the administrative arm of the tribunal service which resolves disputes between employers and employees.

Enquiry **line:0845 795 9775**
Minicom **08457 573 722.**
Telephone: **020-7843 1597**
e-mail: **etswebmaster@ets.gsi.gov.uk**
www.employmenttribunals.gov.uk

Equality and Diversity Forum

The forum is a network of national organisations committed to progress on age, disability, gender, race, religion and belief, sexual orientation and broader equality and human rights issues.

207-221 Pentonville Road
London N1 9UZ

Telephone: **020-7843 1597**
e-mail: **equalityforum@taen.org.uk**
www.edf.org.uk

Equal Opportunities Commission

The Equal Opportunities Commission is the leading agency working to eliminate sex discrimination in 21st Century Britain.

Arndale House, Arndale Centre
Manchester
M4 3EQ

Telephone: **0845 601 5901**
email: **info@eoc.org.uk**
www.eoc.org.uk

Equality Commission for Northern Ireland

The Equality Commission for Northern Ireland is an independent public body which works towards the elimination of discrimination, to promote equality of opportunity and to encourage good practice.

Equality House
7 – 9 Shaftesbury Square
Belfast
BT2 7DP

Telephone: **028 90 500600**
Email: **information@equalityni.org**
www.equalityni.org

Equality Direct

This service is aimed at business managers to give them easy access to advice on a wide range of equality issues.

Helpline: **0845 600 3444**
www.equalitydirect.org.uk

Fawcett Society

The Fawcett Society works for changes in policies, structures, cultures and processes that will lead to real improvements in women's lives.

1-3 Berry Street
London EC1V 0AA

Telephone: **020 7253 2598**
Email: **info@fawcettsociety.org.uk**
www.fawcettsociety.org.uk

Forum Against Islamophobia and Racism

FAIR is an independent charitable organisation established for the purpose of raising awareness of and combating Islamophobia.

Suite 11
Grove House
320 Kensal Road
London
W10 5BZ

Telephone: **020 8969 7373**
e-mail: fair@fairuk.org
www.fairuk.org

Gender Trust

The Gender Trust is a charity which specifically helps adults who are Transsexual, Gender Dysphoric or Trangender.

PO Box 3192
Brighton BN1 3WR

Helpline: **07000 790347**
www.gendertrust.org.uk

Health and Safety Executive

The Executive (along with the Health and Safety Commission) is responsible for the regulation of most risks to health and safety arising from work activity in Britain.

HSE Infoline
Caerphilly Business Park
Caerphilly, CF83 3GG

Telephone: **08701 545500**
e-mail: **hseinformationservices@natbrit.com**
www.hse.gov.uk

Liberty

Liberty is one of the UK's leading human rights and civil liberties organisations. It was founded as the National Council for Civil Liberties in 1934 and has fought to secure equal rights for everyone for 70 years.

21 Tabard Street
London SE1 4LA

Telephone: **020 7403 3888**
email: **info@liberty-human-rights.org.uk**
www.liberty-human-rights.org.uk

Maternity Alliance

The Alliance is a national charity working to improve rights and services for pregnant women, new parents and their families.

Third Floor West
2-6 Northburgh Street
London EC1V 0AY

Telephone: **020 7490 7639**
e-mail: **office@maternityalliance.org.uk**
Information Line: **020 7490 7638**
www.maternityalliance.org

Muslim Council of Britain

The Council aims to promote and encourage greater consultation, cooperation and coordination on Muslim affairs.

Boardman House
64 Broadway, Stratford
London E15 1NT

Telephone: **020 8432 0585/6**
email: **admin@mcb.org.uk**
www.mcb.org.uk

National Association of Citizens Advice Bureaux

The Citizens Advice service helps people resolve their legal, money and other problems by providing free information and advice.

Citizens Advice
Myddelton House,
115-123 Pentonville Road,
London, N1 9LZ

Telephone: **020 7833 2181**
www.citizensadvice.org.uk
www.adviceguide.org.uk

Press for Change

Press for Change is a political lobbying and educational organisation, which campaigns on behalf of all transgender people in the UK.

BM Network
London WC1N 3XX

e-mail: **editor@pfc.org.uk**
www.pfc.org.uk

Public Concern at Work

Public Concern at Work is an independent authority on whistleblowing, providing free help to prospective whistleblowers.

Suite 306
16 Baldwins Gardens
London EC1N 7RJ

Telephone: **020 7404 6609**
e-mail: **helpline@pcaw.co.uk**
www.pcaw.co.uk

Rights of Women

Rights of Women works to attain justice and equality by informing, educating and empowering women about their legal rights.

52-54 Featherstone Street,
London, EC1Y 8RT.

Advice line: **020 7251 6577.**
(Open Tuesday–Thursday 2–4pm and Friday 12–2pm.)
Administration: **020 7251 6575/6**
Textphone: **020 7490 2562.**
Email: **info@row.org.uk**
www.rightsofwomen.org.uk

Stonewall

Stonewall works to achieve legal equality and social justice for lesbians, gay men and bisexual people.

46 Grosvenor Gardens
London SW1W 0EB

Textphone: **020 7881 9440**
minicom: **020 7881 9996**
e-mail: **info@stonewall.org.uk**
www.stonewall.org.uk

Trades Union Congress

The TUC campaigns for a fair deal at work and for social justice at home and abroad.

Congress House
Great Russell Street
London
WC1B 3LS

Textphone: **020 7636 4030**
Know Your Rights line – **0870 600 4 882**
www.tuc.org.uk

Women and Equality Unit

The government's Women and Equality Unit supports the Ministers for Women in promoting the benefits of diversity in the economy and more widely.

35 Great Smith Street
London
SW1P 3BQ
United Kingdom

Telephone: **0845 001 0029**
Email: **info-womenandequalityunit@dti.gsi.gov.uk**
www.womenandequalityunit.gov.uk

Working Families

Working Families helps children, working parents, carers and their employers find a better balance between responsibilities at home and work.

1-3 Berry Street
London EC1V 0AA

Telephone: **020 7253 7243**
e-mail: **office@workingfamilies.org.uk**
www.workingfamilies.org.uk

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