

# Sex Discrimination in Employment

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# An Insight into Sex Discrimination

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This article is not intended to be an all-encompassing guide on the selected topic, but hopefully, what it will do, is provide some helpful guidance as to the key considerations. Being prepared with knowledge and some practical tools is key for an employer to mitigate the impact of a potential issue. We have a wealth of experience in advising employers in all aspects of employment related issues including in relation to the topics covered by this article so please do be in touch if you have any questions or would like some assistance.

As a reminder, the full list of protected characteristics under the Equality Act 2010 are:

- Age
- Disability
- Gender reassignment
- Marriage and civil partnership
- Pregnancy and maternity
- Race
- Religion or belief
- **Sex (covered here)**
- Sexual orientation

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## Direct discrimination

Direct discrimination occurs if an employer treated a female employee less favourably than it treated a male employee, because she's a woman (or indeed, vice versa – sex discrimination affects men too). For example, if an employer dismissed someone because she's a woman, that would be direct sex discrimination.

It is also possible to bring a claim of direct discrimination by association. Here the employee claims that they have been treated less favourably because of the sex of someone else with whom they associate, rather than because of their own sex. In practice, claims of associative discrimination are more likely to arise in relation to some of the other protected characteristics.

## Indirect discrimination

A word of warning – there is a bit of legal jargon involved with indirect discrimination...

Indirect discrimination occurs if an employer applied a provision, criterion or practice (PCP) to all (or a group) of employees which puts (for example) the female employees at a particular disadvantage because they're women, AND the employer isn't able to objectively justify the PCP by showing that it was a "proportionate means of achieving a legitimate aim". Got it? Let's look at it in context.

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## Example

Employer offers bonuses to everyone who works through the night to get their work complete and ready for the morning. Both the men and women have the opportunity to earn the bonus. However, statistics suggest that women bear the majority of childcare responsibilities. This means that it is less likely that women will be able to work a night shift, and therefore they cannot earn the bonus. The employer's PCP of offering a bonus for night shifts has the indirect effect of placing women at a particular disadvantage. If a female employee can show that she is disadvantaged by the employer's PCP due to her childcare responsibilities, she could bring a claim for indirect sex discrimination.

Then we get to the possible defence. Can the employer show that offering the night shift bonus is a proportionate means of achieving a legitimate aim? There is a lot of case law examining "objective justification", looking at what constitutes "proportionate" and "legitimate" aims.

There has been a case based on similar facts to the example above in which the Employment Appeal Tribunal decided that rewarding employees carrying out particularly demanding night shift work was a legitimate aim which justified the indirect discrimination (Blackburn and another v West Midlands Police [2008] EWCA Civ 1208).

However...that case involved police officers, and it's well known that some of the most dangerous situations they face occur at night. That objective justification might not be available to other industries.

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## Harassment

To further complicate things, within the bracket of harassment there are three strands, which all sound quite similar. To make the distinction between these easier, we have set out examples below:

**1.** Harassment related to sex, or sex harassment, occurs if a man (for example purposes only!) engages in unwanted conduct related to sex and the conduct had the purpose or effect of either violating another employee's dignity, or creating an intimidating, hostile, degrading, humiliating or offensive environment for them. Again, there are lots of components and nuances within this but here are some examples:

- John puts the legal reference books on the high shelves in the Outset library so that female lawyers are less able to reach them but the male lawyers can, this may constitute sex harassment. *Nb Perhaps a bad example in this case as us female Outset lawyers are fairly tall!*
- Comments or "banter" being bandied around the workplace that might be more than just risqué. Take the example of discussing a fancy dress event at work, and a colleague makes an inappropriate comment about seeing another colleague dressed up in a provocative outfit – this might make a few people feel uncomfortable.

- Page 3 of The Sun displayed in the workplace could certainly violate dignity and create an intimidating, hostile, degrading, humiliating or offensive environment.

**2.** Sexual harassment occurs when one person engages in unwanted conduct of a sexual nature and that conduct has the purpose or effect of either violating another person's dignity, or creating an intimidating, hostile, degrading, humiliating or offensive environment for them (very similar to sex harassment).

Less favourable treatment for rejecting or submitting to harassment does pretty much what it says on the tin. For example, manager A makes a pass at team member B, she rejects him and then as a result of this he fabricates performance concerns in order to initiate a formal capability process. That would constitute harassment under this particular strand.

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## Victimisation

Victimisation occurs if an employer subjects an employee to a detriment (firing them, for example) because they did, intended to do, or the employer suspected they were going to do any of the following things:

- Bring discrimination proceedings under the Equality Act 2010.
- Give evidence or information in connection with proceedings brought under the Equality Act (for example where they themselves haven't brought proceedings, but give evidence in the case of a colleague).
- Doing anything for the purposes of or in connection with the Equality Act.
- Alleging that the employer, or anyone else, had breached the Equality Act.

For example, team member B brings a grievance accusing manager A of sexual harassment. As a result of bringing the grievance the employer fires team member B. This would constitute victimisation.



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## The consequences

If a company is unfortunate enough to find itself on the wrong side of a successful discrimination claim the consequences could be severe.

## Compensation

There is no cap on compensation for discrimination claims, so in theory an award could be very large. The Employment Tribunal would look at the financial loss the Claimant has suffered (past and future loss of earnings) as well as non-financial loss, the most common in discrimination claims being injury to feelings awards.

There is no guidance set out in the legislation as to how injury to feelings awards should be calculated. There is however a leading case known as **Vento**, where the Court of Appeal set out some helpful guidelines and split discrimination claims into three bands:

- **Top band - £26,300 - £44,000** - serious cases where, for example, there have been repeated/extended examples of discrimination;
- **Middle band – £8,800 - £26,300** - serious cases which don't quite make it to the top band;
- **Bottom band – £900 - £8,800** - not so serious cases. Perhaps where there has been a one-off occurrence of discrimination.

The amounts which apply to each band have increased over the years with later cases, and can be increased by the Courts for inflation, but are still referred to as the Vento bands. The amounts shown above are correct as at July 2019 (they usually increase each April). An injury to feelings award would typically be in addition to an award for loss of earnings.

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## Other remedies

As well as financial compensation, the Tribunal also has the power to make recommendations to the employer to benefit the individual concerned. This power has been significantly reduced though and in fact the Tribunal has no power to enforce a recommendation, so it's pretty meaningless (although it may increase compensation if the employer doesn't have a reasonable excuse for not complying).

Finally, a Tribunal also has the power to make a declaration, which is basically stating for the record the rights of each party.

## Time limits

A claim can be brought after employment has terminated or while the employee is still employed, which can leave an employer in the unenviable position of still employing someone who is suing them for discrimination.

The time limit for bringing a discrimination claim is three months less a day from the date of the last act of discrimination complained of. For example, if the last act of discrimination occurred on 4 January, the deadline for the employee to submit a claim is midnight on 3 April. It's a necessary step to follow the ACAS Early Conciliation process first, and that stops the clock (usually for 28 days).

There are very limited grounds on which a claimant can apply for an extension of time to submit their claim. The grounds are slightly wider in cases of discrimination, however extensions are rarely granted.



If you would like more advice regarding sex discrimination in the workplace, get in touch for a friendly and informal chat today.

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