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**PGDip/MA in Strategic
People Management**

**Advanced Application of
Employment Law**



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Law**

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Discrimination and harassment

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Rebecca Mahon

Senior Associate

Employment & Immigration

Capital Law

Agenda

1. Legal Framework – The Equality Act 2010
2. Protected characteristics
3. Direct discrimination
4. Indirect discrimination
5. Harassment
6. Victimisation

The Equality Act 2010

- An amalgamation and harmonisation of previous discrimination law, e.g.
 - The Race Relations Act 1976;
 - The Sex Discrimination Act 1975; and
 - The Disability Discrimination Act 1995.

Protected characteristics

Protected characteristics

Sex (gender)

Race

Sexual orientation

Religion / Philosophical belief

Pregnancy & Maternity

Marriage / Civil Partnership

Disability

Age

Gender Reassignment

Protected characteristics

Age: a reference to a person who has a particular protected characteristic is a reference to a person of a particular age group.

Sex: A reference to a person who has a particular protected characteristic is a reference to a man or to a woman.

Sexual orientation: sexual orientation is defined as a person's sexual orientation towards:

- Persons of the same sex;
- Persons of the opposite sex; or
- Persons of either sex.

Protected characteristics

Religion or philosophical belief: "Religion" means any religion, and a reference to religion includes a reference to a lack of religion.

"Belief" means any religious or philosophical belief and a reference to belief includes a reference to a lack of belief.

Pregnancy and maternity: there is no definition of pregnancy and maternity – but you're only protected during the "protected period" i.e. whilst you're pregnant and on maternity leave

Gender reassignment: proposing to undergo, is undergoing or has undergone a process (or part of a process) for the purpose of reassigning the person's sex by changing physiological or other attributes of sex.

Protected characteristics

Marriage and Civil Partnership: all persons who are married or in a civil partnership have the protected characteristic of marriage and civil partnership. Single people and divorcees do not have this protected characteristic.

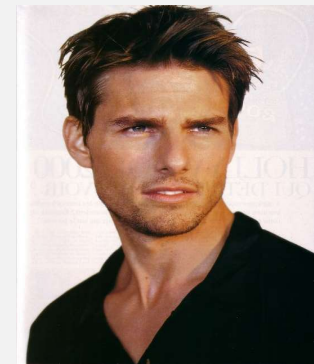
Race: colour, nationality, ethnic or national origins.

Disability: a person has a disability if they have a physical or mental impairment, and the impairment has a substantial and long-term adverse effect on his ability to carry out normal day-to-day activities".

Protected characteristic

- Less favourable treatment must be because of a protected characteristic.
- An employer does not need to know that they are consciously discriminating. An employee does not need to prove this to bring a claim. Unconscious or subconscious discrimination is still prohibited.

Protected characteristics - beware



Direct Discrimination

- Direct Discrimination is where you are treated worse than another person or other people because:
 - a) you have a protected characteristic;
 - b) someone thinks you have that protected characteristic (known as discrimination by perception); or
 - c) you are connected to someone with that protected characteristic (known as discrimination by association)

- A employee claiming direct discrimination must show that they have been treated **less favourably** than a **real/hypothetical comparator**.

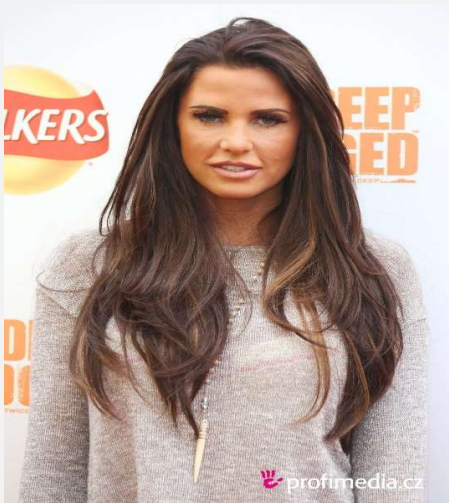
Perceived Discrimination

- Perceived discrimination is when someone treats you less favourably because of a characteristic (that is protected) which you are perceived to have.



Associated Discrimination

- Associated discrimination is when you are treated less favourably because a colleague, associate, family member or friend has a protected characteristic



Less favourable treatment (LFT)

- Treatment that puts an employee at a clear disadvantage compared with others, is usually classed as LFT. LFT could also involve being deprived of choice and opportunity.
- Treating two people differently does not in itself mean that one has been treated less favourably than the other.
- Less favourable treatment cannot be "cancelled out" by more favourable treatment.

Smith v Rees ET/2501040/12

- A female employee was given a top she felt was too revealing to wear.
- Her employer told her not to be a prude.
- Her employer suggested she wear red lipstick to “tart herself up a bit”
- She was dismissed for not wearing her uniform.
- Employment Tribunal concluded that a male employee would not have been required to wear a uniform that was “skimpy and inappropriate” and therefore the waitress had been treated **less favourably** because of her sex.

Comparator

- It is not always possible to identify an actual comparator.
- For direct discrimination purposes, an employee does not need to show that there is an actual person with whom their treatment can legitimately be compared.
- Where no appropriate real comparator can be identified, the tribunal will consider whether a case could be made out based on a "hypothetical comparator."

Can be hypothetical

Comparator Case study

- Jessica Sturgent, a shop worker is 2 months pregnant.
- She makes a mistake on the till, resulting in a small financial loss to her employer Noris Bronson. Noris then dismisses Jessica. The situation has not arisen before, so there is no actual comparator.
- However 4 months earlier, Noris gave a written warning to another worker Clark Drakeford for taking stock (four bottles of lager) home without permission.
- **Could Clark's treatment be used as evidence that Noris would not have dismissed a hypothetical worker who is not pregnant for making an error on the till?**

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Indirect discrimination

Indirect discrimination

Indirect discrimination happens when there is a provision, criterion or practice that applies in the same way for everybody but disadvantages a group of people.

Unfairly affects a group who share a protected characteristic at a particular disadvantage.

Is the PCP objectively justified?

Can the employer demonstrate a legitimate aim?

PCP

Case study

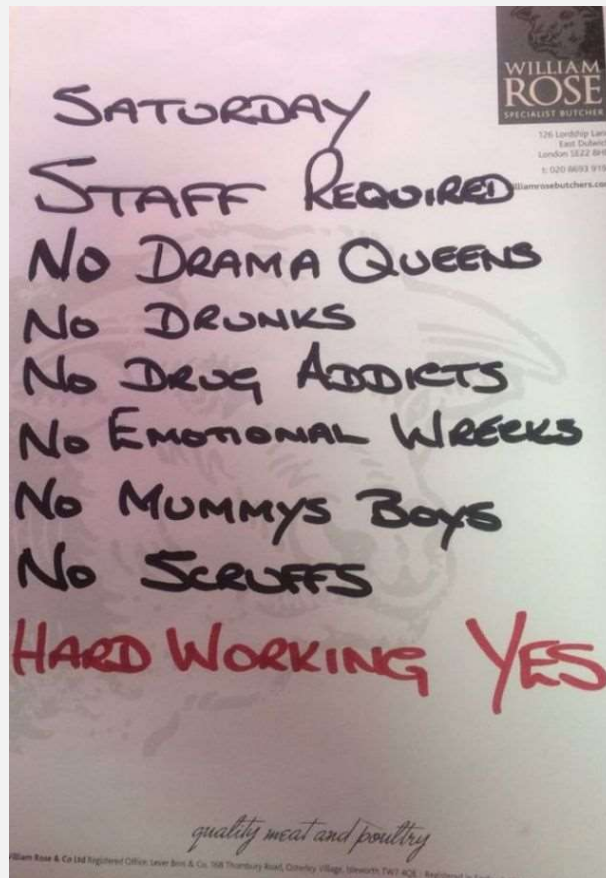


Claimant's disadvantage

The PCP that puts members of a protected group at a particular disadvantage must also put (or would put) the claimant at that disadvantage.

Applicants who only apply for a job to bring a claim will not be protected under the law.

Genuine occupational requirement



Positive discrimination/action in recruitment

Positive discrimination is unlawful (except in relation to disabilities), HOWEVER, positive action (in the circumstances set out in the Equality Act 2010) is permitted.

Positive discrimination occurs where a disadvantaged or under-represented group that share a protected characteristic are treated preferentially in order to address inequality.

Positive action in recruitment is only allowed where:

- A is as qualified as B to be recruited or promoted.
- The employer does not have a policy of treating persons who share the protected characteristic more favourably in connection with recruitment or promotion than persons who do not share it; and
- Taking the action is a proportionate means of achieving a legitimate aim

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Harassment

Harassment

Key issues

A harasses B where A's conduct has the purpose or effect of violating B's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for B

A's conduct will only be harassment if it relates to a protected characteristic

The law protects an employee against harassment based on someone else's protected characteristic, or based on the perception that they have a protected characteristic.

A one-off incident can be harassment.

Relating to a protected characteristic: EHRC guidance

- A Muslim worker has a conversation with a colleague about "Islamic State" fighters. The worker mentions to the colleague some comments made by a journalist about Islamic State fighters which are of a positive nature.
- Later that month the colleague approaches the worker and asks, "Are you still promoting Islamic State?". The worker is upset at the allegation that he promotes Islamic State and brings a claim of harassment related to religion/belief.
- The tribunal finds that the colleague asked that question because of the worker's previous comments, not because the worker is a Muslim or because of anything related to the worker's religion. The question was therefore **not harassment**.

Unwanted conduct

Does not mean that express objection is made to the conduct before it is deemed to be unwanted

“Unwanted” means the same essentially as "unwelcome" or "uninvited”

Spoken words/banter

Aggression

Physical behaviour towards a person/their property

Jokes or pranks

Written words/posts or contact on social media

Imagery/graffiti

Case study on banter: Evans v Xactly Corporations Ltd

- There was an office culture of banter. Employees would “give as good as they got”. The claimant was called a “fat ginger pikey”.
- The tribunal had been entitled to find that the comments were not **unwanted** as the claimant was an active participant in the banter culture, and it did not have the purpose or effect of violating his dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for him.

Banter

The fact that a claimant has put up with the conduct, or joined in with "banter", does not necessarily mean that the conduct is not "unwanted".

There may be circumstances in which a course of conduct is not unwanted in the earlier stages, but at some point "oversteps the mark".

Cases are fact-sensitive

Purpose or effect of violating dignity or creating proscribed environment

A engages in unwanted conduct which has the purpose or effect of violating B's dignity or creating an intimidating/hostile/degrading/humiliating or offensive environment for B.

Where A's conduct is not shown to have the purpose, the effect of their conduct on B must be determined. A tribunal must take the following into account:

- B's perception (subjective viewpoint)**
- The other circumstances of the case**
- Whether it is reasonable for the conduct to have that effect**

Case study

At a club meeting, the club manager makes derogatory comments and jokes about women to a mixed audience of men and women. It is not the club manager's purpose to offend or humiliate anyone in the audience.

This may amount to harassment where the effect of the jokes/comments creates a humiliating or offensive environment for a man or woman in the audience (remember, you don't have to have the protected characteristic in question).

Assessed from B's subjective viewpoint BUT also consider whether viewpoint is reasonable

Harassment final notes

The employer can be liable for harassment committed by their employees, whether or not the harassment is done with the employer's approval.

There is a defence available to an employer/principal if it can show that it took "all reasonable steps" to prevent the employee from doing the discriminatory act or from doing anything of that description.

Employers should also take reasonable steps to ensure that their employees do not harass third parties with whom they come into contact with during their employment

Sexual harassment

A engages in unwanted conduct of a sexual nature.

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Victimisation

Victimisation

Victimisation occurs where a person (A) subjects another person (B) to a detriment because either:

- B has done a protected act.**
- A believes that B has done, or may do, a protected act.**

Protected Acts

Giving evidence or information in connection with proceedings under the EqA 2010.

Bringing proceedings under the EqA 2010.

Doing any other thing for the purposes of or in connection with the EqA 2010

Relevant pay disclosures.

Alleging (whether expressly or otherwise) that the respondent or another person has contravened the EqA 2010

Giving false evidence/ information, or making a false allegation, will not be a protected act if done in bad faith

A claimant does not need to have a protected characteristic in order to be protected against victimisation .

Detriment

Claimant only needs to show that they have been subjected to a detriment because of a protected act.

No comparator required.

If a reasonable worker would or might take the view that they had been disadvantaged in the circumstances in which he had to work

Victimisation need not be consciously motivated. If A's reason for subjecting B to a detriment was unconscious

The protected act need not be the main or only reason for the treatment; victimisation will occur where it is one of the reasons.

Victimisation by Colleagues

It does not matter whether the employer knows about or approves of the acts of their employee.

Like harassment, an employer is legally responsible for victimisation committed by their employees in the course of employment.

There is a potential defence available to an employer, if it can show that it took "all reasonable steps" to prevent the employee from doing the discriminatory act or from doing anything of that description

Remedies under the Equality Act 2010

- Discrimination claims can attract potentially uncapped compensation awards
- “Injury to feelings” (Vento guidelines)
- Recommendations
- Declarations

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**Thank you,
any
questions?**

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Resources

- The Equality Act 2010: <https://www.legislation.gov.uk/ukpga/2010/15/contents>
- ACAS Guidance: <https://www.acas.org.uk/discrimination-and-the-law>
- <https://www.personneltoday.com/> (useful HR resource)
- <https://www.theguardian.com/business/2017/jun/01/construction-firm-mears-bans-workers-from-having-beards>
- Mr D P Evans v Xactly Corporation Ltd: UKEATPA/0128/18/LA
- Smith v Rees: ET/2501040/12
- Vento v Chief Constable of West Yorkshire Police [2002] EWCA Civ 1871