

# 17

**equality at work**

members' guide

experts at work



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# equality at work



Prospect is committed to a policy of equal opportunities for all members irrespective of gender, race, sexual orientation, gender identity, disability, age or religion.

The Equality Act came into force in October 2010. It brought the previous discrimination law into one main piece of legislation. Prospect has long argued for a single equality act to make the myriad of legislation more consistent, accessible and effective. This guide summarises the main provisions of the Act.

The guide gives an overview of the legal rights that relate to equal opportunities at work as at January 2017. However, the law is constantly changing and the guide cannot cover every legal point. For more detailed advice, members should always contact their Prospect representative.

## using the law

Taking legal action is usually a last resort. Legal procedures can be drawn out and stressful and legal remedies are often inadequate. Internal procedures and negotiations should always be followed.

That said, knowledge of the legal issues and rights involved is useful protection for individuals and essential for representatives pursuing individual cases. The law is also a building block for the negotiation of policies and practices to prevent discrimination.

# equality law in UK and Europe

## 1

### a single act for discrimination law

**1.1** The Equality Act covers all the previous strands of discrimination law, including sex, gender identity, race, disability, sexual orientation, religion and belief, and age.

**1.2** The Act not only covers rights in relation to employment, but also applies to goods and services, education, transport and public appointments. This guide only deals with employment issues.

**1.3** The Act applies to England, Wales and Scotland. It does not apply in Northern Ireland, which continues to have separate, though very similar, legislation. There are also significant differences in the Isle of Man and Channel Islands.

### european law

**1.4** UK law on discrimination at work is derived largely from European Union directives on equal treatment and equal pay for women and men.

### part-time, flexible and family rights

**1.5** Regulations provide rights for part-time workers not to be treated less favourably because of their part-time status. There is also a statutory right to request a change in hours, or to work from home.

**1.6** There are also rights for parental leave, maternity, adoption and paternity/maternity support leave and pay, which all overlap and complement discrimination rights. These rights are outside the scope of this guide but see other Prospect guides for details (listed on page 24).

# protected characteristics

## 2

**2.1** The concept of 'protected characteristics' lies at the heart of the Act. These characteristics are:

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

### race

**2.2** Race includes colour, nationality and ethnic or national origins.

**2.3** There have been many legal arguments over exactly what constitutes ethnic or national origin and how to define an ethnic group. The courts have set a list of factors to take into account. Two of the most important are that the group must have a longstanding shared history and a cultural tradition of its own.

**2.4** The Equality Act provides for regulations to be introduced in the future to make discrimination on the grounds of caste unlawful, but this has not been implemented.

### disability

**2.5** The Act defines a person with a disability as someone who has 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.

## transgender

**2.6** The protected characteristic of gender reassignment applies where a person is proposing to undergo, is undergoing, or has undergone a process (or part process) to reassign their sex.

## sexual orientation

**2.7** Sexual orientation is defined in the Act as an orientation towards persons of the same sex, or the opposite and/or same sex, or the opposite sex. Therefore discrimination is outlawed on the basis of being gay, lesbian, bisexual or heterosexual.

## marriage and civil partnership

**2.8** The protected characteristic only applies where a person is married or a civil partner. It does not apply to unmarried couples or partners.

## religion or belief

**2.9** Religion is any recognised religion. Belief means any religious or philosophical belief. Several cases have considered what amounts to a 'belief'. It must be genuinely held, important and serious. It must also be a belief worthy of respect in a democratic society. The Act also applies to discrimination due to any lack of religion or belief.

# prohibited conduct

## 3

**3.1** The Equality Act outlaws a range of 'prohibited conduct' but it should be noted that not all protected characteristics are covered by each type of discrimination. Where there are exclusions they are noted below.

**3.2** There are four types of prohibited conduct:

- direct discrimination
- indirect discrimination
- harassment
- victimisation

### direct discrimination

**3.3** Direct discrimination is where there is less favourable treatment because of a protected characteristic. The Act defines direct discrimination as:

"A person (A) discriminates against another (B) if because of a protected characteristic A treats B less favourably than A treats, or would treat, others."

**3.4** The definition requires the comparison with a real or hypothetical comparator in respect of all the protected characteristics, except for pregnancy and maternity.

**3.5** There is no requirement for a comparator in pregnancy and maternity cases as the Act provides that discrimination occurs where a woman is treated 'unfavourably' because of the pregnancy or maternity.

**3.6** The test for direct discrimination is to compare the less favourable treatment with how the employer treats or would treat someone who does not share the same characteristic. A key question in determining direct discrimination is: would the complainant have received the same treatment but for their protected status?

**3.7** This is a broad enough definition to include **associative discrimination**. It is clear it does not apply only in respect of the employee's own personal characteristics. For example, it will be unlawful to treat someone less favourably because of their association with a person with the protected characteristic.

**3.8** The definition also covers discrimination due to the **perception** that someone has the protected characteristic. For example if someone is perceived to be of a certain religion and are treated less favourably, they will have protection under the Act, even though they may not in fact be of that religious group.

**3.9** In a claim of direct discrimination because of age, the employer can defend the claim if they can show the less favourable treatment is justified as being a proportionate means of achieving a legitimate aim. 'Justification' of direct discrimination is not possible under any of the other protected characteristics.

## indirect discrimination

**3.10** Indirect discrimination will occur where the employer:

- applies a provision, criterion or practice (PCP) to everyone, *but*
- the PCP puts, or would put, persons sharing a protected characteristic at a particular disadvantage compared to others
- the PCP puts, or would put, the individual at that disadvantage, and
- it is not a proportionate means of achieving a legitimate aim.

**3.11** This covers circumstances where the employer treats everyone the same but the treatment would have a disproportionate adverse effect on people with a certain characteristic. For example, if an employer had a policy of not promoting part-time workers this would be likely to affect a greater proportion of women than men, so it would be unlawful unless the employer could objectively justify the policy.

**3.12** Indirect discrimination applies to all the protected characteristics except for pregnancy and maternity.



## harassment

**3.13** Harassment is specified as an unlawful act for which both the perpetrator and the employer may be liable.

**3.14** Harassment is where a person engages in unwanted conduct related to a relevant protected characteristic which has the purpose or effect of:

- violating that other person's dignity, or
- creating an intimidating, hostile, degrading, humiliating or offensive environment for them.

**3.15** In deciding whether harassment has occurred, a tribunal must consider the perception of the person making the complaint but also whether it is reasonable for the conduct to be said to be offensive.

**3.16** The Equality Act specifically outlaws sexual harassment where the unwanted conduct is of a sexual nature. It also prohibits unfavourable treatment because someone has submitted to or rejected sexual harassment, or harassment related to sex or gender reassignment.

**3.17** Because harassment is defined as 'related to a relevant protected characteristic', it covers harassment based on associative or perceived characteristics. For example, someone being subjected to abuse because they live with someone of a particular characteristic or if they are wrongly perceived as having a characteristic.

**3.18** The harassment provisions apply equally to all the protected characteristics with the exception of marriage and civil partnership, and pregnancy and maternity.

For more details see the Prospect *Members' Guide on Harassment and Bullying at Work*.

## victimisation

**3.19** Victimisation is where a person is subjected to a detriment because they have:

- brought proceedings under the Act
- given evidence or information in such proceedings

- done anything for the purpose of or in connection with the Act, or
- alleged that someone has contravened the Act.

**3.20** People are protected against being penalised for making or supporting an allegation of discrimination, so long as the allegation is made in good faith.

**3.21** Victimisation can also apply where the employer knows that the employee intends to take action as above, or suspects that they have done or will do so.

**3.22** For example, if an employee alleges that the reason she was not promoted was because of sex discrimination, and she is then moved to a different job which is less desirable, she may argue that the move was victimisation.

# disability discrimination

## 4

**4.1** The Equality Act prohibits direct and indirect discrimination, harassment and victimisation on grounds of disability in the same way as for the other protected characteristics. There are also two further forms of discrimination which apply only to disability.

### discrimination arising from a disability

**4.2** Under the Equality Act, discrimination arising from a disability will be unlawful. This is defined as:

"A person (A) discriminates against a disabled person (B) if:

- A treats B unfavourably because of something arising in consequence of B's disability, and
- A cannot show that the treatment is a proportionate means of achieving a legitimate aim."

**4.3** For example, this would enable cases to be brought where an employee is dismissed for absence which has arisen from their disability. In such a case a tribunal would have to determine if the employer was justified in dismissing in the specific circumstances of the case.

### reasonable adjustments

**4.4** The Act imposes a duty on the employer to make reasonable adjustments to overcome any substantial disadvantage to a disabled person. There are three requirements to make adjustments where:

- a provision, criterion or practice puts a disabled employee at a substantial disadvantage
- there is a physical feature of the workplace that causes a disadvantage
- an auxiliary aid is required by the disabled employee.

**4.5** Reasonable adjustments may include:

- altering premises
- re-allocating work

- changing working hours
- training
- acquiring or modifying equipment
- providing a reader or interpreter.

**4.6** There are a number of criteria to be considered in deciding whether it would be reasonable to make the adjustment. These include its practicability for the employer, its costs, effectiveness for the employee and disruption to other activities.

See the Prospect *Negotiator's Guide to Disability Equality* for details.

## pre-employment enquiries

**4.7** Employers may not ask applicants for employment about their health or any disability before selecting them for interview or offering a job. There is an exception to this in respect of information with the specific purpose of finding out if the applicant could undertake an assessment for the job, whether reasonable adjustments are needed at an interview or whether they could carry out a function of the job (with adjustments as necessary).

# discrimination at work

## 5

**5.1** Unlawful discrimination can occur at any stage of employment, from applying for a job through to dismissal and after leaving.

**5.2** The Equality Act says it is unlawful to discriminate in these areas:

- arrangements for offering employment, including adverts, selection procedures and interviews
- terms on which employment is offered, for example offering a job on less salary to a person with a disability
- refusal to employ
- terms and conditions of employment, including pay, leave and hours of work
- access to promotion, training, transfers and other benefits, for example denying a black person the opportunity for career development training
- dismissal
- being subjected to any other detriment
- discrimination after termination of employment if it arises out of or is closely connected to the employment (eg discriminatory references).

## employer liability

**5.3** The employer is usually liable for discrimination carried out by employees.

**5.4** Under the Equality Act an employer is liable for acts of discrimination carried out by employees acting in the course of employment. This will apply whether or not the acts of discrimination were done with the employer's knowledge or approval.

**5.5** For example, if an employee is racially harassed at work by a colleague, the employee could take a claim against both the employer and the individual colleague.

**5.6** But it will be a defence for the employer to show they took all reasonable steps to prevent the discrimination from happening.

## positive action

**5.7** Employers may encourage applications for employment and can target training opportunities to people with a protected characteristic, where they are under-represented in the workforce or if they encounter disadvantage as a result of the characteristic.

**5.8** The Act also allows for limited positive action to address under-representation in the workforce. Where a candidate for employment (or promotion) is 'as qualified as' other candidates, the employer would be able to make the selection on the basis of promoting diversity through selection by a protected characteristic, where it could be shown that this is 'a proportionate means of achieving the aim of overcoming or minimising the disadvantage or encouraging participation'.

## occupational requirements

**5.9** It will not be unlawful to restrict employment to someone with a particular protected characteristic where that is a justified requirement for the job. For example, it may be a genuine requirement to have a female nurse in women-only healthcare services.

# equal pay and equality of terms

## 6

**6.1** The Equality Act provides for 'equality of terms' between women and men. It covers all contractual terms and conditions, not only pay itself. Claims can be brought in respect of unequal holiday entitlement, sickness arrangements or even company cars.

### equal work

**6.2** There must be equal pay between women and men who are employed on:

- like work
- work rated as equivalent, or
- work of equal value.

**6.3** Like work is where the work done by both the woman and the male comparator is the same or broadly similar and any differences which do exist are of no practical importance.

**6.4** Work is rated as equivalent where the jobs have been assessed as being equivalent under a valid job evaluation system.

**6.5** Work of equal value is where the nature of the work is different but is considered to be of equal value or worth. Value can be measured by criteria like skill, decision-making and effort.

**6.6** The leading equal value case was *Julie Hayward v Cammell Laird Shipbuilders*, where Ms Hayward, a canteen cook, compared her work with that of a male joiner, a painter and an insulation engineer. Although their work was clearly very different it was judged that she required the same level of skill as her comparators, had the same level of responsibility, and was therefore entitled to equal pay.

### comparators

**6.7** In order to claim equal pay the woman must usually be able to identify a male comparator. The comparator may in some cases

be a successor or predecessor in the post. Under the Act, he must be employed by the same employer and either work at the same establishment, or work at a different establishment belonging to that employer with the same terms and conditions. European law uses the wider requirement that the comparator must be employed in 'the same establishment or service', although there must be a 'single source' for the pay system.

## employer's defence

**6.8** An employer has a defence to a claim for equal pay if they can establish that the difference in pay is due to a material factor other than gender.

**6.9** Where the provisions of a pay system disproportionately disadvantage one gender, and are potentially indirect discrimination, the employer will be required to objectively justify the difference in pay. The employer would have to establish that the pay system was a proportionate means of achieving a legitimate aim.

## code of practice

**6.10** The Equality and Human Rights Commission has a Code of Practice on Equal Pay. The code recommends that employers review their pay systems for gender bias and that employers should adopt a policy on equal pay. For information on the status of the code see Section 10 of this guide. For more information on these provisions see the Prospect *Negotiator's Guide to Equal Pay* or contact your Prospect representative.

## pay secrecy clauses

**6.11** The Equality Act outlaws pay secrecy clauses in employment contracts. Any term in a contract that seeks to forbid employees from discussing their pay with colleagues, for the purpose of finding out whether there is discrimination relevant to a protected characteristic, will be unenforceable.

**6.12** Any detrimental action taken against an employee for discussing pay, to see if there is any inequality, will be treated as unlawful victimisation.



**6.13** These provisions aim to make pay more transparent to help deal with pay equality. They do not just cover differences in pay on the grounds of sex but any of the protected characteristics.

## gender pay gap information

**6.14** The Act provides for regulations requiring private sector employers with 250 or more employees to publish information about pay differences between women and men.

Draft regulations will require employers to report on:

- the difference in average hourly rates of pay between women and men
- the difference in average bonus paid to women and men
- the proportion of women and men in each quartile of the pay band.

**6.15** Unfortunately this information will not be specific enough to identify inequality in pay and Prospect reps should continue to pursue employers to undertake full equal pay audits (see Prospect Negotiator's Guide to Equal Pay for more information).

**6.16** The regulations are likely to become law in April 2017.

# public sector equality duties

## 7

**7.1** There are special responsibilities on public authorities to actively promote equality of opportunity and eliminate unlawful discrimination in respect of all the protected characteristics, with the exception of marriage and civil partnership.

**7.2** Public authorities include central government departments and agencies, local authorities, schools and the health service. Additionally some private sector companies who are performing functions of a public nature will be covered by the duty but only in the exercise of those public functions.

### general duty

**7.3** Public authorities have a general duty to have due regard to the need to:

- advance equality of opportunity on the grounds of the protected characteristics
- eliminate discrimination, harassment and victimisation
- foster good relations between those who share a protected characteristic and those who do not share it.

**7.4** This duty will apply both in respect of how they deliver their services to the public and to their employment practices.

### specific duties

**7.5** The Act provides for regulations to be introduced which impose specific duties on public bodies, such as publishing information relating to their general duty and preparing one or more equality objectives at least every four years.

**7.6** For more detail on public sector equality duties, see the Equality Briefings produced by Prospect's Research and Specialist Services department, available on the Prospect website.

## socio-economic disadvantage

**7.7** The Act introduces a new duty on specified public authorities (including government departments) to consider how their decisions can reduce inequalities resulting from socio-economic disadvantage. This would require the effects of disadvantage due to social class being considered in relation to strategic decisions taken by central and local government. This provision has not been put into force by the government.

# making the law work

## 8

**8.1** It should be stressed that taking legal action is normally a last resort. Making the law work can be a slow and stressful process. Internal procedures and representations should always be followed first (subject to the time limits for taking tribunal claims).

### claims

**8.2** There is no qualifying length of service for the right to take a claim that you have been subjected to discrimination. This is a major difference to many other employment rights.

**8.3** Claims under the Equality Act are usually brought to an employment tribunal. The Prospect full-time officer should always be involved in any case where it looks like ET proceedings will be necessary.

**8.4** Legal advice and assistance is offered at the discretion of the union and will be decided depending on the facts and merits of each case.

**8.5** There is a fee of £1,200 to bring a claim to the Employment Tribunal. Where Prospect supports a claim the union pays the fee.

### time limits

**8.6** Applications to an employment tribunal under the Equality Act must usually be started within three months of the incident of discrimination. This time limit can only be extended where the tribunal thinks it is 'just and equitable' to do so. Late claims are rarely accepted. Equal pay claims can be made at any time during the relevant contract of employment or up to six months after.

**8.7** The first stage in bringing a tribunal claim is to apply to ACAS for 'early conciliation'. This application must be made within 3 months of the act of discrimination. The conciliation period stops the clock for presenting the claim to the employment tribunal. These rules are complex so always seek advice from Prospect.

**8.8** In all cases of discrimination other than dismissal, the employee should present a grievance in writing to the employer before making the tribunal claim. Any failure to raise a grievance could result in a reduction of up to 25 per cent of the compensation awarded.

**8.9** Although you should always use internal procedures, the strict time limits for claims mean it is not always possible to await their outcome before deciding whether to submit a claim. Your Prospect representative and full-time officer should be advised of any potential case at the earliest opportunity.

**8.10** If the discrimination is a continuing act which extends over time, the time limit is three months from the end of that period. For example, if it is established that the non-payment of an allowance is discriminatory, the act of discrimination continues throughout the employment. But if a regrading decision was considered to be discriminatory, the claim must be submitted within three months of the decision – despite the fact that the decision had continuing consequences.

## questions procedure

**8.11** ACAS has produced guidance on a procedure for asking questions of the employer about potential equality complaints. It is particularly useful in cases of indirect discrimination, where gathering evidence of the number of employees and, for example, the racial or gender breakdown of the workforce can be vital to the case.

## legal remedies

**8.12** A tribunal can order three possible remedies:

- a declaration of rights
- an appropriate recommendation
- compensation.

**8.13** A declaration of rights is where the tribunal declares that there was unlawful discrimination. A recommendation can be that an employer takes certain steps to obviate or reduce the effect of any discrimination.

## compensation

**8.14** Compensation is the most common remedy. There is no financial limit to the amount of compensation payable under the Equality Act.

**8.15** Compensation can be awarded for:

- loss of earnings
- loss of the value of any benefit
- any other quantifiable loss arising from the act of discrimination
- interest on financial loss
- injury to feelings
- aggravated damages related to the manner or motive of discrimination.

## proving discrimination

**8.16** The legal burden of proof in a case of discrimination is initially on the person who complains of the discrimination. The claimant needs to show some evidence that any less favourable treatment could be (in the absence of a satisfactory explanation from the employer) on the grounds of discrimination. If they can do this then the burden of proof shifts to the employer for them to establish a non-discriminatory reason for the treatment. If the tribunal is not satisfied with the employer's explanation they must find that there has been unlawful discrimination.

## other legal actions

**8.17** In some circumstances there are alternative legal procedures to taking cases to an employment tribunal under discrimination law. These can include:

- breach of contract
- criminal prosecution for assault
- injunctions
- proceedings under the Protection from Harassment Act.

**8.18** This guide does not detail all these other actions. Generally, in cases of discrimination at work the best route is to pursue the case through an employment tribunal under discrimination law. Other actions are much less common, often entail substantial legal costs and impose a higher burden of proof on the complainant.

# collective bargaining

## 9

**9.1** It is important that your employer has policies in place to ensure that all employees have equality of opportunity. The law creates rights for individual employees, and should be used to argue that all employers have a comprehensive equality and diversity policy.

**9.2** Prospect representatives should consider the impact of equality and diversity issues in all areas of negotiations. The law should be used to give an equal opportunities dimension to other agreements and to strengthen your position in those negotiations.

**9.3** Representatives considering an equality review of the workplace should:

- consult with members as widely as possible to ensure the broadest input
- consider whether any existing equality policy is comprehensive – it may need revising
- look at the contractual terms of employment
- consider the impact of collective agreements and procedures
- see what procedures are in place for identifying and dealing with discriminatory practices
- emphasise the positive value of effective equality and diversity policies
- consider an equal pay review.

**9.4** This guidance cannot cover all the negotiating issues raised by equal opportunities. For more details, see the *Prospect Negotiator's Guide to Race Equality*, the *Negotiator's Guide to Equal Pay* and the *Negotiator's Guide to Disability Equality*.

**9.5** Prospect also runs training courses on bargaining for equality. See the Prospect website for more details.



# enforcement and advice

## 10

**10.1** The Equality and Human Rights Commission oversees discrimination law.

**10.2** The commission aims:

- to work towards the elimination of discrimination
- to promote equality of opportunity
- to keep the law under review and to propose amendments to government.

**10.3** The commission can provide assistance to individuals (including advice and representation) and also has powers to carry out formal investigations.

### codes of practice

**10.4** The EHRC has two main codes of practice, one on employment and one on equal pay.

**10.5** These codes are not legally binding, but breaches of the codes will be taken into account by a tribunal in determining whether discrimination has occurred. The codes are also useful in negotiations over policies at the workplace.

# information and addresses

11

For information on other aspects of equal opportunities at work see these Prospect publications:

- Negotiator's Guide to Race Equality
- Negotiator's Guide to Disability Equality
- Members' Guide on Harassment and Bullying (No. 3)
- Members' Guide to Maternity Rights (No. 13)
- Members' Guide to Parental and Family Leave (No. 12)
- Members' Guide to Part-time and Flexible Working (No. 16)

## equality commission

Equality and Human Rights Commission

Arndale House

Arndale Centre

Manchester M4 3EQ

EHRC also has offices in London, Glasgow and Cardiff.

## prospect equality networks

- Members with Disabilities
- Women
- Women in Science & Engineering
- Lesbian, Gay, Bisexual & Trans Members
- Equal Pay
- Race Equality
- Equal Opportunity Reps
- Young Professionals

For information on these networks contact Prospect on [enquiries@prospect.org.uk](mailto:enquiries@prospect.org.uk) stating which network(s) you are interested in.

[www.prospect.org.uk](http://www.prospect.org.uk)

# experts at work



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