



Chapter 6
Equal opportunities

6.0 Equal opportunities

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6.1 Introduction

- 6.1.1 Equal opportunities is a subject which filters through all aspects of working relationships from recruitment, appointment, treatment at work, terms and conditions of work, access to benefits as well as termination of employment or engagement.
- 6.1.2 October 2010 saw the introduction of the Equality Act 2010. Discrimination law in the UK had developed over more than 40 years and had become complex and confusing. The Equality Act harmonises discrimination law in the UK and most of the UK law in this area can now be found in one place. The majority of previous discrimination laws, for example the Sex Discrimination Act 1975 and the Disability Discrimination Act 1995 are repealed in their entirety.
- 6.1.3 There are two key concepts which underpin equal opportunities in the Equality Act which are:
- › there are certain ‘protected characteristics’ (age, disability, gender reassignment, marriage and civil partnership, pregnancy and maternity, race, religion or belief, sex and sexual orientation); and
 - › it is generally unlawful to discriminate against (either directly or indirectly), harass or victimise a person at work or in certain circumstances linked to work because of a protected characteristic.
- 6.1.4 This chapter sets out the different types of discriminatory behaviour which employers must avoid, potential defences to discrimination claims, codes of practice which must be adhered to and practical steps to promote equality in the workplace. See [3.5 Part-time workers](#) for information on less favourable treatment of part time workers and [2.7 Fixed term contracts](#) for those on fixed term contracts.

6.2 Types of discriminatory act

6.2.1 Discrimination falls into the following five broad categories:

- › direct discrimination;
- › indirect discrimination;
- › harassment;
- › victimisation; and
- › in cases involving disability there are two additional types of discriminatory act, which are:
- › the failure to make reasonable adjustments; and
- › discrimination arising from disability.

6.2.2 In general terms, it is unlawful for an employer to discriminate against a person because of a protected characteristic in any of the following ways:

- › in determining who to employ or engage;
- › the terms and conditions of employment or engagement offered;
- › opportunities for promotion, transfer, training or receiving any other benefit, facility or service;
- › dismissal or termination of engagement;
- › subjecting a person to any other detriment because of a protected characteristic;
- › verbal or physical harassment;
- › victimisation;
- › selecting employees for redundancy; or
- › subjecting a former employee or worker to any form of discrimination if it arises out of and is closely connected to the relationship which used to exist between them i.e. by way of provision of a discriminatory reference for example.

6.3 Who is protected?

All of the following types of employees and workers are protected against discrimination:

- › employees;
- › apprentices and trainees;
- › self employed contractors, casual workers and home workers, all of whom are not employed but do have a contract to carry out services personally for the employer;
- › sub contractors;
- › agency staff;
- › those undertaking practical work experience or vocational training;
- › applicants for any of the types of work detailed above;
- › former employees or workers provided the discrimination arises out of and is closely connected with their employment or work for the employer;
- › People who do not have a ‘protected characteristic’ but are discriminated against because they are perceived to have a protected characteristic (in direct discrimination and harassment cases only); and
- › People who do not have a ‘protected characteristic’ but are discriminated against because they are associated with someone who has a protected characteristic (in direct discrimination and harassment cases only).

Use of the words ‘employee’ and ‘worker’ in this chapter include reference to all of the above.

Recent case law has held that a protected “person” also includes legal personalities, such as limited companies. Clearly such entities do not have protected characteristics themselves, but could be protected from discrimination where they are associated with someone or some group who has a protected characteristic (again in direct discrimination and harassment cases only).

6.4 The protected characteristics

The protected characteristics listed below are the same as those protected by previous discrimination legislation in Great Britain.

6.4.1 Age

- 6.4.1.1 Age is defined by reference to a person's age group. An age group can mean people of the same age or people of a range of ages, for example, people under 30 or people in their mid-50s.
- 6.4.1.2 It should be remembered that the age discrimination rules seek to protect people of all ages, not only the elderly or ageing population as is commonly reported in the press. For example, in a transfer situation, protecting older employees, but not younger employees, in relation to pension rights, was less favourable treatment.

6.4.2 Gender Reassignment

- 6.4.2.1 People who are proposing to undergo, are undergoing, or have undergone the process (or part of a process) to reassign their sex by changing physiological or other attributes of sex have the protected characteristic of gender reassignment.
- 6.4.2.2 In order to be protected, the Equality Act requires that a person should have at least planned to undergo gender reassignment. There is no requirement that the person be undergoing any medical process or be under medical supervision. Further, if someone is driven by his or her gender identity to cross-dress as part of the process of reassigning sex, he or she would have protection under the Act.
- 6.4.2.3 Recent case law has illustrated that this protected characteristic extends to employees who identify as being "gender fluid" or "non-binary".
- 6.4.2.4 It should be remembered that the Gender Recognition Act 2004 still applies and provides that where a person holds a Gender Recognition Certificate, he or she must be treated according to his or her acquired gender.

6.4.3 Marriage and Civil Partnership

- 6.4.3.1 The Equality Act protects people who are married or in a civil partnership against discrimination. People who are unmarried, single, intend to marry or form a civil partnership, who have divorced or had their civil partnership dissolved are not protected.

6.4.4 Pregnancy and Maternity

- 6.4.4.1 It is unlawful to subject a woman to unfavourable treatment, i.e. direct discrimination, harassment or victimisation, during the 'protected period' (defined below) because of pregnancy and/or maternity. Further, a woman cannot be treated unfavourably because:
- of a pregnancy related illness (including any associated sickness absence);
 - she is on compulsory maternity leave;
 - she is exercising, has exercised, is seeking or has sought to exercise her right to maternity leave.
- 6.4.4.2 The protected period commences from the beginning of the pregnancy and ends at the end of additional maternity leave (or the date on which the employee returns to work if earlier).
- 6.4.4.3 Unfavourable treatment will only be unlawful if an employer is aware that the woman is pregnant. An employer must know or suspect that she is pregnant, whether this is by formal notification or through the 'grapevine'.
- 6.4.4.4 A 'maternity equality clause' is automatically implied into a woman's employment contract. This clause denotes entitlement to equality during maternity leave, allowing an employee on maternity leave to insist on equality in, for example, the payment of a bonus. However, it has been held not to be discrimination to withhold childcare vouchers during maternity leave. For further detail on female employees' rights and entitlements during maternity leave generally see [7.2.7 Maternity leave](#).

6.4.4.5 It should be remembered that there are separate legal rights included in the Employment Rights Act 1996 and various maternity and paternity leave rules in addition to those in the Equality Act. For example, handling redundancies and offers of suitable alternative employment for employees on maternity leave, dealing with requests for flexible working, the rights of women on return to work after maternity leave. For further details see [7.0 Maternity, paternity and other types of leave](#)

6.4.5 Race

6.4.5.1 The meaning of race encompasses colour, nationality and ethnic or national origin. A person has protection under the Equality Act if he or she falls within a particular racial group. A racial group is a group of people who have or share colour, nationality or ethnic or national origins. Caste discrimination may be covered under race in certain circumstances. Caste will become a protected characteristic under the Equality Act.

6.4.5.2 Nationality is a specific legal relationship between a person and a state through birth or naturalisation. Ethnic origins relate to people belonging to an ‘ethnic group’ which regards itself and is regarded by others as a distinct and separate community. There are two essential characteristics which an ethnic group must have. Firstly, a long shared history and cultural tradition of its own. Secondly, an ethnic group may have one or more of the following characteristics:

- › a common language;
- › a common literature;
- › common religion;
- › common geographical origin;
- › a minority or an oppressed group.

Examples of ethnic groups include Sikhs, Jews and Romany gypsies.

6.4.6 Religion or Belief

6.4.6.1 Protection is afforded to people of any religion and those who hold any religious or philosophical belief. For example, dismissing an employee because they are Christian would be less favourable treatment because of their religion (and very likely to be contrary to the Equality Act 2010, unless, for example, being of a different religion was an important genuine occupational requirement for the role), but dismissing a Christian employee for improperly trying to convert the faith of customers would not likely breach the Equality Act 2010. The protection also extends to those with a lack of religion or belief.

Recent case law illustrated that a “no beard” policy was contrary to the Equality Act 2010 as it was ruled to be indirectly discriminatory to a Sikh employee who could not have any hair on his body cut in accordance with his religious beliefs. This case was very fact specific, and there may be circumstances where employers may have objective justifications for imposing such a policy (for example on health and safety grounds).

6.4.6.2 To fall within the scope of the Equality Act, a religion must have a clear structure and belief system such as the more commonly recognised religions in the UK, for example, Buddhism, Christianity, Islam and Judaism.

6.4.6.3 ‘Belief’ means any religious or philosophical belief and includes lack of belief. Examples of philosophical beliefs include humanism and atheism. A person is only protected under the Equality Act in relation to this characteristic where the philosophical belief affects how that person lives their life or perceives the world.

For a philosophical belief to be protected, it must:

- › be genuinely held;
- › be a belief and not an opinion or view point;
- › relate to weighty or substantial aspect of human life and behaviour;
- › have a certain level of cogency, seriousness, cohesion and importance;
- › be worthy of respect in a democratic society and not incompatible with human dignity or conflict with the fundamental rights of others.

6.4.6.4 Recent case law confirmed a belief in Scottish independence was capable of being a qualifying philosophical belief, whereas vegetarianism was not because it was not concerned with human life and behaviour (there is some doubt as to whether this case was decided correctly, especially considering a Tribunal recently considered ethical veganism to be capable of being a qualifying belief). This area of the law is complex and rapidly developing. Advice should be sought from Scottish Engineering.

6.4.7 Sex

Sex is a protected characteristic and refers to a male or female of any age. Sex does not include gender reassignment or sexual orientation.

6.4.8 Sexual Orientation

Sexual orientation means a person's sexual orientation towards:

- › persons of the same sex (a gay man or a lesbian);
- › persons of the opposite sex (heterosexual);
- › persons of either sex (bi-sexual).

Sexual orientation relates to how people feel as well as their actions and includes discrimination connected with manifestations of that sexual orientation, for example, someone's appearance, the places they visit or the people with whom they associate.

6.4.9 Disability

6.4.9.1 Definition of a Disabled Person

6.4.9.1.1 A person has the protected characteristic of disability if he or she has a physical or mental impairment which has a substantial and long term adverse effect on his or her ability to carry out normal day-to-day activities. 'Long term' means that the impairment has lasted or is likely to last for at least 12 months, likely meaning it could well happen and does not mean on the balance of probabilities. 'Substantial' means more than minor or trivial.

'Day-to-day' activities are anything that is not abnormal or unusual, with a focus on the individual; for example, it was held that being able to lift up to 25kg in a warehouse was a day-to-day activity for a particular employee in a case, given that employee's ordinary activities.

6.4.9.1.2 In determining whether someone has a disability, any medical treatment received by the individual which lessens or masks the impairment should normally be disregarded.

6.4.9.1.3 Particular rules apply to people with medical conditions relating to sight. In addition, cancer, HIV and multiple sclerosis are all deemed to be disabilities from the point of diagnosis. Progressive conditions and conditions with fluctuating or recurring effects can amount to disabilities in certain circumstances. This means that certain underlying medical conditions where symptoms are not always present can be sufficient to qualify as a disability. Recent case law has also determined that the symptoms of obesity may possibly be considered as falling within the definition of disability for discrimination purposes.

6.4.9.2 Discrimination arising from disability

6.4.9.2.1 There is a separate strand of discrimination that applies only to people with the protected characteristic of disability. This is discrimination 'arising from' disability which occurs where:

- › An employer treats a disabled person unfavourably and this treatment is because of something arising in consequence of the disabled person's disability; and
- › The employer cannot show that the treatment is a proportionate means of achieving a legitimate aim. However, employers have a defence if they did not know, and could not reasonably be expected to know that the person had the disability at the time the act complained of took place.

6.4.9.2.2 This strand of discrimination is different from direct discrimination. The question is whether the disabled person has been treated unfavourably because of something arising in consequence of their disability, not merely 'because of' the disability. There has to be some connection between the 'something' and the individual's disability. For example, if an employer dismisses a worker because he has had a lengthy sickness absence and the employer is aware that most of this absence is disability-related, the decision to dismiss is not because of the worker's disability itself, but rather, it is because of the absence which has arisen in consequence of the disability. The dismissal is therefore unfavourable treatment arising from disability. This is discrimination unless the employer can objectively justify the decision to dismiss.

In a recent case, a disabled employee who found it "impossible" to use the employer's software, was moved to a paper based role as an alternative until the employer had resolved the issues. The Court held that even if moving the employee to a paper role as an *interim measure* was deemed unfavourable, the measure ultimately allowed the employee to remain employed on the same pay grade. Accordingly, the Court held that the employer's actions were reasonable and proportionate in the circumstances.

6.4.9.2.3 The 'consequences' of the disability includes anything which is a result, effect or outcome of a disabled person's disability.

6.4.9.3 Indirect disability discrimination

The Equality Act protects disabled people against indirect discrimination. For an explanation of what amounts to indirect discrimination see [6.6 Indirect discrimination](#). This protection allows disabled people to challenge formal policies and practices that place them at a disadvantage compared with non-disabled people. For example, a disabled person could challenge an employer's absence policy which states that any employee who has a specified number of absences is disciplined regardless of the reason for the absence. Such a policy is likely to have a disproportionate impact on people with disabilities because they are more likely to have higher absence levels. An employer will have to satisfy an employment tribunal that the policy was justified in the circumstances. For further detail of the 'justification' defence see [6.6.4 Justification defence](#). However, comparators are required for indirect disability discrimination claims and, in the context of disability, a person will need to identify an appropriate comparator with the same disability, not any disability. Indirect disability discrimination claims will involve complex legal issues and specific advice should be sought if a person claims indirect disability discrimination.

6.4.9.4 In order to rely on the defence that the employer did not know or could not reasonably have been expected to know that the disabled person had a disability, an employer must be able to show that it had done all it could reasonably have done to find out if the worker had a disability. What is reasonable will depend on the circumstances. Employers should not refrain from finding out more about an employee's medical condition so that they can argue that they had no knowledge of the disability. A tribunal will look at all the facts and circumstances and if it decides that the employer decided to look the other way, that employer will be deemed to have knowledge of the disability.

6.4.10 Duty to make reasonable adjustments

6.4.10.1 The duty to make reasonable adjustments requires employers to take positive steps to ensure that disabled people can have access to and progress in employment. Failure to make reasonable adjustments amounts to disability discrimination. The duty comprises of three elements. Employers are required to take reasonable steps to:

- avoid the substantial disadvantage where a provision, criterion or practice applied by or on behalf of the employer puts the disabled person at a substantial disadvantage compared to those who are not disabled;
- remove or alter a physical feature or provide a reasonable means of avoiding such a feature where it puts a disabled person at a substantial disadvantage compared to those who are not disabled;
- provide an auxiliary aid where a disabled person would, but for the provision of that aid, be at a substantial disadvantage compared to those who are not disabled.

6.4.10.2 Where the adjustment relates to the provision of information, employers should ensure the information is provided in an accessible format, for example, in large print or in audio format.

6.4.10.3 Factors to be considered by employers when deciding whether it is reasonable to make adjustments include:

- the extent to which it is practicable for adjustments to be made;
- the financial and other costs of doing so; and
- the nature of the organisation's activities and its size.

6.4.10.4 An employer's duty to make reasonable adjustments for disability begins when it could take steps to avoid the relevant disadvantage. However, an employer only has a duty to make an adjustment if it knows or could reasonably be expected to know that a worker has a disability and is, or is likely to be, placed at a substantial disadvantage. This disadvantage must bear some relation to the disability. It has now been established that there need not be a "good or real" prospect of a proposed adjustment removing a disabled employee's disadvantage for that adjustment to be reasonable. An adjustment might be reasonable, and therefore required, where there is simply "a prospect" that it will succeed.

6.4.10.5 It is not open to employers to justify a failure to comply with a duty to make reasonable adjustments. However, employers will only breach the duty if the adjustment in question is one which was reasonable for the employer to make. Some examples of reasonable adjustments include:

- › making adjustments to premises such as structural or physical changes to doorways and/or ramps to allow wheelchair use;
- › providing information in accessible format such as large text documents;
- › allocating some of the disabled person's duties to another worker;
- › transferring a disabled worker to fill an existing vacancy which could involve re-training or other adjustments to allow the disabled employee to occupy the post;
- › altering a disabled worker's hours of work;
- › acquiring or modifying equipment;
- › engaging a support worker to assist the disabled worker or providing additional supervision or other support.

A recent case held that the duty to make reasonable adjustments extended to pay protection, when an alternative role was taken up, based on the particular facts of that case. While such "enhanced" pay for a disabled employee is rarely required, the case was very much fact-specific; other cases may require that some adjustment to pay may arise under a package of reasonable adjustments that an employer may have to make.

6.4.10.6 Schedule 8 of the Equality Act sets out particular circumstances in which the duty to make reasonable adjustments applies by clarifying who an 'interested' disabled person is in relation to specific categories of 'relevant matters'.

6.4.11 Pre-employment Health/Disability Enquiries

Except in limited circumstances, it is unlawful for employers to ask any job applicant about his or her disability or health until the applicant has been offered a job or included in a pool of successful candidates to be offered a job when a position becomes available. For further detail see [1.0 Recruitment](#).

6.4.12 Restrictions on protection under The Equality Act

6.4.12.1 For some of the protected characteristics, the Equality Act does not protect individuals against all types of discriminatory conduct. It should be noted that:

- › in relation to the protected characteristics of marriage and civil partnership, there is no protection from direct discrimination by association or perception or harassment. However, harassment related to civil partnership would amount to harassment related to sexual orientation;
- › for pregnancy and maternity, there is no express protection from direct discrimination by association, perception, indirect discrimination or harassment. However, in these situations, a worker is likely to be protected under the sex discrimination provisions.

6.4.13 Post - Employment Discrimination

There is also protection from discrimination and harassment post-employment. The Equality Act provides that a person must not discriminate against or harass another person if it arises out of and is closely connected to a relationship which used to exist between them and is conduct which if it occurred during the relationship would have constituted discrimination or harassment and therefore contravened the provisions of the Equality Act.

The duty to make reasonable adjustments can also apply in certain circumstances after the employment relationship has ended.

6.5 Direct discrimination

6.5.1 As the name suggests, direct discrimination covers situations where an employee has been treated less favourably because of a protected characteristic. Less favourable treatment includes dismissal, not offering a job to a prospective employee or disciplining because of a protected characteristic.

6.5.2 An employee can establish direct discrimination by proving that he or she has been treated less favourably than another person in the same or similar circumstances but who does not have the protected characteristic. If he or she can prove that the reason for that less favourable treatment is because of the protected characteristic then direct discrimination is proved. Employers will not be found to have directly discriminated against an employee if they demonstrate that the treatment of an employee is for a reason not related to a protected characteristic.

6.5.3 It must be emphasised that it does not matter that an employer did not intend to discriminate. The employer's motive or intention is not relevant. A prospective employer may refuse to recruit a homosexual man in the knowledge that the man is likely to encounter some potentially offensive language or banter in the workplace. The employer may have the intention of protecting the job applicant but does, in fact, directly discriminate because of his sexual orientation.

6.5.4 Further, a worker does not have to experience an actual disadvantage (economic or otherwise) for treatment to be less favourable. It is enough that a worker can say that he or she would have preferred not to be treated differently from the way the employer treated, or would have treated, another person. For example, the removal of certain duties from a female employee but not from her male colleagues may not result in any disadvantage because she is still paid the same. However, she may feel demeaned by this, which would mean that the removal of the duties was less favourable treatment.

6.5.5 It should be noted that for direct discrimination because of pregnancy and maternity, the test is whether the treatment of a person is 'unfavourable' rather than 'less favourable'. There is no need for a woman to compare her treatment with that of another worker.

6.5.6 It is no defence to a claim of direct discrimination that the alleged discriminator shares the protected characteristics (or one of them) of the victim.

6.5.7 In cases of direct discrimination (apart from pregnancy and maternity and racial segregation cases) a comparator is required to show that an employer has treated the employee less favourably than it treats, has treated or would treat another worker who did not have the protected characteristics. This other person is referred to as a 'comparator'. In identifying a suitable comparator, there must be no material difference between the circumstances of the two people. The circumstances do not need, however, to be identical in every way, but only to the extent that they are the same or nearly the same in the circumstances which are relevant to the particular treatment being complained of. The question of whether situations are comparable is one of fact. It is not always possible to identify a comparator. In these circumstances, a hypothetical comparator can be used.

6.6 Indirect discrimination

- 6.6.1 Indirect discrimination occurs when an apparently neutral provision, criterion or practice, such as a workplace policy, puts or would put employees with a protected characteristic at a particular disadvantage in comparison to employees who do not share that protected characteristic. It does not matter that the provision, criterion or practice applies to everyone within the workplace.
- 6.6.2 The first step in identifying whether there is potential indirect discrimination is to identify whether there is a provision, criterion or practice ('PCP'). A PCP can include an employer's workplace policies, a term in the employee's contract, an instruction issued to staff or a practice of not doing something. A one-off refusal of a flexible working request can be a PCP. Some potentially discriminatory PCPs are: -
- › requiring employees to work on Sundays. Some religions forbid work on this day;
 - › a dress code which requires women to wear knee length skirts or does not allow headwear. Followers of some religions have particular rules on dress and appearance; and
 - › requiring candidates for a job to have a minimum period of work experience in a particular area. This could be discriminatory on the ground of age.
- 6.6.3 The second step is identifying whether the PCP puts or would put people of a particular characteristic at a particular disadvantage when compared with people who do not have that characteristic. This allows challenges to PCPs which have not yet been applied, but which would have a discriminatory effect if they were applied. However, for a claim of indirect discrimination to succeed, workers must show that they themselves would experience a disadvantage if the PCP were applied to them specifically.

6.6.4 Justification defence

When faced with a claim of indirect discrimination, an employer may avoid liability by showing that the application of the PCP was justified in the circumstances. To justify a PCP, an employer must show that:

- › the aim of the PCP was non-discriminatory and represents a real and objective consideration (e.g. business needs and rewarding staff); and
- › the PCP is proportionate to achieving that objective.

For example, it may not be indirect discrimination when a discrimination complaint affords a defence of justification, and the treatment is a direct result of applying a general rule, policy or procedure. Whether that treatment is justified will also depend on whether the rule, policy or procedure is justified. Where the rule, policy or procedure allows for an assessment on an individual basis according to the circumstances, the particular treatment must be justified also, not just the rule, policy or procedure.

Employers should ensure that they consider alternative options to the potentially discriminatory policy or practice and should be able to demonstrate to an employment tribunal that they have done so. Although cost alone is unlikely to be a sufficient justification, employers are entitled to take cost into account. An employer does not need to demonstrate that the practice in place is the only way of achieving a particular aim but it must go further than just showing that putting the policy or practice in place is reasonable.

6.7 Harassment

- 6.7.1 The Equality Act prohibits three types of harassment:
- › harassment related to protected characteristics (but excluding pregnancy and maternity or marriage and civil partnership);
 - › sexual harassment; and
 - › less favourable treatment because a worker submitted to or rejected sexual harassment or harassment related to sex or gender reassignment.
- 6.7.2 The first type of harassment occurs when a person engages in unwanted conduct which is related to the relevant protected characteristic which has the purpose or effect of violating the worker's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for that worker. Conduct related to a protected characteristic can capture a wide range of situations, for example, it may be related to the worker's own protected characteristic or it may be that the worker has a connection with a protected characteristic (such as being associated with someone who has a disability or because they are perceived to be homosexual).
- 6.7.3 Sexual harassment occurs when a person engages in unwanted contact which is of a sexual nature such as unwelcome sexual advances, touching, sexual jokes or displaying pornographic photographs.
- 6.7.4 The third type of harassment occurs where a worker is treated less favourably by the employer because the worker has submitted to or rejected unwanted conduct of a sexual nature or unwanted conduct which is related to sex or to gender reassignment and it has the effect on the victim described at [paragraph 6.7.2](#).
- 6.7.5 Whether or not conduct is harassment is assessed by tribunals from the subjective view of the victim. Tribunals are, however, entitled to consider to what extent the victim of the alleged harassment is genuinely upset or offended by the conduct. It is extremely important that this is explained to employees through equal opportunities training. One employee's joke or banter is another employee's harassment.

- 6.7.6 Employers are liable for acts of harassment carried out by their employees while at work. The phrase 'while at work' has a very elastic meaning. It is not limited to acts carried out in the workplace or during the working day. Liability can extend to work-related functions or social occasions outwith working hours, even at the weekend. Inappropriate behaviour by one employee to another at a Christmas party or summer barbecue is likely to be regarded as an act committed while at work.
- 6.7.7 An employer who can show it has taken all reasonably practicable steps to prevent the harassment from taking place will be able to escape liability.
- 6.7.8 Previously, under the Equality Act, employers could also be liable when their employees were subjected to harassment by third parties. For example, a female member of bar staff who was harassed by a customer. Where an employer knew that the employee has been subjected to harassment on two previous occasions and has not taken all reasonably practicable steps to prevent the harassment happening again, then that employer was likely to be found liable for the harassment. The harassment could be by three different customers.

In October 2012 the Government stated that it would do away with third party harassment and the provisions were repealed with effect from 1 October 2013 by the Enterprise and Regulatory Reform Act 2013. This takes us back to the previous position which arose from case law over the years whereby an employee may be able to argue that their employer's inaction in the face of third party harassment itself amounted to an unlawful act.

6.8 Victimisation

There is specific provision within the Equality Act which states that employees must not be subjected to a detriment because they have exercised or intend to exercise rights under that Act. It does not matter whether or not that person has actually exercised those rights or has merely threatened to do so. Protection from victimisation can also be triggered where an employer has subjected an employee to a detriment simply because it suspects that the person has done or intended to exercise such a right. The protection also extends to those people who have given evidence or information in connection with legal proceedings or other discrimination proceedings brought by another person against his or her employer.

6.9 Occupational requirements and other exceptions

- 6.9.1 The Equality Act contains a number of limited exceptions that permit conduct that would otherwise be prohibited. Where an exception permits discrimination in relation to one particular characteristic, for example, religion, employers must ensure that they do not discriminate in relation to other protected characteristics.
- 6.9.2 The main exception is that it is lawful for an employer to require a job applicant or worker to have a particular protected characteristic provided certain statutory conditions are met. Employers who wish to reject a job application because of the absence of a particular characteristic must be able to show that, having regard to the nature of the work to be carried out by the person:
- › the requirement to have a particular protected characteristic is an ‘occupational requirement’ (‘OR’);
 - › it is a proportionate means of achieving a legitimate aim;
 - › the applicant or worker does not meet the requirement;
 - › the employer has reasonable grounds for not being satisfied that the applicant or worker meets the requirement.
- 6.9.3 There is no set list of circumstances in which an OR will exist. Each situation has to be looked at as it arises. In relation to discrimination on the basis of sex, an OR may exist in circumstances where it is necessary to preserve decency or privacy or if a person of a particular sex can most effectively perform the job. Tribunals will not readily conclude that an OR exists and so if an employer intends to take a step that may be regarded as discriminatory on the basis that there is an OR, legal advice should be taken.

6.9.4 Direct age discrimination can be justified as a proportionate means of achieving a legitimate aim. Direct discrimination regarding any of the other protected characteristics cannot be justified. An example of where age discrimination may be justified as a proportionate means of achieving a legitimate aim was highlighted in a recent employment decision. In the case, an employee claimed age discrimination against his employer on the basis that the employer's revised pay policy was discriminatory to younger employees (in that changes to the policy meant that newly appointed probation officers would now take around 23 years to reach the top of the pay scale – something that would have taken 6/7 years before the change). Whilst it was held that the policy itself was discriminatory, it was held that it was justified on the employer's legitimate aim, to create a "fair policy in straitened circumstances". Whilst age discrimination would normally not be justified on cost alone, it had been shown that the employer was compelled to cut costs and that the employer had tried to avoid redundancies and had negotiated with unions.

6.9.5 The Equality Act also contains provisions allowing 'positive action' in recruitment and promotion. These provisions were not brought in force with the bulk of The Equality Act in October 2010, but took effect on 6 April 2011. The positive action provisions apply where people who share a protected characteristic suffer a disadvantage, have particular needs or are disproportionately under-represented. Employers can take certain actions to address these issues without the risk of discrimination claims from people without the relevant protected characteristic. Employers are not obliged to take positive action under the Equality Act although public sector employers may have a duty to consider positive action under the public sector single equality duty and all employers have a duty to make reasonable adjustments for people with disabilities, which duty might overlap with the scope of the positive action provisions.

The provisions do not permit "positive discrimination", which is the practice of giving an advantage to those groups in society which are often treated unfairly because of a protected characteristic. The provisions apply where an employer reasonably thinks that people with a particular protected characteristic are disadvantaged or have different needs, or that their participation in an activity is disproportionately low. In those circumstances, the employer can take proportionate measures to enable or encourage persons with the relevant characteristic to overcome that disadvantage, to meet their needs, or to enable or encourage their increased participation. In relation to recruitment and promotion, the positive action provisions permit employers faced with candidates who are equally qualified and experienced to favour a candidate with a protected characteristic where the employer reasonably believes there is under representation in its workforce of those with that protected characteristic or people with that characteristic are at a disadvantage.

6.10 Reasonably practicable steps

- 6.10.1 With some limited exceptions, employers are liable for the discriminatory behaviour of employees. There is, however, a defence available to an employer who can show that all reasonably practicable steps were taken to prevent the discrimination in question. In practice, it is very difficult for an employer to show that all reasonably practicable steps were taken, particularly if employees have not received any form of equal opportunities training or induction. Tribunals will not take account of arguments that no amount of training or induction would have prevented the discriminatory behaviour taking place. What matters is what steps, if any, the employer took to prevent discrimination.
- 6.10.2 An employer is unlikely to escape liability unless it has made it clear to its workforce the types of conduct it regards as discrimination (including harassment and victimisation), has put in place a policy clearly stating that such actions will not be tolerated and deals with complaints of discrimination promptly and fairly and takes appropriate disciplinary action against perpetrators. It is not sufficient for an employer merely to have such a policy. It must be able to show that the terms of the policy have been clearly communicated to employees.
- 6.10.3 Employers may wish to emphasise to employees that they can be personally liable for their discriminatory acts and potentially liable for an award of compensation to the victim, remembering that such compensation is potentially unlimited. An employee who is the victim of harassment can raise a claim against both the individual harasser (i.e. fellow employee) and the employer.

6.11 Equal opportunities policies

- 6.11.1 Employers should, as a minimum, put in place an equal opportunities policy. The policy should set out the employer's approach to equality in the workplace and should include:
- › a statement of what is meant by equal opportunities;
 - › the various types of discrimination;
 - › a statement that discrimination will not be tolerated;
 - › examples of the types of conduct which are prohibited;
 - › an explanation of the possible disciplinary repercussions of such conduct;
 - › a definition and examples of harassment;
 - › a statement of equality principles that apply to recruitment, promotion and access to training;
 - › how to raise a complaint of discrimination within the workplace; and
 - › an explanation of how the company's equal opportunities policy is to be implemented and who is responsible for its implementation.
- 6.11.2 An equality or equal opportunities policy should be reviewed regularly. Records should be kept of training on and implementation of an equality policy so that the employer retains proof that training has, in fact, been given.

6.12 Equality monitoring

6.12.1 The Equality Act creates a new single public sector equality duty, mirroring the structure of the previous duties in relation to sex, race and disability. Public authorities are required to have regard to three matters when exercising this duty:

- › Eliminating conduct that is prohibited by the Equality Act, including practices by reference to sex, race, age and disability;
- › Advancing equality of opportunity between those who share a protected characteristic and people who do not share it;
- › Fostering good relations between those who share a protected characteristic and those who do not share it.

Many private sector employers carry out equality monitoring although it is not mandatory. Monitoring assists employers in assessing whether equal opportunities provisions are effective in practice.

6.12.2 Employers should be mindful that all information gathered for monitoring purposes must be sifted and processed in line with data protection legislation and associated guidance. Information gathered will more often than not be sensitive personal data in terms of the Data Protection Act (see [9.0 Data protection](#)). Whilst an employee's consent is normally required to process sensitive personal data, an exception is made where this data has been processed for the purposes of monitoring equal opportunities. The information gathered must be accurate and not excessive having regard to its purpose.

6.12.3 It is common for employers to carry out monitoring at the recruitment stage with job applicants being asked to complete an equal opportunities monitoring form. Such forms usually request details of age, sex, racial or ethnic origin and medical conditions (see [6.12.4 Prohibition of pre-employment health questions](#)). Employers should ensure that these forms include a statement setting out why the information is being gathered and how it will be used. Unless it would hinder meaningful monitoring, all information gathered for these purposes should be anonymised. Ideally, equal opportunities monitoring forms should be kept separate from application forms and should not be provided to those carrying out the recruitment process to avoid any implication that an individual has not been called for an interview or offered a job due to answers given on the monitoring form.

6.12.4 Prohibition of pre-employment health questions

Under the Equality Act, a job applicant must not be asked about their health before they are offered work except in limited circumstances. Job offers can be made subject to satisfactory responses to pre-employment disability or health enquiries or satisfactory health checks but employers must not discriminate against job applicants as a result of such enquiries or checks. Any health enquiries should be relevant to the job and any reasonable adjustments for disabled applicants must be made.

The limited circumstances in which pre-employment health questions are permitted are where the questions are "necessary for the purpose of" any of the following:

- › Establishing if the applicant will be able to carry out the interview or other recruitment process or to establish whether reasonable adjustments will be required;
- › Establishing if the applicant will be able to carry out an intrinsic function of the job;
- › Monitoring diversity in relation to applicants;
- › Taking positive action.

What is "necessary" is not defined. Questions about current health are more likely to be "necessary" than questions about past health.

- 6.12.5 Monitoring forms can be issued for existing employees. Employees should be made aware of the purpose of the exercise and the importance of completing the form. If possible, the exercise should be carried out anonymously. It must be made clear to the employee that the information will be placed on their personnel file with a statement of how the information was gathered.

6.13 Questionnaires

- 6.13.1 A statutory questionnaire procedure was a mechanism used previously to assist employees in establishing whether or not they have been subjected to discrimination.
- 6.13.2 In October 2012 the government announced that it would do away with the statutory questionnaire procedure and the statutory questionnaire procedure was removed with effect from 6 April 2014.
- 6.13.3 In the absence of the questionnaire procedure, employees are still able to ask questions of their employers in a less formal manner. ACAS has provided guidance on the new system in their Guide: "Asking and responding to questions of discrimination in the workplace".

6.14 Codes of practice

6.14.1 There are a number of statutory codes of practice which have been issued by what were formerly the Disability Rights Commission, Commission for Racial Equality and Equal Opportunities Commission. These organisations have all amalgamated into the Equality and Human Rights Commission ('EHRC'). Where such codes of practice have been issued under anti-discrimination legislation, they may be taken into account by Tribunals. For this reason it is sensible for employers to familiarise themselves with the terms of the various codes of practice.

6.14.2 The EHRC is now responsible for revising, updating and issuing codes of practice in relation to equality matters.

6.14.3 In light of the introduction of the Equality Act, the EHRC published three new codes of practice which came into force on 6 April 2011. These three codes of practice replaced previous codes of practice which were in place under the pre-October 2010 discrimination laws. When these codes of practice came into force the others were revoked. These are:

- › Code of Practice on Equal Pay;
- › Code of Practice on Employment;
- › Code of Practice on Services, Public Functions and Associations.

6.14.4 Employers may wish to consider incorporating guidance from the codes of practice into existing employment policies and procedures.

6.14.5 Public Sector Equality Duty

On 6 April 2011 the new Public Sector Equality Duty (PSED) in The Equality Act 2010 came into force. The EHRC has published new codes of practice as guidance on the new PSED and the Commission is currently in the process of renewing and updating all non-statutory guidance.

6.15 Employment tribunal enforcement

6.15.1 Where a person succeeds in a discrimination claim, an employment tribunal can:

- › order the employer to pay compensation. This is uncapped, unlike in unfair dismissal claims;
- › make a declaration as to the rights of the person and the employer in relation to the matters raised in the claim.

6.15.2 For claims made prior to 1 October 2015 the tribunal can also make an appropriate recommendation. This is a wide power as recommendations can be made with the purpose of reducing the adverse effect of the discrimination on the person raising the claim and can also be made for the benefit of the wider workforce. A recommendation will normally state that specific steps must be taken by an employer to remove or reduce the adverse effect of the discrimination within a specified period of time. Recommendations most often focus on processes and could, for example, include recommendations that an employer:

- › Introduces an equal opportunities policy;
- › Ensures that its harassment policy is more effectively implemented;
- › Sets up a review panel to deal with equal opportunities, harassment and grievances;
- › Re-trains staff; and/or
- › Makes public its selection criteria used for staff transfer or promotions.

This power has now been abolished for any claims made on or after 1 October 2015.