



# Sex Discrimination

## **Must' and 'should'**

Throughout the guide, a legal requirement is indicated by the word 'must' - for example, an employer must not offer a job to a female applicant, because of her sex, instead of a better-qualified male applicant.

The word 'should' indicates what MIRS considers to be good employment practice.

## **Understanding the term 'employee'**

Regarding discrimination matters, under the Equality Act 2017, the definition of 'employee' is extended to include:

- employees (those with a contract of employment)
- workers and agency workers (those with a contract to do work or provide services)
- apprentices (those with a contract of apprenticeship)
- some self-employed people (where they have to personally perform the work)
- specific groups such as police officers and partners in a business
- job applicants are also protected

## **Difference between terms 'sex' and 'gender'**

'Sex' is the most commonly used and accepted term to describe whether someone is male or female. In particular, the Equality Act 2017 uses it when referring to discrimination between men and women. 'Gender' has purposely not been used in this guide to avoid confusion concerning another protected characteristic, gender reassignment.

Sex and gender also have different meanings regarding transgender identity, with sex referring to biological differences, and gender referring to aspects such as behaviours, image and expectations viewed as masculine or feminine.

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## **Acknowledgement**

**This guide is based on the Acas publication "Sex discrimination : key points for the workplace" and has been adapted for the Isle of Man. MIRS acknowledges, and thanks Acas for, their consent to use their source material.**

## About this guide

This guide offers employers, senior managers, line managers, HR personnel, employees, employee/trade union representatives and job applicants a grounding in how sex discrimination can occur in the workplace, how it can be dealt with and how to reduce the chance of future discrimination.

Both employers and employees can be liable for discrimination.

For an overview of how equality legislation applies generally at work, MIRS provides the following guidance:

- Equality and discrimination: understand the basics
- Prevent discrimination: support equality
- Discrimination: what to do if it happens.

The Equality Act 2017 protects employees from discrimination, harassment and victimisation because of sex, one of nine features known in law as protected characteristics and covered by the Act. Guidance on other protected characteristics, and other useful tools and materials can be found at [www.mirs.org.im/equality](http://www.mirs.org.im/equality)

It is important to stress that sex discrimination against men is just as unlawful as sex discrimination against women. Also, it is unlawful for a woman to discriminate against another woman because of her sex, and for a man to discriminate against another man because of his sex.

## What is sex discrimination?

The Equality Act protects and applies equally to people who are discriminated against because they are:

- male or female
- an employee associated with someone who is male or female – for example, a colleague, friend or family member
- an employee who is perceived – correctly or incorrectly – to be male or female
- subjected to comments and behaviour regarding sex which they find offensive. For more on this particular point, see the section Harassment later in this guide.

What the law terms 'transgender' employees – those who propose to start, have started or completed a process (or part of a process) to change his or her gender from man to woman or woman to man - are protected under another protected characteristic, Gender reassignment. However, for example, a job applicant or employee, who is not known to have a 'transgender' history and experiences sex discrimination as a woman, may be covered under the protected characteristic of sex.

For more on Gender reassignment discrimination and the related matter of what is termed gender identity, see the MIRS companion guide, Gender reassignment discrimination at [www.mirs.org.im/equality](http://www.mirs.org.im/equality).

Pregnancy and maternity, and Marriage and civil partnership are two other protected characteristics in the Act. Each is covered in its own guide in this series. It is not uncommon for a complaint of sex discrimination to also involve complaints under these two other characteristics, or be combined with age, another protected characteristic from 1 January 2020.

Sex discrimination does not include Sexual orientation discrimination which comes under its own protected characteristic. For more information, see the guide Sexual orientation discrimination at [www.mirs.org.im/equality](http://www.mirs.org.im/equality).

The Act does not require any minimum length of continuous employment, or any employment at all in the case of a job applicant, for a discrimination claim to be made. It makes discrimination unlawful at all stages - from when a role is advertised and interviewed for, through to the last day of employment and beyond, including any references.

## **How sex discrimination can happen**

There are four main types of discrimination within the protected characteristic of sex under the Equality Act 2017:

- Direct discrimination
- Indirect discrimination
- Harassment
- Victimisation.

Successfully resolving a complaint of discrimination is not always the end of the matter. It is useful to think of how any future instances of discrimination might be prevented. Find out more in the companion guide, Prevent discrimination: support equality.

## **Direct discrimination**

This breaks down into three different types of direct discrimination where someone is treated less favourably than others because of:

- their own sex – this is ordinary **direct discrimination**
- the sex of someone they are associated with, such as a friend, family member or colleague – this is **direct discrimination by association**
- how their sex is perceived, regardless of whether this perception is correct or not - this would be **direct discrimination by perception**.

Direct discrimination in all its forms could, for example, involve a decision not to employ someone, to dismiss them, withhold promotion or training, offer poorer terms and conditions or deny contractual benefits because of sex. In almost all circumstances, it would be unlawful. However, the Act, in very limited circumstances, allows discrimination where the job requires someone of a particular sex – this is known as an 'occupational requirement' which is explained later in this guide

### **For example... ordinary direct discrimination**

Annette, an experienced security guard, applies for a job at her local shopping centre. She attends an interview, but is not successful. The feedback from the company simply said she was not a suitable match for the job, but did not explain the reasons.

She later discovers that several completely inexperienced male applicants were offered jobs, that the security team has always been all-male, and that the company felt she would not fit in because she is a woman. She writes a letter to the company to complain, alleging sex discrimination.

### **For example... direct discrimination by association**

Kofi approaches his manager, Bob, to discuss applying for his section's supervisor vacancy. He is shocked when Bob tries to talk him out of it.

Bob also runs the firm's successful five-a-side football team which is all male. Kofi has no interest in football and through his role networks mostly with female

colleagues. Bob tells Kofi the football team helps bonding in the office, and his lack of interest in 'being one of the boys' is a problem. Bob adds that he feels they would 'not gel' as a management team and struggle to work effectively together. Kofi is

also angered by Bob's refusal to listen to how he works hard to build good work relationships with all colleagues.

Kofi feels Bob's attitude is unjustified and unreasonable, and that he is blocking him. He complains to his trade union representative that he is being discriminated against because of his association with female staff. The rep contacts HR which says it will look into the matter. HR arranges an informal meeting with Bob to explain that his actions are likely to be sex discrimination by association. Bob apologises, says he was only thinking of getting the best office dynamics, but didn't realise his reaction to Kofi could be breaking the law. He agrees he needs refresher equality training.

Next, HR and Bob meet with Kofi to acknowledge Bob's mishandling of the situation and say Kofi is welcome to apply for the role. Kofi is satisfied with the acknowledgement and that Bob will undergo training.

### **For example... direct discrimination by perception**

A doctors' surgery advertises for a new GP because of the planned retirement of Dr Alicia Gomez. There is only one other GP at the practice and he is male.

Some at the surgery would prefer to recruit a female GP – so the practice continues to have one male and one female doctor. And that bias creeps in when the surgery sifts the large number of applications. Dr Charlie Peters, an experienced female GP, has applied for the position, but the surgery assumes Charlie is a man because of the name and its spelling. Because of this, it does not invite her to an interview. This is likely to be sex discrimination by perception.

### **Indirect discrimination**

This type of discrimination is usually less obvious than direct discrimination and can often be unintended. In law, it is where a provision, criterion or practice is applied equally to a group of employees/job applicants, but has (or will have) the effect of putting those who share a certain protected characteristic at a particular disadvantage when compared to others without the characteristic in the group, and the employer is unable to justify it.

An employee or job applicant claiming indirect discrimination must show how they have been, or could be, personally disadvantaged. They must also show how the application of the 'provision, criterion or practice' has or might disproportionately

disadvantage other employees or job candidates with the same protected characteristic.

The Equality Act does not define a 'provision, criterion or practice'. However, in the workplace, the term is most likely to include an employer's policies, procedures, rules and requirements, whether written down or not. Examples might include recruitment selection criteria, contractual benefits, a redundancy scoring matrix or any other work practice.

In some limited circumstances, indirect discrimination may be objectively justified if the employer can prove the 'provision, criterion or practice' is 'a proportionate means of achieving a legitimate aim'. However, employers should note this can be difficult to prove.

In attempting to demonstrate 'a proportionate means of achieving a legitimate aim', an employer must show:

- there is a legitimate aim such as a good business reason, but employers should note that cost alone is unlikely to be considered sufficient **and**
- the actions are proportionate, appropriate and necessary.

Both points apply in justifying 'a proportionate means of achieving a legitimate aim', not just one of them.

The process of determining whether discrimination is justified involves weighing up the employer's need against the discriminatory effect on the employee and group of employees of the same sex. The employer should scrutinise closely whether any discriminatory act, policy, procedure or rule can really be justified. And it should be able to show that it has looked for another way of achieving the same aim which would be less discriminatory or not discriminatory, and has been fair and reasonable.

It is important to stress that employers should regularly monitor their policies and practices, otherwise they may inadvertently indirectly discriminate. For example, policies and practices which were not discriminatory when they were first introduced may become discriminatory over time, perhaps because of a change in the composition of the workforce or a change in the law. For more on monitoring, see the companion MIRS guide, Prevent discrimination: support equality.

### **For example... preventing indirect discrimination**

Zara sees vacancies advertised for her local DIY store. The advert says applicants must be at least 5ft 8ins tall, as staff have to get items from shelves for customers. She is 5ft 2ins tall.

She thinks the height rule is unfair and unreasonable. The average height of women in the UK is 5ft. 3ins, so more women than men would feel unable to apply and that they would be rejected because of height if they did. Also, she feels the store should provide step ladders for staff to safely reach the higher items.

She contacts the store to make the manager aware that its rule is likely to be indirect sex discrimination. The store considers Zara's concerns, says it will re-advertise the vacancies, taking the height rule out of the ad, and invites her to apply.

## **Harassment**

This breaks down into three different types of harassment:

- 'unwanted conduct' which must be related to a relevant protected characteristic – in this case, sex
- 'unwanted conduct' of a sexual nature – this is sexual harassment
- less favourable treatment of an employee because they have rejected sexual harassment or been the victim of it.

In practice in cases of harassment, the impact of unwanted conduct as perceived by the victim tends to take precedence over the perception of the harasser and their intent. Whether it is reasonable for the victim to feel the way they do is also taken into account.

Also, it is possible for an employee to make a complaint of harassment where they are not on the receiving end of the conduct, but witness it and it has a negative impact on their dignity at work or the working environment. The employee making a complaint of harassment in this situation would not need to be the same sex as the colleague being harassed.

Managers should be careful not to let their own views influence a situation or dismiss a concern because they don't deem the behaviour offensive themselves. It is important to remember that if an employee feels strongly enough to raise a concern or make a complaint, the employer should take it seriously, and deal with it appropriately and correctly.

For more information on handling complaints, see the MIRS guide Discrimination: what to do if it happens at [www.mirs.org.im/equality](http://www.mirs.org.im/equality).

## **'Unwanted conduct' related to sex**

'Unwanted conduct' related to the protected characteristic of sex must have the purpose or effect of violating a person's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for that individual.

This can include bullying, nicknames, threats, intrusive or inappropriate questions, excluding someone (ignoring, not inviting someone to meetings or events etc) and insults. It can be verbal, written or physical. Also, unwanted jokes and/or gossip which the employee finds offensive can be harassment, and to say they were 'banter' is no defence.

### **For example... 'unwanted conduct' related to sex**

Clare is an ambitious hairdresser in her fifth year in the trade. She has done well at her two previous employers and has recently moved to a prestigious salon. Her new colleagues are all male.

Her new employer, Lance, makes recurrent comments about her work out of customers' earshot. At first, she thought he was giving her constructive criticism. Later, this turned into frequent spiteful comments including that women just aren't as talented as male hairdressers. And he tells her it was a mistake to employ her.

Clare is losing confidence and feels she is being harassed by Lance because she is a woman. She asks to see Lance to ask him to stop making the comments and to explain how she feels. At the meeting, Lance is brusque, unsympathetic and tells Clare to just get on with her job. However, the comments get worse. Clare is so unhappy at work she decides to make an Employment and Equality Tribunal claim.

An employer should make clear to employees what sort of behaviour would be considered sexual harassment and that it is unacceptable.

It should deal with such issues and complaints sensitively, as the employee who believes they are being sexually harassed can be extremely distressed and regard them as potentially life-changing.

An employer and employees should be mindful that some types of sexual harassment such as sexual assault and other physical threats are a criminal matter as well as an employment matter. Criminal matters should be reported to the police.

If a complaint is reported to police, or criminal court proceedings are being pursued, an employer must still investigate the complaint as an employment matter. An

employer may then follow its disciplinary procedure, without awaiting the outcome of criminal proceedings, provided this can be done fairly.

Also, there can be circumstances where two different types of harassment - sexual harassment and harassment related to the protected characteristic of sex - overlap.

### **Less favourable treatment**

This is where an employee is treated less favourably than another member of staff because they have rejected or submitted to unwanted conduct of a sexual nature.

#### **For example... less favourable treatment**

During a department's social outing to a bowling alley after work, a male manager flirts with one of his female employees and suggests that just the two of them should go on to a nightclub. She turns down his advances. Two months later she is turned down for promotion even though she was the most experienced candidate. She believes this is because she rejected her manager's come-on.

### **Victimisation**

Victimisation is when an employee suffers what the law terms a 'detriment' - something that causes disadvantage, damage, harm, or loss – because of:

- making an allegation of discrimination, and/or
- supporting a complaint of discrimination, and/or
- giving evidence relating to a complaint about discrimination, and/or
- raising a grievance concerning equality or discrimination, and/or
- doing anything else for the purposes of (or in connection with) the Equality Act 2017.

Victimisation can also occur because an employee is suspected of doing one or more of these things, or because it is believed they may do so in the future.

'Victimisation' is a term commonly misused and misunderstood, and only applies when it meets the explanation in this section.

A 'detriment', for example, might include being labelled a 'troublemaker', being left out and ignored, being denied training or being given a poor reference.

An employee is protected under the Equality Act if they make, or support, an allegation of victimisation in good faith – even if the information or evidence they give proves to be inaccurate. However, an employee is not protected if they give, or support, information or evidence in bad faith – in other words, maliciously.

### **For example... victimisation**

Gabriela attends her annual appraisal arranged by her manager. She goes to the meeting expecting a good outcome, but is shocked when given a performance improvement plan.

There had been no previous warnings or indicators about poor performance, but her line manager, Ruth, had made some personal jibes she chose to ignore. Part-timer and mother-of-two Gabriela believes Ruth's behaviour stems from her bias for preferring to work with full-time career men.

Gabriela decides to raise a grievance. Her grievance is upheld by a senior manager, her performance re-assessed and she is taken off the improvement plan. She has heard through office gossip that Ruth has been disciplined.

Then, Gabriela finds that Ruth is barely communicating with her. Conversations with colleagues reveal Ruth is not notifying her of opportunities and developments they have been told about, and often does not give her the dates of team meetings. She believes Ruth is punishing her for complaining. She raises a further grievance. Ruth's behaviour is likely to be victimisation.

### **Key areas of employment where sex discrimination can happen**

Six common areas of employment where sex discrimination can occur are:

- recruitment
- pay, and terms and conditions of employment
- promotion opportunities

- training opportunities
- when an employee is dismissed
- selection for redundancy.

## Recruitment

Even with the push for equality, there are still jobs done predominantly by men, and others predominantly by women. For example, currently most engineers, IT staff and builders are men. By comparison, currently most nurses, and admin and sales staff are women.

This can be because of factors including the employee's own choice, and others which can come from either some employers or jobseekers, or both. These can include traditional thinking, unconscious bias and an impression that an occupation is dominated by one sex.

Another feature is that men are in about two-thirds of managerial roles, more likely to be in higher skilled and paid jobs, and make up the majority of the top ten per cent of earners. However, many job sectors, particularly those involving engineering, the sciences, technology and mathematics, are now endeavouring to attract more women and encourage a balance between the sexes.

To avoid any discriminatory stereotyping and bearing in mind workforce trends, an **employer when recruiting should** generally:

- be careful when writing an advertisement, job description and person specification for a vacancy. Stay clear of any reference to a particular sex, including in job titles – for example, avoid terms such as waitress and tradesman. Also, avoid using images of only men or women. However, there can be rare exceptions – see the 'Occupational requirements' section further into this guide. Further, an employer **should not** include anything irrelevant to the job, and should avoid any wording it is unsure about or thinks might be open to legal challenge
- be clear on the skills, experience and qualifications needed for the job so it is objective in assessing and selecting candidates. At the same time, this should reduce the chances of favouring a candidate because of their sex
- avoid advertising solely in one kind of place or media - for example, advertising only in lifestyle magazines or on websites targeted at one sex. Use

at least two different channels so as not to end up with candidates from too narrow an audience

- make sure the job application form asks only for personal information relevant to the job and/or for the administration of the recruitment
- be mindful if spreading word of vacancies through existing employees and managers, as relying only on 'word of mouth' is likely to perpetuate any imbalance in the make-up of the workforce, particularly where it is predominantly one sex or made up of only full-time staff. Also, it is likely to yield only a small pool of candidates
- not ask the candidate questions of a personal nature unrelated to the job and their application. They may be perceived as intrusive, not relevant to the job and imply potential discrimination. Where such information is volunteered,

interviewers or others in the selection process should take care not to be influenced by that information

- be careful and professional when making notes about a candidate – they could ask to see them if making a discrimination claim
- tell a recruitment agency being used to comply with the Equality Act. An employer **must not** suggest to the agency that it would prefer candidates of a particular sex – if it did, both the employer and the agency would be liable.

And where possible an **employer could**:

- consider 'Positive action' if men or women are under-represented in the organisation. For more information see the section, Taking 'Positive action', further into this guide
- look to redesign jobs, perhaps by making them part-time, job-shares or considering other different types of flexible working so a wider range of candidates might feel able to apply, including men with responsibilities for child care or other dependents.

### **For example... discrimination in recruitment**

A children's day-care nursery advertises in a local newspaper and on its own website for 'women with relevant level 3 national standard child care qualifications' to apply for two day-care posts. This would be discriminatory against male applicants who wanted to apply. The advertisement should have used the word 'applicants', not 'women'.

## **Pay, and terms and conditions of employment**

It is important to ensure there are no terms and conditions (including contractual benefits) that disadvantage or exclude people because of their sex, perceived sex or association with someone of a particular sex. This might include pay, a bonus scheme, being allowed to work flexibly, parental leave or compassionate leave. For example, if a man on a £35,000 salary leaves an organisation and is then replaced in the same role by a woman with the same level of skills, experience and qualifications on £30,000, she is likely to be able to claim sex discrimination.

An employer may be able to justify different terms and conditions if it can demonstrate there is a material factor or factors behind them not related to sex. For example, these might include job experience, qualifications, where the job is based geographically and the size of the employer.

### **For example... discrimination in terms of employment**

An employer offers female employees five days' parental leave per year on full pay to help with their child care commitments if they have youngsters under the age of 18. However, male employees are offered the time off, but not the pay. This is likely to be sex discrimination against employees who are fathers with children under 18.

## **Promotion**

In promotion opportunities, employees should not be discriminated against because of their sex, perceived sex or association with someone of a particular sex. For example, it would be discriminatory to:

- only provide job details to people of one sex (apart from in rare circumstances where an 'occupational requirement' could be justified as lawful)
- discourage an employee from applying because of their sex or because a female employee has discussed a wish to have a child
- not promote an employee who is the best person for the job because it is believed they would not fit in because of their sex
- decide not to promote someone because they have previously made a complaint about discrimination

- have an unwritten rule that preferred candidates above a certain level to be of a particular sex or work full-time (the latter is likely to be discriminatory because more women than men work part-time).

Employers should be mindful that some women who become mothers, carers or are over 40 can find it difficult to get promoted or develop their careers because of factors including:

- being assumed to be less interested in their jobs, and openly, or behind the scenes, being discouraged by their employer or managers from applying for promotion
- a lack of flexibility in some jobs and careers resulting in some women with caring responsibilities finding it hard to remain in a skilled or senior job if they work less than four days a week
- women having little option but to work part-time or in lower level jobs
- where there tend to be fewer opportunities for training and promotion.

Where possible, an employer should look to take steps including:

- saying in job advertisements that it is open to flexible working where the arrangement could meet the requirements of the role
- encouraging the design and redesign of jobs, particularly in skilled and senior roles, to allow for flexible working, such as part-time working or a job-share, where the arrangement could meet the requirements of the role. Trials have shown that at the very least benefits, such as increased employee commitment and less absence, tend to balance out against extra costs, such as training two people instead of one and the need for more liaison between job-share partners and their colleagues
- vigorously promoting and establishing a workplace culture where staff are encouraged to develop themselves and their careers, and are supported to do so.

### **For example... discrimination in promotion**

Margarita completes her training at a finance firm and qualifies as a chartered accountant. She arranges to meet a partner to explore how she might develop her career at the company.

He tells her that she's talented, but that he's going to be honest. He says she would probably be 'better off' applying to firms with the scope to be more family friendly. He explains the firm is small, dominated by men at senior level and that

they have doubts about promoting women to top roles when the hours are long, and in the past they have left to have children or wanted to go part-time once they had families. He says she would find it difficult to get promoted.

While the partner is trying to be well-meaning, he and the partners would be discriminating against Margarita because of her sex, and, if the practice continued, other female staff, too.

## **Training**

Withholding training from an employee because of their sex, perceived sex or association with someone of a particular sex would be discriminatory. For example, it would be discriminatory to deny an employee training with the intention of making promotion less likely or selection for redundancy more likely, as 'punishment' for complaining about discrimination or as a malicious act.

An employer should be sensitive about when an employee, who is taking some form of parental leave under the law, undertakes or completes any training. It should be mindful of their needs in these circumstances to avoid any potential discrimination.

Also, an employer should ensure training opportunities are equally accessible for staff in flexible working or part-time working arrangements as for those working full-time – generally, there are more women than men in flexible and part-time work, so failure to do so could be indirect discrimination. In addition, failure to make staff aware of training opportunities because they are in flexible or part-time work may be discriminatory.

Employers should be mindful that some women who become mothers, carers or are over 40 can find it difficult to get training to help develop their roles at work or improve their chances of promotion. This can be because of some of the same or related factors restricting opportunities for promotion, as outlined in the previous section. Others include:

- a reluctance by some employers to develop and train part-time employees because the organisations do not expect them to stay long-term
- an assumption by some employers that part-time employees are unlikely to want to switch to full-time work.

## **For example... preventing discrimination in training**

Victoria starts a new job on production lines packing biscuits. As part of her induction, she was supposed to be trained on monitoring the mechanics of the lines. Her boss, Dave, decides she need not do the mechanics training as he

says men are better at checking machinery and that there are plenty of men on the lines already trained to do it.

Victoria is unhappy about the negativity towards her. She wants to be trained, feeling it would help her overall job confidence. Also, she is worried that not being trained puts her at a disadvantage and could hold her back if there was an opportunity to try for promotion. Denying Victoria the training because she is a woman is sex discrimination.

## **Dismissal**

It is unlawful for an employer to dismiss an employee because of sex – whether this is their actual or perceived sex, or the sex of someone they are associated with. Research by the UK's Equality and Human Rights Commission showed that some women complained of a change in attitude from their employers and some colleagues when they returned to work after maternity leave. They claimed this included negative comments, harassment and dismissal.

Women are also protected if pregnant or on maternity leave under the protected characteristic of pregnancy and maternity. To find out more, go to MIRS website page Maternity leave and pay at [www.mirs.org.im/equality](http://www.mirs.org.im/equality)

### **For example... discrimination in dismissal**

Sophie, employed by a firm with a new owner, is one of five women on the staff. There were six, but Lucy was fired for insubordination. Lucy denied the allegation, but 'couldn't be bothered to fight it'.

Sophie returns to work from honeymoon and is shocked to be dismissed for 'performance issues' after the company had previously always been happy with her work. She has overheard the new owner making comments that 'employing women is too much trouble. They want time off to have babies, and then when they get back, they want to change their hours all the time'.

Sophie believes she has been dismissed because the new owner is 'anti-women' and assumes she is now thinking of having a family - even though she has no plans to have children at the moment. She appeals against her dismissal through the firm's disciplinary procedure. If her appeal is unsuccessful, she will make an Employment and Equality Tribunal claim of sex discrimination.

## Redundancy

An employee must not be at a disadvantage or discriminated against in a redundancy process because of their sex. For example, an **employer must not** target:

- women of child-bearing age because they could become pregnant and take maternity leave
- employees because they have child or other caring responsibilities outside of work – they are most likely to be women.

Otherwise, risk of discrimination tends to be in two key areas:

- the criteria an employer uses to select employees for redundancy
- how an employer manages the redundancy process.

An employer should **check the redundancy selection criteria** it is intending to use including:

- **absence** - exclude an employee's absences where there is legal protection - for example, because of something related to their pregnancy - or because of child care responsibilities. Failure to do so could be discriminatory. Instead, if measuring absence and attendance records, use the comparable period from the previous year
- **working hours** - avoid simply selecting part-time staff or those with other flexible working arrangements. This is because, generally, there are more women than men in part-time work and flexible working arrangements. Also, do not alter scores in the redundancy selection process through making assumptions about their performance or output because of these arrangements
- **job performance** – avoid assessing the employee's job performance during absences such as maternity or adoption leave. It would be advisable to use another period of time – perhaps their previous annual review. If that is not possible, adjusting their job performance score upwards realistically may be appropriate - however, this can be a legally complicated area. An employer should ensure it can clearly show that an adjusted score is proportionate, appropriate and necessary so an employee is not at a disadvantage because of their sex. On the other hand, it should not attempt to duck the issue by giving the employee a maximum score, unless fully justified, as otherwise this

would be unfair and potentially discriminatory against colleagues also being assessed in the redundancy process

- **skills, experience and qualifications** - for example, an employee, who was taking leave such as statutory adoption leave, missed important exams for a qualification to help further their career – a proportionate adjustment to their score here might be considered, but this too can be a complicated area.

An employer should be careful **managing a redundancy process** in areas including:

- **communication** - make sure employees, who are absent because of leave such as parental leave where there is legal protection, are kept informed about any relevant changes at work, and are consulted properly throughout the redundancy process. Failure to do so could put them at a disadvantage and be discriminatory
- **offering an alternative role** – an employee being made redundant, and who is taking leave such as statutory maternity leave, must be offered any suitable vacancy before any other employee. Also, they do not have to apply for it. If the employer has doubts about the employee's suitability for the role, it can assess/interview them for the role – and if they are found to be suitable, they must be offered the role first. However, if there is not a suitable role, they can be made redundant if the decision is not because of their legally-protected leave, and the redundancy process is fair.

Employers and employees should be aware that particular issues affect employees who are pregnant or on maternity leave.

### **For example... discrimination in redundancy**

Sheila and Charu work in one branch of a chain of small shops. The firm is considering making some staff in stores redundant because of a fall in sales. As part of its plan to restructure the business, the firm decides it will only employ full-time staff, in part to reduce its headcount which it believes will make managing the business less involved.

Sheila and Charu are part-timers and now at risk of losing their jobs because of the policy change. In other stores there are part-timers, all of them women. The policy is likely to be discriminatory because it will mean all of the staff being made redundant will be women.

## **Considerations for everyone**

Employers, senior managers, line managers, HR personnel, employees and their employee or trade union representatives should make sure they understand what sex discrimination is and how it can happen, their rights and responsibilities, the employer's policy for preventing discrimination, and what behaviour and actions are unacceptable.

Awareness of what behaviour is unacceptable is essential, because many people think their jokes, nicknames and 'banter' can be part of normal workplace conversations and have no idea that if they cause offence they may be unlawful. Also, employers and employees should be very careful regarding questions related to an individual's protected characteristics as these might be or become discriminatory, particularly if invasive or handled insensitively. These can be some of the commonest forms of sex discrimination.

An employer should provide training for all employees in constructively developing their awareness and understanding of each other, and building a culture in the organisation of promoting equality and diversity. Find out more in the companion guide, *Prevent discrimination: support equality*.

## **Part-time and flexible working**

All employees who have worked for their employer continuously for 26 weeks have the right to ask if they can work flexibly. For example, that might be a request to reduce hours, change which hours they work or work the same number of hours but over fewer days. Or, it might be to work from home or as a job share.

An employer must agree to flexible working where the business can accommodate the request, but it can also turn down requests on business grounds defined in flexible working regulations.

Employers and managers should avoid making assumptions when assessing requests and consider each one individually with regard to the business circumstances. This is to meet flexible working regulations and avoid sex discrimination claims.

So, while female employees are often the main child carers, an employer should not assume a male employee is less likely to want flexibility for child care. For example, an employer which thinks that requests from men may be easier to turn down, or which prioritises requests from women, is likely to be discriminating against men. Instead, employers should look to handle requests consistently.

At the same time, working hours or patterns which clash with an employee's child care responsibilities are more likely to affect women.

For example, an employer's requirement that all employees work until 6pm at least once a week could indirectly discriminate against female employees. If an employer believes there is a genuine business need for all employees to do this, it would have to be able to justify the rule as what the law terms 'a proportionate means of

achieving a legitimate aim'. An employer would also have to look at and introduce a way or ways to reduce or remove the discriminatory effect – for example, by providing child care support.

For more on 'legitimate aims' see the companion MIRS guide, Equality and discrimination: understand the basics.

## **Pregnancy and maternity**

Pregnancy and maternity is its own protected characteristic under the Equality Act. It protects an employee from one type of direct discrimination as well as victimisation because of her pregnancy, or for taking/seeking to take maternity leave.

During the employee's pregnancy or maternity leave, any other discrimination because of her pregnancy or maternity leave could be a separate and overlapping matter which might amount to sex discrimination and/or sexual harassment.

How the protected characteristics of sex, and pregnancy and maternity can overlap regarding discrimination can be complicated. For example, an employee treated unfavourably, because she is wrongly thought to be pregnant, may be able to claim direct sex discrimination by perception.

## **Avoid stereotyping**

Employers and employees should avoid making assumptions about people because of their sex. Such guesswork can often be done without realising – what is known as unconscious bias. For example, this might include assumptions about their capabilities, the type of work they should/shouldn't do, traits and appearance.

Making such assumptions and uninformed decisions are likely to be discriminatory. Also, employers and employees should not make assumptions about colleagues or job applicants who have children. For instance, both these examples would cause offence and potentially be sex discrimination:

- a line manager making an off-hand comment that female employees who have children are 'unreliable', or

- raising doubts about how much of her job a mother may get through because of caring responsibilities outside of work.

Even when the stereotype is intended as a compliment, employers and employees should be aware that this still has the potential to cause offence. For example, saying a team is well organised because women tend to be naturally tidy is likely to upset the team's men and be sex discrimination.

Whether intended or not, stereotyping often has negative connotations and repercussions.

To find out more about the origins of stereotyping see the companion MIRS guide, Prevent discrimination: support equality at [www.mirs.org.im/equality](http://www.mirs.org.im/equality)

## **Unacceptable terminology**

Derogatory terms that refer to somebody's sex are clearly unacceptable and discriminatory whether they are male or female. Also, employees and employers should be careful not to overlook potentially offensive comments simply because they are aimed at a large part or majority of the workforce.

An employer should provide equality training explaining to managers and staff that even referring to an employee's sex at all unnecessarily could be potentially discriminatory.

As there can be rare circumstances where a transgender employee may be covered under the protected characteristic of sex, an employer should make clear what terminology is acceptable and unacceptable if it is really necessary to refer to an employee's gender status in these circumstances. If there is uncertainty around what terminology the employee would find acceptable, an employer would be best approaching the individual to tactfully ask how they would wish their gender status to be described. This should be handled in a discreet and professional way.

It is important for everyone to remember that certain words have the potential to cause offence and therefore there is a need to be considerate as to how such words might be perceived by others. With discrimination, it is generally how the recipient perceives words and actions rather than the intention of the person delivering them. For example, referring in a friendly way to a woman as 'babe' is likely to be perceived as demeaning or being over familiar, and could lead to a claim of sexual harassment.

The term 'banter' is often used when there is a disparity between what was intended by one person and how it has been perceived by another. Employers should be

prepared to manage situations where a 'joke' or 'banter' has caused offence or upset.

Employers should manage these situations with care. Sometimes these situations can be dealt with by a manager having an informal discussion with an employee and explaining that they have caused offence. In other situations, it could be appropriate for the employer to consider a more formal approach such as disciplinary action.

There is more information about handling complaints further on in this guide and the companion MIRS guide, Discrimination: what to do if it happens, at [www.mirs.org.im/equality](http://www.mirs.org.im/equality).

Also, employers and employees need to take into account that the acceptability or unacceptability of terms can change over time, and sometimes quite quickly.

## **Dress code and appearance**

There can be many reasons why an employer may have a dress code, which, as well as clothes, may cover jewellery and hair. For example, to communicate a corporate image, ensure customers can easily identify a member of staff, for health and safety reasons in the running of the workplace, or because of the organisation's ethos.

If an employer has dress code and appearance restrictions or requirements it should ensure these are for business reasons. Also, it should be confident an Employment and Equality Tribunal would accept them as what the law terms 'a proportionate means of achieving a legitimate aim'. For more on 'legitimate aims' see the companion guide, Equality and discrimination: understand the basics.

From the very start of thinking about a dress code, an employer should consult staff to get their input and support. Then, when drawing up the code, an employer should be aware that:

- stipulating different dress codes and appearance standards for men and women could lead to discrimination claims. For example, allowing female staff to wear earrings, but forbidding male staff from wearing them, may amount to sex discrimination.

Also, it is advisable that any rule on the covering up of tattoos or removal of body piercings is applied consistently to both sexes – but in the first place, an employer would need good business reasons for such a rule which would be accepted by an Employment and Equality Tribunal.

A tribunal may accept an employer having different dress codes for men and women if they are what the Equality and Human Rights Commission calls 'conventional standards of dress and appearance' and the employer is consistent in insisting on an equivalent level of smartness for men and women, and in applying any restrictions.

It is important to remember that a tribunal's ruling on dress code will depend on the particular circumstances of a case, including the working environment and work sector. Consequently, a ruling in one area of work may not always be the same as in another.

- Flexibility is likely to be necessary in some circumstances, including other protected characteristics – race, religion or belief, pregnancy and maternity, gender reassignment and disability.

For example, many Muslim women insist they must cover their legs because of their religious beliefs. So, in such a case, it would seem potentially unjustifiable to insist on the wearing of a skirt if a smart trouser suit would be a reasonable alternative.

### **Matching core 'occupational requirements' of the job**

In certain and rare circumstances, it may be lawful for an employer to specify that applicants for a job must have a particular protected characteristic under the Equality Act. In law, this approach is known as an 'occupational requirement'. For example, there might be a very unusual role where the employer might specify that job applicants must be women.

However, it is not enough for an employer to simply decide they would prefer to employ someone of a particular sex. Any such requirement must:

- be crucial to the post, and not just one of several important factors, **and**
- relate to the nature of the job, **and**
- be 'a proportionate means of achieving a legitimate aim'. If there is any reasonable and less discriminatory way of achieving the same aim, it is unlikely that the employer could claim an occupational requirement.

All three points apply to an occupational requirement, not just one or two of them. There is more on 'legitimate aims' in this guide's section, Indirect discrimination.

An occupational requirement must be reassessed each time the job is advertised, even though it may have been valid for the same post in the past. Circumstances may have changed, meaning the occupational requirement may no longer be applicable.

An employer should think very carefully, and consider seeking specialist legal advice, before claiming an occupational requirement, as it can be **difficult to justify** and will be rare. Also, a job applicant might challenge at an Employment and Equality Tribunal an occupational requirement which appears unjustified.

Further, an occupational requirement can only be used in a defence against claims of ordinary direct discrimination (but not for by association or by perception). Also, it cannot be used in a defence against claims of indirect discrimination, harassment or victimisation.

### **For example... an occupational requirement**

A charity running a refuge for women and children fleeing domestic violence and abuse advertises for a refuge support worker. The advert says that women and children depending on the refuge want to be able to turn to a woman experienced in the work. And it explains that consequently the charity can only consider applications from women, and that it is allowed to do this as an 'occupational requirement' under the Equality Act.

### **Taking 'positive action'**

Under the Equality Act, an employer can take what the law terms 'positive action' to help employees or job applicants it thinks:

- are at a disadvantage because of their sex, and/or
- are under-represented in the organisation, or whose participation in the organisation is disproportionately low, because of their sex and/or
- have specific needs connected to their sex.

An employer must be able to show evidence that any positive action is reasonably considered and will not discriminate against others. If it can, it may legally:

- take proportionate steps to remove any barriers or disadvantages

- provide support, training and encouragement to increase the participation of people of a particular sex.

This means 'positive action' can be used to encourage applicants and develop the skill set of people of a particular sex. However, 'positive action' must not, apart from in very specific circumstances, go so far as treating someone more favourably because of their sex during a process to recruit or promote. This is a complex area and it may be advisable to take legal advice.

For more on 'positive action', see the companion MIRS guide, Equality and discrimination: understand the basics at [www.mirs.org.im/equality](http://www.mirs.org.im/equality) . While there is no legal necessity for an employer to take - or consider taking - 'positive action' if it does not wish to do so, many employers do now take 'positive action'.

## How employees should raise complaints

There are two ways a complaint of alleged discrimination may be handled. Informally or formally.

Some complaints may be dealt with **informally**, where the employer has a quiet word with those involved to reach a resolution which has the desired effect and to which they can all agree. However, the employer is advised to keep a note of the matter. Dealing with a complaint this way can prevent it escalating and possibly ending as an Employment and Equality Tribunal claim.

It is not uncommon for complaints of alleged discrimination to evoke strong feelings for both the person who has made the complaint and the person that the complaint has been made against. Such a complaint is very likely to go through the **formal** approach, using the organisation's formal grievance procedure, and possibly its disciplinary procedure, too. All employers should have discipline and grievance procedures, and each employee's contract of employment should include information on where the details can be easily found.

How employees should raise complaints, including the option of raising the matter with a trade union representative, is covered in more detail in the companion MIRS guide, Discrimination: what to do if it happens at [www.mirs.org.im/equality](http://www.mirs.org.im/equality). It includes help for employers and employees in deciding whether to handle a matter informally or formally.

## **When an employee experiences discrimination**

When an employee makes a complaint that they have been a direct target of discrimination, an employer should be mindful that the employee may feel they have been personally attacked. Handling the situation sensitively with the complainant, the person(s) accused of discrimination and any witnesses is essential, whether this is being done informally or formally.

### **For example... How an informal complaint can work**

Tamara works at a builder's merchants. Some male colleagues have started making derogatory comments about women. She finds their behaviour upsetting. She raises the matter with her union rep, and together they tell the manager 'what's going on'. Tamara adds that she is sure the men think their behaviour is just high jinks, not offensive. All three agree it would be best to try to deal with the matter informally.

The manager speaks to the men, reminding them of company rules about unacceptable language and conduct. They apologise to Tamara, the manager and union rep, and assure them the behaviour will not recur. Tamara, manager and rep hope this should resolve the matter

### **For example... How a formal approach can work**

Amelie is in a new job and her work is regularly praised by her line manager, Pete. One Friday night, he suggests the team go for drinks after work. Amelie is keen to go to help her integrate with colleagues.

After a few drinks most staff head home, but Pete, Amelie and a few others stay. Pete moves closer to Amelie and comments on her clothes and appearance. She tries to change the subject and involve the others in conversation. However, Pete carries on and puts his hand on her knee. He says he can help her advance her career if she 'returns the favour'. She feels very threatened, makes excuses and leaves.

She is very upset by her boss's behaviour and is worried it will affect her job. Back at work on Monday, she approaches Pete's manager, Grant, who can see she is visibly upset. In private, she explains what happened. Grant explains to Amelie that the matter is serious and must be investigated. The findings result in a disciplinary hearing. The outcome is Pete is dismissed for gross misconduct – sexual harassment.

## **When an employee observes discrimination**

An employee who witnesses discrimination taking place is just as entitled to raise a complaint as the victim. What has been observed should be taken seriously by the employee who has seen it and by the employer who receives a complaint about it from the witness. The main issue is that discrimination is allegedly taking place. Also, the employer should be mindful that the witness feels strongly enough to make a complaint. As with a complaint from an employee alleging discrimination aimed at them, a complaint about discrimination which has been observed should be handled just as sensitively.

### **For example... How an informal approach can work**

Michelle is one of the bus drivers who work out of a small depot. All of the drivers were female until two male drivers were recruited recently.

She regularly hears a couple of her female colleagues refer to the male drivers as 'fit', adding suggestive remarks which seem to make the men feel uncomfortable. Michelle isn't sure whether the men are offended. However, she views the language as sexist and unprofessional, and thinks it should stop.

She talks to manager Pavel, who says the men have not said anything to him about it – however, he adds that he finds the women's language unacceptable. Pavel talks to the women concerned and tells them their behaviour must stop. Also, he arranges equality awareness training for all staff. Michelle is satisfied with this approach, as she thinks her colleagues did not really mean to cause offence

### **For example... How a formal approach can work**

Christian works in a company's sales team. In the staff canteen, he overhears his supervisor complain to another manager that having two women on shared parental leave means her team can't hit its targets.

The supervisor says she's 'sick of women, who just want to take time off to have a baby every couple of years, taking the company for a ride'. He recalls she has made similar remarks in the past. He feels he cannot talk to her about her behaviour as she is his supervisor, but that his employer should be aware of it. So, he talks to HR.

He decides to raise a grievance against his supervisor. Although her comments are not aimed at him, he feels the working environment has become offensive. Following an investigation, his complaint is upheld. Also, the employer takes disciplinary action against the supervisor.

## How employers should handle discrimination complaints

When an employer receives a complaint about sex discrimination, it should take the matter very seriously, and listen carefully and with empathy to what the employee says.

A complaint – or grievance as it is also known – might be handled in an organisation **informally** or **formally** depending on the nature of the particular complaint, its seriousness, the possible action that may need to be taken, or the outcome desired by the person making the complaint, as explained in the previous section, How employees should raise complaints.

However, if an employer or manager becomes aware that discrimination, harassment or victimisation is taking place because of someone's sex, it is important that they do not wait until a complaint or grievance is raised. The sooner action is taken the more easily it can be resolved and it is less likely that the employer would be liable for the discriminatory actions of the employee/s involved.

An employer should discuss with the employee raising the concern whether they wish to have the matter dealt with informally or formally. They should also come to an agreement on this.

It is for an employer to decide whether to pursue disciplinary measures against an employee. However, it should ensure it investigates complaints thoroughly and follows disciplinary procedures where warranted. Any inaction by the employer could damage staff morale in general and possibly culminate in the employee who made the complaint submitting a claim to an Employment and Equality Tribunal.

How employers should handle a complaint of alleged discrimination is covered in more detail in the companion guide, *Discrimination: what to do if it happens at [www.mirs.org.im/equality](http://www.mirs.org.im/equality)*. It includes help for employers and employees in deciding whether to handle a matter informally or formally.

To help give a better understanding of when to use an informal approach or a formal one concerning alleged sex discrimination, both employers and employees should assess the following examples.

### When to consider an informal response

It is likely an employer will use an informal response when the employer and the parties involved agree that this is likely to be the best way forward. Such an approach will be largely based on the employer having conversations with the

parties concerned to investigate the matter in the hope of resolving it, without using the organisation's formal grievance procedure.

If the matter turns out to be relatively straightforward, the informal approach can have the advantage of resolving the matter sooner, with less stress and at less cost than if the matter went through the formal grievance route. Also, it can make it easier for work relationships to be rebuilt.

When considering whether an informal response is appropriate, an employer should be mindful of the outcome the complainant is seeking and the outcome that might be necessary from the employer's point of view. Also, an employer can explain to an employee that an informal approach still means the complaint is being treated seriously and, in the circumstances, is potentially the best way to try for the most desirable outcome for all concerned.

However, if an informal approach doesn't work, the matter could still be dealt with formally.

### **For example... Informal response to informal complaint**

Maria is a health and safety trainer. She spends some time in the office, but is mostly out delivering courses to other employers. Her company's dress code requires staff to wear smart/business dress. When delivering training, staff adhere to the code. However, when Maria works from the office, she notices that while she and her female colleagues wear business dress, male colleagues turn up in casual clothes.

Maria thinks this is unfair, so talks to her union rep who in turn raises the matter with the office's HR section. HR reviews the code and decides to revise it to make clear that smart/business dress is only required outside of the office on company business, or meeting the public, customers or potential clients inside or outside of the office.

### **When to consider a formal response**

The formal response, usually using the employer's formal grievance procedure including a hearing, is likely to be the way forward when the allegation of discrimination cannot be resolved informally. It is even more likely if the complaint is particularly serious and could also lead to a disciplinary investigation.

However, there can be other circumstances where the need for a formal response can arise, as highlighted in the final example, Formal response to informal complaint.

### **For example... A formal grievance**

Bhav is the father of a nine-month-old. His wife plans to return to her job, so he would like, if possible, to reduce his hours to help care for the baby. He puts in a flexible working request.

Bhav meets with his manager, Fiona, to discuss his request. Their meeting lasts only 10 minutes and he doesn't get the opportunity to talk through any detail. Afterwards, he receives a letter saying his request has been turned down because the company would not be able to meet customer demand if it allowed him to work fewer hours.

Following this, two female staff who work in the same department have their requests for part-time hours approved. Bhav feels Fiona did not take his request seriously because he is a man. He decides to raise a grievance as he believes he has been discriminated against because of his sex.

A senior manager investigates the grievance and a hearing upholds it. Bhav's flexible working request is reconsidered and approved. Also, the employer takes disciplinary action against Fiona.

### **For example... Formal response to informal complaint**

Sonia works in a store's stockroom where Mark gets a job. Line manager Lynne whispers to Sonia that Mark is nice and looking for a girlfriend. She tells Lynne she's not looking for a boyfriend and that she's making her uneasy.

Lynne, though, suggests to her that she will arrange shifts so she and Mark can work alone together, and that 'by accident' she'll book them into the same hotel so they can attend a training course. Sonia is so unnerved by Lynne's match-making and suggestive remarks, she feels she has to confide in the store's general manager, Ray. Sonia doesn't want to 'cause trouble', but does feel she is being treated very inappropriately because of her sex (it may also be sexual harassment).

Ray tells Sonia the matter sounds serious. He will contact the company's HR department. A senior HR manager investigates which includes Sonia, Mark and Lynne giving statements.

Lynne is invited to a disciplinary hearing. She says she is very sorry and can now see her behaviour was unacceptable. Because Lynne is genuinely apologetic, she is given a second chance – a final written warning instead of being dismissed. She must also attend refresher equality training.



## **Manx Industrial Relations Service (MIRS)**

The Manx Industrial Relations Service (MIRS) is an independent organisation funded by Government and we provide a free, impartial and confidential service on any employment relations matter. We are here to help employers, employees and trade unions work together for the prosperity of the Isle of Man.

Information in this booklet has been revised up to the date of the last reprint – see date below. For more up-to-date information go to the MIRS website [www.mirs.org.im](http://www.mirs.org.im)

Legal information is provided for guidance only and should not be regarded as an authoritative statement of the law, which can only be made by reference to the particular circumstances which apply. It may, therefore, be wise to seek legal advice.

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